It is nevertheless equally true that they are liable for taxes which he collected during that term, upon assessment rolls received during a prior term, or for moneys or stamps on hand at the expiration of a former term, and remaining in his possession at the beginning of a new one; for the collector is responsible, as well for moneys and stamps retained by him as his own successor, as for those received by him from any other predecessor, and the separate adjustment of his accounts for both periods, made at the treasury department upon its books, is prima facie evidence, not only of the fact and of the amount of the indebtedness, but also of the time when, and the manner in which, it arose. It is, of course, always open to the defendants sought to be charged to show by opposing proof that the default charged occurred before the commencement of their liability."

In the present case the sureties did not offer any proof tending to show that the postmaster did not have in his hands the sum of $1,689.85, belonging to the government, at the time the new bond took effect. The case rested solely upon the prima facie evidence introduced by the government. In order to relieve themselves from responsibility, it was essential for the sureties to prove, by circumstances or otherwise, "that the default charged occurred before the commencement of their liability."

The judgment of the circuit court is reversed, and cause remanded for a new trial, in accordance with the views expressed in this opinion.

NORTHERN PAC. R. CO. v. PAUSON.

(Circuit Court of Appeals, Ninth Circuit. October 31, 1895.)

No. 224.

CARRIERS—EXPULSION OF PASSENGER—OMISSION OF AGENT TO STAMP TICKET.

Plaintiff purchased from the defendant railway company a round-trip ticket from P. to S. and return, one of the conditions of which, printed on its face, was that the return coupon would not be honored for passage unless the passenger was identified by the agent at S., before returning, and the coupon signed by him, and witnessed and stamped by such agent. Plaintiff, when about to return from S., presented his ticket to the agent there, signed it for the purpose of identification, and handed it to the agent, at the same time asking for a sleeping-car ticket. The agent took the ticket to the rear of his office, and, returning with it, handed it to plaintiff, folded up with the sleeping-car ticket. Plaintiff put the ticket, so folded, in his pocket, and did not discover, until he was on the train on the way to P., that the agent had omitted to stamp the ticket, for which cause plaintiff was ejected from the train by the conductor upon his refusal to pay fare. *Held*, that the plaintiff, having done all that he was required to do, and being justified by the circumstances in believing that the agent had duly stamped the ticket, was a legal passenger upon the train, and the railway company was liable in damages for his expulsion.

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

This is an action to recover damages for the alleged wrongful expulsion of the defendant in error from a passenger car of the plaintiff in error. It was commenced in the superior court of the city and county of San Francisco, and, upon motion of the plaintiff in error, was removed to the United States circuit court. The complaint alleges that on the 6th day of September, 1892, the plaintiff (defendant in error) became and was a passenger upon a train of cars operated upon the railroad of defendant (plaintiff in error), running from Seattle, Wash., to Portland, Or., for the purpose of being transported

from Seattle to Portland, and had paid to the defendant the fare for such transportation; that while he was a passenger upon said train the defendant wrongfully, maliciously, wantonly, and willfully assaulted, insulted, and maltreated the plaintiff, and by force and arms ejected him from the said train; that by reason of said acts the plaintiff suffered both physical and mental injuries,—and prayed for damages in the sum of $10,000. The answer denies these allegations of the complaint. The case was tried before a jury, and a verdict was rendered in favor of the plaintiff for the sum of $310.

Upon the trial, the plaintiff, to sustain the issues upon his part, introduced evidence to the effect that he was a merchant engaged in business at San Francisco, Cal., and at Seattle, Wash.; that he had purchased of the defendant a round-trip ticket from Portland to Seattle and return, which, among other things, required that the holder must be identified as the original purchaser of the ticket by writing his or her signature on the back thereof, or by other means, if necessary, in the presence of the ticket agent of the Northern Pacific Railroad at Seattle, Wash., who will witness the same, otherwise it will not be honored for passage; that he had made the trip from Portland to Seattle on this ticket; that on the 6th day of September he sent a messenger to the ticket office of defendant at Seattle to reserve a sleeper; that about 10 o'clock on the evening of said day he went to the ticket office, and asked the agent if he had a sleeper; that the agent replied, "What is your name?" and then asked him for his ticket; that he handed over the ticket in question; that the agent took it, and laid it on the board, and gave him a pen, and said to him, "Please sign that"; that he signed it, and handed it to the agent; that the agent took it to the rear end of the ticket office, and came back with a ticket berth for the sleeper; that the agent folded both tickets together, and handed them over to the plaintiff, who thereupon paid to the agent the sum of two dollars for the sleeper ticket; that plaintiff then put the folded tickets in his pocket, got on the train, and, after getting a check for his sleeper berth, went to bed. As to what occurred on the train the plaintiff testified as follows: "I was asleep when the conductor came around, and he asked for my ticket. I had put my ticket under a pillow, in order not to be annoyed, so I could get it when asleep,—under my pillow, in order to have it handy when the conductor comes. So I handed him the ticket, and he looked at it, and he told me that I could not ride on that ticket. I was surprised, and thought may be I gave him the wrong ticket or something, and I asked him what the trouble was with it, and he said, 'That ticket won't go,' and I explained the matter to him. I looked at the ticket,—examined the ticket,—and seen where there was a place where it says, 'Station agent stamp here,' and I seen there was no stamp on it. I explained the matter to him, and I says, 'I have done my part.' I presented the ticket in the presence of two of our men from the store, and I described to him what I had done in regard to it, and that the ticket was all right; that I got the ticket, and paid for it, and signed it in his presence,—all that was required of me to do; and he says, 'That don't make any difference. I know my business, and the ticket ain't no good, and you cannot ride on it.' I told him I had positively paid for the ticket, and it was my own until I had used it up, and 'I am going to ride on it.' He says, 'You cannot; and I know my business; and you cannot ride on this ticket.' And we talked the matter over for some time, and I hated to get out of bed, and told him so. And he says: 'You have either got to pay your fare or get off.' I told him: 'You mean, according to that, I have got to get out of bed and dress myself?' He says, 'That is what you have got to do,' and I got up and dressed myself, and before I got through dressing the train stopped, and the conductor came to me, and I was not quite done yet, and he waited until I got through, and he says, 'Now get off the train.' I told him: 'No, I would not. I wanted to ride on the train, and I had paid my fare, and I did not want to get off.' He says, 'All right; I will put you off.' I says, 'All right; you will have to put me off. I won't go until I am put off.' He says, 'Have you any baggage,' and I says, 'Yes,' and I pulled a satchel from under the bed, and I am not positive, but I think the porter took my satchel, and he led me out of the train onto the platform. When I was on the platform, it looked really—I could not see any light—only a small station there, and asked him if he knew where I could find a hotel

or place to stop over night, and he says he don't know; he don't care a damn. I looked around there, and did not like to lay out all night, and did not see any place where I could go to. I told him, 'I think I had better pay my fare and go on,' and I went on the train, and paid my fare, and went on. * * * I was excited, and felt bad on being put off of the train. Never had anything of that kind happen to me before, and I travel a great deal. I felt naturally insulted and degraded, and consider I was treated just like a tramp in being put off the train. I talked to the conductor in reference to the affair, and told him who I was, and told him I was certainly put off the train wrongfully; explained the matter to him; told him how the whole thing happened; told him the same thing over again before he put me off; and the conductor told me he was satisfied in his mind that I was the right man, that it was my ticket, and that I was the right party; and I told him that I belonged to the firm in Seattle, and he told me that he had his instructions, and he had to do according to his instructions." There was a conflict in the evidence as to what occurred at the ticket office between the agent and the plaintiff. The defendant, at the close of the case, moved the court to instruct the jury to find a verdict for defendant, which motion was denied. The court, after stating the conditions on the ticket, and the notice given to the passenger "that it will not be good unless so signed, witnessed, and stamped," and that this notice was substantially a part of the terms of the ticket, charged the jury as follows: "Therefore it was the duty of the plaintiff to present the ticket to an agent for signing and witnessing and stamping. When so presented and signed, it was the duty of the agent to witness and stamp it. There is a controversy between the plaintiff and defendant as to what was done, which you are to decide from the testimony; and if you find from the testimony and evidence that the plaintiff did present himself to an agent, and sign the ticket in his (the agent's) presence, and the agent took the ticket, and returned it in such a way and under such circumstances as to justify plaintiff in believing that he, the agent, had witnessed and stamped the ticket, and plaintiff, so believing, entered the train, he was a legal passenger; and if you find from the evidence, further, that he explained to the conductor the circumstances, he had a right to refuse to pay or deposit a fare with the conductor; and his removal from the train, if you find from the evidence he was removed, was unlawful."

Joseph D. Redding, for plaintiff in error.

George Lezinsky, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts). The disposition to be made of this case depends upon the question whether the charge of the court to the jury states a correct legal principle applicable to the facts and circumstances of this case. The authorities bearing upon this question are by no means uniform, some of the courts holding that it is the duty of the passenger, before going upon the train, to examine his ticket, and to ascertain therefrom whether or not any mistake has been made by the ticket agent; that the face of the ticket is conclusive evidence to the conductor of the train as to the contract between the passenger and the railroad company; that the conductor can look only to the ticket, and has no right to be governed by any statement or explanation of the passenger; that if the ticket is not upon its face such a ticket as entitles the passenger to ride, the conductor has the right, and it is his duty, to eject him from the train; and that his only remedy for the mistake, negligence, or carelessness of the ticket agent is by an action for breach of the contract to recover the extra amount

he was compelled to pay for his fare, and he cannot recover for the tort of the conductor in expelling him,—others holding that the passenger has the right to rely upon the acts and statements of the ticket agents or conductors, and that, if expelled from the train when he has acted in good faith and is without fault, the carrier would be liable in damages for such expulsion, whether the action is brought for a breach of the contract or solely for the tort of the conductor. With this conflict in the decisions, state and national, we must examine the reasons given by the courts for the adoption of the rule upon which their decisions are founded, and endeavor to ascertain the controlling principles of the law applicable to this case which are best established by the soundest reason and justice of the cases. In the view we take of the question of pleadings it is wholly immaterial whether the action is to be treated as founded upon a tort, pure and simple, as claimed by the plaintiff in error, or as an action upon a contract to recover damages resulting from a tortious breach of the contract. Under the system of practice prevailing in many of the states there ought not to be any special controversy as to the character of this action, as the formal distinctions which prevailed at common law are abolished. The action was instituted in California, and, being an action at law, is controlled by the provisions of the Code and decisions of the state court. In Gorman v. Southern Pac. Co., 97 Cal. 6, 31 Pac. 1112, the court expressly held that, "when a passenger is wrongfully expelled from a train, it is a breach of duty on the part of the carrier, and an action in tort will lie to recover damages." McGinnis v. Railway Co., 21 Mo. App. 407; Railroad Co. v. Roberts, 91 Ga. 513, 519, 18 S. E. 315; Hall v. Railroad Co., 15 Fed. 59. In all such actions the plaintiff is not to be confined in his recovery to the price of his extra tickets or fare or mere loss of time, but the jury may award damages for the humiliation or injury received by his wrongful expulsion from the train. Zion v. Southern Pac. Co., 67 Fed. 503, and authorities there cited. With reference to the principles enunciated in the charge of the court it is deemed proper to refer generally to many cases which discuss the relative rights and duties of a railroad company and of its passengers. It has been held that it is a reasonable regulation upon the part of the company to require passengers getting upon its railroad train without a ticket to pay additional fare, but in this connection the courts declare that a reasonable opportunity must be given to the passenger to enable him to purchase the ticket, and that, if the passenger fails to purchase a ticket solely on account of the premature closing of the ticket office, or of the failure of the railroad company to have an office for the sale of tickets, he cannot be required to pay additional fare, and, if expelled for the nonpayment of the additional fare, after paying or offering to pay the regular fare, he is entitled to recover damages for the expulsion. Poole v. Railroad Co., 16 Or. 261, 19 Pac. 107; State v. Hungerford, 39 Minn. 7, 38 N. W. 628; Everett v. Railway Co., 69 Iowa, 15, 28 N. W. 410. The reason given is that, to allow a railroad company to enforce its rule for

additional fare, under such circumstances, would be punishing the passenger for the railroad company's neglect of duty. Unless the railroad company furnishes the necessary conveniences or facilities for procuring tickets, the passenger cannot be considered to be in any manner at fault. Ray, Neg. Imp. Dut. 181–183, and authorities there cited.

With reference to the right of a passenger to be carried on the wrong coupon, where the coupons are detached by the conductor on the going trip, and the returning coupon, instead of the going coupon, is retained by the conductor, and the going coupon, instead of the returning coupon, given to the passenger, which the passenger retains without discovering the mistake until he presents it to the conductor on the return trip, and then makes his explanation as to how the mistake occurred, the courts have held that under such circumstances the passenger has the lawful right to be carried on his return trip on presenting the going coupon, with the explanation; and, if expelled for not paying his fare, he is entitled to recover damages for the expulsion. Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439; Railway Co. v. Fix, 88 Ind. 381; Railroad Co. v. Bambrey (Pa. Sup.) 16 Atl. 67; Wightman v. Railway Co. (Wis.) 40 N. W. 689; Railroad Co. v. Rice, 64 Md. 63, 21 Atl. 97; Rouser v. Railway Co., 97 Mich. 565, 56 N. W. 937. These cases, as well as the others previously referred to, all proceed upon the broad ground that the passenger was wholly without fault; that he had done all that could reasonably be required of him to do; and that the railroad company, by the mistake, carelessness, or negligence of its agents or conductors, was itself at fault. This is the underlying principle of all the well-considered cases upon this subject. This principle is fair to both parties. It is sound, reasonable, and just. In further support of it we cite the following additional authorities: Johnson v. Railway Co., 46 Fed. 347; Zion v. Southern Pac. Co., 67 Fed. 506; Head v. Railway Co. (Ga.) 7 S. E. 217; Railroad Co. v. Dougherty, 86 Ga. 744, 12 S. E. 747; Railroad Co. v. Roberts, 91 Ga. 514, 18 S. E. 315; Railway Co. v. Hennigh, 39 Ind. 509; Hufford v. Railroad Co., 64 Mich. 631, 31 N. W. 544; Railway Co. v. Mackie (Tex. Sup.) 9 S. W. 451; Railroad Co. v. Conley (Ind. App.) 32 N. E. 96; Murdock v. Railroad Co., 137 Mass. 293; Muckle v. Railway Co., 79 Hun, 38, 29 N. Y. Supp. 732; McGinnis v. Railway Co., 21 Mo. App. 399; Burnham v. Railway Co., 63 Me. 298.

In a majority of the cases cited by the plaintiff in error in support of its contention, it affirmatively appears that the passenger was himself at fault, and that the railroad company was free from any fault, negligence, carelessness, or mistake. Especially is this true in the following cases: Railway Co. v. Bennett, 1 C. C. A. 544, 50 Fed. 496; Dietrich v. Railroad Co., 71 Pa. St. 433; Railway Co. v. Griffin, 68 Ill. 499; Pennington v. Railroad Co., 62 Md. 95; Johnson v. Railroad Co., 63 Md. 106; Petrie v. Railroad Co., 42 N. J. Law, 449. In Mosher v. Railroad Co., 127 U. S. 390, 8 Sup. Ct. 1324, upon which plaintiff in error principally relies, neither party seems to

have been at fault. In that case there was a special contract in regard to a tourist's ticket sold by the St. Louis, Railroad Company to Mosher at St. Louis, Mo., "good for one first-class passage to Hot Springs, Ark., and return, when officially stamped on back hereof, and presented with coupons attached." The St. Louis Railroad extended to Malvern, and a coupon on the ticket entitled Mosher to be carried from Malvern to Hot Springs, and back on the Hot Springs Railroad. The regulations upon the ticket provided that it was not good for return passage "unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs, Ark." When Mosher returned, he went to the ticket office of the Hot Springs Railroad, at Hot Springs, for the purpose of having himself identified in pursuance of the terms of the ticket, but failed to obtain such identification on account of the failure of the Hot Springs Railroad to have an agent at that place. He returned over the Hot Springs road to Malvern, and when he got upon the train of the St. Louis road the conductor called for his ticket, and refused to honor it, because its conditions had not been complied with. Another condition upon this ticket was "that in selling this ticket the St. Louis, Iron Mountain and Southern Railway Company acts only as agent, and is not responsible beyond its own line." Upon these facts the court held that Mosher had no cause of action against the St. Louis Company for his expulsion. In the course of the opinion the court said:

"By the first condition of the contract contained in the plaintiff's ticket the defendant is not responsible beyond its own line. Consequently, it was not responsible to the plaintiff for failing to have an agent at the further end of the Hot Springs Railroad. The agent who was to identify the passenger and stamp his ticket there was the agent of the Hot Springs Railroad Company, and is so described in the ticket, as well as in the petition. If there was any duty to have an agent at Hot Springs, it was the duty of that company, and not of the defendant. * * * The omission to have an agent at Hot Springs not being a breach of contract or of duty on the part of this defendant, the case is relieved of all difficulty."

This was the reason, and the sole reason, given for the decision. It will therefore readily be seen that the decision in that case does not support the views contended for by the plaintiff in error.

In Railroad Co. v. Winter's Adm'r, 143 U. S. 60, 73, 12 Sup. Ct. 356, there is a clear recognition of the fundamental principles which we have announced. The court, in the course of the opinion, said:

"The reason of such rule is to be found in the principle that, where a party does all that he is required to do under the terms of a contract into which he has entered, and is only prevented from reaping the benefit of such contract by the fault or wrongful act of the other party to it, the law gives him a remedy against the other party for such breach of contract."

In the present case Pauson introduced testimony tending to show, and from which the jury were authorized to infer, that he had fully complied with all the conditions of the ticket upon his part; that he "did present himself to an agent, and sign the ticket in his [the agent's] presence, and the agent took the ticket, and returned it in such a way and under such circumstances as to justify plaintiff in

believing that he, the agent, had witnessed and stamped the ticket, and plaintiff, so believing, entered the train." The court did not err in instructing the jury that, if they believed such facts to be true, then the plaintiff was a legal passenger, and his removal from the train was unlawful. The judgment of the circuit court is affirmed.

UNITED STATES v. BENSON.

(Circuit Court of Appeals, Ninth Circuit. November 8, 1895.)

No. 171.

1. CRIMINAL PLEADING—CONSPIRACY—REV. ST. § 5440.
   In an indictment under Rev. St. § 5440, for conspiring to defraud the United States, it is sufficient to charge an unlawful combination and agreement as actually made, and in addition to describe any act by one of the parties, as an act relied on to show the agreement in operation, without showing how such act would tend to effect the object, or that the object was actually effected.
2. SAME.
   An indictment under Rev. St. § 5440, against B. and R., for conspiracy to defraud the United States, charged that B. and R. on a certain day did conspire together, etc., to defraud the United States of $2,500, in the manner following: That they, knowing that a contract had been made between one F., a United States deputy surveyor, and the United States surveyor general for California, for the survey of certain lands, to be made by F. personally, and the field notes thereof filed with the surveyor general, upon approval of which payments were to be made (the contract being set out in detail), and in pursuance of the conspiracy B., with the intent to effect the same, caused a fraudulent, fictitious, and pretended survey of the lands to be made, and fraudulent field notes to be made, whereby the surveyor general was deceived into certifying the amounts due to F. *Held*, that the indictment was sufficient, though it failed to show how the acts charged would tend to effect the fraudulent object, or that B. and R. had actually profited by the conspiracy.

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

This was a petition by John A. Benson to be discharged on habeas corpus from the custody of the marshal for the district of California, by whom he was held to answer an indictment for conspiracy. The circuit court discharged the petitioner. 58 Fed. 962. The government appeals. Reversed.

The indictment in this case is founded upon section 5440 of the Revised Statutes, as amended May 17, 1879 (21 Stat. 4; 1 Supp. Rev. St. p. 264), which reads as follows: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court." The indictment contains three counts, each of which is of great length. The first count, in appropriate language, charges that John A. Benson and M. F. Reilly on a certain day "did unlawfully, corruptly, and wickedly conspire, combine, and agree together, and with divers other persons to the said grand jurors unknown, to defraud the United States of a large sum of money, to wit, the sum of twenty-five hundred [dollars], lawful money of the United States, by the means and in the manner following:

That is to say, that they, * * * well knowing that a certain contract had * * * been procured, secured, and entered into by and between John W. Fitzpatrick, then and there being a United States deputy surveyor in and for the state of California, on the one part, and W. H. Brown, then and there being the United States surveyor general in and for the state of California, on the other part, whereby the said John W. Fitzpatrick, in his capacity aforesaid, in substance and effect, undertook, agreed, and promised." Then follows a detailed statement of the terms and conditions of the contract to survey certain public lands, which are specifically described, and avers that Benson and Reilly had full knowledge thereof; that Fitzpatrick agreed that in his official capacity he would faithfully survey said lands, and establish and mark all the lines and corners thereof, in strict conformity with the laws of the United States, and complete the same, and return true field notes thereof to the surveyor general, on or before the 30th of June, 1885; that compensation was to be paid therefor at specified rates; that no accounts were to be paid therefor unless properly certified by the surveyor general, nor until approved plats and certified transcripts of the field notes should be filed in the general land office; that no payments were to be made for surveys not executed by said Fitzpatrick in his own proper person; that said contract was on December 17, 1884, approved by the commissioner of the general land office; that Fitzpatrick was officially notified thereof; that in pursuance of the aforesaid conspiracy, combination, confederacy, and agreement among them, and with full knowledge of all the facts, the defendant Benson, for the purpose and with the intent to effect the object of "the aforesaid conspiracy, did cause and procure a fraudulent, fictitious, and pretended survey of the lands described in the aforesaid contract"; that defendant Benson, well knowing that said survey had not been made in strict conformity with the laws of the United States, or at all, and that the survey made by him was fictitious and pretended, for the purpose "and with the intent of imposing upon and deceiving" the surveyor general, and for the further purpose of procuring the surveyor general "to properly certify to the accounts and amount accruing to defendant under and by the terms of the aforesaid contract, and for the further purpose of securing approved plats and certified transcripts of the field notes of said pretended survey to be filed in the general land office, and with the intent and for the purpose of securing the payment from the United States of the contract price for said survey," and with the intent to corruptly, wickedly, and unlawfully defraud the United States out of the sum of $2,500, the said Benson on May 6, 1885, did cause and procure false, fictitious, and fraudulent field notes of the aforesaid false, fictitious, and pretended survey to be made of the lands specifically described, the same being public lands of the United States. The second count is substantially the same as the first, except that in stating the overt acts committed to effect the object of the conspiracy it avers that Benson on May 6, 1885, falsely pretending that the surveys had been properly made by Fitzpatrick according to the contract, with full knowledge to the contrary, and with the intent to impose upon and deceive the surveyor general, and for the purpose of fraudulently obtaining his official approval of said pretended survey, and procure the surveyor general to certify the accounts for said survey and of the amount due to Fitzpatrick under the contract, and the approval of the plats and certified transcripts of the field notes to be filed in the general land office, and for the purpose of defrauding the United States by securing the payment to him from the United States of the contract price for said survey, did make and cause to be made false, fictitious, and fraudulent field notes, etc., and that the surveyor general was by the said unlawful conspiracy of Benson and Reilly and the fraudulent acts of Benson "deceived into approving the said pretended survey and the said fictitious and fraudulent field notes, and into stating and certifying the amounts accrued to and earned by the said John W. Fitzpatrick under and by the terms of the aforesaid contract." The third count is substantially the same as the first. The circuit court held this indictment to be wholly insufficient to charge Benson with any crime punishable by the laws of the United States, and discharged him upon habeas corpus. In re Benson, 58 Fed. 962. From this order the United States takes this appeal.

F. S. Stratton, Special Counsel, and Charles A. Garter, U. S. Atty., for the United States.

Reddy, Campbell & Metson, for appellee.

Before GILBERT, Circuit Judge, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts). Is the indictment in this case sufficient in law to constitute a crime punishable by the laws of the United States? The form of the indictment is certainly open to criticism. It is not as clear, concise, and direct in its averments as it might have been made. It is, as was said by the supreme court with reference to the form of an indictment in another of the Benson Cases, in U. S. v. Perrin, 131 U. S. 57, 9 Sup. Ct. 681, "so diffuse and obscure, presenting in no point a distinct issue of law on which the guilt of the defendants must rest, that it is impossible to decide any of the points without the most laborious wandering through the whole of the three counts of the indictment, and passing upon the whole question whether, under all the circumstances set out, the parties are liable to the indictment"; and for that reason the court declined to answer certain questions touching its sufficiency. Notwithstanding the labor involved, it becomes our duty, as best we can, to wander through the whole indictment and solve the troublesome question. The case comes to this court with the knowledge that there has been a wide divergence of opinion among the nisi prius judges who have, in one form or another, been called upon to decide the identical question here presented. A demurrer to the indictment was overruled by one without any opinion being filed, and his reasons therefor cannot be ascertained. Appellee was subsequently discharged by another on the sole ground of the insufficiency of the indictment, in a forcible and strong opinion, wherein his views are clearly and ably stated. In re Benson, 58 Fed. 962.

It is argued by appellee that the indictment is wholly insufficient in this, among other things: that it does not allege that the defendants named therein, or either of them, ever agreed to make any use of the contract entered into by Fitzpatrick, or of the accounts for the contract price of the survey, for the purpose of defrauding the United States; that neither Fitzpatrick nor the surveyor general is in any manner connected with the conspiracy; that there was never any assignment of the contract to Benson; that Benson is not shown to have had any interest therein, or any such connection therewith as to enable him to commit any fraud against the government of the United States; that no such fraud as is alleged could, by any of the acts of the conspirators, have been consummated either by the defendants, Fitzpatrick, or any other person or persons; that Benson could not have obtained any money on the vouchers given by the surveyor general, because the same were not payable to him; that no money could be paid to Fitzpatrick upon the accounts without his being a party to the conspiracy, which is not alleged; that the facts alleged are not sufficient to advise Benson of what particular offense he is called upon to meet. Is it necessary to allege that the defend-

ants named in the indictment, or either of them, would profit by the conspiracy, or to state the means by which the conspiracy was to be successfully carried out, or that any fraud was actually consummated, or that it should appear upon the face of the indictment in what particular manner the acts alleged to have been performed in pursuance of the unlawful agreement would tend to accomplish the object of the conspiracy? What facts are necessary to be alleged in the indictment in order to constitute an offense punishable under the provisions of section 5440? It will be observed by reference to the language of this section that it embraces two separate and distinct offenses, viz.: First, a conspiracy to commit an offense against the United States; second, a conspiracy to defraud the United States in any manner or for any purpose. It is made an essential element of these offenses that one or more of the alleged conspirators must have done some act to effect the object of the conspiracy. The facts alleged in the indictment must be considered with reference to the second offense above stated, to wit, a conspiracy to defraud the United States. It is important that these offenses should be kept separate, as to the requirements of an indictment under either. A reference to the authorities as to what is required under the first to show that an offense has been committed, or to indictment under other sections of the statute, unless there is a clear analogy between them and the essentials required under the second, would tend more to confuse than to enlighten the court as to the sufficiency of the present indictment. There are, of course, certain general rules, that are well settled, which apply to all indictments, and to these rules it will be necessary to refer.

At common law "conspiracy" is defined to be the unlawful confederacy and agreement of two or more persons to do an unlawful act, or a lawful act by unlawful means. The conspiracy constituted the offense, and it was frequently held that it was unnecessary to state the particular means by which the government or party was to be defrauded; that the felonious intent being charged, the means to effect the fraud were matters of evidence for the consideration of the jury; nor was it necessary to aver any overt act. The gist of the offense was the entering into the conspiracy. The bare combination and agreement constituted the crime. 2 Bish. Cr. Proc. §§ 207, 208, 217; 2 Bish. Cr. Law, §§ 171, 175, 191, 193, 198; 2 Russ. Crimes, 674 et seq. But the national courts cannot resort to the common law as a source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon congress to define what are crimes, to fix their punishment, and to confer jurisdiction for their trial. U. S. v. Walsh, 5 Dill. 60, Fed. Cas. No. 16,636; U. S. v. Martin, 4 Cliff. 156, Fed. Cas. No. 15,728; In re Greene, 52 Fed. 104; Swift v. Railroad Co., 64 Fed. 59; U. S. v. Hudson, 7 Cranch, 32; U. S. v. Coolidge, 1 Wheat. 415; U. S. v. Britton, 108 U. S. 199, 206, 2 Sup. Ct. 531. We must therefore look elsewhere than to the common law for the test to be applied which will determine the validity of the indictment. Where the offense is

purely statutory, having no relation to the common law, it is, as a general rule, sufficient to charge the defendant, in the indictment, with the acts coming fully within the statutory description, in the substantial words of the statute, without any further elaboration. To this general rule should be added the qualification that the description of the offense in the indictment must be accompanied by a statement of all the particulars essential to constitute the offense, and must be sufficient to inform the accused as to what he must be expected to meet at the trial. U. S. v. Simmonds, 96 U. S. 362; U. S. v. Carll, 105 U. S. 612; U. S. v. Hess, 124 U. S. 483, 8 Sup. Ct. 571; Potter v. U. S., 155 U. S. 438, 15 Sup. Ct. 144.

Keeping in sight these general principles, we now come to the question as to what a conspiracy is, and what facts are necessary to constitute the offense under the particular provisions of section 5440, upon which the present indictment is based. A conspiracy is a combination of two or more persons by concerted action to accomplish some criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. In other words, it is a combination formed by two or more persons to effect an unlawful end, said persons acting under a common purpose to accomplish the end desired. U. S. v. Babcock, 3 Dill. 581, 586, Fed. Cas. No. 14,487; U. S. v. Nunnemacher, 7 Biss. 111, 120, Fed. Cas. No. 15,902; In re Wolf, 27 Fed. 607; U. S. v. Thompson, 29 Fed. 86; U. S. v. Wootten, Id. 702; U. S. v. Owen, 36 Fed. 534. The essential elements of this offense, as applied to the charges in the indictment, are the alleged combination or conspiracy between the defendants to defraud the government of the United States out of the sum of $2,500, and the overt act or acts by them, or either of them, performed to effect the object of the conspiracy. In U. S. v. Nunnemacher, there were four counts in the indictment. The first three were based on section 3296 of the Revised Statutes, providing certain penalties for the removal of any distilled spirits on which the tax has not been paid. The fourth count was based upon section 5440. With reference to its sufficiency the court, in its charge to the jury, said:

"A conspiracy is formed when two or more persons agree together to do that which is unlawful,—in other words, when they combine to accomplish by their united action a criminal or unlawful purpose; and the statutory offense is complete when such agreement is made or such combination is entered into, and one or more of the parties does any act to effect the object of such conspiracy. To illustrate, if two or more persons agree together that by fraudulent practices they will deprive or defraud the government of the tax required to be paid on distilled spirits, and one or more of these persons does any act to effect the object of such agreement, they are guilty of the offense of conspiracy. * * * If the conspiracy is formed by all or some of the parties charged, and the act to effect the object of the conspiracy is done by only one of the parties, this constitutes a complete offense as to both or all of the members of the conspiracy, for in that case the act of one becomes the act of both or all. * * * Such connection with or relation to a conspiracy as the law takes notice of and punishes is not dependent upon personal pecuniary interest in the result of the unlawful adventure. Where there is an attempted attainment of an unlawful end by two or more persons, who are actuated by a common design of accomplishing that end, and who in any way and from any motive work together in furtherance of the unlawful scheme, each one of the persons becomes a member of the conspiracy."

In U. S. v. Sacia, 2 Fed. 755, the court in charging the jury, after reading section 5440 of the Revised Statutes, said:

"The offense * * * consists in two or more persons conspiring to defraud the government in any manner whatever, in a case where one or more parties to the conspiracy shall do any act to effect the object; that is, to effect the fraud. It need not be successful. It may fall short of the actual commission of the fraud. Merely agreeing or combining together to commit the fraud is sufficient to constitute the offense, without any loss to the government, if any one of the parties has taken a step towards its execution. The section is very sweeping in its terms, and was doubtless intended to meet the party to the fraud against the government on the very threshold of the perpetration of his crime, and to render him liable to its penalties before the consummation of the fraud."

See, also, U. S. v. Newton, 48 Fed. 218, 52 Fed. 275.

In U. S. v. Donau, 11 Blatchf. 168, Fed. Cas. No. 14,983, where there was a motion to quash the indictment, founded upon section 5440, the court said:

If the "indictment correctly charges an unlawful combination and agreement as actually made, and in addition describes any act by any one of the parties to the unlawful agreement, as an act intended to be relied on to show the agreement in operation, it is sufficient, although upon the face of the indictment it does not appear in what manner the act described would tend to effect the object of the conspiracy. It is sufficient if the act be so described as to apprise the defendant what act is intended to be given in evidence as tending to show that the unlawful agreement was put in operation, without its being made to appear to the court, upon the face of the indictment, that the act mentioned is necessarily calculated to effect the object of the unlawful combination charged. It is not the case of an attempt to commit crime. The crime is committed when the combination is made, and the act of one of the conspirators is not required by the statute to show the intent. That is inferred from the unlawful act of combining to defraud or to commit an offense, but the object of requiring proof of some act in furtherance of the unlawful agreement is to show that the unlawful combination became a living, active combination."

An indictment under section 5440, which avers the conspiracy and then sets out the overt acts done to carry it into effect, is sufficient, and it is not necessary to aver the means agreed on to effect the conspiracy. U. S. v. Dennee, 3 Woods, 50, Fed. Cas. No. 14,948; U. S. v. Goldman, 3 Woods, 192, Fed. Cas. No. 15,225; U. S. v. Dustin, 2 Bond, 332, Fed. Cas. No. 15,011; U. S. v. Sanche, 7 Fed. 715; U. S. v. Gordon, 22 Fed. 250; U. S. v. Adler, 49 Fed. 736. See, as to other offenses, U. S. v. Ulrici, 3 Dill. 535, Fed. Cas. No. 16,594; U. S. v. Simmonds, 96 U. S. 360; U. S. v. Britton, 107 U. S. 655, 661, 2 Sup. Ct. 512.

From the authorities we have cited and quoted from, it will be observed that the gist of the offense under the statute, as well as at common law, is the conspiracy. The cases quoted from and cited are principally decisions rendered in the respective circuits, and have no binding force upon this court, except such as may be found in the soundness of the reasons therein given. Our attention, however, has not been called to any decision of the supreme court which takes issue with the circuit courts as to the requirements of an indictment under the clause of section 5440 declaring it to be a conspiracy for two or more persons to conspire "to de-

fraud the United States in any manner or for any purpose." On the other hand, there are decisions which substantially affirm the doctrines announced in the circuit courts. Some of them have already been cited in the course of this opinion. In Dealy v. U. S., 152 U. S. 539, 14 Sup. Ct. 680, the question was as to the sufficiency of the indictment to sustain a conviction under section 5440 for a conspiracy to defraud the United States of the title and possession of large tracts of land of great value by means of false, feigned, illegal, and fictitious entries of said lands under the homestead laws of the United States; the said lands being public lands of the United States, open to entry, etc. It was there, among other things, objected that the indictment did not allege any particular tract of land of which the defendants conspired to defraud the United States. Mr. Justice Brewer, in delivering the opinion of the court, said:

"It is true, no tract is named by number of section, township, and range, and the language is broad enough to include any or all the public lands of the United States situate within that county and subject to homestead entry at the land office. But manifestly the description in the indictment does not need to be any more definite and precise than the proof of the crime. In other words, if certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential. Can it be doubted that if these defendants entered into a conspiracy to defraud the United States of public lands, subject to homestead entry, at the given office in the named county, the crime of conspiracy was complete, even if no particular tract or tracts were selected by the conspirators? It is enough that their purpose and their conspiracy had in view the acquiring of some of those lands, and it is not essential to the crime that in the minds of the conspirators the precise lands had already been identified."

The entire opinion is instructive upon many points. We pass to the last objection there urged,—that the overt acts are not charged to have been done within the limits of the United States. In replying to this the court said:

"The solicitation was to do a wrongful act within the state of North Dakota. In re Palliser, 136 U. S. 257, 265, 10 Sup. Ct. 1034. And that solicitation was not a part of the conspiracy, but subsequent to and in furtherance of it. The gist of the offense is the conspiracy. As said by Mr. Justice Woods, speaking for this court, in U. S. v. Britton, 108 U. S. 199, 204, 2 Sup. Ct. 531: 'This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy merely affords a locus pœnitentiæ, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.' Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done elsewhere."

Viewed from the standpoint of good pleading, the weakest point in the indictment is perhaps found in the descriptive words: "By the means and in the manner following: That is to say." But in answer to this, as well as to the further question whether it properly informs defendant Benson as to what he is accused of, we content ourselves by quoting the language of the supreme court, in reply to like objections, in Potter v. U. S., 155 U. S. 438, 445, 15 Sup. Ct. 144, as follows:

"It is generally true, as claimed, that where an indictment is unnecessarily descriptive even the unnecessary description must be proved as laid; but that proposition does not seem to be in point, for it is not claimed that the testimony did not show just such a writing as is charged to have been made by the defendant, and surely it cannot be claimed that unnecessary matter of description must be proved otherwise than as it is stated. While there is plausibility in the contention of counsel, yet we think it would be giving an unnecessary strictness to the language of the indictment to adjudge it insufficient, or to hold that it failed to inform the defendant exactly of what he was accused, or lacked that precision and certainty of description which would enable him to always use a judgment upon it as a bar to any other prosecution; and that, as we all know, is the substantial purpose of a written charge."

The judgment of the circuit court is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

In re RACE HORSE.

(Circuit Court, D. Wyoming.)

1. FEDERAL COURTS—JURISDICTION—HABEAS CORPUS—REV. ST. § 753.
The treaty between the United States and the Bannack Indians, made in 1868, provided (article 4) that the Indians should have the right to hunt on the unoccupied lands of the United States, so long as game should be found thereon, and so long as peace should subsist between the whites and Indians on the borders of the hunting district. The state of Wyoming, after its admission to the Union, passed an act making it a misdemeanor to hunt or kill elk, and some other kinds of game, within the state, at certain seasons. One R., a member of the Bannack tribe, in a time of peace between the whites and Indians, killed a number of elk during the prohibited season, upon a tract of country, about 30 by 36 miles in extent, within the boundaries of the state of Wyoming, of which tract a small part had been surveyed by the United States, and opened to settlement, and the remainder was unsurveyed. A few settlers, not exceeding seven in number, had established ranches at points within the tract, and cattle ranged in the valleys and along the streams, wild game being also abundant throughout the tract, and the country being generally mountainous and wooded. The point at which the elk were killed was not within the limits of any settlement. R. was arrested and prosecuted by the officials of the state of Wyoming for violation of the statute, and applied to the United States circuit court for discharge upon habeas corpus. *Held*, that the federal court had jurisdiction, under Rev. St. § 753, to issue the writ, and to determine whether or not R. was restrained of his liberty in violation of the treaty.

2. INDIAN TREATIES—HUNTING RIGHTS—UNOCCUPIED LANDS.
Held, further, that the tract of country within which the elk were killed constituted unoccupied lands of the United States, within the meaning of the treaty with the Indians, notwithstanding the presence of a few settlers thereon, and the fact that it was within the boundaries of the state of Wyoming.

3. SAME—EFFECT OF ADMISSION OF STATE.
Held, further, that the admission of Wyoming as a state, upon an equal footing with the original states, as well in respect of the exercise of the police power as otherwise, did not abrogate the provisions of the treaty in reference to the rights of the Indians in the lands within the state.

4. SAME—INCONSISTENT STATE LAWS—WYOMING STATUTE.
Held, further, that, as the provisions of the state statute were inconsistent with the treaty, and as the latter, under the constitution, was paramount, the statute could not be enforced against the Indians, and that R. should be discharged from custody.