

ging reports concerning the operation of the strikers. Many of these telegrams were published at the time as part of the current news of the day, and have been copied into the subpoena as published, while others are supposed, from the reported declarations of the parties and their concerted actions, to have been sent and received by them. In *Ex parte Jaynes*, 70 Cal. 639, 12 Pac. 117, the court held that the subpoena in that case, commanding the witness to search for and produce all messages from and to a large number of persons therein named, between specified dates, did not identify the particular messages required, and hence the witness was not bound to respond, and committed no contempt in failing to examine the papers under his control to ascertain if any such messages had been sent or received. The subpoena in that case was obtained by counsel for respondent, and presented to the court for examination and comparison with the subpoena in the present case. There is no question but that in many particulars they are very similar. But the state court, in commenting upon the former subpoena, said that it "was an evident search after testimony;" that is to say, that it called for an indiscriminate search among the papers in the possession of the witness,—for no particular paper, but for some possible message or communication that might throw some light on some issue involved in the trial of a civil case. This is a very different affair from an examination before a grand jury, involving an original inquiry into the conduct of parties with respect to criminal acts, where the telegraphic messages were probably the effective means of carrying out their unlawful purposes. The subpoena now under consideration calls for the production of telegrams, describing them with such particularity as appears to be practicable; and, under all the circumstances, I think they are sufficiently described to indicate, to an ordinarily intelligent person, the particular communications required.

The objection that no compensation has been tendered the witness for his outlay in making the necessary search for the telegrams is without merit. The United States is not required by the statute to tender witness fees in advance, and, as there is no suggestion that the appropriation for the payment of witness fees for the current year has been exhausted, it is sufficient that he will be paid his legal fees in due course, when he shall have responded to the subpoena. The subpoena *duces tecum* is, in my opinion, sufficient. The motion to quash is therefore denied.

HUNT et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 335.

BAIL IN CRIMINAL CASES—DEFENSE TO RECOGNIZANCE—ESTOPPEL.

It is no defense to a recognizance that it was taken and acknowledged before the clerk of the district court, where this was done by order of the district judge, made at the request of the accused, and to secure his speedy discharge.

In Error to the District Court of the United States for the Western District of Missouri.

This was a proceeding by the United States to enforce, by scire facias, a forfeited bail bond against Robert H. Hunt and Hugh C. Ward, the sureties thereon. The district court rendered judgment for the United States, and the defendants sued out a writ of error. This court heretofore affirmed the judgment below (10 C. C. A. 74, 61 Fed. 795), but defendants have now petitioned for a rehearing.

Hugh C. Ward, for the motion.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. In this case a petition for rehearing has been filed, supported by an elaborate brief, which we have carefully read and duly considered. The chief complaint is that the decision heretofore rendered makes a void contract binding by the application of the principle of estoppel or waiver, which ruling, as counsel assert, "has not the support of a single authority." It is said that as the opinion concedes that there was no statute, state or federal, authorizing the clerk of the United States district court to admit parties to bail, the bail bond in question was absolutely null and void, and could not be validated by any application of the doctrine of estoppel or waiver. There is, as we think, a fundamental error in the line of thought pursued by counsel, in that it is taken for granted that the clerk of the district court admitted the accused to bail. This was not the fact. Besides approving the sureties, the act of admitting an accused person to bail involves the determination of two questions, in the decision of which the officer acts judicially. In the first place, it must be determined whether the offense of which the party stands accused is bailable, and, secondly, what amount of bail ought to be required. The decision of this latter question is always important, as article 8 of the amendments to the federal constitution declares that "excessive bail shall not be required." When an order has been made by the proper officer, allowing bail and fixing the amount thereof, the sureties tendered must, of course, be accepted or approved, and the release of the offender after the sureties have signed the bond is a sufficient approval. But no law of which we are aware requires the sureties to appear personally before the judge, unless they are to become bound by a technical recognizance, such as is entered into in open court, and spread upon the journal of its proceedings. When a bail bond is taken, as in the present case, and the obligation assumed by the sureties is evidenced by their signature to the bond, and not by the court record, it is not essential that they should appear personally before the court or judge. In accepting a bail bond, a court or judge may undoubtedly act upon knowledge of its own, or upon knowledge derived from third parties, as to the solvency of the sureties and as to the genuineness of their signatures. In point of fact they do frequently so act in the interest of personal liberty; and it would sometimes lead to great hardship if they

should act otherwise by requiring sureties to be brought from a great distance, at great inconvenience and expense, to merely sign a bail bond in the presence of the judge. From what has been said, it is manifest that the clerk of the district court did not admit the accused to bail as counsel have erroneously assumed. The district judge discharged each important judicial function in connection with taking bail. He decided that the offense was bailable, and fixed the amount of the bond. He also ordered the clerk to approve the bond when it should be signed by two sureties. This order addressed to the clerk was tantamount to an approval in advance of a bond signed by two sureties whom the clerk might accept as sufficient. We are not prepared to admit that the action taken by the district judge in the matter of thus approving the bond was even irregular; but, conceding that it was irregular, such action was induced by the request of the accused that the bond might be so executed, so as to secure his more immediate release; and, as we have heretofore held, and still think, it was competent for the accused and his sureties to waive the irregularity, and they should be adjudged to have done so.

In conclusion, it is proper to add that we have examined the additional cases cited by counsel in support of the proposition that the bail bond now in suit is null and void, for the reason that it was signed in the presence of the clerk, and not in the presence of the judge. With reference thereto it may be said that the cases cited are generally cases where a person who was wholly unauthorized to take bail for the particular offense assumed to do so on his own motion, and to discharge each judicial function connected therewith, or they are cases where the bail was taken contrary to the provisions of some express statute, which fact was held to render the obligation void. *Com. v. Otis*, 16 Mass. 198; *Chinn v. Com.*, 5 J. J. Marsh. 29; *Dickenson v. State*, 20 Neb. 72, 29 N. W. 184; *Clink v. Circuit Judge*, 58 Mich. 242, 25 N. W. 175; *Butler v. Foster*, 14 Ala. 323. We think, upon an examination of the cases, that none of the citations in question are in necessary conflict with the views which we have expressed, and the principles upon which we have predicated our decision. The petition for a rehearing is accordingly denied.

McEWAN BROS. CO. v. WHITE.

(Circuit Court, D. Connecticut. October 22, 1894.)

No. 752.

PATENTS—ANTICIPATION—PAPER BOARD.

The McEwan patent, No. 492,927,—claiming, as a new article of manufacture, a superior paper board, formed from printed newspapers ground to a pulp, and having the particles of printers' ink minutely subdivided and uniformly distributed, so as to impart an even tint to the board,—was not anticipated by previous processes, in which the ink was utilized as part of the coloring matter by the use of an alkali which saponified the oil in the ink, after which the saponified matter was washed out; it appearing that such process required additional expense, and also weakened the fiber of the board.