

SIMONTON, District Judge. This indictment is brought under the sixth section of the act of congress approved September 19, 1890, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors," (1 Supp. Rev. St. 801.) The evidence in the case is that the defendant is a dealer in timber on the Great Pedee river, in South Carolina, a navigable water of the United States; that he made up his rafts in the upper part of the river, and floated them down the stream to market; that in several instances the rafts so made up were seen floating down the stream with no hands on them, and with no means of governing or directing their movement; that in this navigable river there were often sailing craft and steam vessels, and that the presence of these unguarded rafts was very dangerous to navigation, especially at night, the rafts frequently having no lights. It is also in evidence that at times a raft would break up, and that its debris would lodge on the bank of the river, obstructing the current; and also that a part of a raft had lodged in the stream, and had made an obstruction. The only evidence as to the manner in which the rafts left the place at which they were made up came from the defendant and his witnesses. They say that they were always provided with a crew, ropes, and oars. It was admitted, however, that on several occasions the crew had deserted rafts on their passage.

The act of congress on which this indictment was framed is directed against the casting into or constructing upon the beds of navigable streams anything which may create obstructions more or less permanent in character, diminishing the navigable capacity of the streams. It is not directed against the floating of logs or rafts thereon, which may obstruct the surface of the streams, but which necessarily are temporary in their effect. Rafts are included in the general term "vessels." Navigable streams are as much dedicated to their use as to the use of other vessels. If this privilege of use be abused, the persons so abusing the use are liable civilly for damages they may occasion. This act of congress does not make them liable criminally.

The jury will find the defendant not guilty.

WOODRUFF v. UNITED STATES.

(Circuit Court, D. Kansas. November 29, 1893.)

1. POST OFFICE—MONEY-ORDER FUNDS.

Post-office money-order funds are part of the public moneys of the United States.

2. TRIAL—INSTRUCTIONS—COMMENTS ON EVIDENCE.

A federal judge is authorized, in criminal as well as civil cases, to express his opinion on the questions of fact which he submits to the jury, when he further tells them that they are the sole judges of the weight of the evidence and the credibility of the witnesses.

3. CRIMINAL LAW—SENTENCE—EMBEZZLEMENT OF POST-OFFICE FUNDS.

Under Rev. St. § 4046, declaring the embezzlement of post-office money-order funds a crime, and providing that one convicted thereof shall "be imprisoned * * * and fined in a sum equal to the amount embezzled," a sentence of imprisonment, without any fine, is invalid.

At Law. On writ of error to the district court. Trial of indictment against Frank Woodruff for embezzlement of postal-order funds. Judgment reversed.

J. G. Waters and S. R. Riggs, for plaintiff in error.

J. W. Ady and P. L. Soper, for defendant in error.

Before CALDWELL, Circuit Judge.

CALDWELL, Circuit Judge. The plaintiff in error was assistant postmaster of the United States at Lawrence, Kan. He was indicted, tried, and convicted in the district court of the United States for the district of Kansas for embezzling money-order funds in violation of section 4046 of the Revised Statutes of the United States, which reads as follows:

"Every postmaster, assistant, clerk, or other person employed in or connected with the business or operations of any money-order office who converts to his own use, in any way whatever, or loans, or deposits in any bank, except as authorized by this title, or exchanges for other funds, any portion of the money-order funds, shall be deemed guilty of embezzlement; and any such person, as well as every other person advising or participating therein, shall for every such offense, be imprisoned for not less than six months nor more than ten years, and be fined in a sum equal to the amount embezzled. * * *"

The first count in the indictment charged him with the embezzlement of \$5,066.88 of the public moneys of the United States, the same being a portion of the money-order funds of the United States. The jury returned the following verdict: "We, the jury impaneled and sworn in the above-entitled cause, upon our oaths, do find the defendant guilty as charged in the first count of the indictment." The sentence of the court was that the defendant "be imprisoned in the Kansas state penitentiary for one year and one day."

Post-office money-order funds are part of the public moneys of the United States, and the contention to the contrary is not tenable.

It is assigned for error that the jury could not fail to draw the conclusion from the instructions that the judge thought the defendant was guilty. Conceding this to be so, it was not error. The judge told the jury that they were "the sole judges of the weight of evidence and the credibility of the witnesses;" and he said to them, "It is the province of the court to declare to you the law applicable to the facts of the case, but you are to ascertain and determine what the facts are, and to make your own conclusions and inferences from the facts and circumstances in evidence. * * *". Having told the jury that it was their province to determine the facts from the evidence, it was perfectly competent for the judge to indicate to the jury his opinion upon the facts. It is well settled that a judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist a jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination. *Simmons v. U. S.*, 142 U. S. 148, 12 Sup. Ct. 171.

It will be observed that the act under which the defendant was indicted declares that one convicted of the offense therein charged

shall "be imprisoned for not less than six months nor more than ten years, and be fined in a sum equal to the amount embezzled." The sentence in this case was one of imprisonment only, and not imprisonment and fine, as required by the statute. In the courts of the United States the rule is well settled that a judgment in a criminal case must conform to the requirements of the statute, and that any variation therefrom, either in the character or extent of the punishment inflicted, avoids the judgment. *Ex parte Kars-tendick*, 93 U. S. 396; *In re Graham*, 138 U. S. 461, 11 Sup. Ct. 363; *Ex parte Lange*, 18 Wall. 163; *In re Mills*, 135 U. S. 263, 10 Sup. Ct. 762; *In re Johnson*, 46 Fed. 477; *Harman v. U. S.*, 50 Fed. 921; *In re Pridgeon*, 57 Fed. 200.

This court, sitting as a court of review, is not, on this record, called upon to point out the proper practice for the purpose of ascertaining the amount embezzled, with a view to the imposition of the fine which the statute requires shall be imposed. The question was not agitated in the lower court, and it will be time enough for this court to express an opinion upon it after it has been raised and decided by that court, and its ruling thereon brought up for review. As bearing somewhat on that question, see *Reynolds v. U. S.*, 98 U. S. 145, note pp. 168, 169; *Roberts v. State*, (Fla. 1892,) 11 South. 536.

The judgment of the district court of the United States for the district of Kansas is reversed, and the cause remanded to that court "for further proceedings" therein according to law.

UNITED STATES v. WILSON.

(District Court, N. D. California. November 28, 1893.)

No. 2,978.

1. POST OFFICE—OBSCENE SEALED LETTERS.

The mailing of an obscene, private, sealed letter is not within the prohibition of Rev. St. § 3893, as amended September 26, 1888, by the insertion of the word "letter," for all the words of enumeration are limited in character by the concluding words, "or other publication." *U. S. v. Chase*, 10 Sup. Ct. 756, 135 U. S. 255, applied; *U. S. v. Martin*, 50 Fed. 918, disapproved.

2. STATUTES—CONSTRUCTION—VIEWS OF LEGISLATORS IN DEBATE.

While the courts cannot recur to the views expressed by individual members in debate, for the purpose of ascertaining the intention of congress, they may yet advert to statements made by such members, as part of the history of the times, and for the purpose of meeting an objection that a word used could have no operation at all, if it were not given a certain meaning contended for.

At Law. Indictment of F. L. Wilson for mailing an obscene letter inclosed in a sealed envelope in violation of section 3893, Rev. St., as amended. Heard on demurrer and motion to quash. Demurrer sustained and indictment quashed.

Charles A. Garter, U. S. Atty.
Lorenzo S. B. Sawyer, for defendant.