CENTRAL TRUST CO. v. EAST TENNESSEE, V. & G. RY. CO.

(District Court, E. D. Tennessee, N. D. August 27, 1895.)

1. NEGLIGENCE—PROXIMATE CAUSE—DELAY BY RAILWAY COMPANY IN DELIVERING GOODS.
   Goods were shipped over the E. Ry. to plaintiff on May 18th. Between that time and June 5th, plaintiff, having been advised of the shipment, inquired several times for the goods, but was told by the agent at his station that they had not arrived. On Saturday, June 5th, plaintiff again inquired for the goods, and was again told by the agent that they had not arrived; but, on personal investigation, he found them in the station. It being too late to remove them on that day, plaintiff left them to be removed on Monday. On Sunday, June 6th, the station and its contents, including plaintiff's goods, were destroyed by fire, without fault of the railway company. *Held*, that the negligence of the railway company in failing to deliver the goods was the proximate cause of their loss, and that the railway company was liable for their value.
2. CARRIERS—SOURCE OF OBLIGATIONS—LIABILITY TO PASSENGERS OR SHIPPERS.
   The liabilities of a carrier of passengers or freight, who has entered into contract relations with passengers or shippers, depend not only on his contract, but also, in part, on the obligations imposed by law, as a matter of public policy; and an action may be brought against the carrier, either upon the contract, or for negligent omission of a duty imposed by law, independently of the contract, or for an injury done to person or property, as the case may be.
3. RAILROAD COMPANIES—DAMAGES IN OPERATING ROAD—PRIORITY OF JUDGMENT AND MORTGAGE—TENNESSEE STATUTE.
   A judgment against a railroad company for damages for the loss of property, caused by the negligent omission of the railroad company to deliver goods promptly to the consignee, in consequence of which they were destroyed by a fire in the company's station, is one for damages done to property in the operation of the railroad, within the statute of Tennessee (Laws 1877, c. 12) providing that no railroad company shall have power to give a mortgage valid as against a judgment for such cause.

This was a suit by the Central Trust Company against the East Tennessee, Virginia & Georgia Railway Company for the foreclosure of a mortgage. One James intervened, asking judgment against the railroad company for the loss of certain property, and claiming priority for such judgment over the mortgage. The special master to whom his petition was referred reported in favor of the intervener. The railway company and the trust company excepted to his report.

Ingersoll & Peyton, for creditor.

Henderson, Jourolman, Welcker & Hudson, for defendant and Trust Co.

CLARK, District Judge. James intervenes in this foreclosure suit, and asserts a claim against defendant company for the value of goods lost in the destruction by fire of defendant's depot at Mossy Creek, June 6, 1892. Priority of payment out of the proceeds arising from sale of the mortgaged property is claimed against the lien of the mortgage under the act of the general assembly of 1877. The goods were sold on order, and shipped from Knoxville, Tenn., May 18, 1892, to intervener, at Mossy Creek, Tenn. An invoice of these goods was sent by seller to intervener by mail on same day the goods

were shipped. The goods reached their destination May 19, 1892, and were deposited in defendant's depot or warehouse, and remained there until destroyed by fire as stated. During the interval between the arrival of the goods and the fire, the consignee sent on three different occasions for the goods, and was informed by the agent that the goods had not been received. Finally, on the evening of June 5th, intervener was at the depot on other business, and again asked if the goods had arrived, and was informed by the same agent that they had not. Thinking the delay was strange, the consignee undertook an examination for himself, and found the goods in the depot, almost concealed by straw and other material. This was late in the afternoon, and the consignee was not prepared to take the goods home. He accordingly went away, intending to return for the goods early Monday morning. On Sunday, the next day, the depot, with its contents, was consumed by fire. The fire is not shown to have resulted from the defendant's negligence, and the primary liability of the carrier depends on whether its negligence unnecessarily exposed the goods to the ravages of the fire.

It is set up in the answer to the petition that the agent had given notice to consignee of the arrival of the goods, but this would be inconsistent with his repeated declarations that the goods had not arrived. There is no proof of this fact, and the agent's gross inattention to his duty, in not knowing what he should have known, is such as to forbid any presumption that he discharged his duty in any respect, if ordinarily such presumption arose, in a case like this. The notice referred to is that required by statute (Mill. & V. Code, § 2788). In view of the ruling in Butler v. Railroad Co., 8 Lea, 33, the question whether notice was given or not does not change the result of any issue in this case. The special master reports in favor of the claim, and the defendant railway company and the trust company except. So far as the defendant railway company is concerned, the facts of this case are in all essential respects similar to those in Railway Co. v. Kelly, 91 Tenn. 699, 20 S. W. 312. Judge Caldwell, speaking for the court, gives the reasoning, and states the ground on which the liability rests in such cases, with great clearness, as follows:

"The fire and the loss may have had different causes. The fire destroyed the goods, but it does not follow that the cause of the fire and the cause of the loss to plaintiff were one and the same, in legal contemplation. They may have been entirely different. The failure to deliver the goods when demanded did not cause the fire, but it did cause the loss, in such sense that they would not have been lost without the failure. Had the defendant delivered the goods, they would have been removed, and the loss averted. The neglect and wrongful detention of the goods, and that alone, exposed them to the fire; and, but for that detention, they would not have been destroyed, though the fire did occur. Thus it becomes obvious that the negligence of the railway company was the proximate cause of the loss. The causal connection between the failure to deliver the goods and the injury to the plaintiff is complete."

Upon the authority of Railway Co. v. Kelly, judgment is allowed against the defendant railway company for the value of the goods, with costs incident to the intervention. It remains to determine whether this judgment is one of the class provided for by the act of

1877, c. 12, § 3, against which the lien of the mortgage is invalid. So much of the act as affects the matter now under consideration is as follows:

"And provided further, that no railroad company or corporation shall have power under this act, or any of the laws of this state, to create a mortgage or other kind of lien on its property in this state, which shall be valid and binding against judgments or decrees, and execution therefrom, for timbers furnished or work and labor done on its road, or for damage done to persons and property in the operation of its railroad in this state."

The court in this case is concerned only with the last clause of the provision,—"or for damages done to persons and property in the operation of its railroad in this state." Counsel for the trust company insist that the act applies only to judgments in actions in tort, where the damages result from an injury directly done, with force, whereas in the case at bar the suit is necessarily upon the contract of shipment, for a breach thereof; and in support of the latter proposition the case of Railroad Co. v. Neal, 11 Lea, 270, is relied on. The opinion by Judge Freeman is brief, and may be given in full:

"The facts are that the plaintiff delivered this bale of cotton, with several others, to the railroad agent, who gave receipt of the company, to be shipped to Mosby, Hunt & Co., of Memphis, Tenn. The cotton was not shipped, but probably stolen from the platform, no watchman or guard being kept over it while on the platform after delivery. The only question contested is whether the statute of limitations bars plaintiff's claim. If the statute of three years applies to the case as presented, it is conceded the suit cannot be maintained. If six years, it is then conceded the action can be sustained, and the defendant is liable. This is not an action for injury to personal property, nor for detention or conversion of the same, which is barred in three years by section 2773 of the Code. It is for damages, or for breach of the contract to ship the cotton to Mosby, Hunt & Co., and comes under section 2775,—"actions on contracts, not otherwise provided for, shall be barred within six years."

It is entirely conceivable that if the shipper could not assert and prove an injury to the cotton, or a loss or destruction, by some act of negligence by the carrier, his only remedy was upon the contract, for failure to deliver the cotton. The opinion is to be read and understood with reference to the facts of the particular case decided. It is clear that the court did not decide that the contract, in such case, furnished the full measure of the defendants' obligation, nor that the shipper's only remedy would be upon the contract, where a contract exists. And the statute does not admit of any interpretation based on such proposition, nor upon the distinction between a suit upon the contract and one in tort, although the suit would very generally be of the latter kind. For, whenever the common carrier is brought into contract relations with either a passenger or shipper, the law, at once, as matter of public policy, imposes on the carrier certain obligations and liabilities, which do not depend on the particular contract at all. Indeed, these imposed duties are primary obligations. This doctrine has often been announced by law writers and judges in different forms, and its truth is obvious enough from a simple statement of the proposition. Railroad Co. v. Swift, 12 Wall. 262; Railroad Co. v. Derby, 14 How. 468; Pollard v. Railroad Co., 101 U. S. 223; Ray, Pass. Carr. p. 19, § 3, and cases; Tayl. Priv. Corp. §§ 350, 351, and cases cited. And these obligations, thus im-

posed by law from motives of public policy, the carrier cannot limit or modify, except by consent of the person dealing with such carrier, and then not to an extent without limit. The carrier cannot, for example, validly stipulate for immunity from liability for loss resulting from negligence. This is now fully established by leading cases of the highest authority, such as Railroad Co. v. Lockwood, 17 Wall. 357; Railway Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Railway Co. v. Sowell, 90 Tenn. 19, 15 S. W. 837; Transportation Co. v. Bloch, 86 Tenn. 392, 6 S. W. 881; Inman v. Railroad Co., 129 U. S. 128, 9 Sup. Ct. 249; The Edwin I. Morrison, 153 U. S. 211, 14 Sup. Ct. 823. The carrier's obligations being in part defined by the contract, and in part imposed by law, regardless of the expressed contract, a count upon the contract contained in the bill of lading may be united in the same declaration with a count in tort for negligence in the loss of the goods shipped. Railroad Co. v. Soper, 8 C. C. A. 341, 59 Fed. 879. And an action against two railway companies for personal injuries resulting from their negligence is an action ex delicto, although the declaration shows that plaintiff held a ticket for transportation on the railroad, which ticket, of course, constitutes a contract, to the extent of its stipulations. Railroad Co. v. Laird, 7 C. C. A. 489, 58 Fed. 760. So a passenger wrongfully ejected from a train by the conductor, on the claim that he is not the person named in his ticket, is not limited to an action for breach of the contract. Railway Co. v. Russ, 6 C. C. A. 597, 57 Fed. 822. There is nothing in the case of Railroad Co. v. Neal, 11 Lea, 270, in conflict with what is here said. The shipper, then, for a loss, may sue in assumpsit, upon the contract, or in case, for negligent omission of a duty imposed by law, independently of the contract, or for an injury done to the property, as the facts of the case may be. The existence of a contract therefore imposes no limit on the kind or character of the suit which may be brought. This is determined by the nature of the injury suffered by the shipper or passenger. Of course, reference is here made to the form of action only as illustrating the proposition announced,—that rights and obligations grow out of every transaction with the carrier beyond those stipulated in the specific contract itself. Forms of action in this state were long since abolished by the Code (Mill. & V. § 3440), so far as concerns any question of pleading or practice. The contract imposing no limit on the right to sue the carrier for an omission of duty, or an injury done, regardless of the terms of the contract, there is, of course, no restriction, on account of such contract, against the passenger or shipper, in his effort to show that his claim is one of the class defined and protected by the act of 1877. To bring a judgment within the limited class defined by the act, it must be—First, for damages done to the person or property; and, second, "in the operation of its railroad in this state." The statute has been before the courts only in the cases of Frazier v. Railway Co., 88 Tenn. 138, 12 S. W. 537; Id., 139 U. S. 288, 11 Sup. Ct. 517; and Railroad Co. v. Evans, 14 C. C. A. 116, 66 Fed. 816. The only one of these cases bearing upon the point now considered is that last cited, in which, in the progress of the opinion, Judge Lurton comments on this statute as follows:

"The claim of Kratzenstein was for damages in detention of freight shipped over its line of railway. There is no evidence as to the character of the damages sustained. If the goods perished or were injured in transit through this state, Kratzenstein would seem to be within the saving of the statute, as having a claim for 'damages done * * * to property in this state.' There are two objections to this claim: First. It is not shown that Kratzenstein's property was damaged in the operation of the railway. If his loss was not due to an actual injury to his property, then he has not made out a case of 'injury to property,' within the meaning of the act of 1877. Second. It is not shown that any injury was done his property in the operation of the road within this state. If his damages were sustained at some point on the line, but in another state, the claim is not within the act. Kratzenstein alleges that his loss was 'for a delay at Chattanooga.' The answer only admits that his judgment was for damages for 'detention on some part of its line of railroad.' There is no evidence as to where he sustained his loss, or as to whether his damages were to the goods in shipment, or for a decline in the market, or loss of a profitable contract by reason of delay. One who seeks to avail himself of a proviso limiting the operation of a general power must bring himself clearly within the exception."

It is true that a point in the construction of the statute could hardly be considered as definitely settled by what is said, and that the language is guarded; but this is characteristic of a really able and critical judge, and only adds value to the opinion as far as given. It is clear from what is here said, as well as the terms of the act itself, that it is not material whether the claim is for damages directly done, or damages suffered in consequence of negligence in any form.

It is next insisted by the able counsel for the trust company that according to the doctrine of Butler v. Railroad Co., 8 Lea, 32, and Railway Co. v. Kelly, 91 Tenn. 699, 20 S. W. 312, the damages did not occur "in the operation of the railroad," but while in custody of defendant company as a warehouseman. What the court decided in those cases was that when the freight arrives at the point of destination, and is deposited in the carrier's depot, the liability of the company as common carrier ceases, and the liability thereafter is that of a warehouseman, involving the duty of ordinary care. The court did not consider, and clearly did not decide, that the use of the depot was not a part of the operation of the railroad. The statute is to be construed in the light of the actual facts and circumstances of the subject to which it relates. These depots, and their use at the principal stations, are just as essential to the operation of a railroad as any other part of the equipment. This is well known to be so, and the facts which make it so need not be stated. The operation of the railroad is not confined to the movement of its cars, but includes the use of its depots and all appliances, until delivery to the consignee is complete, and the duty of the company terminated. In Easton v. Railway Co., 38 Fed. 12, Judge Pardee said:

"A debt of a railroad company, arising out of the loss by fire of goods while in possession of said railroad company as a common carrier, is generally, and perhaps properly, classed as an operating expense; but when presented against an insolvent railroad company over four months after the railroad property is placed in the hands of a receiver in a foreclosure suit, and urged as a lien upon the income of the property earned by the receiver, it is necessary to discriminate such a debt from debts arising for labor, supplies, equipments furnished for, and necessary for keeping up, the railroad, as 'a going concern.'"

Following, and giving full effect to the ruling in, Railway Co. v. Kelly, I hold that the destruction of consignee's property resulted from the negligence of the railway company; and the judgment, in my opinion, is one for damages done to property, within the class protected by the act of 1877. Views of the statute entertained by leading members of the bar are so divergent that I deemed it a fit occasion for stating at some length the court's opinion. The opinion is limited strictly to the facts which call for judgment.

In re SUMMERHAYES.

(District Court, N. D. California. November 8, 1895.)

No. 11,205.

GRAND JURORS—DISCLOSING PROCEEDINGS—CONTEMPT.

A federal grand jury, when impaneled, was properly instructed by the court in respect to the duty of its members to keep their deliberations secret, and to abstain from all conversation in regard thereto outside the jury room. Subsequently, one F., who had caused an alleged crime, relating to matters in which he was interested, to be investigated by the grand jury, presented to the court an affidavit in which he alleged that one of the grand jurors had accosted him and his counsel in an hotel, requesting an interview, and had there conversed with them for some hours about the matters before the grand jury in which F. was interested, telling them many things which had occurred in the grand jury room and suggesting that, for money, F. might secure the indictment of the persons whom he wished to have indicted. Upon investigation of the charge in court, the juror denied that he had suggested bribery, but substantially admitted the other allegations, claiming that he had only inadvertently violated his duty. *Held* that, upon the juror's own admission, disregarding the charge of soliciting a bribe which, as it involved a crime, should not be passed upon in contempt proceedings, it appeared that the juror had been guilty of a contempt of court, involving a serious wrong, which could not, consistently with the circumstances, have been inadvertent, and he should be punished by imprisonment for six months.

In re order to show cause why H. J. Summerhayes, a member of the grand jury of the district court of the United States for the Northern District of California for the July, 1895, term, should not be punished for contempt of court in disobeying an instruction of said court.

H. S. Foote, U. S. Dist. Atty., and Bert. Schlesinger, Asst. U. S. Dist. Atty.

Robert Ferral, for H. J. Summerhayes.

MORROW, District Judge (orally). The grand jury of this court was impaneled on the 1st day of August of the present July term. The respondent was drawn as a member of that body. He was impaneled, after being examined as to his qualifications, to serve as a juror, and was thereupon sworn in this court by the clerk; the clerk first administering the oath to the foreman of the jury in this form:

"You, Philo D. Jewett, as foreman of this grand inquest for the body of the Northern district of California, do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge. The counsel of yourself and your fellows you shall

keep secret. You shall present no person from envy, hatred, or malice. Neither shall you leave any person unpresented from fear, favor, affection, gain, reward, or the hope thereof. But you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God."

This same oath, taken by the foreman of the grand jury, was administered by the clerk to all the other members of the body. After the oath had been administered to the grand jury, the court proceeded to instruct the members as to their duty, and, among other things, instructed the jury, particularly:

"That you must keep your deliberations secret. You are not at liberty even to state that you have a matter under consideration. You will allow no one to question you as to your action or the action of your associates on the grand jury."

In other words, the instructions of the court were, specifically, that the lips of the jurors were absolutely sealed respecting every matter that might come before the body in the course of its proceedings. It is not for a juror to disclose any secrets of the body of which he is a member, or reveal anything concerning any matter brought before the jury, nor is it the province of the juror to privately interview witnesses, or to approach witnesses who have been before the jury, concerning their testimony, outside of the jury room. The instructions, in this respect, were full and specific.

On the 7th of this month the following affidavit was presented to this court:

"Northern District of California, City and County of San Francisco, State of California—ss.:

"Walter K. Freeman, being first duly sworn, deposes and says: That he is one of the parties to an interference proceeding now pending in the United States patent office, wherein the Westinghouse Electric Company, Gibbs, et al., are also contesting parties. That, pursuant to notice served on the part of said Westinghouse Electric Company, Gibbs, et al., he came to San Francisco on or about the 23d day of October, A. D. 1895, with his counsel, J. B. Church, Esq., of Washington, D. C., in order to attend the examination of witnesses produced on behalf of said Westinghouse Electric Company, Gibbs, et al. That, upon his arrival in San Francisco, he learned certain facts which led him to believe that a conspiracy had been formed to suborn witnesses to give perjured testimony, and in furtherance of that conspiracy that threats and intimidation had been used in the case of certain witnesses which it was proposed to examine in said proceeding. That, upon ascertaining these facts, and within twenty-four hours after his arrival, he laid the matter as then known to him before the United States district attorney, and requested that the same be investigated. That subsequent developments confirmed his suspicions, and the matter was again brought to the attention of the United States district attorney's office, whereupon the parties concerned were subpœnaed before the United States grand jury, to the end that the whole matter might be fully and fairly investigated. I was subpœnaed to appear before the grand jury at 2 o'clock p. m. on Tuesday, the 5th inst. I am informed that other witnesses, including J. B. Church, Esq., my said counsel, was sworn before the grand jury on the 1st inst., and that, pursuant to an adjournment, some witnesses were examined on the 5th inst., and I was sworn and cautioned by the foreman of the grand jury at about 4:30 p. m. on said day, and notified to appear on the 8th inst. at 2 o'clock p. m. On the evening of said 5th day of November, as we were leaving the grill room of the Palace Hotel, through the billiard room, where we were stopping, while I was in company with Mr. Church, the latter was accosted by a gentleman, whom I

had seen in the grand jury room, and whom I supposed to be one of the members of the United States grand jury. I heard him request Mr. Church to introduce him to his client, Walter K. Freeman, referring to myself. He mentioned his name, which I did not fully gather, and thereupon we went to the opposite side of the billiard room and sat down, and he explained, then, that he was the only man on the jury that knew anything about electrical matters, and he would like to get some points. From this point an interview began, which lasted from about 8 o'clock until midnight, during which time he discussed very freely his experiences as a juror in criminal cases and as a grand juror in the county and federal courts. He, of his own volition, introduced the subject-matters which I had brought to the notice of the United States district attorney, and which were being considered by the United States grand jury, and he stated, among other things, that he had listened to the testimony given in the grand jury room by Warren P. Freeman, and discussed his testimony, and remarked that he would not believe him under oath, because he said that, during the time that Warren P. Freeman was before the grand jury, he acted and told his story in a suspicious way; that he seemed more interested in looking at his boots than in giving an intelligent story of his connection with the affairs which led up to charges being preferred against him before the grand jury. Continuing, he referred to the testimony given by Marvin L. Freeman before the grand jury, discussed it, and said that he did not think Marvin was telling the whole truth; that he believed he was holding something back, and asked me if I knew what it was. The reason he gave for not having confidence in Marvin L. Freeman's testimony was because Marvin seemed to hesitate and think, and acted as though he was endeavoring to tell a fixed-up story, and in this connection he remarked that he thought that a man who was telling the truth would speak up promptly, and would tell the same story forty-seven different times in as many different ways, and still tell the truth.

"During our conversation Mr. Church excused himself for a few moments, and during his absence that person, whose name I later learned was H. J. Summerhayes, began questioning me very closely regarding the financial status of the Ft. Wayne Electric Corporation, whom he seemed to understand was the owner of the inventions in controversy, and he proceeded to inquire whether or not I could secure enough money to handle the case pending before the United States grand jury. He said: 'You must know, Freeman, that if the proper influence is brought to bear you can have done what you want.' Continuing, he made a statement as to his knowledge of jury duty, and the probable influence he would have with the present grand jury, and asked me what it would be worth to the Ft. Wayne Electric Corporation to have H. S. McKaye and Warren P. Freeman indicted for intimidating witnesses. He said: 'You know it would have great influence in the patent office, and will be worth a great deal to you, if this is brought about.' As he continued his conversation, he drifted to a point where he made a comparison between the compensation received by the gentlemen who are members of the United States grand jury, and in this connection remarked: 'We only get two dollars a session,—four dollars a week,—and you fellows are fighting here for patents that are worth millions to whoever wins the suit, and are asking us to go into an investigation at the rate of four dollars a week, and decide a question that would have great influence in the patent office. Now, look here, Freeman; this is not fair. The lawyers are getting big money out of this thing, and I know that the Westinghouse Electric Company has got a whole lot of money available for the purpose of fighting you here; so, why don't you resort to the same means? You know that you could fight the devil out of hell if proper influence was brought to bear.' Continuing in this strain for some time, he continued and said: 'I'll tell you, my opinion is that it is not a fair division of the spoils.' I then inquired whether or not it was a practice in California in fixing juries. He said it was not an uncommon thing to do, but that he had never accepted or had anything to do with any such affairs, because he was a wealthy man, and above such influences. At about this time Mr. Church returned to the billiard room, and Summerhayes' conversation drifted to a recital of personal experiences, and then drifted back again to his intimate acquaintance with certain reputable gentlemen of San Francisco,

and spoke of them in a manner that gave me the impression that his social standing was of the best; that his integrity and influence as foreman of grand juries had never been questioned, and that the juries of which he had been a member in the past had always decided cases as he suggested, and in this connection he said: 'I have been a juror for three years, with the exception of one week; and while acting as such in the criminal courts, every case that was ever tried resulted in a conviction.'

"In this affidavit I have eliminated such matter and such parts of his recital and conversation as seems necessary to intelligently and briefly outline the drift of his remarks, without going into all the details. He quoted certain conversations between members and jurors in the jury room, and in this connection said that there had been a discussion between himself and other members of the United States grand jury respecting the small compensation that they received, which was four dollars a week, for puzzling their heads over the affairs of myself and the Westinghouse Electric Company, which involved millions of dollars. There are other fragments of sentences, interspersed in the conversation, referring to what occurred in the jury room and comments made by the jurors, which it would be impossible to intelligently express without going into a lengthy statement of what was said. And further deponent sayeth not. Walter K. Freeman.

"Sworn to before me this 7th day of November, 1895. J. S. Manley,
"Commissioner U. S. Circuit Court, Northern District of California."

This affidavit tended to show, not only that Mr. Summerhayes had violated his oath, but that he had been guilty of contempt of court, in misbehaving as a juror in revealing the proceedings of the grand jury and also in discussing matters which had been brought before that body.

On that affidavit the court issued a citation, requiring the respondent to appear here this morning and show cause why he should not be punished for contempt of court. He appeared, and through counsel asked that the witnesses in support of the affidavit might be produced for cross-examination. Pursuant to this request, the witnesses in support of the charges contained in the affidavit were placed on the witness stand and examined as to the matters referred to in the affidavit. Mr. Freeman testified substantially as set forth in the affidavit. He was then cross-examined by counsel for the respondent. Mr. Church, his attorney, was called, and requested to state what occurred on the occasion mentioned in the affidavit. He did so, and confirmed the testimony of Mr. Freeman, in its principal features. He was cross-examined by counsel for respondent. Mr. Seidenberg, a reporter for a morning paper, was also called to testify to certain admissions said to have been made by Mr. Summerhayes at his house on the night of the 6th of November, concerning the same matter. He, also, was cross-examined by counsel for the respondent. The respondent then went upon the stand and testified as to what occurred on this occasion. He has controverted or denied some portions of the testimony delivered by the witnesses in support of the charges contained in the affidavit.

With respect to such portions of that affidavit as charge, or tend to charge, corrupt conduct, it probably involves offenses against the laws of the United States. If so, these matters must be tried elsewhere and by other methods of procedure than that which is now appropriate in this proceeding for contempt. When a person

is charged with the commission of a crime against the United States, he is entitled to have the matter investigated by the grand jury, and, if indicted, to be tried by a jury of his peers. It is not for the court to determine the questions of fact involved in a public offense, or the issues of fact presented in such matters. If the tendency of respondent's conversation with Mr. Freeman was in respect to a violation of law,—if it was for the purpose of opening up negotiations leading to bribery and corruption,—that is a matter that should be investigated by the grand jury, and presented to the court in proper form for trial by a jury. The court has only to deal now with the question of contempt,—to determine whether the orders of this court and the laws governing their enforcement have been violated by the respondent.

Section 725 of the Revised Statutes provides:

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance of any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of said courts."

It will be observed that contempt of court may be committed—First, by the misbehavior of a juror in the presence of the court, or so near thereto as to obstruct the administration of justice; secondly, a contempt of court may be committed by a disobedience of a juror to a lawful command of the court. The oath taken by the respondent and the command given to him by the court was that the counsel of himself and his fellows he should keep secret; or, in other words, that he should not communicate with persons outside of the jury room with respect to any matter under investigation by the grand jury. The law and instructions of the court in this respect were not obscure, and there is no reason why a person should be in doubt as to their command. It is one of the inheritances we have as an English-speaking people, coming down through the long channels of the common law, to respect and sustain the sanctity of the jury room and the secrecy of the procedure of investigation provided for grand jurors. Indeed, the integrity of proceedings in criminal cases depends almost entirely upon the jurors confining themselves to the investigation of only such matters and things as they have received from the court, or from the district attorney, in the grand jury room, and through regular channels.[1] For a juror to receive documents or papers, or anything pertaining to a case, outside of the jury room, is not only clearly in violation of his oath, but it is contrary to the principles of our jurisprudence and the whole system of law we are called upon to administer. If jurors may leave the jury room and privately obtain evidence elsewhere, if the jury can be dismissed

[1] A grand jury of the United States does not possess the inquisitorial powers conferred by statute upon state grand juries. Charge to Grand Jury, 2 Sawy. 671.

from a court or jury room, and the individual members be permitted to interview parties or witnesses outside of the jury room, the courts may as well close their doors, and let the administration of justice fall into the hands of those who will deal in it as an article of personal favor or purchasable merchandise. But this is a government of law, and we are charged to execute the law, and to see that it is preserved in all its integrity, and so conduct all the proceedings that not a breath of suspicion should ever properly attach to any verdict or judgment, and when we forget to insist upon all the safeguards that belong to proceedings in courts of law, we must not be surprised to find our form of government under the law a subject of ridicule and derision; indeed, it may not stand the strain of distrust that accompanies irregularity and corruption in the administration of justice.

The court appreciates the unfortunate position of the respondent in this case, as stated by his counsel. He comes here, undoubtedly, with the credit of a reputable citizen. He has borne, heretofore, so far as I know, a good reputation. But he has certainly disobeyed the order of the court. He ought to have thought of his good reputation when confronted with the situation, as it appears here presented to the court by the testimony. He ought not to have approached these men. He ought not to have allowed himself to come in contact with them, or to discuss with them the proceedings of the grand jury, even to the extent he admits. While I am not now considering anything further than the mere fact of the respondent having disobeyed the order of the court, still there clings about the affair the atmosphere of wrong,—serious wrong. There is, I am afraid, something more than the mere disobedience of the order of the court. It is said by counsel that all there was to it was indiscretion, and it has been characterized as though the conduct of the respondent was a matter of possible thoughtlessness. That is not the case. The case cannot be disposed of in that way. It is a serious matter. It must be considered that there was some reason for this juror having a conversation in a public billiard room with Freeman and Church, covering the long time stated in the testimony. It cannot be disposed of as a passing conversation. I think that, while the testimony in this case has been brought to my attention orally, and has not been left to be disposed of by the affidavits of the persons who had knowledge of the facts and the answer of the respondent, I am permitted, under the rules governing the examination of such a case, to determine whether or not the story of the respondent is consistent with the situation. I am bound to say that, from all the statements, I do not think his story is consistent with all the circumstances of the case, even as admitted by himself. The meeting of these persons in a public billiard room, and the claim that the respondent was merely talking to a Mr. Buckman indirectly, and in a formal way, about the case before the grand jury, does not seem to be in accord with the situation of affairs. I am now speaking of the case as presented by the respondent himself, disregarding the statements of Mr. Freeman and Mr. Church. The respondent's own statement of the situation is not sufficient to account for the

interview, or the color he gives to it. I think it is a serious offense. I think it is one of the gravest offenses that has been committed in this district against the regular and proper administration of the law. The respondent must be punished, and I think he ought to be punished severely.

The sentence of the court is that he be imprisoned for the term of six months, and that this imprisonment be executed in the county jail of San Francisco.

In re DE LONG et al.

(Circuit Court, D. Massachusetts. December 3, 1895.)

CUSTOMS DUTIES—CONSTRUCTION OF LAWS—FRESH FISH.

In the tariff act of August, 1894, the free list (paragraph 481) enumerates "Fish, frozen or packed in ice fresh." The schedule relating to dutiable fish enumerates (paragraph 210) "Herrings, pickled, frozen, or salted, and salt water fish frozen or packed in ice, one-half of one cent per pound." *Held* that, under the rule of construction requiring each part of a law to be made effective if possible, the paragraph in the free list must be held as generic, and paragraph 210 as exceptional or specific.

This was a petition by Edward R. De Long and others for a review of the decision of the board of general appraisers in respect to the classification for duty of certain imported fish.

Thomas H. Russell, for petitioners.
Wm. G. Thompson, for the United States.

PUTNAM, Circuit Judge. The tariff act of August, 1894, contains in the free list this paragraph: "(481) Fish, frozen or packed in ice fresh." The schedule relating to dutiable fish contains the following: "(210) Herrings, pickled, frozen, or salted, and salt water fish frozen or packed in ice, one-half of one cent per pound."

The issue here arises from the incongruous expressions touching fish, frozen or packed in ice, found in the paragraphs quoted. The imperative rule of construction applicable to the case is that each paragraph shall be held effective if possible. All other rules referred to by counsel are subordinate to this, and some of them fanciful. It is possible to make each paragraph effective by holding 481 generic, and 210 exceptional or specific; and the court is compelled to accept this construction as obligatory upon it. If the result of the application of this rule of construction should prove absurd in any particular case, some other rules must be sought for. But such is not the fact here. Since the abrogation of the articles of the treaty with Great Britain of 1871, in pursuance of which the products of the sea fisheries of the maritime provinces were made free, congress has pursued a policy, more or less restricted, of imposing duties on Canadian salt-water fish. We think this was never relaxed, beyond admitting free fish, intended for daily or immediate consumption. This exemption gave rise to a perplexing controversy, whether fish frozen or packed in ice came ordinarily within that classification. The framers of the act of 1894 were apparently anxious to obviate that question, and their anxiety was