

The court erred in declining to instruct the jury to return a verdict in favor of defendant, as was requested by defendant at the close of the testimony. *Sixth.* Said court erred in refusing to charge the jury in writing, and before the argument of counsel, as to the law in this case. *Seventh.* The court erred in charging the jury as follows: "The engineer should be on the lookout for stock when running his train, and should use due care and vigilance in keeping such lookout."

The first assignment is well taken, and for that error the case must be reversed. The second, third, and fourth assignments are frivolous. As the case must go back for a new trial, we refrain from expressing any opinion on the question of the sufficiency of the evidence to support the verdict of the jury. It was not error for the court to refuse to put its charge in chief to the jury in writing. *Railway Co. v. Campbell*, 49 Fed. Rep. 354, (at the present term.) The court did not err in giving the instructions set out in the seventh assignment. *Railway Co. v. Washington*, 49 Fed. Rep. 347, (at the present term.) The judgment is reversed, and the cause remanded, with directions to grant a new trial.

GULF, C. & S. F. R. CO. v. MARTIN.

(Circuit Court of Appeals, Eighth Circuit. February 8, 1892.)

In Error to the United States Court in the Indian Territory,

Action by T. A. Martin against the Gulf, Colorado & Santa Fe Railroad Company to recover for the killing of stock. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

E. D. Kenna, J. W. Terry, and C. L. Jackson, for plaintiff in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This action was commenced before a United States commissioner in the Indian Territory by Martin against the railway company to recover damages for a sorrel mare alleged to have been killed through the negligence of the company. The plaintiff below recovered judgment before the commissioner for \$75, from which judgment the company appealed to the United States court, where the case was tried *de novo* before a jury, and there was a verdict and judgment in that court in favor of the plaintiff for \$75, and the company sued out this writ of error. Every error assigned has been decided in the cases of this plaintiff in error against Washington, the same against Campbell, and the same against Ellidge, in which the opinions were filed at this term. Reference is made to the opinions in those cases. It is needless to go over the ground again. The only error in this case was in refusing the defendant's request for a panel of 18 jurors. For this error the judgment is reversed, and the cause remanded, with directions to grant a new trial.

In re McDONOUGH.

(District Court, D. Montana. February 5, 1892.)

1. INDIANS—"SPIRITUOUS LIQUORS"—BEER.

Beer is not a "spirituous liquor," within the meaning of Rev. St. U. S. § 2139, denouncing the offense of selling spirituous liquors and wine to Indians.

2. SAME—STATUTES—LEGISLATIVE CONSTRUCTION.

Act Cong. July 4, 1884, declaring (p. 94) that section 2139 shall not be a bar to the prosecution of any officer, soldier, or employe of the United States who shall furnish "liquors, wines, beer, or any intoxicating beverage whatever" to any Indian, is not a legislative construction of such section.

3. SAME—PENAL STATUTES—CONSTRUCTION.

A penal statute must be strictly construed, and cannot be enlarged beyond the ordinary meaning of its terms, in order to carry into effect the general purpose for which it was enacted.

Petition by W. J. McDonough for a writ of *habeas corpus* to release him from imprisonment on a complaint before a United States commissioner for selling beer to an Indian. Prisoner discharged.

Rufus C. Garland, for petitioner.

J. M. McDonald, Asst. U. S. Atty.

KNOWLES, District Judge. The petitioner was arrested on complaint made before a United States circuit court commissioner for selling to an Indian in charge of an Indian agent spirituous liquor, to-wit, one bottle of beer. Section 2139 of the Revised Statutes of the United States provides:

"Every person (except an Indian in the Indian country) who sells, exchanges, gives, barter, or disposes of any spirituous liquors or wine to an Indian under the charge of any Indian superintendent or agent * * * shall be punished by imprisonment for not more than two years, and by a fine of not more than three hundred dollars."

It is claimed on the part of petitioner that the term "spirituous liquor," does not include beer. "The popular or received import of words furnishes the general rule for the interpretation of public laws as well as private and social transactions." *Maillard v. Lawrence*, 16 How. 261; *Arthur v. Morrison*, 96 U. S. 108; *Martin v. Hunter's Lessees*, 1 Wheat. 326; Sedg. St. & Const. Law, § 220. What is the general definition of "spirituous liquors?" The definition of the word "spirituous," as given by Webster's Dictionary, is: "Containing spirit; consisting of refined spirit; ardent; as, spirituous liquors." If we turn to the word "spirit," we find this as a definition of that word: "Hence a liquid produced by distillation, especially alcohol; the spirits of wine from which it was first distilled. Hence rum, whisky, brandy, and other distilled liquors having much alcohol, in distinction from wine and malt liquors." Turning from the definition given in the dictionary to legal authors, we find: "Spirituous liquor is composed, wholly or in part, of alcohol extracted by distillation. It need not be rectified,—that is, it is within the terms, though it has passed through the still once. Fermented liquors are not included." *Bish. St. Crimes*, § 1009. "In common parlance, 'spiritu-

ous liquor' means 'distilled liquor.' * * * Fermented liquor, though intoxicating, is not spirituous." In *Com. v. Grey*, 2 Gray, 502: "Wine is a fermented liquor; spirits are distilled liquors. We therefore think that the words 'spirituous liquors' embrace all those procured by distillation, but not those procured by fermentation." *Fritz v. State*, 1 Baxt. 17. In the case of *People v. Crilley*, 20 Barb. 246, STRONG, J., said in speaking of ale: "Neither is it a spirituous liquor, as spirits are manufactured by distillation; whereas, ale is produced by fermentation." "Fermented liquors are not, in common parlance, spirituous liquors. The latter term is properly used to designate distilled liquors, as distinguished from fermented liquors." *State v. Adams*, 51 N. H. 568. In this case it was held that ale, porter, and cider are not spirituous liquors. In the case of *State v. Oliver*, 26 W. Va. 422, the court said: "From these definitions it will be perceived that ale, porter, and beer are drinks of a like nature, differing from, but similar to, each other, but wholly differing from spirituous liquors or wine."

There are two cases which define "spirituous liquor" so as to include "beer." These are *Nevin v. Ladue*, 3 Denio, 43, and *State v. Giersch*, 98 N. C. 720.¹ In the first of these cases the court say: "'Beer' is defined by Webster to be a spirituous liquor made from any farinaceous grain, but generally from barley, which is first malted and ground, and its fermentable substance extracted by hot water. This extract or effusion is evaporated by boiling in caldrons, and hops or some other plant of an agreeable bitterness added. The liquor is then suffered to ferment in vats." I have been unable to find this definition in Webster's Dictionary. In the unabridged Webster's Dictionary of our time "beer" is defined to be "a fermented liquor, made from any malted grain, with hops and other bitter flavoring matter; a fermented extract from the roots and other parts of various plants,—as spruce, ginger, sassafras," etc. Undoubtedly this decision was based upon a different definition of beer from any we now have in common use. It was reviewed in the court of errors of the state of New York. (Reported in 3 Denio, 437.) Chancellor WALWORTH, in his opinion in the case, enters into an exhaustive and curious history of the manufacture and use of fermented liquors. I do not think any one can read the discussion of that distinguished chancellor in that case without coming to the conclusion that he thought there was a difference between spirituous liquors and fermented liquors. He holds that beer would come within the meaning of "strong liquors," as used under the statute in consideration. In the case of *People v. Crilley*, *supra*, the court did not think these cases determined the question at issue, and felt justified in giving a definition to spirituous liquor which did not include beer. In the case of *State v. Giersch*, *supra*, the court maintains that all liquors which have alcohol in them are spirituous liquors. It says: "Hence, also, distilled liquors, fermented liquors, and various liquors are all alike spirituous liquors." In the light of the definition which "spirituous liquors" have generally received, I do not think

this definition can be maintained. To maintain it would be to say that the term "wine," as used in the very statute under consideration in this case, was a redundant and useless word. Yet the general rule is that, if possible, in the construction of a statute, every word should be considered of use, and given a proper meaning. The same point is urged in this case as was urged in that of *State v. Giersch*, namely, that the object of the statute was to prevent intoxication. In that, intoxication generally; in this, the evil is limited to intoxication among the Indians under the charge of the national government. Undoubtedly this is true. But this is denominated a "penal" statute, and should be strictly construed, and with a view of carrying out the object aimed at by such a statute, or on the grounds of public policy, a court has no right to interpolate words into it, or to give a different meaning to words used from what are their natural import as commonly used. There is no better presentation of this point than that by Chief Justice MARSHALL, in *U. S. v. Willberger*, 5 Wheat. 76. And I do not see that I can better present this question than by using his language. He said:

"The rule that penal laws are to be construed strictly is perhaps not less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. It is said that, notwithstanding this rule, the intention of the law-maker must govern in the construction of penal as well as other statutes. This is true, but this is not a new, independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this: that, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which these words in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words; especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character, with those which are enumerated."

These remarks of that distinguished jurist I quote as an answer to the remarks of the able counsel for the government, who are most energetic and persistent in looking after offenses against national law within this jurisdiction. And I also would place them in contrast with some of the views of the learned court as expressed in the case of *State v. Giersch*, *supra*.

I do not think the provisions of the statute of July 4, 1884, (23 U. S. St. p. 94,) can be called a legislative construction of section 2139, under consideration. It does not purport to be such a construction, and is in no true sense a construction of the same. For the reasons assigned I

am satisfied beer is not within the meaning of spirituous liquors or wine; and it is hereby ordered that the defendant be discharged from further custody.

GRIER v. BAYNES *et al.*

(Circuit Court, N. D. New York. February 10, 1892.)

PATENTS FOR INVENTIONS—CONDITIONAL ASSIGNMENT.

A patentee granted to a company a license to make, use, and sell the patented articles throughout the United States, and an exclusive license for certain western states, except that he reserved to himself the right to sell in those states, and to transfer that right to one other. Thereafter he executed an assignment to other parties of one-third of his interest in the patent, in which he, in terms, excepted the rights granted to the company, and also reserved to himself the right to sell in all the remaining states, and to transfer that right to one other; and further reserved to himself the exclusive control "of and over all sales of the right to manufacture, use, and sell" the patented articles, which right he agreed should not be granted or sold at less than a specified price; and he agreed to account to the assignees for one-third of the proceeds of such sales; and that, should he neglect so to account or to pay them their share thereof, his exclusive control over such sales should cease, and the assignment should "thereupon become and be absolute forever." *Held* that, until such default, the assignment was merely conditional, in the nature of a security for the performance by the patentee of his agreement.

In Equity. Suit by William Watson Grier against James B. Baynes and others for royalties under letters patent. On settlement of final decree. See former report, 46 Fed. Rep. 523.

STATEMENT OF FACTS.

On the 5th of June, 1891, a decision was rendered in favor of the complainant for an accounting. 46 Fed. Rep. 523. On the 24th of June, 1891, an interlocutory decree was entered referring it to Mr. Charles B. Germain, of Buffalo, N. Y., as master to take the accounting and directing him to state "separately the number of sets of springs made and sold by said defendants prior to December 6, 1887, and the number made and sold subsequent to that date." On the 11th day of December, 1891, the master filed his report in which he finds: *First*, that the complainant is entitled to recover \$138.60 on account of royalties and \$47.50 interest thereon, in all \$186.14, against the defendant Baynes for springs made and sold by him. *Second*, that the complainant is entitled to recover \$1,896.30 on account of royalties and \$527.79 interest thereon, in all \$2,424.09, against defendants Baynes and the Buffalo Spring & Gear Company for springs made and sold by them subsequent to and including March 12, 1886, and prior to December 6, 1887. *Third*, that complainant is entitled to recover \$12,012.70 on account of royalties and \$1,057.36 interest thereon, in all \$13,070.06, against the defendants Baynes and the Buffalo Spring & Gear Company for springs made and sold by them from December 5, 1887, to October 1, 1891.