

trator de bonis non. She alone is liable on the notes, whatever benefit the transaction in which they were given has conferred upon the estate.

The answer concludes as follows: "Therefore this defendant prays that the petition of the plaintiff may be dismissed, and that said notes may be delivered up and canceled, and for all proper relief." The prayer is for purely equitable relief in an answer at law. This is wholly inadmissible, and makes plain in one sentence the erroneous theory on which the second and fourth defenses are founded.

The demurrer to the first and third defenses will be overruled. The demurrer to the remaining defenses will be sustained.

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UNITED STATES v. ALDRICH et al.

(Circuit Court of Appeals, First Circuit. September 29, 1893.)

No. 49.

1. UNITED STATES MARSHAL.—PER DIEM FEES.

The provision in the act of August 4, 1886, (24 Stat. 253,) that no part of the money thereby appropriated should be used in payment of per diem compensation, except when business was actually transacted in court, merely related to that appropriation, and the legal right to per diems remained the same as before.

2. SAME.

Under Rev. St. § 829, a marshal is entitled to his per diem when he attends court because he is required to attend, even though no judge is present, and no business is transacted; and it is immaterial that the record does not show whether there was any written order directing the opening of the court. U. S. v. Pitman, 13 Sup. Ct. Rep. 425, 147 U. S. 669, followed.

In Error to the Circuit Court of the United States for the District of Rhode Island.

At Law. Action by the United States against Elisha S. Aldrich and another, executors of James H. Coggeshall, to recover moneys paid to said Coggeshall, as United States marshal, for attendance on court, etc. The case was submitted on an agreed statement of facts. Judgment was rendered for the United States for \$15.20, and it appeals therefrom. Affirmed.

Charles E. Gorman, U. S. Dist. Atty. for R. I., (Frank D. Allen, U. S. Dist. Atty. for Mass., on the brief,) for the United States.

Henry Marsh, Jr., and James M. Ripley, for defendants in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. The United States waive all question except as to the items in paragraph 1, 2, 3, and 4 of the agreed statement. The item in paragraph 1 was disallowed by the circuit court, and, with the commissions on it, constitutes the amount of the judgment below for \$15.20, and there is now no question touching it.

The items in paragraph 4, beginning August 6, 1886, and ending September 7, 1886, are claimed to be covered by the appropriation act of August 4, 1886, (24 Stat. 253,) which provided that no part of any money appropriated by that act should be used in payment of per diem compensation, except for days when business was actually transacted in court. This is not a prohibition of a per diem, but extends merely to that appropriation; so that the legal right to the per diem remained the same as though the act had not been passed, and the marshal stands, with reference to those days, precisely as he stands with reference to the others in items 2, 3, and 4. The appropriation act of March 3, 1887, (24 Stat. 541,) is of another character, and relates to all moneys thereafter appropriated. Therefore, this statute was held by the court of appeals for the eighth circuit, in *U. S. v. Perry*, 1 C. C. A. 648, 50 Fed. Rep. 743, to be a substantial amendment of the Revised Statutes touching the right to a per diem.

*U. S. v. Pitman*, 147 U. S. 669, 13 Sup. Ct. Rep. 425, seems to meet all the objections of the United States to the effect that a court is not in session for the purposes of a per diem when no judge is present; also, to the effect that the act of March 3, 1887, already referred to, does not furnish a legislative construction of the words "in session," occurring in Rev. St. § 829. Indeed, *U. S. v. Pitman* fully settles that under this section an officer present to attend a court, when required to be present, is entitled to his per diem whether the court is opened by the judge or not, or whether the judge is present or not.

The above suggestions dispose of all items in paragraphs 3 and 4, although it is particularly claimed by the United States that the record does not indicate that the court was in session for the days set out in paragraph 4 within the meaning of section 829; the point seeming to be that the agreed statement does not show whether the court remained open during the entire day, or whether it was opened, and forthwith adjourned. This is immaterial, under *U. S. v. Pitman*, as that case holds that the marshal is entitled to his per diem when he attends because he is required to attend, even though no judge is present, and no business is transacted.

A large portion of the argument of the United States is based on the claim, that it does not appear that there was any written order directing the opening or adjourning of the court on the days named in paragraph 2. It is of no consequence whether there was a written order adjourning from those days, because the only question, under *U. S. v. Pitman*, is whether the marshal was required to be then in attendance for whatever emergency might arise. Even if an improper attempt was made to then adjourn the court, it would not affect the right of the marshal to receive his per diem for those days; but the question, if any, would arise with reference to those to which the court was adjourned. No such question is made in this record. Neither is the mere fact that there was no written order directing the opening of the court material. If, by the expression, "no written order of the judge directing the opening," it was intended to mean that there was no written order of

the judge directing an adjournment to those particular days, even this would not go far enough, because there may be adjournments without a written order—in the district court, by the judge in person, and in the circuit court, by the judge in person, or under Rev. St. § 671, by the marshal in person. It appearing that a court was opened on the days named, it is to be presumed that it was regularly opened. This presumption cannot be met without negating all the conditions providing for its opening, which the agreed statement fails to do.

On the whole, as this record stands, *U. S. v. Pitman* protects the marshal, as to his entire account, except item 1, already referred to. Judgment of the circuit court affirmed.

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UNITED STATES v. CHINA & JAPAN TRADING CO., Limited.

(Circuit Court of Appeals, Second Circuit. November 17, 1893.)

CUSTOMS DUTIES—JAPANESE WALL DECORATIONS.

Japanese wall decorations, made of paper, or of paper and cotton, or of narrow strips of bamboo joined together with cotton cord, and upon which representations of flowers, of birds, or of human figures are painted in water colors, the large bodies of colors being applied by stenciling, while the features of the work which are delicate and ornamental and give character to the article are by hand, are dutiable, under paragraph 465 of the act of October 1, 1890, at 15 per cent. ad valorem, as "paintings in oil or water colors." Such articles are not dutiable, respectively, according to the component material of chief value, under paragraph 425, as manufactures of paper not specially provided for; paragraph 355, as manufactures of paper and cotton, cotton chief value, not specially provided for, and paragraph 230, as manufactures of wood not specially provided for, at 25, 40, and 35 per cent. ad valorem, respectively.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Application by the China & Japan Trading Company, Limited, for review of a decision of the board of general appraisers in relation to certain importations of wall decorations by said company. The circuit court reversed the decision of the board of general appraisers. The United States appeal. Affirmed.

Edward Mitchell, U. S. Atty., and Henry C. Platt, Asst. U. S. Dist. Atty., for the United States.

Albert Comstock, for respondent.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The China & Japan Trading Company imported into the port of New York, in the year 1891, sundry invoices of Japanese wall decorations, which were invoiced as paintings. These articles were made either of paper, or of paper and cotton, or of narrow strips of bamboo joined together with cotton cords, and upon which representations of flowers or of birds or of human figures were painted in water colors. They were very cheaply made in Japan, and were valued at from 17 to 45 cents