

unsound and so clearly against all authority that we must suppose that, if the expression referred to is susceptible of such a construction, it is the result of inadvertence or clerical misprision, and does not express the deliberate judgment of the court.

The demurrer to the cross-bill and the exceptions to the answer, except so much thereof as pleads the statute of limitations in bar of a personal judgment on one note, are sustained.

UNITED STATES v. MISKELL.*

(Circuit Court, D. Kentucky. March, 1883.)

MAKING OR USING FALSE AFFIDAVIT TO OBTAIN PAYMENT OF CLAIM—SECTION 5438, REV. ST.

To support a conviction under section 5438, Rev. St., for making or using a false affidavit for the purpose of obtaining the payment or approval of certain claims against the government, it must be shown, not only that the affidavit was false, but also that the claim, the payment of which was sought to be obtained by the use of the affidavit, was false, fictitious, or fraudulent.

Indictment. Motion for new trial.

Geo. M. Thomas, Dist. Atty., for the Government.

Samuel McKee, for defendant.

BAXTER, J. The act under which the indictment in this case was framed (section 5438, Rev. St.) provides that "every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining, or aiding to obtain, the payment or approval of such claim, makes, uses, or causes to be made or used, any false affidavit, etc., knowing the same to contain any fraudulent or fictitious statement," etc., shall be punished, etc.

The indictment follows the statute. It contains one count for making and presenting, or causing to be made and presented, for payment a false, fictitious, and fraudulent claim, etc., and another count for having made and used a false affidavit, etc., for the purpose of obtaining the payment of a false, fictitious, and fraudulent

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claim, etc. Upon a trial had, the defendant was acquitted of the first and convicted of the crime alleged in the second count; and thereupon moved for a new trial. No evidence was offered by the government upon the trial tending to show that the claim, in support of which the alleged false affidavit was used, was either false, fictitious, or fraudulent. Hence we are called on to determine whether a conviction obtained for the making and using of a false affidavit, etc., to obtain payment or allowance of a claim upon or against the United States, can be sustained, without proof showing that the claim, in support of which such affidavit was made or used, was itself false, fictitious, or fraudulent.

The crime created and defined by the statute and formulated in the second count of the indictment is not the making or using of a false affidavit to obtain payment of a claim upon or against the government, but it is the making or using a false affidavit, etc., for the purpose of obtaining the payment or approval of a false, fictitious, or fraudulent claim, etc. In other words, the crime charged in the second count of the indictment under consideration is composed of two elements—*First*, a false affidavit; and, *secondly*, the making or the using of such false affidavit to obtain the payment or allowance of a false, fictitious, or fraudulent claim. But in this case there was no evidence tending to establish the false, fictitious, and fraudulent character of the claim, the payment of which defendant sought to obtain by use of the false affidavit referred to.

The crime, therefore, of which the defendant stands convicted was only half made out; but one of the foregoing two elements which constitute it was proven, and it follows that defendant is entitled to a new trial, which is awarded.

An indictment under section 5438, Rev. St., which charges that the accused did "unlawfully make a claim against the government of the United States," well knowing the same to be false, etc., is insufficient. It should charge that the claim was made "for payment or approval." The changes in the punctuation of the original statute have altered the meaning of this section, and the phrase "for payment or approval" is a part of both the first and second clauses of the section. *U. S. v. Ambrose*, 2 FED. REP. 764. In an indictment under that section it is sufficient to charge a presentation to the "first auditor of the treasury," without naming the person who held such office; and the different items of an account may all be included in one count of the indictment, and it is not necessary that there should be separate counts for each false item. *U. S. v. Ambrose, supra*. Section 5438 includes a false claim pre-

sent by a person as a pensioner, demanding money as a pensioner, and where the pension certificate was genuine, but had been fraudulently obtained. each presentation of the certificate constituted a distinct offense within the meaning of the statute. *U.S. v. Goggin*, 3 FED. REP. 492.—[REP.]

MALLOY v. BENNETT.

(Circuit Court, S. D. New York. February 21, 1883.)

1. ACTIONS FOR LIBEL—NEW TRIAL—SURPRISE—EXCESSIVE DAMAGES, ETC.

Where a new trial is asked for on the ground of surprise, and that the party seeking the new trial forgot to offer certain letters in evidence, the omission to show the letters, or copies of them, is significant, and raises an inference against their importance.

2. SAME—PROOF OF FALSITY OF STATEMENTS.

It is not necessary for the plaintiff, in a suit for libel, to disprove the truth of the criminal charges contained in it; but he may always give proof of the falsity of the statements in order to enhance damages. It is only by such evidence that the essential character of the publication can be determined.

3. SAME—MENTAL SUFFERINGS.

Mental suffering is one of the elements of personal injury for which compensation should be awarded, and this, even when the injury is not malicious, but merely negligent.

4. SAME—EXEMPLARY DAMAGES—PRINCIPAL AND AGENT.

There is nothing in the law of damages, or of principal and agent, to justify the assumption that the principal is not liable in exemplary damages for the acts of his agent. An employer is responsible for the willful as well as the negligent acts of his servants, when they are performed in the course of the servant's employment. Actions of libel, so far as they involve questions of exemplary damages, and the law of principal and agent, are controlled by the same rules as are other actions of tort. The right of a plaintiff to recover exemplary damages exists wherever a tortious injury has been inflicted recklessly or wantonly, and it is not limited to cases where the injury resulted from the personal malice or recklessness of the defendant. It follows that the owner of a newspaper is responsible for all the acts of omission and commission of those he employs to edit it and manage its affairs, as he would be if personally managing the same.

5. SAME—NEW TRIAL IN ACTIONS FOR LIBEL.

The court will not grant a new trial in actions for libel on the ground of excessive damages, "unless the amount is so flagrantly atrocious and extravagant as to show that the jury must have been actuated by passion, partiality, prejudice, or corruption."

6. SAME.

Where it seems evident that the refusal of the court to charge the jury as requested, though such refusal be not properly subject to an exception, had the effect upon the jury to render their verdict larger than it otherwise would have been, the court will grant a new trial.