

Plaintiffs insist that the dam erected to improve the navigation of the river has raised the level of mean low tide, and the latter result has destroyed their usufruct in the waters of the river for the purposes of rice culture on their lands on Hutchinson's island and on the main-land. They are not suing for the conversion of the land, nor is it alleged that the government has converted to its own use the water-rights connected with the lands, but they are suing for consequential injuries to their water-rights, resulting indirectly from the act of the government, which act was performed for a lawful purpose, and not performed on the land with which the usufruct was connected. It is true that if the property be tortiously taken or converted, the tort-feasor may be sued in trespass or trover, or the injured party may waive the tort, and sue in *assumpsit*, upon the implied contract to compensate. In the latter case the same result follows as if there had been an implied contract, as insisted by the plaintiffs here. *May v. Le Claire*, 11 Wall. 217. This, however, is applicable where there has been an actual conversion of the property, and not an indirect injury to it, resulting from acts which the alleged tort-feasor had the legal right to perform. Any demand of the plaintiffs, therefore, must be based upon the tortious conduct of the defendant's agents; but to constitute a tort two things must concur,—actual or legal damage to the plaintiff, and a wrongful act committed by the defendant. The court being of the opinion that neither of these essentials exists in the case at bar, we feel constrained, on both the questions herein considered, to sustain the demurrer to the plaintiffs' declaration, and to order the case dismissed.

UNITED STATES *v.* WILSON

(*Circuit Court, D. Idaho.* June 1, 1891.)

1. CRIMINAL LAW—SUSPENSION OF SENTENCE.

Courts have no power to suspend sentence except for short periods pending the determination of other motions or considerations arising in the cause after verdict.

2. SAME—REVOCATION OF ORDER.

When the court has by order indefinitely suspended sentence, it cannot thereafter, and especially at a subsequent term, revoke such order, and proceed to judgment by sentencing the defendant.

(*Syllabus by the Court.*)

At Law. Indictment for adultery.

Fremont Wood, U. S. Atty.

James H. Hawley, for defendant.

BEATTY, J. On June 7, 1888, the defendant was arraigned in the third district court of Idaho territory upon the charge of adultery, to which, on the same day, he pleaded guilty, and upon his promises there made in open court to obey the laws upon that subject, it was "ordered that the sentence be suspended, and until further orders of this court, and that

said defendant be released, and his bail exonerated." On June 12, 1890, said order was revoked, and by another judge, the successor of the judge who suspended sentence, and on the following day defendant was sentenced to imprisonment, from which judgment he appealed to the supreme court of Idaho, whence the cause has been transferred here.

The questions for determination are, first, the power of a court to indefinitely suspend sentence, and, next, to revoke such order of suspension and to proceed to judgment. There can be no doubt of the right of a court to temporarily suspend its judgment, and continue to do so from time to time in a criminal cause, for the purpose of hearing and determining motions and other proceedings which may occur after verdict, and which may properly be considered before judgment, or for other good cause. In this cause however, the record does not show that the suspension was for any such reason, or for a certain or short time, but on the contrary, it appears it was for such uncertain time as the defendant should continue to remain so favorably impressed with the laws of the land as to obey them. Instead of this being a mere suspension of sentence, it operated as a condonation of the offense, and an exercise of a pardoning power, which was never conferred upon the court. In this I think the court clearly transcended its authority. The court having erred in its order of suspension of sentence, can it subsequently, at another term of court, and especially by a judge, who did not try the case, revoke such order, and proceed to a rendition of judgment? To hold that a court may from time to time, and term to term, revoke its orders, and by new orders attempt the correction of former errors, to say the least, would lead to a most uncertain practice. In support of the court's action in this matter, attention has been called to *People v. Reily*, 53 Mich. 260, 18 N. W. Rep. 849. In that case it appears that after verdict a motion for a new trial was interposed, and, pending its disposition, defendant entered into a recognizance for his appearance from time to time for sentence, which, in the mean time, and for about 13 months after verdict, remained suspended, when judgment was pronounced. This was, on appeal, affirmed, but not without dissent, by one of the most able members of the Michigan bench. The facts in that case are not like those in this. Quite similar to this is the case of *People v. Blackburn*, (Utah,) 23 Pac. Rep. 759, in which it was held the order of suspension could not be revoked, nor sentence be rendered. In support of the foregoing conclusions will be found *People v. Morrisette*, 20 How. Pr. 118; *People v. Brown*, (Mich.) 19 N. W. Rep. 578; *Weaver v. People*, 33 Mich. 296,—and attention has not been called to any contrary authorities. It may be further noted that section 7980, Rev. St. Idaho, contemplates that sentence must be pronounced during the term of court when the conviction was had, unless suspended, pending the consideration of some motion in the cause, or for some good reason, as above stated. It appears that not only had the term passed, but two years had expired, and in the mean time no motion was either made or pending. It is concluded that the territorial court in its order of judgment erred, and it is now ordered that the same be set aside, and the defendant be discharged.

UNITED STATES v. HIGGERSON.

(Circuit Court, D. Idaho. June 1, 1891.)

1. UNLAWFUL COHABITATION—EVIDENCE—TESTIMONY.

In the trial of such offense, as well as of its kindred offenses of adultery and bigamy, as defined by the laws of the United States, proof of the existence of the marriage relation is pertinent; it being a collateral fact which aids in explaining the association of a man and woman, and tends to show whether such association is justified and innocent, or that of unlawful cohabitation.

2. MARRIAGE—EVIDENCE OF BY REPUTE.

The general reputation in the community of the existence of the marriage relation is competent as tending to prove such relation, but is not alone sufficient to establish it.

(Syllabus by the Court.)

At Law. Unlawful cohabitation.

Fremont Wood, U. S. Atty.

James H. Hawley, for defendant.

BEATTY, J. The defendant is charged with the crime of unlawful cohabitation, in violation of section 3, 22 St. U. S. p. 31. After his conviction in the third district court of the territory of Idaho, he appealed to the supreme court of such territory, whence the cause has reached this court. In asking the reversal of the judgment below, the defendant assigns as reasons therefor the insufficiency of the evidence, and errors of the court in the admission of evidence of general repute of marriage, and instructions sustaining such evidence, but upon this hearing has relied chiefly upon the alleged errors. The testimony however, seems sufficient to justify the verdict. It appears, among other things, by several witnesses, that there was no other family in the neighborhood by defendant's name but his; that there were two women there known by his name, and as his wives; that in the year 1888 defendant was found in a small house on his farm with two women and four or five small children, each woman having a small child eight or nine months old; that he said they constituted his two families; that he was afterwards seen by the same witness with the same two women in Soda Springs; that afterwards he had on his farm a house for each woman, not over a quarter of a mile apart; that the women had been seen there for over a year past, and when arrested he told the officer that one of the women was his second wife. It cannot be said the jury reached an erroneous conclusion when they found these facts constituted unlawful cohabitation. On page 21 of record this interrogatory appears: "In that community who is her reputed husband? [It does not appear clearly which woman is meant, but probably the second wife.] *Answer.* Higgeson." And on page 23 is this: "*Question.* You stated that the husband of that woman is reputed to be the defendant. *Answer.* Yes, sir." And on page 28 the court, as part of its instructions, said:

"The court charges you, also, that the question as to whether one of the women named in the indictment is the wife of the defendant is a material issue, and must be proven beyond a reasonable doubt by competent evidence.