

that occur in our admiralty courts, where insurance companies are subrogated to the place of the insured in cases of fraud or negligence on the part of other parties, whereby losses occur to ships for which an insurance company is liable and compelled to pay under its policies. Further than that, it seems to me there is a principle of public interest involved in this question that should entitle this plaintiff to all the remedies that the employer would have. We all know that in cases of large corporations, whose sole business it is to make, handle, and disburse money for the benefit of their stockholders, or parties interested in their earnings, if they get their money from the sureties of their dishonest employes, they will not prosecute the employe either civilly or criminally. They will simply stand on their bond, and, if they get the money from the surety, they leave the punishment of the dishonest servant to the man who has suffered, rather than spend their money in prosecutions which either directly or indirectly may punish the wrong-doer; and inasmuch as we know that it is almost the universal custom for bankers, railroad companies, and all large corporations, employing numerous agents and servants, who handle their funds in one capacity or another, to exact a bond, whether it may be such a policy as this or the ordinary bond, it seems to me the common dictates of public policy should give to the sureties of such employes the same remedy that the defrauded employer would have. The constitution and statutes of Illinois authorize the issue of a *capias ad respondendum* upon the filing of an affidavit showing that the defendant "fraudulently contracted the debt or incurred the obligation" respecting which the suit is brought, and there seems to me no room for question, as the record now stands, that defendant fraudulently incurred the obligation he is now under to make good this defalcation to the plaintiff. The motion to discharge on common bail is overruled.

UNITED STATES v. VAN VLIET.

(District Court, E. D. Michigan. January 5, 1885.)

CRIMINAL LAW—ILLEGAL PENSION FEES—REV. ST. § 5485.

A prosecution for a violation of Rev. St. § 5485, in demanding and receiving a greater compensation for services in procuring a pension than is allowed by law, cannot be maintained for any offense committed prior to July 4, 1884.

On Demurrer to Information.

Defendant was prosecuted by information of the district attorney for a violation of Rev. St. § 5485, in demanding and receiving a greater compensation for his services and instrumentality in prosecuting certain claims for pensions than was allowed by law. Defendant demurred upon the ground that the law fixing the compensation

for such services had been repealed, and hence that there could be no conviction.

S. M. Cutcheon, Dist. Atty., and *J. W. Finney*, Asst. Dist. Atty., for the United States.

C. D. Long and *John Atkinson*, for defendant.

Brown, J. A clear comprehension of the question raised by this demurrer requires a careful examination and analysis of the several statutes upon the subject of compensation to pension agents enacted at different times within the past 12 years. The information charges the defendant with a violation of section 5485, which reads as follows:

"Sec. 5485. No agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation for his services, or instrumentality in prosecuting a claim for pension or bounty land, than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land-warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall for every such offense be fined," etc.

This section is evidently incomplete, since it is only by reference to "the title pertaining to pensions" that it is possible to know the compensation which the agent is entitled to receive. Turning to title 57, "Pensions," we find the following section:

"Sec. 4785. No agent or attorney, or any other person, shall demand or receive any other compensation for his services, in prosecuting a claim for pension or bounty land, than such as the commissioner of pensions shall direct to be paid to him, not exceeding twenty-five dollars."

Construing this in connection with the former section, it is apparent that an information charging an agent with receiving more than the amount allowed by the commissioner of pensions, or with more than \$25, would be good. But in 1878 congress repealed section 4785, and provided that it should be "unlawful for any attorney, agent, or other person to demand or receive for his service, in a pension case, a greater sum than ten dollars." 20 St. at Large, 243, (Supp. Rev. St. 386.) This repeal of section 4785 left section 5485 as imperfect a foundation for criminal prosecution as it would have been had section 4785 never been enacted, since "the title pertaining to pensions," in so far as it affected the amount which the pension agent was entitled to receive, was obliterated. Hence it was held by the circuit judge of this circuit, (I think correctly,) in *U. S. v. Mason*, 8 FED. REP. 412, that no prosecution could be sustained for overcharges made subsequent to the act of 1878; in other words, that the act of 1878 could not stand in the place of section 4785 in "the title pertaining to pensions," for the purpose of a criminal prosecution. It is true that in *U. S. v. Dowdell*, 8 FED. REP. 881, the learned judge for the district of Indiana held that the statute of 1878 might be enforced as a substitute for section 4785, and that the words, "than is provided in the title pertaining to pensions," should be construed as if they read,

"than is provided by law;" but, to remove all doubt upon the subject, congress, in 1881, declared, in a general appropriation bill, that "the provisions of section 5485 of the Revised Statutes shall be applicable to any person who shall violate the provisions of the act entitled "An act relating to claim agents and attorneys in pension cases, approved July 20, 1878," (Supp. Rev. St. par. 2, p. 602.) Under the law as thus amended, frequent prosecutions took place, and convictions were sustained.

But in the general appropriation bill of July 4, 1884, § 1, congress repealed the act of 1878, with a proviso "that the rights of parties shall not be abridged or affected as to contracts in pending cases, as provided for in said act; but such contracts shall be deemed to be and remain in full force and virtue, and shall be recognized as contemplated by said act." This provision saved the rights of parties to contracts under the statute of 1878, and declared such contracts in full force; but there was no saving of the right to prosecute criminally for taking greater compensation than had been allowed under this act, nor even of prosecutions already begun. Section 5485 was left as incomplete and inoperative as it had been before the act of 1881 was passed. It is true that this case differs from that of *U. S. v. Mason*, 8 FED. REP. 412, in the fact that the offense was committed after the act of 1881 was passed, and before the repealing act of 1884; but I understand the law to be well settled that a penal statute cannot be enforced after it has been repealed; though the offense has been committed before such repeal, unless there be a saving clause reserving a right of prosecution, (*Anon.* 1 Wash. 84; *U. S. v. The Helen*, 6 Cranch, 203;) and even if the act be repealed after conviction, judgment will be arrested. *Yeaton v. U. S.* 5 Cranch, 281; *U. S. v. Preston*, 3 Pet. 57; *Com. v. Marshall*, 11 Pick. 350; *Com. v. Kimball*, 21 Pick. 373; *Butler v. Palmer*, 1 Hill, 324. In this instance the act imposing the punishment (section 5485) is still in force, but the act defining the offense has been repealed. In the case of *Hartung v. People*, 22 N. Y. 95, the prisoner was convicted of murder. After conviction the legislature passed an act repealing the punishment of death on convictions of crime, without any saving in respect to offenses already committed. The cases are all reviewed, and it was held that the prisoner could not be executed. This case is the converse of that, but the result is the same in either case. To use the language of Mr. Justice TINDAL in *Key v. Goodwin*, 4 Moore & P. 341: "The repeal of a statute obliterates it as completely from the records of parliament as though it had never been passed." Of the same purport is the remark of Lord TENTERDEN in *Surtees v. Ellison*, 9 Barn. & C. 750. Applying this test to the act under consideration, it is quite clear that without section 4785, or the substituted act of 1878, there could be no prosecution for a violation of section 5485. The demurrer must be sustained and the defendant discharged.

UNITED STATES *v.* WALSH.*(Circuit Court, D. Massachusetts. December 11, 1884.)*

1. **PERJURY—INDICTMENT—DECLARATION OF INTENTION TO BECOME A CITIZEN OF UNITED STATES—REV. ST. § 5395.**
An indictment for perjury alleged to have been committed by the respondent in his declaration of intention to become a citizen of the United States, under Rev. St. § 5395, need not set forth the declaration.
2. **SAME—CONSTRUCTION OF REV. ST. § 5396.**
Section 5396 of the Revised Statutes does not require that when the false swearing is to a written instrument, it should be so stated, or that, when the court before whom the perjury was committed was properly, distinctly, and correctly set forth, the person holding the court should be named. The word "and" in section 5396 should be construed "or."
3. **SAME—OATH—BY WHOM ADMINISTERED.**
Where the indictment distinctly states that the application of respondent to become a citizen was before "the district court of the said United States then and there holden for the said district of Massachusetts," and that the said respondent "did then and there, in the said matter and proceeding, knowingly swear falsely and make oath before *said court*," it is a sufficient designation of the court, and a distinct averment that the oath was made before it.
4. **SAME—FORM OF OATH.**
Section 5396 of the Revised Statutes does not require the indictment to show what oath was taken, but "the substance of the offense charged," "with proper averments to falsify the matter wherein the perjury is assigned."
5. **ALIENS—NATURALIZATION—DECLARATION OF INTENTION TO BECOME A CITIZEN OF UNITED STATES.**
The declaration of intention of an alien to become a citizen of the United States, required by Rev. St. § 2167, must be under oath.
6. **PERJURY—RECORD EVIDENCE.**
When the indictment alleges the perjury to have been committed by the respondent in his application for naturalization, the record of the court before which the application was made, by him signed and sworn to, is the best and only evidence that can be produced.
7. **SAME—EVIDENCE OF CLERK TO CONTRADICT RECORD.**
The clerk of the court cannot be permitted to testify that the record was false.
8. **SAME—RECORD SHOWING JURISDICTION.**
It is immaterial that the record does not show the facts necessary to give the district court jurisdiction in naturalization proceedings, as its jurisdiction does not depend upon the facts stated, but is derived from the statutes of the United States.
9. **SAME—INSTRUCTION AS TO VERDICT.**
It is not the practice in federal courts to instruct the jury to bring in a specific verdict, but to instruct the jury upon the law and the competency of the evidence, and leave it to them to find the verdict accordingly.
10. **SAME—CONVICTION—EVIDENCE.**
As the court committed no error in not directing a verdict of not guilty on the second count, and the evidence was sufficient to convict respondent, judgment should be entered on the verdict.

Motion for New Trial and Arrest of Judgment.

Charles Almy, Asst. Dist. Atty., for the United States.

Prentiss Cummings, for defendant.

CLARK, J. Indictment for perjury, alleged to have been committed by the respondent in his declaration of intention to become a citizen of the United States, under section 5395, Rev. St. The indictment