

Demurrer to Indictment under Section 5440 for Conspiracy to Defraud the United States.

The first count charges a conspiracy, by the defendant and others, to defraud, without setting forth the means by which the fraud is to be consummated. The second count charges a conspiracy to defraud the United States by presenting for approval to the register and receiver of the Duluth land-office false and fraudulent affidavits and proofs of settlement and improvement under the pre-emption law of 28 persons; such affidavits falsely state that said persons were qualified to enter public land under the pre-emption laws, and that they had severally complied with the pre-emption laws, and that they had severally entered such lands for their individual benefit and not for purposes of speculation. The third count charges a conspiracy to defraud the United States by hiring 28 persons to enter at the Duluth land-office, under color of the pre-emption laws, certain public lands of the United States solely for the purpose of selling the same on speculation to the defendant and one Albion K. Lovejoy. The fourth count is similar to the third, except that it charges that the land was to be entered for the purpose of selling the same on speculation to the defendant Gordon, Albion K. Lovejoy, and some other person to the grand jury unknown. In each count the land is described as being 4,480 acres in township 63 N. range 16 W., accompanied by the allegation that a more particular description is unknown to the grand jury. A large number of overt acts, identically described, follow each count.

C. A. Congdon, Asst. U. S. Atty., for the United States.

H. L. Gordon, *in personam*.

NELSON, J. The three counts in the indictment charge that the defendant, with others, conspired to defraud the government out of certain public lands. There is no separate and distinct offense charged. The second and third counts allege the means which the defendant intended to use to consummate the fraud. This mode of pleading is not objectionable, and the demurrer cannot be sustained for the reasons assigned: that separate and distinct offenses are charged. The first count is good. The section of the statute (5440) makes it a crime to conspire to defraud the United States in any manner, and the cases cited from the state courts which hold that a conspiracy to defraud is not criminal, unless it is a conspiracy to defraud in a manner made criminal by statute, have no application to indictments under section 5440. It is immaterial what means were used to defraud, as it is criminal to conspire to defraud the United States in any manner or for any purpose, and the court does not care to know whether the modes adopted to accomplish the end proposed is made criminal or not. The second count is sufficiently clear in its statements, and the acts which it is alleged the defendant conspired to do would defraud the government. Each count is followed by allegation of a large number of acts done in pursuance of and to effect

the object of the conspiracy, and these allegations are identical. I think the lands are sufficiently described, and the defendant is reasonably informed of the particular instances intended and referred to. The third count is good. It charges with sufficient particularity that the defendant, with others, conspired to defraud the government out of the land by a pretended compliance with the pre-emption laws at the Duluth land-office, in which district the lands were situated. The fourth count is good. It charges that the defendant and others conspired to defraud the government out of the lands by a pretended compliance with the pre-emption laws, for the purpose of selling them to the defendant. It charges a contrivance to secure the privilege of pre-emption, and a combination to defraud the government.

Demurrer is overruled, with leave to plead.

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EVEREST *v.* BUFFALO LUBRICATING OIL Co., (Limited.)

(Circuit Court, N. D. New York. November 29, 1884.)

PATENTS FOR INVENTIONS—REHEARING—SURPRISE.

A party cannot obtain a rehearing by asserting that the conduct of his adversary's counsel upon the argument was different from what he had anticipated, and that he was surprised because the attack came from an unexpected quarter.

Motion for Rehearing.

A rehearing is asked by defendant upon the following grounds: *First*, the complainant, having declared upon two patents known as the "distillation" and "fire-test" patents, and having on the argument withdrawn the former from the consideration of the court, the defendant was taken by surprise, supposing that the main reliance of the complainant would be upon the patent thus abandoned; *second*, little attention was given in the progress of the cause to the fire-test patent, (the one sustained,) for the reason that it was believed by the defendant to be invalid for want of invention; the effort of the defense was, therefore, mainly directed to the overthrow of the distillation patent; *third*, considerations of an important and controlling character bearing upon the construction of the fire-test patent and the defense of lack of invention and novelty have failed to come to the attention of the court.

*Corlett & Hatch and James A. Allen*, for petitioner.

*T. G. Outerbridge*, for complainant.

COXE, J. The defendant does not present a case for a rehearing. The petition, when analyzed, is reduced to two main propositions—*First*, the defendant assumed that complainant would not make a serious effort to sustain the fire-test patent, and was thus misled; and,