In re CHARGE TO GRAND JURY.

(District Court, N. D. New York. March 19, 1895.)

LACK OF FACILITIES FURNISHED TO THE COURT FOR THE TRANSACTION OF BUSINESS—NEED OF AN OFFICIAL STENOGRAPHER—NEED OF ADDITIONAL BAILIFFS — WANT OF PROVISION FOR FURNISHING MEALS TO JURORS IN CIVIL CASES—FAILURE TO PROVIDE FUNDS FOR TERMS OF COURT.

The following is a portion of a charge delivered to a grand jury at Utica by the district judge (ALFRED C. COXE) March 19, 1895, together with a presentment thereon made by the grand jury, at Utica, March 27, 1895.

COXE, District Judge (charging grand jury). There is another matter to which I desire to call your attention, with the request that, after investigation, you make such presentment upon the subject as you may deem proper. I refer to the facilities, or, rather, the lack of facilities furnished to this court. All patriotic citizens, no matter how they differ upon other subjects, unite in the desire that the courts of our country shall be conducted with dignity and decorum, so as to command the respect and confidence of all. The people of this state have favored every amendment to the constitution intended to increase the efficiency of the courts. It is unnecessary for us to emulate the pomp and ceremony which surround the tribunals of foreign countries, but it is of the utmost importance that our courts, both state and federal, should be provided with the necessary conveniences with which to transact the business confided to their care in a decorous manner and in conformity with modern usages. Especially is this true of the federal courts, which represent the judicial branch of the national government, and are charged not only with the interpretation and construction of the national laws, but often with the maintenance of the national honor. They should be models in all that goes to make up a dignified, efficient and orderly judicial tribunal. Not only are the means and appliances furnished these tribunals inferior in many respects to those of the highest courts of our state, but, I believe, that it can be demonstrated that the circuit and district courts of the United States, charged with the decision of the most vital and far-reaching questions, having to dispose of causes often involving millions of money, have not as good facilities for the transaction of business as some of the police courts of our larger cities.

Let me be more specific. A stenographer is now a necessary adjunct of every well-conducted trial. In this age of superlative progress we are not contented to revert to the antique methods of a quarter of a century ago. Time and money are saved by enlisting the services of those expert writers, who are able to take the evidence as fast as it falls from the lips of the witnesses. A court that adopts the method of writing down the evidence in long hand is regarded as intolerably slow and behind the age, and yet in the United States courts there is no official stenographer. Other courts have felt the impulse of modern progress, but the federal courts in this respect are in the condition of a century ago. When

a stenographer reports a civil cause here he is furnished and paid for by the lawyer for the plaintiff, or defendant, unless they agree to divide the expense between them. The presiding judge has no control over his action. He follows the direction not of the court, but of the parties who employ him. There is no official record. The inconvenience and impropriety, to say nothing of the graver abuses which may occur, and do occur under this system, suggest themselves at once. Not only is it unfair to litigants to compel them to bear this burden, but it is unseemly that one who bears such an important relation to the court should be the paid assistant of the attorneys. It is true that in some of the causes tried here the services of a stenographer are not needed. It may be that you will say that the appointment of an official stenographer is unnecessary, but surely the court should have the authority to employ one in every case where, in the opinion of the judge, the issues involved are of sufficient importance to justify the expense.

Again, a few years ago, in 1888, I believe, the congress of the United States paused long enough from the task of elucidating the momentous questions which confronted it, to pass a bill reducing the number of bailiffs in the federal courts from five to three. After an experience of 12 years upon the bench, I am prepared to assert that it is simply impossible to conduct the business of the United States courts in this district in an orderly and proper manner, with only three bailiffs. A moment's consideration will make this plain. One bailiff is necessary for attendance upon the grand jury, one at the door of the court room, one in the court room to preserve order, one to attend a petit jury when deliberating on their verdict, one should be assigned to the district attorney, and at least two should be detailed to conduct the prisoners to and from the jail. Here are seven whose presence is essential, and, besides this, the services of several more are often very useful. For instance, at a recent term of court four petit juries were deliberating at once. The three bailiffs and the crier were impressed into the service, and the court was for a time left without a single officer in attendance. With work for seven officers, the court is allowed but three. Compare this condition of affairs with the courts of our state. During a recent investigation in this county a sheriff was criticised because, as I remember the accusation, he employed 13 constables at ordinary terms of the circuit court. Several lawyers of prominence and experts in such matters gave testimony, and though some thought that 13 was too large a number, no one, I believe, put the number of necessary officers at less than eight; this in a local court and in a court where few criminals are tried. Here, on the contrary, the time of the district court is largely occupied in the trial of criminals. Strangers from all parts of the United States and a motley assemblage, representing all sorts and conditions of men, gather before its bar. It goes without saying that the maintenance of order in such a tribunal requires the services of a larger number of officers than in a local court, where every one is known

and where civil causes largely predominate. A misunderstanding between the judges of the court of general sessions in the city of New York caused an investigation a few weeks ago in which it appeared that 40 officers are constantly assigned to duty in the criminal courts, 10 being in attendance upon each branch of the court. The judges, though differing upon other matters, all agreed that this number was insufficient. Since the number of bailiffs in the federal courts has been reduced to three we have often been in a lamentable condition. The court has frequently been entirely without officers, all of them being detailed for necessary outside duty. Preservation of order has been at times almost impossible. In trials of public interest the presiding judge has frequently seen men standing upon the seats and window sills and conducting themselves more as if they were in a theater than in a court of justice. The judge has been powerless to prevent these unseemly exhibitions. Several prisoners have escaped for lack of sufficient officers to guard them. At a recent term of the court one of the prisoners left the prisoners' box, came up upon the platform behind the bench and commenced a conversation with the judge during the trial of a cause. There was no officer in the court room to see the impropriety, not to say indecency, of such conduct and prevent it. It seems to me intolerable that the court should be crippled thus in the discharge of its duty in order that the government may save the two dollars per day which would be paid to a few extra bailiffs. This is not economy, it is parsimony.

Again, there is no provision made for furnishing meals to jurors in civil cases. The time has gone by when jurors can be starved into a verdict. Common decency and common humanity require that while they are endeavoring to reach a conclusion they should be furnished at least with the ordinary necessities of life, and yet in civil cases in the United States circuit court their meals must either be paid for by the parties to the litigation or the jury must be discharged after a few hours deliberation. The expense, delay and trouble of a second trial is thus made necessary. The short-sighted character of this policy is made apparent when it is remembered that the cost of one second trial may exceed the cost of supplying meals to jurors for years to come.

I might go on indefinitely enumerating instances of the penurious policy pursued towards the federal courts. Often they are entirely without means. Some of you remember that only last year congress wholly failed to provide money for this term and the court was adjourned without date. From the inconveniences of that adjournment the court has hardly yet recovered. In New York City where the courts are practically in session during the entire year the pay of the court officers is several months in arrears. I am informed that some of them, being unable to pay their rent, have been turned into the streets by their landlords. In this district the marshal has several times been compelled to borrow money in order to hold a term of court, or has given the jurors and witnesses vouchers which they have negotiated at local banks at

a ruinous rate of discount. The district attorney, the marshal and the clerks will go before your body if requested to do so and doubtless will inform you upon these and other matters which may occur to them. I have been hoping for years that a congress would some day assemble which would deal with the federal courts, if not in a liberal, at least not in a niggardly and hostile spirit, but as matters in this regard have constantly been growing worse instead of better I have concluded, after consultation with the other officers of the court, to call your attention to what we all consider serious obstacles in the path of efficient work. It is possible that this treatment grows out of indifference, or lack of information on the part of those in the legislative and executive branches of the government. Such treatment is surely unbecoming a great and powerful nation and it is possible that your presentment may call attention to the subject and result in a more liberal policy in the future.

In accordance with the above charge, the grand jury made the following presentment to the district court at Utica, March 27, 1895:

We have examined and heard the statements of the United States attorney, his assistants having charge of the presentation of cases before us, the United States marshals and the clerks of the circuit and district courts respectively, and as the result of our inquiry make this presentment:

The investigation developed a most surprising condition of affairs. We doubt if one in a thousand of our fellow citizens has any knowledge of the fact that while terms of United States courts are required by statute to be held at stated times and places, a failure of congress to make necessary appropriations or the neglect of a department at Washington promptly to honor a requisition for money to defray expenses, nullifies the statute by preventing the holding of the court. It seems incredible, nevertheless it is true, that the presiding judge has no power to make any order involving the payment of money to defray any expense connected with the proper conduct of the business of the court, other than pay of jurors and fees of witnesses, without the sanction of the department of justice previously obtained, and that the marshal, the executive officer of the court, is often placed in the position of either disobeying orders requiring the payment of money for some unexpected expense, or taking the alternative of making the payment at personal risk. To-day, almost at the close of the nineteenth century the expenditures of United States courts are controlled and limited by statutes enacted from fifty to one hundred years ago, and by restrictions inserted in appropriation acts passed by the congress of the United States which are a disgrace to our nation. As grand jurors sworn and charged well and truly to inquire of such matters and things as shall be given us in charge we deem it our duty to call attention to some of the most glaring deficiencies brought to our notice.

United States courts are the only courts of record sitting in this state not provided with stenographers. It is unnecessary to make argument concerning the necessity of an official stenographer in a court of justice in this age of progress and pressure. We find it to be a fact, notwithstanding, that in the trial of criminal cases, a stenographer, if employed, must be paid either by the defendant or the United States attorney at individual expense; in civil cases the stenographer is not under control of the court, his minutes are unofficial, and if objected to, the end of his employment is defeated. In many cases the failure to provide a stenographer works injustice to the litigants; in all cases the economy which lops off this expenditure defeats its object and becomes an extravagance by protracting trials, thereby adding largely to the expense for witnesses and jurors. Without entering into details we feel justified in finding, from the evidence before us, that the salary of a competent stenographer for an entire year would be saved by the decrease in other expenses at a single important term of court.

In 1888, by an enactment in the legislative and judicial appropriation bill, the number of attendants at all courts of the United States except those held in the Southern district of New York, was fixed at three bailiffs and one crier; should additional attendants be required they can be secured only by application made by the marshal, before the sitting of the court, to the department of justice for authority to employ a specified number of laborers. A presentment, complete in itself, could be made upon the annoyance and difficulty caused the court, and the absolute injury to and delay of justice caused by this penny wise pound foolish legislation. We find that during the term of court held at Albany in 1894, the court was left absolutely without attendants, no less than four petit juries being out of court deliberating upon causes tried and submitted; the fourth being in charge of the crier of the court; that during the session of the court a prisoner left the prisoner's box, mounted the bench and addressed the presiding judge, there being but one bailiff available for and on duty in the court room and he too far away to prevent the unseemly performance. At the present term we have observed prisoners going to and from jail to court inadequately guarded. We have seen the proceedings of the court delayed for lack of sufficient officers to bring prisoners to court. For the last five days we have seen from four to thirteen prisoners in court at the same time, the room crowded to overflowing with attorneys, litigants, witnesses and spectators and a meager force of two or three bailiffs to preserve order and guard the prisoners. Escapes of prisoners in this district have occurred more than once for want of sufficient guards, and this week we received an object lesson when called on to consider the case of a prisoner under sentence, who made a most desperate and well-nigh successful attempt to rescue himself and five other prisoners who were proceeding from court to jail under the guard of two bailiffs. That the attempt failed was due only to the opportune presence of the sheriff of this county and one of his deputies. If the people are to respect the courts, their proceedings must be conducted with such order and dignity as will cultivate and inspire that respect. During the past few years the power of the courts of the United States has been repeatedly invoked to repress riots, demonstrations and unlawful interference with property; in many instances respect for the mandate has been the only deterrent force required. If that respect is to continue, the courts must have at least the authority to enforce order within their own precincts. Their sessions are public, attended by all the people, and we submit that nothing is more calculated to destroy respect and inculcate contempt than the spectacle of a court powerless to enforce order, practically at the mercy of the spectators; and all to save the United States the salary of two dollars a day for the number of bailiffs necessary to assure order and decency in the conduct of judicial proceedings. We believe that our fellow citizens have no sympathy with or support for legislation which requires pretended economies of this character.

In criminal cases the court decides that the interests of justice will be promoted by holding the petit jury together from the time it is impaneled until a verdict is rendered, or an agreement becomes impossible. Here, again, we find the court hampered by the statute limiting the number of attendants, and by regulations requiring applications to be made in advance to the department of justice, for authority to incur the expense for board of jurors and officials in charge. Such statutes and regulations serve no good purpose; they embarrass and ofttimes defeat the proper administration of justice. In all cases where the United States is not a party, we were astounded to learn that the barbarous and inhuman custom of past centuries still prevails in United States courts, and that a jury in such cases, after retiring to deliberate upon their verdict, literally and truly can have neither meat nor drink, water excepted, at the expense of the United States. If not fed at the cost of the litigants, which can be done only by stipulation, jurors must feed themselves or starve. We find that the cost to the United States of one mistrial, which occurred in the circuit court of this district because the judge humanely declined to allow the jury to deliberate until they agreed or starved, would have more than paid for all meals likely to be furnished jurors for at least two years.

That the court cannot transact business unless provided with a reasonable amount of stationery is self-evident. We find that to procure such stationery,

the marshal must make application to the department of justice in advance for authority to make the purchase. His application for such authority for this term, made in due season, has not yet been granted, although court has been in session over a week, and had he not purchased the necessary articles without authority and at his own risk, the court would have convened without any stationery to use in the transaction of its business. Comment on regulations of this character is useless. They are unnecessary and indefensible, still they are but part and parcel of the system unsuitable to the demands of the age, and which ingrafted from time to time with the results of hasty, undigested legislation, seems to have been devised and maintained for no other purpose than to annoy and embarrass litigants and place every possible obstacle in the way of the proper, orderly and speedy administration of justice.

The evils specified could easily be remedied by the passage by congress of general laws giving the courts of the country control over expenditure necessary to provide proper facilities for the transaction of their business. To say that the courts of our country cannot be trusted with the administration of such a fund would be an insult to a judiciary that annually and finally disposes of questions involving sums in comparison with which the expenses of the maintenance of the courts are but a trifle.

Without entering into details, we recommend the passage of such laws as will provide for the courts:

First—A permanent appropriation to be drawn upon by the marshal of each district, upon the approval of the circuit or district judge, his expenditures to be audited and allowed by the court, such audit and allowance to be final.

Second—The repeal of the law fixing the number of bailiffs and providing that the number be fixed from time to time by the court upon application of the marshal.

Third—The issue under the authority and at the expense of the United States to each marshal of a sufficient number of badges, or other designation of office, to be worn by the bailiffs while on duty. At present it is impossible to distinguish a bailiff from a spectator or witness.

Fourth—The employment of an official stenographer for each court. Such stenographer to be appointed by the presiding judge.

Fifth—The enactment of such other laws as may be necessary to place the courts of the United States upon an equal footing with the supreme court of this state regarding the facilities for the transaction of business by the court and the judges thereof sitting, either in chambers or at places other than their residence.

After the presentation had been made, Judge COXE, addressing the jury, said:

"I wish to thank you, gentlemen, for the thorough investigation you have made of the matters to which your attention was called by me at the opening of the court. The full, clear and convincing presentment which you have made on this subject will, I am sure, excite wide interest not only in this district but throughout the United States. I feel confident that it will do much to bring about reforms so much needed.

"You are discharged with the thanks of the court for the able and efficient manner in which you have discharged your duty."

SALTONSTALL, Collector, v. BIRTWELL.

(Circuit Court of Appeals, First Circuit. March 21, 1895.)

No. 117.

1. CUSTOMS DUTIES—TIME OF PROTEST—PAYMENT ON GROSS ESTIMATE.
Where gross estimates of duties were made prior to liquidation in accordance with Rev. St. § 2869, and were paid by the importer in order to obtain possession of the goods, no protest was then required, but it was sufficient if the protest was filed within 10 days after the date of the final liquidation. Rev. St. § 2931, and § 3011 as amended, construed. 63 Fed. 1004, affirmed.

2. SAME—"PAYMENT UNDER PROTEST" DEFINED.
The words "payment under protest," as used in the first part of Rev. St. (2d Ed.) § 3011, as amended, must, by reason of the reference, in the latter part, to section 2931, which defines a protest, be construed to include a payment in connection with a protest; that is, a payment preceded by, accompanied with, or followed by a protest, whichever is permitted by said section 2931.

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

This was an action by Joseph Birtwell against Leverett Saltonstall, collector of the port of Boston, to recover duties paid under protest. There were two trials of the case, the first resulting in a judgment for plaintiff (39 Fed. 383), which was reversed by the supreme court on a writ of error (14 Sup. Ct. 169, 150 U. S. 417). After a second trial the circuit court again rendered judgment for plaintiff. 63 Fed. 1004. Defendant then brought error to this court.

Sherman Hoar, U. S. Atty., and William G. Thompson, Asst. U. S. Atty., for plaintiff in error.

Josiah P. Tucker (William Odlin, on the brief), for defendant in error.

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

PUTNAM, Circuit Judge. The importations in this case were two invoices of iron, arriving in February and March, 1888. The collector, on the respective entries of the goods, made gross estimates of the duties, as provided in section 2869 of the Revised Statutes. These gross estimates were paid in accordance with the classification and rate of duty then assessed by the collector, and which classification and rate of duty were the same determined on when the duties were finally liquidated. The question which the importer seeks to raise is whether the classification and rate were sufficiently favorable to him.

The record finds that, at the times the gross estimates were made, the importer paid the amounts thereof for the purpose of obtaining possession of the merchandise. After the gross estimates had been paid and the merchandise delivered to him the duties on one invoice were liquidated, on the 4th day of April, 1888, and on the same date a protest was filed. On the 10th of April, the duties

on the other invoice were liquidated, and on the same day a protest touching it was filed. No protest was filed at or before the payments of the gross estimates, or until the respective days above named; and only one question arises on this writ of error. The importer claims that the proceedings were governed by section 2931 of the Revised Statutes, and that that section, in connection with other provisions of statute, gave a right of action, provided protests or notices of dissatisfaction were filed, in the form required by it, within 10 days after the respective liquidations, and without any protests at or before the payments according to the gross estimates. The United States claim that section 2931 merely provides additional regulations, and that the importer, to maintain his suit, must show, not only that he complied with it, but also that he complied with the provisions of section 3011 of the Revised Statutes, to the extent of having made payment under protest, which payment under protest the United States define as requiring for this case protests at or before the times the payments were made according to the gross estimates. For the purpose of determining this question, it is not necessary that we should specially examine the nature of a protest at common law, or the legislation prior to the act of 1864, as the nature of the early legislation and the common-law character and use of protests are settled by decisions and rules too familiar to require a lengthy review.

The act approved March 2, 1799 (chapter 22), contained, in section 49 (1 Stat. 664), the following:

"And the collector jointly with the naval officer, or alone where there is none, shall, according to the best of his or their judgment or information, make a gross estimate of the amount of the duties on the goods, wares or merchandise, to which the entry of any owner or consignee, his or her factor or agent, shall relate, which estimate shall be endorsed upon such entry, and signed by the officer or officers making the same. And the amount of said estimated duties having been first paid, or secured to be paid, pursuant to the provisions of this act, the said collector shall, together with the naval officer, where there is one, or alone where there is none, grant a permit to land the goods, wares and merchandise, whereof entry shall have been so made, and then, and not before, it shall be lawful to land the said goods."

This is found re-enacted in section 2869 of the Revised Statutes, already referred to, in all substantial respects the same as originally enacted.

The next act to which we need to refer is that of February 26, 1845, c. 22 (5 Stat. 727), as follows:

"That nothing contained in the second section of the act entitled 'An act making appropriations for the civil and diplomatic expenses of government for the year one thousand eight hundred and thirty-nine,' approved on the third day of March, one thousand eight hundred and thirty-nine, shall take away, or be construed to take away, or impair, the right of any person or persons who have paid or shall hereafter pay money as and for duties under protest to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him, or them, or on his or their account, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the secretary

of the treasury to refund any duties paid under protest. Nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

It will be seen that this act was not of an affirmative character; that is to say, that it did not itself give a right of action, but simply removed the difficulty arising under the previous statute, with reference to the recovery of duties paid under protest,—a difficulty which was declared by the supreme court in Cary v. Curtis, 3 How. 236. The previous act referred to, that of March 3, 1839, c. 82, § 2 (5 Stat. 348), is now section 3010 of the Revised Statutes, requiring the collector to forthwith place to the credit of the treasury moneys received by him for unascertained duties, as well as for duties paid under protest. Notwithstanding the apparently explicit language of this last-named statute, Chief Justice Taney ruled in Brune v. Marriott, Taney, 132, Fed. Cas. No. 2,052, with reference to importations made in 1848, that the payment of the gross estimate, made in accordance with the act of 1799, already cited, was rather in the nature of a pledge or deposit than a payment, so that protest might legally be made when the duties were finally determined and the amount assessed by the collector. This case came before the supreme court in 9 How. 619, where the judgment below was affirmed, the court saying (page 636):

"But where the duties had not been closed up in any cases, when the written protest in April was filed, though the preliminary payment of the estimated duties had taken place, the court justly considered the protest valid, because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer."

There was an act passed in 1857 (March 3, c. 98, § 5; 11 Stat. 195) framed somewhat as the act of 1864, which we will hereafter refer to, but limited to the determination of the question whether goods were free or dutiable, as was settled in Barney v. Watson, 92 U. S. 449. This act did not come before the supreme court with reference to any question except that decided in Barney v. Watson, and was not re-enacted in the Revised Statutes, the commissioners' report stating that section 2931 superseded it. Therefore, we need not give it further attention.

The next act to which we need refer was that of June 30, 1864, c. 171, § 14 (13 Stat. 214), re-enacted in section 2931 of the Revised Statutes without change, as follows:

"On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatis-

fied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the secretary of the treasury. The decision of the secretary on such appeal shall be final and conclusive; and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the secretary of the treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted until the decision of the secretary of the treasury shall have been first had on such appeal, unless the decision of the secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains."

It is claimed by the United States that this act, like the provisions of section 2931, as the latter are interpreted by the United States, gave no right of action, but provided additional regulations, and was merely a limitation of whatever right of action existed previously. There is very much in its frame and history to lead to a different construction of it, and to the understanding that congress intended by it to form an entirely new system touching the topic which it involved, superseding prior legislation. If this were so, the mere fact that a right of action was not given in terms would not necessarily exclude such right, because it could fairly be implied, although not expressly stated, by what is found in the enactment. The apparent purposes of the act were to give ample opportunity for all parties concerned to ascertain and state carefully their rights, and yet within a time sufficiently seasonable to inform the United States and its officers, and thus to relieve from the inconvenience, and the liability to confusion, error, and misunderstanding, inherent in the old system, by which protests must be filed before the merchant could obtain his merchandise, no matter how urgent his necessities nor how brief the time they allowed him. The customary rules of interpretation, applied to this statute in its historical position, would naturally lead to the construction which the importer puts on it. The expressions of the supreme court in Barney v. Watson, 92 U. S. 449, 452, 453, Arnson v. Murphy, 109 U. S. 238, 241, 3 Sup. Ct. 184, and U. S. v. Schlesinger, 120 U. S. 109, 114, 7 Sup. Ct. 442, though perhaps not necessary to the conclusions in those cases, strengthen this view. The mere facts that the act of 1845 was not expressly repealed, and that the next section in the act of 1864 uses the word "protest," would have little weight to the contrary. The notice of dissatisfaction provided in the act of 1864, although given after the duties are paid and the merchandise received, would be in law a protest, as there is nothing in the word itself which always limits it to a proceeding taken before or at the time of the act to which it relates. However, we need not determine the effect of the act of 1864 standing alone, because the question was, we think, settled by subsequent legislation.

It is a common expression that the act of 1845 was reproduced in section 3011 of the Revised Statutes. This is a mistake, as appears

by the commissioners' report, and as results from what is said in Barney v. Watson and Arnson v. Murphy, already cited. Section 3011, as enacted, closed as follows:

"But no recovery shall be allowed in such an action, unless a protest in writing, and signed by the claimant or his agent, was made and delivered at or before payment, setting forth distinctly and specifically, the grounds of objection to the amount paid."

Thus, the Revised Statutes brought together section 2931 and section 3011,—an apparently incongruous result. Congress so determined, because by the act of February 27, 1877, c. 69 (19 Stat. 247), which was expressly passed "for the purpose of correcting errors and supplying omissions in the Revised Statutes," "so as to make the same truly express the laws," section 3011 was amended, so that the closing paragraph now reads as follows:

"But no recovery shall be allowed in such an action unless a protest and appeal shall have been taken as prescribed in section 2931."

These references give all the legislation bearing on the proposition before us; and by admission of the counsel of each party, as well as from our own investigation, the question raised on this writ of error remains to be determined for the first time. Various expressions of the supreme court and various inferences from its decisions may, perhaps, have a tendency one way or the other; but in none of them can it be said that that court had the precise question now before us under consideration. The expression found in U. S. v. Schlesinger, 120 U. S. 109, on page 113, 7 Sup. Ct. 442, may be thought to lead to the view that no payment of duties is within the provisions of section 2931, except one made at or after protest. But the question before us was not under consideration by the supreme court at that time, and this expression was incidental.

It is conceded that, as the law thus stood, giving full effect to section 2931, and section 3011 as amended, an importer could not recover unless the payment made by him was in order to obtain possession of his merchandise. The case finds that the payments in this case were thus made. It is also claimed by the United States, as already said, that the "payment under protest," described in section 3011, means a protest made at such a time as was required by the common law in order to maintain an action for duties wrongfully assessed; in other words, a protest made at or before the time of payment. The importer says that, even if this be true, the duties in this case were not paid until they were liquidated. He relies on Brune v. Marriott, Taney, 132, Fed. Cas. No. 2,052, and the same case in 9 How. 619, to which we have already referred. The syllabus prefixed to the case by Mr. Howard, the supreme court reporter, contains the following expression:

"But if the protest be made in a single case with a design to include subsequent cases, and the money remains in the hands of the collector without being paid into the treasury, and it was so understood by all parties, such a protest will entitle the importer to recover the money from the collector."

The revised syllabus found in 18 Curt. Dec. 283, covers the point under discussion, but omits the facts specially stated by Mr. Howard. Judge Curtis, however, in Warren v. Peaslee, 2 Curt. 231, 236, Fed. Cas. No. 17,198, about five years after the decision of Brune v. Marriott on appeal, considers that case; and, although he speaks of it with reference to a point other than that which arises here, he says, generally:

"The circumstances of that case were very peculiar, and they are relied on by the court as the reasons for the decision, at which they manifestly felt great difficulty and hesitation in arriving."

We refer, also, to the views of Judge Nelson, expressed in 1859, in Crocker v. Redfield, 4 Blatchf. 378, Fed. Cas. No. 3,400, where, with reference to a payment under section 3010, he says that "the money deposited was to be applied by the collector to the duties, and it cannot be said after this that it was paid compulsorily in order to get possession of the goods." He closes that a protest after the duties were ascertained came too late. As Judge Nelson was on the bench of the supreme court when Brune v. Marriott was determined, he must have understood the effect of that decision. Moke v. Barney, 5 Blatchf. 274, Fed. Cas. No. 9,698, states the practice at the custom house in New York as defendant in error claims the law to be; but the case itself is not in point, and the expressions of Judge Nelson on pages 277 and 278, 5 Blatchf., and Fed. Cas. No. 9,698, are in harmony with Crocker v. Redfield.

The act of 1845 had no reference to any moneys except those paid "as and for duties under protest." Notwithstanding other changes from the act of 1845, found in section 3011 of the Revised Statutes, this expression was saved in the words there existing, "payment under protest" "of any money as duties." Both statutes also contain the limitation that the payment must be made "in order to obtain possession of the merchandise imported." In Porter v. Beard, 124 U. S. 429, 8 Sup. Ct. 554, it is directly held that, under the Revised Statutes, the importer is limited to the recovery of moneys paid "in order to obtain possession of the merchandise"; and U. S. v. Schlesinger, 120 U. S. 109, 113, 7 Sup. Ct. 442, is of the same effect. In the case at bar the payments to obtain possession of the merchandise were made at the times of the gross estimates, and if, as claimed by the importer, the payments of the duties were not made until they were liquidated, then there has been no payment by the importer "of any money as duties" "in order to obtain possession of the merchandise imported." The importer, by his proposition on this point, puts himself and the court to the dilemma of maintaining and holding that the payment of his money "as duties" was after he had obtained possession of his merchandise; so that it would be apparently impossible for him to meet the first requirement of the law. Notwithstanding the reliance placed by the importer on Brune v. Marriott, which, if applied to the case at bar, might result fatally to him, we think our safe course is to adhere to the plain letter of the statute, and determine that the moneys paid in at the times of the gross estimates were duties, either unascertained or paid under protest, as nominated in section

2869 of the Revised Statutes, and that the duties to which this writ of error relates were paid at those times, and not when the final liquidations were made.

Having disposed of this question, the case comes, we think, directly to a conclusion in harmony with that of the circuit court, although, in view of the plain error, afterwards admitted by congress, in combining sections 2931 and 3011 in the Revised Statutes, and of the peculiar method by which this error was in part corrected in 1877, it is not easy to reconcile, if taken in their primary and natural sense, the words "payment under protest," in the first part of section 3011. It must be admitted that these words, although having relation in section 3011 to a merely statutory regulation, are presumptively to find their interpretation in the common law, and thus they primarily and naturally intend, in this and like connection, where a protest lays the basis of an action for money paid, a protest made before or at the time of the act protested against. Yet, as section 3011 originally stood, these words, "payment under protest," were not left to be ascertained from the common law, but they were expressly defined in the latter part of the same section by the words "unless a protest in writing, and signed by the claimant or his agent, was made and delivered at or before the payment." Therefore, we find in this section a precise, legislative definition of the words "payment under protest." By the act of 1877 this legislative definition was taken out, and another substituted; that is to say, a protest or notice made and given as prescribed in section 2931. The following expressions of Chief Justice Marshall in Alexander v. Alexandria, 5 Cranch, 1, 17, seems very apt in this connection:

"If, in a subsequent clause of the same act, provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

Of course, congress might have provided, as apparently it did by the Revised Statutes as they stood before the amendment of 1877, that not only should a protest be made within 10 days after liquidation, but that one should also be made at or before payment. In other words, it might have required, as claimed by the United States, and, perhaps, before the amendment of 1877 did require, a double limitation as to time. But, if congress intended to retain the law in this form, it is to be presumed that it would not have stricken out the clear words "at or before the payment," although it left standing the expression "payment under protest." By electing to strike out, as between these two, the one that was unmistakable, it declared its intention as certainly, though not as clearly, as though it had stricken them both out. As the section now stands, "payment under protest" must be construed to mean other than its natural and primary sense, and to include a payment in connection with a protest; that is, a payment preceded by, accompanied with, or followed by, a protest, whichever is permitted by section

2931. This is one of the instances where a purely literal construction of one part of an enactment must yield to the undoubted intention of the legislature, expressed in another part. Examples supporting a construction of statutes with this result are not infrequent. One of them is found in Davies v. Miller, 130 U. S. 284, 9 Sup. Ct. 560, touching this very section 2931, by which the words "within ten days" are diverted from their natural and primary meaning, so as to include a period anterior to the "ten days." As stated in substance by the learned judge of the circuit court, congress, at the close of section 3011, before it was amended, and again when it was amended, defined the nature of the protest named in the first part of the same section, as well as the circumstances under which it was to be made. Originally, it was required to be made at or before the time of payment, and now within the time provided in section 2931, whatever it may be.

We have referred to the fact that the United States question the construction of the act of 1864, to the extent that they claim it gave no new right of action, and that after it was passed, and before the enactment of the Revised Statutes, a protest at or before the time of payment was necessary. While we have already said that we lean against this construction, we concede that, as it stood originally, there was doubt on these propositions. The construction of it, as it stood in the Revised Statutes as originally enacted, we need not consider. But the act of 1877, by striking out the expression found in the act of 1845, and also in section 3011 of the Revised Statutes, "at or before the payment," has presumably declared that the notice or protest, as thereafterwards required by section 2931, may be given at any time prior to the expiration of 10 days from liquidation, whether before or after the payment of duties. As already said, this answers all the purposes of the United States, and gives its executive officers information sufficiently seasonable for their action.

In this connection, we call attention to the fact that the words "payment under protest," appearing in the early part of section 3011, would permit an oral protest, as well as a written one. To prevent a reversal of the declared policy of the United States, in existence continuously in every direction since 1845, adverse to parol protests, the definition of this expression which was made in the last part of the same section became necessary. But, on the view of the United States of the law as it now stands, the importer has his option to file at or before payment of duties a single, consolidated written protest or notice of dissatisfaction (Davies v. Miller, 130 U. S. 284, 9 Sup. Ct. 560, already referred to) if within the 10-days period; or, following the literal construction insisted on by the United States, he may make an oral protest at or prior to the payment of duties, to be followed by a written notice of dissatisfaction later, within the 10-days period. In other words, the position of the United States on the point in controversy leaves standing, and of some effect, a provision which includes every form of protest known to the common law, with the rest an oral one. Experience has shown such a protest of no value, and that it

leads to misunderstandings and errors, and congress has so impliedly declared. Our views already expressed are therefore strongly re-enforced by the violent presumption that it cannot be supposed congress intended to revive, for any purpose, the oral protest, abolished so many years ago, and so constantly provided against by legislation.

Whatever else might be said about the evidence of Miss Kenrick which was excepted to, our conclusions render it immaterial and harmless.

The judgment of the circuit court is affirmed.

CHICAGO DOLLAR DIRECTORY CO. et al. v. CHICAGO DIRECTORY CO.

(Circuit Court of Appeals, Seventh Circuit. March 20, 1895.)

No. 210.

COPYRIGHT—DIRECTORY—INFRINGEMENT—EVIDENCE—INJUNCTION.

Defendants compiled and printed, and were about to publish, a business directory of the city of Chicago, containing about 60,000 names, alphabetically arranged, under an alphabetical classification of businesses, containing about 800 pages. On a preliminary hearing, in a suit for infringement of complainant's copyrights in annual directories of the city of Chicago, it appeared that 67 errors in the annual business directory of complainant were followed in defendants' directory. Defendants' canvassers testified that they made a personal canvass, and obtained the names from original sources. *Held*, that an order granting an injunction against the whole book should not be disturbed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a bill in equity brought by the Chicago Directory Company, a corporation of the state of Illinois, against the Chicago Dollar Directory Company, the Interstate Directory Company, Emory A. Hartsig, J. E. Scanlan, W. E. Bishop, James Ditty, and others, for infringement of copyright. The bill alleged that for the last 20 years complainant and its predecessors had compiled and published an annual general directory of the city of Chicago, and for more than 10 years past an annual business directory of the city of Chicago. The bill alleged that the general directory and the business directory for the year 1893, which were known as "The Lakeside Annual Directory" and "The Lakeside Annual Business Directory," respectively, were duly copyrighted. It also alleged that the business directory embraced an alphabetical list of business houses and persons in the city of Chicago, occupying 562 pages, and also a classified list of the various businesses and callings, alphabetically arranged, with the names of the persons thereunder, occupying 655 pages, and also miscellaneous information, covering about 218 pages. The bill further alleged that Emory Hartsig, J. E. Scanlan, and W. E. Bishop were the managing officers of the Interstate Directory Company, and that said persons, with Ditty and other defendants named, were managers, agents, or employés of the Dollar Directory Company, which latter corporation was doing business under various names; that defendants, in furtherance of a scheme to injure and defraud complainant and pirate and infringe the copyrights of its said directories, had compiled a business directory of the city of Chicago planned similar to that of complainant, 600 pages of which had already been printed; that pages 101–646 were made up substantially by copying from complainant's business directory, and that in such copying defendants had copied numerous errors and mistakes which were contained in complainant's business directory, 14 of which errors were set out; that defendants had not compiled their directory from