

upon demand; and the question now to be settled is whether, after these proceedings had in the state court, the plaintiff can dismiss his action there when the case is called for trial a second time, and then bring his case in the federal court. This, I think, the plaintiff cannot do. If he wished to have his case tried in the federal court, he should have brought it there in the first instance. This he had the unquestioned right to do; but he selected his tribunal, and sought to litigate his rights in the state court, and had one trial in that court, which resulted in judgment against him. He then demanded a new trial in that court under the statute, which was granted, and procured the judgment entered against him on the first trial to be set aside. If the first judgment had not been set aside under the statute, it would have been final. By procuring that judgment to be set aside, without cost, under the statute, which was a part of the proceedings authorized, plaintiff waived his right to resort to this tribunal. As was well stated by the court in the case of *Fraser v. Weller*, 6 McLean, 12:

"It would be a fraud upon the law. For aught that appears, the first judgment could not have been set aside except under the provisions of the statute, and, this remedy having been claimed under the statute, the party is bound to go on with another trial. Having set aside the bar to another suit, he does so under an obligation to pursue the special remedy under the statute. He cannot claim the remedy in part to his advantage, and then abandon it, to the injury of the other party."

The first judgment was not only a judgment against him for the property, but for costs as well. This he procured to be set aside under the statute, thus relieving himself of the obligation to pay the costs, and he cannot, under such circumstances, be permitted to require the defendants to incur cost and expenses in another tribunal. The case will be dismissed, at the plaintiff's cost.

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#### UNITED STATES v. SEARS.

(District Court, D. Kentucky. April 3, 1893.)

##### POST OFFICE—OBSTRUCTING MAILS—REFUSAL TO PAY TOLL.

On indictment for obstructing the passage of the mail, the defendant, a toll-gate keeper on a gravel road, cannot justify his act on the ground that the driver of the wagon conveying the mail refused to pay toll in advance, and that by statute (Gen. St. Ky. c. 110, § 3, subsec. 2) toll-gate keepers on gravel roads are authorized to stop persons who refuse to pay in advance from passing and using the road.

At Law. Indictment under section 3995, Rev. St. U. S., containing four counts. By the first count the defendant was charged with knowingly and willfully obstructing the passage of the mail of the United States then and there being carried from Paducah to Benton, Ky.; by the second, with unlawfully, knowingly, and willfully retarding the passage of the mail; by the third, with unlawfully, knowingly, and willfully obstructing the passage of the driver, one Andrew Melbur, who was then and there carrying the mail; and, by the fourth, with unlawfully, knowingly, and

willfully obstructing Melbur, who was then and there a driver of a wagon in which the mail was being conveyed, etc. The case was tried November 21, 1892, and the jury returned a general verdict of guilty. On November 23, 1892, the defendant made motion in arrest of judgment on the ground that he was a toll-gate keeper, and, as such, had the right under the laws of Kentucky (Gen. St. Ky. c. 110, § 3, subsec. 2) to demand and receive tolls in advance, and, the carrier having failed and refused to pay his toll in advance, defendant rightfully denied him passage over the pike, though he thereby obstructed and retarded the passage of the carrier and the mail.

George W. Jolly, U. S. Atty., and W. McD. Shaw, Asst. U. S. Atty. Bishop & Dishman and Gilbert & Kahn, for defendant.

BARR, District Judge. This indictment was under section 3995, which provides that—

“Any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying same, shall, for every such offense, be punishable by a fine of not more than one hundred dollars.”

There can be no doubt under the evidence that the defendant stopped the mail carrier while he was carrying the United States mail, and that the defendant did this because he did not pay his toll for the use of the gravel road in advance, and also for some toll past due, and that he did this knowing he was the mail carrier, and was at the time carrying the mail. The only questions which were considered by the jury under the instructions of the court were whether he could lawfully stop said mail carrier, and whether the stoppage under the circumstances was “willful,” within the meaning of this section.

The state statute authorized the defendant, who was a toll-gate keeper on a gravel road, to collect in advance the toll for the use of the road, and to stop persons from passing through the gate and using the road who did not pay their toll in advance. See chapter 110, § 3, subsec. 2, Gen. St. Ky.<sup>1</sup> But this statute did not and could not authorize a toll-gate keeper to stop a mail carrier while he was carrying the mail, because he did not pay in advance the toll for the use of the road. The authority of the United States was supreme in that matter, and if the defendant did knowingly and willfully obstruct or detain the mail of the United States he cannot defend by proving that he had the state of Kentucky's authority to thus obstruct and detain the mail. If the authority to obstruct or detain the passage of the United States mails be conceded to the states for a purpose like this, there can be

<sup>1</sup>Gen. St. Ky. c. 110, § 3, subsec. 2, is as follows: “All tolls are to be paid at the several gates at the time they are passed, or in advance, unless, by agreement with the managers of the road, a special permit is obtained to pass for a month or other longer term, not exceeding a year. If not so paid, the gate keeper may stop any person, and prevent him or his property from passing until payment is made.”

no limitation to the power to prevent the passage of the mails in and through the states at all. It is not intended to indicate that a state may not grant any remedy it chooses in the enforcement or collection of tolls on bridges or roads which do not encroach upon the rights and powers of the United States, but we think whatever remedies may be granted are subordinate to the power and authority of the United States under the federal constitution. Nor is it intended to assert that the United States can take private property for this public use without just compensation. It is not the right of the company to the tolls under the state law which is doubted, but the right to stop the passage of the mails to enforce their collection which is denied. Congress had, under the constitution, the authority to enact this section, and the only question in this case is whether the defendant Sears did "knowingly and willfully" obstruct or retard the passage of the mail or the mail carrier while he was carrying the mail.

This question seems to be answered in the opinion of the supreme court. In *U. S. v. Kirby*, 7 Wall. 485, the court say:

"The statute of congress by its terms applies only to persons who 'knowingly and willfully' obstruct or retard the passage of the mail or its carrier,—that is, to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation. When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows. All persons in the public service are exempt, as a matter of public policy, from arrest upon civil process while thus engaged. Process of that kind can therefore furnish no justification for the arrest of a carrier of the mail. This is all that is decided by the case of *U. S. v. Harvey*, [8 Law Rep. 77, 1 Brunn. Col. Cas. 540,] to which we are referred by the counsel of the government. The rule is different when the process is issued upon a charge of felony."

In that case Farris had been arrested on a bench warrant issued on an indictment charging him with murder, and the court decided the sheriff, who had arrested him while carrying the mail, had not willfully obstructed or detained the mail or a mail carrier. But if, as the court declared, Farris had been arrested under a civil process by the sheriff, and thereby obstructed or detained the passage of the mail, the sheriff would have been within this section (3995) of the law, how can it be claimed that a toll-gate keeper who, to collect toll in advance, obstructs and detains the passage of the mail, is not within this section, and does not violate the law? In *U. S. v. Barney*, 3 Hughes, 545, 12 Myers, Fed. Dec. 244, decided in 1810, the court decided that the lien on horses for their keep cannot be enforced in a manner to stop the passage of United States mail in a stage coach drawn by the horses upon which the lien was claimed. In *U. S. v. McCracken*, 3 Hughes, 544, Judge Hughes dismissed an indictment under this section where the offense as proven was the refusal of the stable keeper to allow a horse in his stable to be taken out to be used for carrying the mail unless his lien claim was paid him for keeping the horse. This was because the section did not apply, as there was no obstruction or detention of

the mail while it was in transitu, but the court seemed to assume that the offense would have been made out had the obstruction been while the mail was being carried from one place to another. The cases of *U. S. v. De Mott*, 3 Fed. Rep. 478, and *U. S. v. Kane*, 19 Fed. Rep. 42, sustain the view herein indicated. In the case of *U. S. v. Harvey*, 1 Brunn. Col. Cas. 543, Chief Justice Taney says:

"We do not consider the warrant a justification to the officer. Yet the mere serving of the warrant would not render the party liable to an indictment under the law; but if, by serving the warrant, he detained the carrier, he would then be liable. We do not construe the term 'willfully' in the same sense as the traverser's counsel. If the traverser, by serving the warrant, detained the carrier, then he 'willfully' detained him in the sense that word is used in the act of congress."

In that case a constable had arrested a mail carrier while he was carrying the mail, by virtue of a warrant in an action of trespass *quare clausum fregit*, but the detention was only for a short time, and the carrier got to the next office at his usual hour.

Although the facts surrounding the case should be considered in the sentence, we cannot consider the state statute a justification for the stoppage of this mail carrier while he was transporting the mail, and I must therefore overrule the motion to arrest the judgment on the verdict of the jury, and it is so ordered.

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In re FITTON.

(Circuit Court, D. Vermont. April 15, 1893.)

**INTERSTATE RENDITION—INFRACTION OF DISCHARGE—HABEAS CORPUS.**

Relator was extradited from New York for larceny. He furnished bail, and was at once rearrested on a prior charge of perjury, and was discharged by the federal circuit court on habeas corpus with protection for one day, in which to return to New York. He appealed on the ground that protection should have been extended during the pendency of the proceeding for larceny, which appeal was dismissed during his enlargement on bail and while he was confined in jail for contempt against a state court in an entirely different matter. He was then convicted in the state court of perjury, and sentenced to the penitentiary for ten years, from which he claimed a discharge on the ground that he was convicted of the perjury pending his bail in the larceny proceeding. *Held*, that having, by his contempt of court, placed himself in a position where he could not surrender himself in discharge of his bail, and the state having done nothing on the indictment for perjury to prevent such surrender, he was not entitled to a discharge.

At Law. Application by Robert Fitton for discharge on habeas corpus from a conviction of perjury in a state court. Application denied.

Robert Fitton, pro se.  
William W. Stickney, for the State.

WHEELER, District Judge. The relator was extradited from the state of New York for larceny, was bound over, and furnished bail. He was at once rearrested on a prior charge of perjury, and was afterwards discharged by this court from that arrest on habeas