RUTHERFORD v. MORNING JOURNAL ASS'N.

(*Circuit Court, S. D. New York.* July 15, 1891.)

LIBEL AND SLANDER—DAMAGES.

When the proprietor of a newspaper publishes, without inquiry as to its authenticity, an item from a news agency, falsely stating that a certain named man and woman of high respectability have eloped, that the intimacy between them had for some time excited comment, etc., he is guilty of reprehensible negligence, and, though not guilty of malice, the jury may, in an action against him for libel and slander, award punitive or exemplary damages.

At Law. Action for libel. The jury rendered a verdict for plaintiff for $4,000.

Harriman & Fessenden, for plaintiff.

Don Passos Bros., for defendants.

WALLACE, J. The instructions to the jury upon the law were strictly accurate, and the comments upon the facts were fully justified by the circumstances of the case as they appeared upon the trial. Was the verdict excessive? The plaintiff, a resident of Toronto, Canada, came to New York city on the 8th of June, 1890, accompanied by the wife of a friend of his, who resided at Toronto. When the train arrived, they were met at the station by the husband. All the parties were people of high respectability, and were apparently intimate friends, who had arranged for a visit at New York together. While they were staying at the Hotel Brunswick, and on the 14th of June, there appeared in the newspaper published by the defendant a communication, under the heading "Eloped to New York," which purported to have been sent to it by its special correspondent at Toronto the day before. The communication stated, in substance, that the plaintiff had eloped with the lady; that for some time the intimacy between the two had excited comment in Toronto, and when they were found to be missing "tongues wagged freely;" that a dispatch from New York city had been received by the husband, stating that his wife and plaintiff had been seen there, and that he at once started for New York. It further appeared that one Cronin, a reporter for a Toronto newspaper, had, without investigating into the facts, sent the communication to a Chicago newspaper, or to a news agency at Chicago; that it was published in a Chicago newspaper, was forwarded by the news agency to the defendant, was published by the Sun newspaper in New York, and was inserted by the telegraph editor of the defendant as an item of news, and published without making any inquiry in respect to its authenticity. The publication of the article was not prompted by any personal malice towards the plaintiff or the other persons mentioned. But the defendant was guilty of reprehensible negligence in publishing it without making any effort to verify its truth. The injury to the reputation of the plaintiff was probably insignificant, but the jury undoubtedly thought that a newspaper manager who would publish such an article—one in which the good name of a decent woman

was trailed in the mire—without any attempt at independent investigation to ascertain whether it was true or false, was guilty of a wanton act, and that the facts warranted such a verdict as would be an example to deter other newspaper managers from similar conduct. Reckless indifference to the rights of others is equivalent to an intentional violation of them, and in actions of libel, where the facts show the publication of a defamatory article without any excusable motive, and without any attempt to inquire into the truth of the facts stated, the jury are authorized, for the sake of public example, to award punitive or exemplary damages. The present verdict is a severe one, and if it had been for a less amount would have vindicated the plaintiff, and sufficiently punished the defendant; but questions of damages belong peculiarly to the jury, and the court will not set aside a verdict simply because it may be dissatisfied with the amount rendered. To warrant the interference of the court on the ground of excessiveness, the verdict must be for a sum so plainly exorbitant or inordinate as to show that the jury must have been actuated by some improper motive. Tested by this rule, the verdict ought not to be disturbed.

The motion for a new trial is denied.

UNITED STATES v. THOMAS.

(*Circuit Court, W. D. Wisconsin.* January 6, 1891.)

INDIANS—JURISDICTION OF CRIMES ON RESERVATIONS.

The provisions of Act Cong. March 3, 1885, (23 St. at Large, 385,) that all Indians committing certain crimes within the boundaries of any state, and within the limits of any Indian reservation, shall be subject to the same laws, and be tried in the same courts and in the same manner, and be subject to the same penalties, as are all other persons committing any of said crimes within the exclusive jurisdiction of the United States, do not apply to such a crime committed within the sixteenth section of a township, which section, although within the outside limits of an Indian reservation established in accordance with a treaty with the Indians, was ceded to the state for the use of schools by the act of congress admitting the state into the Union, passed previous to the treaty, and, after the lands were surveyed, subsequent to the treaty, was sold by the state to a grantee, who entered into possession thereof long before the commission of such crime therein. BUNN, J., dissenting.

At Law. On motion in arrest of judgment, on conviction on indictment for murder.

Hollen Richardson, for the motion.

Samuel A. Harper, U. S. Atty., opposed.

Before GRESHAM and BUNN, JJ.

GRESHAM, J. Michel Thomas, a full-blood Indian of the Chippewa tribe, was convicted of the murder of David Corbine, a half-breed of the same tribe, and a motion was made in arrest of judgment. Section 9 of the act making appropriations for the Indian department for the fiscal year ending June 30, 1886, (Act March 3, 1885; 23 St. at Large, p. 385,) reads:

"That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian, or other person, any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians, committing any of the above crimes against the person or property of another Indian, or other person, within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The indictment charged that the offense was committed in the state of Wisconsin, within the limits of Lac Courtes Oreilles Indian Reservation. Section 7 of an act passed in 1846, (9 St. at Large, p. 58,) admitting the territory of Wisconsin into the Union as a state, ceded to the state, for the use of schools, section 16 in every township of public lands within the state not sold or otherwise disposed of. The United States entered into a treaty with the Chippewa Indians in 1854, by which, in consideration of certain relinquishments made by them, the government agreed to set apart and withhold from sale a tract of land on Lac Courtes Oreilles, equal in extent to three townships, the boundaries of which should be thereafter agreed upon or fixed under the direction of the president. The lands in that part of the state were not surveyed until a year after the treaty. In 1859 Lac Courtes Oreilles reservation was established in accordance with the terms of the treaty, and the chiefs and headmen, who represented the tribe, agreed to use every effort to induce their people to abandon the lands ceded to the United States by the treaty, and reside upon the reservation. In 1872 the Indian department sent to the state's land-office a map of the reservation, showing the exterior boundaries, as well as interior lines, embracing lands not made part of the reservation. The offense was committed on one of the sixteenth sections thus designated on the map. The state sold this section in 1865, and its grantee entered into possession, and denuded the land of its pine timber. The title to the sixteenth sections of the surveyed lands vested in the state when it became a member of the Union under the act of 1846, and the title to the sixteenth sections in the unsurveyed public domain in the state vested in it when those sections were subsequently located and defined by surveys. The sixteenth sections within the exterior boundaries of the reservation, as it was agreed upon and established in 1859, had belonged to the state since 1855, and the government had no more right to take them for an Indian reservation than it had to take the lands of individual proprietors for the same purpose. The state's right of dominion over these sections, including the right to sell, became complete when they were located by the survey in 1855. The government's right to occupy or otherwise control them then ceased, and it

follows that the Indians thereafter acquired no right of occupancy from the government. The offense was committed in 1889, on one of the sixteenth sections within the outer boundaries of the reservation, but not on land constituting part of it. That section was sold by the state in 1865, and the purchaser entered into possession, and denuded it of its pine timber, as he lawfully might. A fair interpretation of the last clause of the statutes quoted shows that congress intended to confer jurisdiction on the federal courts to punish Indians who committed the specified offenses upon an Indian reservation in a state; that is, upon lands belonging to the United States within a state, and occupied by Indians as a reservation.

The court has no jurisdiction of the offense, and the motion is sustained.

BUNN, J., (*dissenting*.) Believing, as I do, that the court has jurisdiction of this case, I am compelled to dissent from the conclusion reached by the circuit judge. I cannot think that the jurisdiction of the court turns upon the question of the government's title to the land on which the offense was committed. Moreover, the section 16, township 40, range 8, upon which the murder was committed had always been a part of the Indian country, and the possessory title of the Indians to it had never been divested, unless by the treaty which gave them this, with other lands. In 1854 a treaty was made between the government and the Indians, by which the Indians were to take, in lieu of all the lands which they occupied, and for a long time before had occupied, in that region, the equivalent of three townships of land in Sawyer county. This was before any survey of the land was had. During the next two years the land was surveyed, and in 1859, by agreement between the commissioners on the part of the government and the Indians, the treaty of 1854 was carried into effect by a selection and location of the lands. The land was taken in contiguous sections and in as compact form as was possible, and this section 16, where the murder was committed, was a part of the reservation agreed upon. The land so selected and agreed upon pursuant to the treaty was withdrawn from market and platted, and set apart by the government for the use of the Indians, who have occupied it as a reservation, under the charge and superintendence of the government, for 37 years since the date of the treaty, and for 32 years since the date of the selections in June, 1859. Whoever should be considered as the owner upon a proper trial of the question of the title to section 16, one thing is manifest, that this section, with all the others going to make up the reservation, had constituted a reservation *de facto* for all that time, and, as such, the government has claimed and exercised jurisdiction over it. And now comes in the statute, (section 9, c. 341, Laws 1885,) and says that all Indians committing murder, manslaughter, rape, assault with intent to kill, arson, burglary, or larceny against the person or property of another Indian, or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried by the same courts and in the same manner, and

subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States. Section 16, as shown by the evidence, is within the outside limits of the reservation, it being two miles from it to the nearest outside limit. It is also a part of the land actually selected by the commissioners pursuant to the treaty, and platted and set apart by the government for the use of the Indians, and though, in 1865, the state of Wisconsin assumed to sell it, and the purchaser went on and stripped it of the pine timber growing upon it, it has been vacant and unoccupied always, except as used and occupied by the Indians previous to the treaty in 1854, under their own possessory right, which was always recognized by the government, and since that time as a part of the reservation selected and set apart by the government for their occupancy and use. Why, then, is it not within the limits of the reservation, within the true meaning of the law of 1885, so far as the question of jurisdiction is concerned? It seems certain that the United States has assumed jurisdiction over this land for the government of the Chippewa Indians, and I fail to discover any intrinsic difficulty in its doing this, especially so long as the government does not, by the statute in question, assume to take jurisdiction to punish for the offenses named, on the ground of exclusive governmental jurisdiction over the territory, (as in the case of the District of Columbia, and forts, arsenals, ship yards, etc., within the limits of any state, where the constitution gives exclusive jurisdiction of other criminal offenses committed within a state of the Union,) but upon the ground that the subject-matter is one of national cognizance.

The statute under which the prisoner was tried received full and exhaustive consideration by the supreme court in *U. S.* v. *Kagama*, 118 U. S. 375, 6 Sup. Ct. Rep. 1109, and the jurisdiction of congress to pass the act, and that of the United States court to punish for the offenses named therein, were sustained; not, as I read that case, on the ground of exclusive jurisdiction, because of the government's owning the land, or having general or exclusive governmental jurisdiction over the territory embraced within an Indian reservation, but because the subject-matter, which is the management and control and government of the Indians under the charge of the United States, is necessarily one of national cognizance. "The Indian tribes were the wards of the nation. They were communities dependent on the United States for their political rights. They owed no allegiance to the states; and received from them no protection. Because of the local ill-feeling, the people of the states where they were found were often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, there arose a duty of protection, and with it the power. This had always been recognized by the executive and by congress, and by the supreme court, whenever the question had arisen. For this reason it was within the power of congress to enact the law giving the United States jurisdiction of these crimes." The statute was again up for consideration by the same court in *Re Gon-Shay-ee*, 130 U. S. 343, 9 Sup. Ct. Rep. 542, and the former decision

of the court recognized and affirmed. Of course, the jurisdiction of the courts is limited by the words of the statute. The offense must have been committed within the limits of an Indian reservation within a state. Not that congress might not probably have made the law broader, and given jurisdiction over the same offenses committed by an Indian under the charge and superintendence of the government in any part of the state, as it had before given a like comprehensive jurisdiction under the statute relating to the sale of intoxicating liquor to Indians under the charge of an Indian agent. But it did not. The offense must be committed within the limits of an Indian reservation, to give the court jurisdiction. As said by DEADY, J., before the law of 1885 was enacted, in *U. S.* v. *Barnhart*, 22 Fed. Rep. 288:

"The question is not one of power in the national government, for, as has been shown, congress may provide for the punishment of this crime wherever committed in the United States. Its jurisdiction is co-extensive with the subject-matter,—the intercourse between the white man and the tribal Indian, —and is not limited to place or other circumstances."

I cannot see that the question of title is at all material. I suppose that when Wisconsin was admitted into the Union as a state under the enabling act of August 6, 1846, considerably more than one-half of the whole state was government land, and the title still in the United States. But, upon its becoming a state, general governmental jurisdiction in local matters passed from the government to the new state, and that without regard to the title to the land, whether in the government, in the state, or in individuals. The United States only retained jurisdiction over subjects of national concern and cognizance, except as to any places within the state purchased by the government, with the consent of the legislature of the state, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, according to article 1, § 8, of the constitution.

Congress could not give the United States courts general jurisdiction to punish for murder or rape or robbery, though these crimes should be committed upon land belonging to the general government. But the general government retained jurisdiction over all subjects of national concern and cognizance, where the subject-matter gave it jurisdiction under the constitution. And it is on this ground that jurisdiction comes to these courts, under the statute in question, and not at all upon ground analogous to that, where jurisdiction is taken within states over all crimes committed upon land owned and occupied by the government for the purpose of the erection of forts, arsenals, dock-yards, etc. Of the two hundred or more prosecutions by indictment brought in the United States district and circuit courts of this state where it has been my duty to preside within the last year, in not a single instance, unless this case be an exception, has jurisdiction been given to these courts upon any other ground than that the subject-matter of indictment was of national concern, under the constitution and laws of the United States. Now, then, if the title or general legislative and governmental jurisdiction is not a necessary element in the question, the only inquiry is whether the murder was committed within the limits of an Indian reservation, set apart

and recognized by the government, and actually occupied by the Indians for reservation purposes; and that it was is evident from the testimony and undisputed facts.

It did not seem to me to be worth the while, or very appropriate, to look into and decide a question of title arising, as this did, in a collateral way, in a criminal proceeding, unless absolutely necessary. The state was not a party, and could not be bound by any decision that might be made. It was in evidence that the title to these sixteenth sections within this reservation had been in dispute. The state claimed these lands under the enabling act for Wisconsin, (see 9 St. at Large, p. 56,) which provided "that section numbered sixteen, in every township of the public lands in said state, and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools." The land department at Washington had always claimed that, by the treaty with the Chippewa Indians already referred to, made in 1854, the sixteenth sections, of which there are three included in the reservation, had been disposed of by the government before any survey of the lands was made, and consequently before the claims of the state could attach. And this contention seems plausible. The land in that vicinity had always been Indian land, and occupied by them, the evidence showed, certainly for 50 years, which is as far back as the memory of the witnesses ran. It had in fact been occupied by them from time immemorial. The government recognized their possessory right, and set to work to make a compromise, by which the Indians were to take and keep possession of a definite portion of these lands, and to give up all claim to the rest. With this view, the treaty of 1854 was entered into. Now it was exceedingly desirable that the three townships to be devoted to the exclusive use of the Indians, and on which definite allotments were to be made to individuals in severalty, should be composed of contiguous territory, and be in as compact form as possible. Every consideration looking to the well-being both of the Indian tribe and the white people of the state pointed that way. But how could such a policy, no doubt contemplated by the treaty, be carried out, if, so soon as the survey of the country should be made, every sixteenth section should go to the state? It was no hardship for the state to receive other lands in the place of these, which, under the treaty, it would be wise and judicious should be taken by the Indians to make the reservation in contiguous and compact form. This is the view, as I understand, which has been taken by the National land department in regard to the sixteenth sections, by agreements between the government and the Indians, pursuant to treaty made in 1854, before the lands were surveyed, and having for one object the extinguishment of the Indian title to a large tract of country; that they must be considered as disposed of, within the meaning of the enabling act of 1846; and that the state should accept other lands in their place. The Hon. Jos. A. Wilson, commissioner of the general land-office, writing to Hon. H. E. Paine, member of congress from Wisconsin, on December 17, 1870, (see letter in evidence,) says:

"The sixteenth section of each of the above townships, [39 and 40,] except town forty, (40,) range seven (7) west, is embraced within the reserve; and, since these lands were at the date of the reservation unsurveyed, and have not been returned to the public domain, or opened to disposal, as other public lands, in Wisconsin, we are of the opinion that the state has never acquired title to said 16th sections, nor can we recognize the swamp-land sections, within the present limits of said reserve, for the reason that the selections were made whilst the lands were in a state of reservation, from which they have not since been relieved. The same argument relates to the La Pointe band of Indians, which has remained as originally reserved."

But, without passing any opinion upon this question of title to the sixteenth sections which has been so long in dispute, and is still unsettled, it has seemed to me quite clear, as this section was a part of the lands agreed upon, platted, and set apart by the government as and for a reservation, and occupied so long by the Indians as such, the government claiming it as a part of the reservation, and assuming to extend its jurisdiction over it for the purpose of the control and proper management of the Indians, that, for all objects of jurisdiction for the purposes indicated, the United States courts should exercise it. As a practical matter, it will certainly be very embarrassing if this question of whether a crime, confessedly committed within the outside limits of an Indian reservation, was on this side or that side of a quarter line, or some line dividing a meandered lake or stream and the surveyed land adjoining it. The government farmer or subagent, residing on one of these reservations, owns in fee the piece of ground he occupies. There are numerous small pieces of land in the reservation belonging in fee to individuals.

The evidence also shows that there are two or three small meandered lakes in this reservation. There may also be meandered streams. These are not included in the lands selected, which make up the 69,114.29 acres constituting the Lac Courtes Oreilles reservation, though within the outside limits of the reservation. The general supposition has been that, upon the state's coming into the Union, the title to the lands under this meandered water goes to the state; but, whether the title is in the government or the state, suppose one Indian kill another on one of these lakes or streams, being within the outside limits of the reservation. It is within the Indian country, and within the limits of the reservation. Will these courts take jurisdiction under a liberal, but practical and just, interpretation of the act, or must such cases be handed over to the state tribunals, with the prospect of a keen dispute about lines and titles, and a clashing of jurisdictions in half the cases that shall arise? This is not, however, by any means the question the court is called upon to decide in this case, as here the land on which the crime was committed is a part of the reservation, as agreed upon and platted, while the meandered lakes and small tracts belonging to individuals are not. The sixteenth section was within the inside, as well as outside, limits of the reservation. It will practically, moreover, be very difficult to administer justice in criminal matters on these reservations if these fine distinctions in regard to boundaries are to prevail. These controversies will arise quite often enough if it be held that the court has ju-

risdiction of all cases defined in the law arising within the outer limits of the reservation. And what objection there can be to such interpretation I am unable to see. It is feasible and practical. It will subserve the ends of justice, and will save embarrassment and complication. In the case at bar the government came into court prepared to show that the murder was committed within the outside limits of the reservation, the nearest limit one way being two miles, and the next nearest the other way three miles. The defendant had no witness who knew just where the lines ran at the place where the murder was committed. But the evidence tended to show that the road where the deed was done ran across the corner of section 16, cutting off a small piece about three rods wide at one end, and running to a point at the other six or eight rods away. It was a road that the Indians traveled constantly, leading from their village at Courtes Oreilles lake to their village at Round lake, only a short distance from the scene of the murder. The country was wild and unoccupied, except that the Indians had built their wigwams there, and had hunted and traveled and made their trails over and across it. I think it clear that congress, by the act of 1885, intended to give jurisdiction in such a case; and that it was within the power of congress to do it, I entertain as little doubt. The subject-matter of that statute is the government of the Indians, who are the wards, and under the charge and tutelage, of the nation; and it is the subject-matter, and not the title to the land whereon the crime is committed, which gives these courts jurisdiction. As there is a disagreement of opinion, the case will be certified to the supreme court for decision.

UNITED STATES v. THREE COPPER STILLS, etc.

(*District Court, D. Kentucky.* December 16, 1890.)

1. ILLICIT DISTILLING—FORFEITURE—CRIMINAL PROSECUTION.
   One who has been fined and imprisoned under Rev. St. U. S. § 3257, for illicit distilling, is estopped to claim as his own the distillery and spirits forfeited thereby; and such a conviction is not a bar to the proceeding *in rem* required by section 3453 to declare and perfect the forfeiture.
2. SAME—FORMER JEOPARDY.
   A conviction, under Rev. St. U. S. § 3296, for removing distilled spirits to a place other than a distillery warehouse, or concealing them there contrary to law, is not a bar to a conviction under section 3281 for illicit distilling, because the same are different offenses; and the question of being twice in jeopardy, within Const. U. S. Amend. 5, does not arise.
3. SAME—PROCEEDING IN REM.
   Const. U. S. Amend. 5, declaring that no one shall twice be put in jeopardy for the same offense, does not apply to proceedings *in rem;* and a conviction, therefore, under section 3296 is not a bar to proceedings under sections 3289, 3299, for the forfeiture of spirits found in unstamped packages, or in places other than distillery warehouses, to which they have been removed contrary to law.

At Law.
George W. Jolly, U. S. Atty.
S. McKee, for claimants.

BARR, J. This is a proceeding to condemn as forfeited three copper stills and distilling apparatus and thirty-three packages of apple brandy. The proceedings seek to forfeit this property under sections 3257, 3281, 3289, and 3299, and the allegations of the information are sustained by the evidence. The only question is whether or not the plea of the claimants, Jones and Chestnut, of a former conviction will bar the present proceedings, and release the property seized. The records of the proceedings under the indictments, which were tried in this court at Covington, show that the claimant Chestnut was indicted under sections 3257 and 3296, but that a demurrer was sustained to the count of the indictment under section 3257. The jury found him guilty on the other counts of the indictment, which were drawn under section 3296. The other claimant, Jones, who was a partner with Chestnut in the distilling business, was indicted under the same sections as Chestnut, and was convicted on all of the counts of the indictment,—that is, under both sections. Both claimants were sentenced under these convictions to be fined and imprisoned; and they now insist that, as the brandy seized and sought to be forfeited in this proceeding belongs to them, having been distilled by them, and they have been indicted and convicted for the violation of the law for which the brandy was seized and is sought to be forfeited, their conviction is a bar to the present proceeding; that they are being twice put in jeopardy for the same offense. This is an interesting question, and one not free from doubt. Section 3257 provides that—

"Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits, found in the distillery and on the distillery premises, and shall be fined not less than $500 nor more than $5,000, and be imprisoned not less six months and not more than three years."

The forfeiture of the still and distilling apparatus and also 10 packages of brandy is sought under this section. There may be other provisions of the law which would authorize a forfeiture of the still and distilling apparatus, but as 10 packages of brandy were found in the distillery warehouse, properly gauged and marked, this section is the only one which authorizes a forfeiture of that brandy. It will be seen from the record of the criminal proceedings that the claimant Chestnut was not tried under this section, but that a demurrer was sustained to the count of the indictment alleging an offense under this section. The claimant Jones was, however, indicted and found guilty under this section. Jones and Chestnut claim to be joint owners of this distillery and the brandy. Thus the question arises as to the effect of the conviction of Jones under this section. This section prescribes as punishment a forfeiture, a fine, and an imprisonment. A fine and imprisonment would follow as the sentence of court on the conviction under the indictment against Jones, but a sentence of forfeiture could not be entered upon this conviction. The sentence of forfeiture did not follow upon the conviction under this indictment, because congress has provided another

mode of procedure. The legal effect of the conviction may be to estop the convicted person from recovering the specified things if guilty, but a proceeding *in rem* is necessary to declare and perfect the forfeiture. See section 3453, rule 22, Admiralty Rules. In such proceedings the supreme court has said:

"The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be *malum prohibitum* or *malum in se.* * * * Many cases exist when the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of caseshas it ever been decided that the prosecutions were dependent upon each other; but the practice has been, and so this court understands the law to be, that the proceeding *in rem* stands independent of and wholly unaffected by any criminal proceeding *in personam*." *The Palmyra*, 12 Wheat. 14.

This opinion has been somewhat modified by a later case in the supreme court, in that, the court declares some proceedings *in rem* for forfeitures under the internal revenue laws do not "stand independent of and wholly unaffected by any criminal proceeding *in personam*." In *Coffey* v. *U. S.*, 116 U. S. 436, 6 Sup. Ct. Rep. 437, the court has declared that an acquittal under a criminal charge is a bar to a proceeding *in rem* to forfeit spirits upon the same facts as against the person acquitted. The court, in the *Coffey Case*, says:

"The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all between the United States and the claimant in the criminal proceeding, so that the facts cannot be again litigated between them as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

Although the court in that case declined to express an opinion as to whether a conviction on an indictment under section 3257 could be availed of as conclusive evidence in law for a condemnation in a subsequent suit *in rem* under that section, it must necessarily follow from the reasoning of the court that, if an acquittal is conclusive on the United States, a conviction must be conclusive on the convicted claimant, who, in this case, is Jones. Chestnut was not tried under section 3257, hence his position is different. The alleged bar because of conviction under this section does not arise.

This brings us to consider whether Jones and Chestnut's conviction under section 3296[1] is a bar to the present proceeding. The claimant

[1]Sec. 3296. Whenever any person removes or aids or abets in the removal of any distilled spirits on which the tax has not been paid to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes or aids or abets in the removal of any distilled spirits from any distillery warehouse or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years.

Chestnut was convicted of aiding in the removal to a place other than the distillery warehouse provided by law of 200 gallons of distilled spirits, contained in 5 packages, on which a tax had been imposed by law, which tax had not been paid, and in aiding in the concealment of 120 gallons of distilled spirits, contained in 3 barrels, in the barn of Charles Day, on which a tax had been imposed by law, which tax had not been paid. The claimant Jones, in addition to being found guilty under section 3257, was convicted under section 3296 of unlawfully aiding in the removal to a place other than the distillery warehouse provided by law of 200 gallons, contained in 5 packages, on which spirits a tax had been imposed by law, and which had not been paid. These are the same packages mentioned in the indictment against Chestnut. He was also convicted of aiding in the concealment of the 3 barrels of distilled spirits found in the barn of Charles Day. These 8 packages are part of those now sought to be forfeited in this proceeding. The other packages of the 33 now proceeded against are not mentioned or covered in the counts of the indictment under section 3296 against either Jones or Chestnut.

Section 3299 provides that—

"All distilled spirits found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law, shall be forfeited to the United States."

Section 3289 provides that—

"All distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States."

Section 3281 provides that—

"Any person * * * who shall * * * carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall for every such offense be fined," etc. "* * * And all distilled spirits, and all stills or other apparatus fit or intended to be used for the distillation * * * of spirits, * * * owned by such person, wherever found, and all distilled spirits * * * and personal property found in the distillery, * * * or in any building, room, or yard, or inclosure connected therewith, and used with or constituting a part of said premises, * * * shall be forfeited to the United States."

It is evident that proceedings *in rem* may be had under sections 3289 and 3299 without regard to the guilt of any particular person, and that the forfeiture is because of the location and *status* of the distilled spirits, or the condition in which the casks containing the distilled spirits are found. The thing is considered guilty, without regard to the owner or his guilt. This is certainly primarily so. In this case 8 of the 33 packages proceeded against were removed and concealed by the claimants, and hence they are so far the guilty party, and for this they have been convicted. It is also true that in the trial of the indictments evidence of the want of marks and stamps on the 8 packages could have been given in evidence to prove the tax was unpaid. The forfeiture authorized under section 3281 seems to be because of the guilt of

the distiller, and the use to which the things were put, and their location. This information, which proceeds under section 3281, is, I think, a different offense from the one for which the claimant Chestnut was convicted under section 3296. The offense under section 3257, for which Jones was convicted, is substantially the same as that charged in this information. But, as I have indicated, that conviction prevents him from claiming property which is forfeited by the provisions of section 3257. The question of being twice put in jeopardy cannot arise as to the copper stills and distilling apparatus which has been seized, either as to Jones or Chestnut. This question, however, does arise as to the three and five packages of brandy, not because they were removed or concealed by Jones and Chestnut, but because they were found elsewhere than in a distillery or distillery warehouse, and had not been removed according to law, and were without proper marks or stamps. The forfeiture is not, therefore, because of the guilt of Jones and Chestnut, but by reason of the *status* and condition in which the brandy was found, without regard to or an inquiry into the conduct of the owners of the brandy seized. The brandy and the packages in which they are is the offender, or, to use the language of Judge Story, "the offense is attached primarily to the thing," without regard to the owner or his conduct. Congress intended distilled spirits, under these sections, to be liable to forfeiture if found as therein described, even though the owner was innocent of causing the condition and *status*. If I am correct in this construction of these sections, the innocence of the owner of such distilled spirits would not protect it from forfeiture, and certainly the guilt of the owner should not; and it does not, unless some provision of the constitution prevents such a forfeiture.

The constitution of the United States (amendment 5) declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," but this provision is not a limitation upon the kinds of punishment which may be inflicted for an offense. Hence there may be a fine, an imprisonment, and forfeiture for the same offense, if the law so provides. This provision of the constitution does not in terms include such a proceeding as this one. It was intended by a constitutional provision to embody the common-law rule, but that rule did not embrace proceedings *in rem*, such as this one, when the thing was forfeited because of its *status*, use, or location. *The Palmyra*, 12 Wheat. 12; *State* v. *Barrels of Liquor*, 47 N. H. 374; *Sanders* v. *State*, 2 Iowa, 230; Wap. Proc. in Rem, §§ 24, 25; *State* v. *Inness*, 53 Me. 536. There is no case known to me which decides that this constitutional provision includes a proceeding *in rem*, which is a civil action, within its inhibition. It is true that the reasons given for the decision in *U. S.* v. *McKee*, 4 Dill. 128, would indicate that the fact the second proceeding was a civil action would make no difference as to the application of this constitutional provision, but that case differs from the one at bar in that it was a direct proceeding against McKee, and sought to secure double taxes for the same offense for which he had been convicted and sentenced. This is certainly a very broad application of this provision of

the constitution, but, broad as it is, it does not cover a proceeding *in rem* to forfeit a thing subject under an express statute because of its *status*, use, or location, and that without regard to the guilt or innocence of the owner of the thing. This case—*U. S.* v. *McKee*—is referred to in the case of *Coffey* v. *U. S.*, 116 U. S. 445, 6 Sup. Ct. Rep. 437, and the reason for that decision given; but I do not understand the reason given for the decision is approved and declared applicable to a proceeding *in rem*. The reason given by the supreme court in *Coffey* v. *U. S.* is entirely different, as we have seen; and this is a most significant fact, since, if the reasoning of the court in *U. S.* v. *McKee* had been adopted and made applicable, it would have been conclusive of that case, and all others like it, whether there was a conviction or an acquittal. But the reasons given by the supreme court prove, we think, that it did not intend to declare or intimate that the proceeding *in rem* taken to forfeit property claimed by Coffey was putting him "twice in jeopardy of life or limb," within the meaning of the constitutional prohibition. Indeed, the language of the court seems to put that beyond controversy. The court says, (page 443, 116 U. S., and page 441, 6 Sup. Ct. Rep.:)

"Whether a conviction on an indictment under section 3257 could be availed of as conclusive evidence in law for a condemnation in a subsequent suit *in rem* under that section, and whether a judgment of forfeiture in a suit *in rem* under it would be conclusive evidence in law for a conviction on a subsequent indictment under it, are questions not now presented."

If there is inference to be drawn from this language, it is rather that there could be a subsequent suit *in rem* or a subsequent indictment, as the case might require. If not this, there is certainly no indication that there could be only an indictment or a proceeding *in rem*, and that the United States would be forced to elect which it would pursue. If I am correct in the conclusion that this proceeding to forfeit these eight packages of brandy claimed by Jones and Chestnut is not putting them in jeopardy twice, within the meaning of the constitution, notwithstanding they have been convicted for aiding in removing and concealing them under section 3296, it follows they must be condemned as forfeited as well as the other property seized. I conclude, therefore, that the facts proven by the United States fully sustain the grounds alleged for the forfeiture in the information, and that the conviction of Jones and Chestnut under the indictments at Covington is not a bar to the forfeiture. All of the property seized and described in the information should be condemned, and it is so ordered.

UNITED STATES v. SMITH.

(*Circuit Court, D. New Hampshire.* August 18, 1891.)

1. CRIMINAL LAW—EVIDENCE—SELF-CRIMINATION—FORMER TESTIMONY—PROSECUTION AGAINST ANOTHER.
   Rev. St. U. S. § 860, providing that "no discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him, or his property or estate, in any court of the United States in any criminal proceeding," does not render it incompetent to contradict a party who testifies in his own behalf, by showing that, in a prosecution against another, he voluntarily appeared as a witness, and testified differently, where such testimony of itself has no tendency to criminate the witness, but rather to place the responsibility wholly upon the other. *U. S.* v. *McCarthy*, 18 Fed. Rep. 87, and *In re Counselman*, 44 Fed. Rep. 268, distinguished. *U. S.* v. *Brown*, 1 Sawy. 531, and *State* v. *Broughton*, 7 Ired. 96, followed.
2. SAME—PROCEEDINGS BEFORE GRAND JURY.
   A defendant who testifies in his own behalf may be contradicted by showing that he testified differently before the grand jury as a witness against another, who was charged with the same offense.

At Law. Indictment of Horace N. Smith for forgery of a pension check. There was judgment of conviction, and respondent excepts. Exceptions overruled, and motion for new trial denied.

The respondent was tried under an indictment charging forgery and the utterance of a pension check, knowing that the indorsement on the back was false. On direct examination, one Davis, a witness called by the government, stated that he had had some acquaintance with the respondent's handwriting, by having seen him sign a note, and by having received a letter or two from him, one of which he had. Thereupon, and without objection, he was permitted to say that the name "A. D. Towne" on the back of the check may have been written by the respondent. This qualified opinion was given hesitatingly. On cross-examination, the respondent's counsel called for the letter, and proposed to call the attention of the witness to it, and cross-examine him in regard to it, by asking him to point out wherein it resembled the name of A. D. Towne on the back of the check. The district attorney objected. The court ruled that the letter might be presented to the witness, and that he might be cross-examined in reference to it, for the purpose of testing the worth of his opinion, but that it could not go to the jury for purposes of comparison. The letter was thereupon shown to the witness, and he was cross-examined in regard to it, and its resemblance to the signature of Towne on the check. The witness was halting and uncertain, and said there was a chance for doubt. The respondent's counsel then proposed to have witness call the attention of the jury to the letter, and the similarities and dissimilarities between it and the name of A. D. Towne on the check. The district attorney objected. There was no direct evidence that the letter was in Smith's hand, further than the fact that it was signed by him. The court ruled, subject to exception, that the witness could not be required to point out to the jury the manner in which the letter sustained his opinion by comparison, and that the letter could not go to the jury for that purpose.

Respondent took the stand in his own behalf, and testified generally as to matters set forth in the indictment. It appeared, without objection, that he had previously testified in reference to the same matters, at a preliminary hearing, and later before the grand jury by which he was indicted, as a witness against Towne, who was charged with the same crime. Although Smith was under recognizance to appear before the grand jury upon an investigation based upon a preliminary proceeding against Towne, in which the subject-matter of this prosecution was under investigation, he was in fact willing and anxious to give his testimony, with a view of fixing the responsibility upon Towne. So, in this sense, he gave his testimony voluntarily. At the trial he was asked on cross-examination, if he did not testify at the preliminary hearing, and before the grand jury, and if he did not then give an account of the transaction different from the one testified to at the trial, (the points of difference being stated,) and he answered without objection. Then, for the purpose of contradicting him, and disparaging his credibility as a witness, the district attorney called the clerk who took minutes before the grand jury, and offered to show that he did testify differently, in the respects inquired about, than he had testified on the stand. Respondent's counsel objected and excepted, generally, on the ground that the testimony would disclose the secrets of the grand jury room, and be a violation of the oath which he had taken as clerk. No statute or ground of objection was suggested other than the general objection.

The foregoing bill of exceptions is allowed.

The District Attorney, for the United States.

John S. H. Frink, for respondent.

ALDRICH, J., (*after stating the facts as above.*) It is not necessary, in this case, to decide whether the common-law rule, which excludes collateral writings from the jury, will be strictly adhered to, for the reason that I find, as a matter of fact, that the respondent's case was not prejudiced by the testimony of Davis, and the refusal to permit the comparison. The opinion of the witness was so qualified that it was of little value to the prosecution, and upon cross-examination it became more uncertain; and, in view of this uncertainty, the respondent's counsel offered to let the papers go to the jury, and the district attorney objected. I thought at the time, and think now, that the government's case was weakened, and the respondent's strengthened, by this affair.

The contradiction of the respondent by showing that he testified differently before the grand jury was of a character to prejudice his case, and it therefore becomes important to inquire whether this evidence was improperly admitted.

The first objection is based upon the fact that it involved statements made in a proceeding before a grand jury. I do not think the evidence was inadmissible for that reason. *U. S.* v. *Farrington*, 5 Fed. Rep. 343; *U. S.* v. *Kilpatrick*, 16 Fed. Rep. 765.

The second objection is grounded upon section 860 of the Revised Statutes of the United States, which statute, it is conceded, was not

in the mind of either court or counsel at the time of the trial, and was first suggested as a specific ground of exception in argument after verdict. Although it may be doubtful, under the authorities, whether the objection taken at the trial was sufficiently specific to save to the respondent the objection now taken on the ground of the statute, I am inclined, for the purposes of this case, to treat the question as fairly and fully raised. The question presented, therefore, is this: Should the statute in question be so construed as to make it incompetent to contradict a party, who testifies in his own behalf, by showing that on another occasion, in a prosecution against another party, he, as a witness, gave a different account of the transaction, such account of itself having no tendency to criminate the witness, but rather to place the responsibility wholly upon another? The statute provides that—

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence or in any manner used against him, or his property or estate, in any court of the United States in any criminal proceeding."

An examination of the history of this statute satisfies me that congress only intended to do away with the liability of criminal prosecution, and thereby remove the privilege of refusing to testify in situations where under the common law, the privilege exists, to the end that justice may be promoted by compelling a witness to testify to affirmative matter in a prosecution against others, although the evidence sought may tend to criminate the witness as well. In other words, the object was to remove the personal privilege, so that evidence against others might be compulsorily obtained. In a case where the evidence was obtained through the compulsion of judicial proceeding, and tended to criminate the witness, the statute would undoubtedly furnish absolute immunity from any use of such evidence to sustain a prosecution against the witness. But such is not the situation presented. At the time the respondent gave the evidence which was used in contradiction, one Towne was under prosecution for forging the indorsements on the check in question, and Smith willingly gave evidence as to the condition of the check when he first saw it; his account of the transaction in no way tending to criminate, but, on the contrary, to wholly exculpate, himself, and fasten the responsibility of the wrong upon Towne. Smith was subsequently indicted for the same offense, and, upon the trial, gave a different account of the condition of the check; and, for the purpose of impairing his credibility as a witness, the government was permitted to show that he had made inconsistent and contradictory exculpatory statements. This statute was not designed to protect a party from the consequence of making inconsistent statements for the purpose of wrongfully fixing crime upon another, and thereby shielding himself, but, rather, to protect from prosecutions based upon affirmative evidence as to transactions which involve the witness with others in questionable proceedings. It is against such evidence obtained in judicial proceedings that the statute affords protection; and, to render the statute operative as a protection

against the consequences of contradiction, the evidence previously given must have been self-criminating, and obtained through the power of compulsion. So it follows that a witness who willingly gives evidence which does not in itself tend to self-crimination, but to fix the crime upon another, will not, upon subsequent proceedings in which he is a party, be exempt from the common-law rules as to contradictions and other methods of testing the credibility of witnesses and parties.

It often happens that justice is promoted by showing that a witness or a party has made inconsistent and contradictory statements, charging guilt upon others. If this case were to be tried again, and the respondent should give evidence different from the exculpatory evidence voluntarily given in his own behalf upon the last trial, it would at least be anomalous if such inconsistency could not be shown upon the question of credit. Or suppose, A. being on trial, John should testify that he saw B. commit the crime, and upon a second trial of the same case he should say that it was C., could it not be shown that the witness had made inconsistent and contradictory statements, to the end that the value of his testimony should be known? A construction of the statute in question which would shield a witness or a party from the consequences of such tests would at once destroy common and well-understood rules of evidence, long ago established for the better administration of justice. None of the cases cited by counsel are quite in point; yet it may be observed that *U. S.* v. *McCarthy*, 18 Fed. Rep. 87, and *In re Counselman*, 44 Fed. Rep. 268, on which counsel for the respondent chiefly rely, involve the self-criminating and compulsory elements, while *U. S.* v. *Brown*, 1 Sawy. 531, 536, and *State* v. *Broughton*, 7 Ired. 96, in reasoning, sustain the view which is here taken. If I am wrong in the construction placed upon the statute, the respondent has a speedy remedy by writ of error. The exceptions are overruled, and the motion for a new trial is denied.

NEW YORK BELTING & PACKING CO. *v.* NEW JERSEY CAR-SPRING & RUBBER CO.

(*Circuit Court, S. D. New York.* May 25, 1891.)

INFRINGEMENT OF PATENT—ASSIGNMENT PENDENTE LITE—JOINDER OF ASSIGNEE.

Where the owner of a patent makes an assignment pending a suit by him to restrain an infringement, and for damages, but expressly reserves past damages, and there is no proof or claim of infringement subsequent thereto, the assignee cannot maintain a suit against the defendant, and should not therefore be joined as complainant.

In Equity.

The New York Belting & Packing Company, a Connecticut corporation, brought this suit against the New Jersey Car-Spring & Rubber Company in the year 1887, for infringement of a patent. In June, 1890,