NATIONAL MASONIC ACC. ASS'N OF DES MOINES v. SHRYOCK.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1896.)

No. 677.

1. ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—BURDEN OF PROOF.
Under a policy promising indemnity in case death results solely because of bodily injuries effected by external, violent, and accidental means, and independently of all other causes, the burden of proof is on those claiming under the policy to show that the accident was the sole cause of death, independently of all other causes.

2. SAME—DEATH FROM ACCIDENT COMBINED WITH DISEASE.
Under such a policy, the insurer would not be liable if, at the time of the accident, insured was suffering from a pre-existing disease, and death would not have resulted from the accident in the absence of such disease, but insured died because the accident aggravated the effects of the disease, or the disease the effects of the accident.

3. REVIEW ON ERROR—SUFFICIENCY OF EVIDENCE—RECORD.
The sufficiency of the evidence to sustain the verdict cannot be considered when the record discloses that only a portion of the evidence is included in the bill of exceptions, nor will a certificate that the substance of the evidence is returned warrant the court in considering that question.

4. HEARSAY EVIDENCE—PUBLIC POLICY—DISCRETION OF COURT.
The rule that hearsay testimony is incompetent to prove a past occurrence rests upon settled principles, the maintenance of which is essential to the preservation of personal liberty and property rights. The enforcement of this rule is not discretionary with the trial court, and its violation is fatal error.

5. SAME—DECLARATION—RES GESTÆ.
Declarations made by a person since deceased, two hours after an injury from a fall in a street, and not at the scene of the accident, but while engaged in his ordinary avocations in other places, that he had fallen and sustained an injury from which he was suffering, are inadmissible, as part of the res gestæ, to establish the fact of the fall.

6. APPEAL—PREJUDICIAL AND HARMLESS ERROR.
The rule that error without prejudice is no ground for reversal is applicable only when it is clear beyond doubt that the error alleged did not prejudice, and could not have prejudiced, the party against whom it was made.

7. RELEVANCY OF EVIDENCE—ACCIDENT INSURANCE.
In an action on an accident insurance policy, where defendant alleged that death resulted from disease or bodily infirmity, without alleging intoxication or suicide, *held*, that it was error to admit evidence for plaintiff that insured was not addicted to the use of intoxicating liquors, and that evidence offered for defendant, tending to show that he committed suicide, was properly excluded.

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

The National Masonic Accident Association of Des Moines, Iowa, a corporation, brings this writ of error to reverse a judgment rendered against it, and in favor of Celia V. Shryock, the defendant in error, on a certificate of membership of her husband, William B. Shryock, in that association. In her complaint the defendant in error alleged that on the 14th day of November, 1890, this accident association issued to William B. Shryock its certificate of membership, by which it agreed to pay to her such a sum, not exceeding $5,000, as should be realized by it from one quarterly payment of $2, made and collected from all its members at the date of the accident, if the death of William B. Shryock should result through external, violent, and accidental means alone, which should, independently of all other causes, cause his death within 90 days of the date of the accident, but expressly stipulated in the certificate that "this

insurance does not cover disappearances, nor injuries of which there is no visible mark upon the body, nor accident, nor death or disability resulting wholly or in part, directly or indirectly, from any of the following causes, or while so engaged or affected: Suicide, intoxication, or narcotics, dueling or fighting, war or riot, voluntary overexertion or exposure to unnecessary danger, intentional injuries (inflicted by the assured, or by any other person with the consent or procurement of the assured), medical or surgical treatment (necessitated solely by injuries, and made within ninety days of the occurrence of accident excepted), sunstroke, violating law or the rules of a corporation, taking poison or inhaling gas, disease or bodily infirmity, hernia, fits, vertigo, or sleep-walking." She then averred that on July 2, 1892, Shryock received a personal injury by a violent and accidental fall, and by striking a hard substance, on the street in the city of Omaha, from which he died in a few hours, and that she had complied with the provisions of the certificate on her part. The plaintiff in error filed an answer, in which it admitted its issue of the certificate, denied that Shryock met with any accident which caused his death, within the meaning of the certificate, set forth the stipulation of the certificate which we have quoted, and alleged, as a separate defense, that if Shryock received any bodily injury through external, violent, or accidental means, he was at the time suffering from disease or bodily infirmity, the same being some form of heart disease or other kindred disease, and his death resulted wholly or in part from that disease. The answer contained other allegations, but none that are inconsistent with those that we have recited, and none which attributed the death to any other cause than this disease.

Clark Varnum and Carroll S. Montgomery (Matthew A. Hall, with them on the brief), for plaintiff in error.

A. N. Sullivan, J. C. Cowin, and Mr. McHugh (R. Graham Frost, in behalf of counsel), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The certificate of membership in this accident association, on which this action is based, contained the covenant of this corporation to pay to the defendant in error the indemnity it promised in case the death of William B. Shryock resulted, within 90 days from the date of any accident, solely because of bodily injuries effected by external, violent, and accidental means, and independently of all other causes; and it also contained an express agreement that the insurance promised thereby should not cover any death which resulted wholly or in part, directly or indirectly, from disease or bodily infirmity. The defendant in error alleged that Shryock's death was caused by an injury to him which resulted from an accidental fall on the street. The association denied this allegation, and alleged that, if he was injured by such a fall, his death was not caused by that alone, but resulted, wholly or in part, from some disease of his heart. The burden of proof was upon the defendant in error to establish the facts that William B. Shryock sustained an accident, and that that accident was the sole cause of his death, independently of all other causes. If Shryock suffered such an accident, and his death was caused by that alone, the association agreed by this certificate to pay the promised indemnity. But if he was affected with a disease or bodily infirmity which caused his death, the association was not liable under this certificate, whether he also suffered an accident or not. If he sustained an accident, but at the time it occurred he

was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the express contract was that the association should not be liable for the amount of this insurance. The death in such a case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident, and the contract exempted the association from liability therefor. These propositions have been so lately discussed and affirmed by this court that we content ourselves with their statement. Insurance Co. v. Melick, 27 U. S. App. 547, 12 C. C. A. 544, 547, and 65 Fed. 178, 181; Association v. Barry, 131 U. S. 100, 111, 112, 9 Sup. Ct. 755; Freeman v. Association, 156 Mass. 351, 353, 30 N. E. 1013; Anderson v. Insurance Co., 27 Scot. L. R. 20, 23; Smith v. Insurance Co., L. R. 5 Exch. 302, 305; Insurance Co. v. Thomas, 12 Ky. Law Rep. 715; Marble v. City of Worcester, 4 Gray, 395, 397; Association v. Grauman, 107 Ind. 288, 290, 7 N. E. 233.

On the trial of the case there was evidence tending to show that about 4 o'clock in the afternoon of July 1, 1892, William B. Shryock, who resided at Louisville, in the state of Nebraska, went from that place by rail to the city of Omaha, in that state, where he arrived about 5 o'clock in the afternoon of that day; that, some months before, he had been injured by the fall of a horse upon him, but had recovered from much of the disability caused by that injury; that he was still lame, and wore a rubber supporter on his knee; that he told one of his acquaintances, just before he left Louisville, that he was nervous, and felt badly, that he was going to Omaha, and that he wanted him to keep his grave green if he never saw him again; that after his arrival in Omaha he met another acquaintance at the Millard Hotel in that city, about 6 o'clock in the evening, and went with him to a harness shop, bought a harness, and accompanied him to the depot; that the baggage master saw him at the depot in Omaha between 7 and 8 o'clock on that evening, and noticed that he was lamer than usual, and looked like a man in pain; that about 8 o'clock on that evening he entered the store of one Keefer, in Omaha, and purchased a harness; that he was very lame and pale, and looked as if he was suffering; that about half past 8 on that evening he entered the store of one Darst, in Omaha; that he remained there an hour and a half, and seemed to be weak and in pain; that Darst then accompanied him to his hotel in Omaha, where he obtained from a drug store a phial of some liquid, and retired to his room, where he was found dead in his bed at 6 the next evening; that an autopsy was held, from which it appeared that he had long been afflicted with fatty degeneration of the heart, and that there were abrasions on his left hip and on his left knee that might have been produced by such an accident as a fall on the street; that his heart was in such a diseased condition that, in the opinion of some of the physicians, a fall which probably produced these abrasions might have caused, and probably did cause, his death; but all the physicians testified that in their opinion the injury from such a fall or accident as these

abrasions indicated would not have been sufficient to have produced death if the heart of the deceased had not been weakened by its disease.

The sufficiency of the evidence in this case to warrant the verdict is not before us for consideration, because the record before us discloses the fact that only a portion of the evidence presented to the court below is contained in the bill of exceptions. A certificate that the substance of the evidence is returned is not sufficient to warrant an appellate court in reviewing the refusal of the trial court to direct a verdict. Railway Co. v. Washington, 4 U. S. App. 121, 1 C. C. A. 286, and 49 Fed. 347, 350, 353; Railway Co. v. Harris, 27 U. S. App. 450, 12 C. C. A. 598, and 63 Fed. 800, 805; Taylor-Craig Corp. v. Hage, 16 C. C. A. 339, 69 Fed. 581.

But it is assigned as error that the trial court admitted in evidence the testimony of William Darst that, when the deceased came to his store, between three and four hours after he arrived in Omaha, he asked him what the matter was with him, and he said in reply that in going up from the depot he had slipped, got a fall, and struck something hard, and that he had hurt his side and the same leg that was injured before; that the court admitted the testimony of Keefer, to the effect that when he was selling him a harness at his store, about three hours after the arrival of the deceased in Omaha, the latter told him, in answer to his inquiry why he walked so lame, that he had slipped and hurt his ankle; and that the court allowed the baggage master, at the depot where Shryock went to ship his harness, to testify that, between two and three hours after his arrival in Omaha, he told him, in answer to a like question, that he had slipped and hurt the same leg that he hurt before. Each of these three witnesses testified that, when the deceased made these statements to them, respectively, he was lamer than usual, and Darst testified that he looked pale, said he was in pain, and acted as though he was. The objection urged upon our consideration, however, is not to the testimony of these witnesses, to the appearance, symptoms, and statements of the deceased to them as to his present condition and sufferings when he made these statements, and we dismiss that question here. The objection urged is that his statements that he had slipped and fallen, and struck against something hard, some hours before these statements were made, were mere narratives of a past occurrence, and were incompetent to prove the fact of the fall and accident. The rules of evidence which govern the trial of actions insure the stability, and measure the extent, of the rights of persons and property. Reversals, modifications, or variations of these rules tend to produce instability and uncertainty in these rights, and breed distrust of courts and of governments. The rule that hearsay testimony is incompetent evidence of a past occurrence rests upon settled principles of the law, the maintenance of which is essential to the preservation of personal liberty and property rights. The enforcement of this rule is not discretionary with the trial court, and its violation is fatal error. Waldele v. Railroad Co., 95 N. Y. 274; Tilson v. Terwilliger, 56 N. Y. 273; People v. Davis, Id. 95; Reg. v. Bedingfield, 14 Cox, Cr. Cas. 341; Meek v. Perry, 36 Miss. 190,

260; Merkle v. Bennington Tp., 58 Mich. 156, 24 N. W. 776; Patterson v. Railway Co., 54 Mich. 91, 19 N. W. 761; Lund v. Inhabitants of Tyngsborough, 9 Cush. 36; Martin v. Railroad Co., 103 N. Y. 626, 9 N. E. 505; Association v. McCluskey (Colo. App.) 29 Pac. 383, 384; Railway Co. v. McLelland, 27 U. S. App. 71, 10 C. C. A. 300, and 62 Fed. 116.

In Mima Queen v. Hepburn, 7 Cranch, 290, 295, Chief Justice Marshall said:

"It was very justly observed, by a great judge, that 'all questions upon the rules of evidence are of vast importance to all orders and degrees of men. Our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered for their antiquity, and the good sense in which they are founded.' One of these rules is that 'hearsay' evidence is, in its own nature, inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible. * * * If the circumstance that the eye-witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained."

This was a just and timely warning against laxity in the enforcement, and carelessness in the application, of this rule. Why do not the statements of these witnesses that the deceased told them, two hours or more after the occurrence, that he had slipped and injured himself, fall under its ban? The argument in support of their admission is that they were a part of the res gestæ at the time of the fall, and that for this reason they come within the well-known exception to this rule, that, whenever the act of a party may be given in evidence, his declarations made at the time of the act are not hearsay, but constitute verbal acts, and are for that reason admissible, if they are calculated to elucidate and explain the character and quality of the act, and were so connected with it as to derive credit from the act itself, and to constitute one transaction with it. It is, however, equally well settled that statements which constitute a mere narrative of a past transaction are never admissible in evidence because they are detached from any material act that is pertinent to the issue. Insurance Co. v. Mosley, 8 Wall. 397, 405, 416; Railroad Co. v. O'Brien, 119 U. S. 99, 104, 105, 7 Sup. Ct. 118; Fordyce v. McCants, 51 Ark. 509, 513, 11 S. W. 694; Railway Co. v. Becker, 128 Ill. 545, 21 N. E. 524; Railway Co. v. Ivy, 71 Tex. 409, 9 S. W. 346; Adams v. Railroad Co., 74 Mo. 553; Tennis v. Railway Co., 45 Kan. 503, 25 Pac. 876; Railway Co. v. Holland, 82 Ga. 257, 10 S. E. 200. The question is, were the statements of the deceased that he slipped and fell, made as much as two hours after the alleged fall, verbal acts done at the time of the fall, and a part of that occurrence, or were they mere narrations of that occurrence? The question seems to answer itself. After the slip and fall occurred, if they occurred at all, the deceased went about his business, met a friend at the hotel about an hour later, pursuant to a prior engagement, went with him to a harness shop, bought a harness, went with him to the de-

pot to send it to his home, then went to Mr. Darst's office, and finally, at about 10:30 p. m., returned again to the hotel. It was about 8:30 in the evening when he told Darst that he had slipped and fallen on his way up from the depot, and he went up from the depot about 5 o'clock in the afternoon. So far as this record discloses, he said nothing to the friend whom he subsequently met at the hotel, and who went with him to purchase the harness, and to carry it to the depot, about this slip and fall. He did not mention it to any one, except in answer to a question about his lameness or his health, and he mentioned it for the first time either in a harness shop, where he was buying a harness, or in a depot, where he was shipping it. None of his declarations were made at the place or at the time of the fall, but at later times, and in other places, when he was not falling, or arising from his fall, but when he was carrying on other transactions, entirely disconnected with that accident. He made his earliest declarations about it when he was engaged in the transaction of purchasing and shipping a harness. That transaction can hardly be said to be a part of the res gestæ at the fall in the alley two hours before, and, if it was not, how can the declarations made while he was conducting this harness trade and shipment, and thereafter, be so?

Counsel for the defendant in error cite but a single case in support of their contention that these declarations were a part of the res gestæ at the fall, and that case is Insurance Co. v. Mosley, 8 Wall. 397. Two questions were presented at the hearing in the supreme court in the Mosley Case—First, whether or not the declarations of a deceased person as to his bodily injuries and pains some time after he suffered a fall were admissible to prove his physical condition at the time they were made; and, second, whether or not his declarations, made immediately after the fall, that he had fallen, were competent to prove that fact. The court answered the first question in the affirmative, on the ground that his declarations of the former class related to present existing facts at the time they were made. It answered the second question in the affirmative, on the ground that the declarations of the latter class were made at the time and place of the accident, and immediately thereafter. These declarations of the latter class were two,—one to his son, and another to his wife. His wife testified that between 12 and 1 o'clock at night, after she and her husband had retired, he got up and went down stairs; that she did not know how long he was gone, but when he came back he said he had fallen down the back stairs, and almost killed himself; that he vomited as soon as he got into the room; that he did not sleep any more that night; and that she was up with him all night. The son testified that he slept down stairs, and that about 12 o'clock that night he saw his father lying with his head on the counter, and he said he had fallen down the back stairs, and hurt himself very badly. Thus it will be seen that these declarations were made within a few moments of the fall, at the place where it occurred, to the first persons the deceased met after the accident, and when he was suffering severely therefrom. The ruling that they constituted a part of the same transaction with the fall

has no tendency to show that declarations made in a harness shop or depot, in the course of the purchase and shipment of a harness, hours after a fall had occurred in a street in a city, constitute a part of the latter transaction. The declarations made in the Mosley Case were made at the place of the fall, immediately after it occurred, before any other transaction had intervened, and when that was the only transaction under consideration. The declarations in the case at bar were made at places distant from the scene of the accident. They were made hours after the fall, when other transactions had intervened between the fall and the declarations, and when the deceased was engaged in transactions entirely disconnected with the accident. Moreover, the case of Insurance Co. v. Mosley was decided by a divided court, and Justices Clifford and Nelson filed a vigorous dissent, which has, in effect, since received the sanction of the supreme court in Railroad Co. v. O'Brien, 119 U. S. 99, 104, 105, 7 Sup. Ct. 118. In the latter case the surviving members of the majority of the court in the Mosley Case joined in a dissent, while the majority of the court held that the declaration of an engineer, made from 10 to 30 minutes after an accident happened, was not admissible as a part of the res gestæ, because "the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it." In Fordyce v. McCants, 51 Ark. 509, 512, 11 S. W. 694, the deceased was found lying in great pain about 60 yards from a railroad wreck. In response to a telegram immediately sent, a doctor, after driving 12 or 13 miles, came to treat him, and his patient then told him that he had been thrown heavily across the corner of a seat in a car, and injured. The supreme court of Arkansas held that this declaration was not a part of the res gestæ at the accident, and reversed the judgment. In Leahey v. Railway Co., 97 Mo. 165, 10 S. W. 58, the supreme court of Missouri held that the declarations of a deceased child as to the manner in which he was hurt, made at the scene of the accident, and while surrounded by the persons who witnessed the calamity, were admissible as a part of the res gestæ; but that what the child said after being carried 50 or 75 feet, and laid on a cot, and from 5 to 25 minutes after the accident, was not so admissible. In Railway Co. v. Becker, 128 Ill. 545, 21 N. E. 524, the supreme court of Illinois held that declarations as to the manner in which the injury occurred, made by one who was injured by a street car in the middle of a street 80 feet wide, after he had arisen and walked to the sidewalk, in answer to the question, "What is the matter?" were not admissible as part of the res gestæ.

Perhaps these decisions sufficiently illustrate the rule which forbade the admission of the declarations of the deceased in this case to prove the fact of the accident. If not, a large number of authorities in support of this rule, in addition to those we have cited, supra, will be found in 21 Am. & Eng. Enc. Law, p. 104, note 2, and Id. p. 105, note 1. The declarations here in question were not a part of the res gestæ at the fall, and were incompetent to prove it, because they were not made during the continuance of that transaction, but after it had ended, because they were not made until subse-

quent transactions had intervened between the accident and the declarations, which completely detached the latter from the former, and because they were made in answer to inquiries, while the deceased was engaged in subsequent transactions entirely disconnected with the accident. They were mere narrations of a past occurrence. The result is that declarations made by a deceased person two hours after an injury from a fall in a street, and not at the scene of the accident, but while engaged in his ordinary business avocations in other places, that he had fallen, and sustained an injury from which he was suffering, are inadmissible, as a part of the res gestæ, to establish the fact of the fall, because they are mere narratives of a past transaction, which had ended before they were made.

It is argued that this judgment ought not to be reversed on this ground, because there was other evidence of this fact in the case sufficient to sustain the verdict, and its admission was not prejudicial to the plaintiff in error. But the court below expressly charged the jury to take these declarations of the deceased into consideration in deciding whether or not he had slipped or fallen, and whether or not he died from the effects of that fall. The jury may have been persuaded by these declarations to find a verdict for the defendant in error, when, in their absence, they would have found against him; and it is impossible for us to say that they were in no way influenced by them. The presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error complained of did not prejudice, and could not have prejudiced, the party against whom it was made that the rule that error without prejudice is no ground for reversal is applicable. Deery v. Cray, 5 Wall. 795, 808; Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct. 471; Smith v. Shoemaker, 17 Wall. 630, 639; Moores v. Bank, 104 U. S. 625, 630; Railroad Co. v. O'Brien, 119 U. S. 99, 103, 7 Sup. Ct. 118.

It was error for the court below to admit testimony on behalf of the defendant in error that the deceased was not addicted to the use of intoxicating liquors, because this testimony was not relevant to any issue in the case. The plaintiff in error had alleged that Shryock's death was caused by disease or bodily infirmity, and had made no averment that it was produced by intoxication, or by any other of the excepted causes named in the certificate in suit.

For the same reason the court rightly held that evidence tending to show that Shryock committed suicide, offered on the part of the plaintiff in error, was irrelevant and inadmissible. The association pleaded no such defense, but pleaded that the death was caused by disease,—a defense inconsistent with the theory of suicide.

There are other errors assigned in this case, but some of the questions they present may not arise upon a second trial, and no good purpose would be subserved by extending this opinion for their discussion.

The judgment below must be reversed, with costs, and the cause remanded, with directions to grant a new trial; and it is so ordered.

SAUNDERS v. UNITED STATES.

(Circuit Court, D. Maine. March 30, 1896.)

No. 26.

1. OFFICERS OF UNITED STATES—JAILERS OF STATE JAILS.
The jailer of a state jail, in which prisoners, under sentence or awaiting trial by the federal courts, are confined, is not an officer of the United States; and a United States commissioner has no power to call upon him to perform any service.

2. UNITED STATES MARSHALS—FEES—SERVICE OF MANDATE ON POOR CONVICT.
A United States marshal is entitled to a fee of two dollars for the service of a mandate to bring in a poor convict for examination, upon his application for release, pursuant to Rev. St. §§ 1042, 5296.

3. SAME—REMOVAL OF PRISONERS.
A warrant for the removal of a prisoner, confined in a jail remote from the place of trial, but within the district, to the place of trial, is unauthorized; and such a warrant must be regarded simply as an order of court, under Rev. St. § 1030, for the service of which the marshal is not entitled to any fee.

4. SAME—WARRANT OF PARDON.
A marshal is entitled to a fee of two dollars for the service of a warrant of pardon, pursuant to directions of the department of justice.

5. SAME—MITTIMUS.
A mittimus for the commitment of a prisoner is a warrant, for the service of which on such prisoner the marshal is entitled, under Rev. St. § 829, to a fee of two dollars.

6. SAME—DISTRIBUTING VENIRES.
A marshal is entitled to fees, limited, however, by the statute, to $50 for any one term, for distributing venires and paying constables. Harmon v. U. S., 43 Fed. 560, followed.

7. SAME—DISCHARGE OF POOR CONVICTS.
A marshal is not entitled to any fee for the discharge of a poor convict, after examination pursuant to Rev. St. § 1042.

8. SAME—EXPENSES.
It is not a sufficient objection to the allowance to a marshal of expenses, incurred while endeavoring to make an arrest, that the warrant was issued and served at the place where the court is located.

9. SAME—TRANSPORTATION—NEAREST OFFICER.
Under the act of March 3, 1893 (27 Stat. 609), as well as under that of August 18, 1894 (28 Stat. 416), it was the duty of the marshal or other officer arresting a prisoner to take him before the nearest commissioner or other judicial officer, for examination; and the marshal was not entitled to charge for the transportation of a prisoner, for examination by the commissioner who issued the warrant for his arrest, when another commissioner was nearer to the place of arrest.

10. SAME.
The statutory allowance to a marshal for transporting prisoners is intended to cover the cost of actual transportation, and cannot be charged where the marshal and the prisoner walked from the jail to the place of hearing.

11. SAME—ATTENDANCE OF OFFICERS.
The determination of the number of officers whose attendance is necessary, at a hearing of parties accused before a commissioner, is a matter for such commissioner; and the marshal is entitled to charge for the attendance of as many officers as are so found necessary. Harmon v. U. S., 43 Fed. 560, followed.

12. SAME.
The marshal is entitled to charge for attendance at an examination of a poor convict before a commissioner. Harmon v. U. S., 43 Fed. 560, followed.

13. SAME—TRAVEL—RETURN HOME DURING TERM.
A marshal is entitled to charge for travel from his home to attend court, as often, during the term, as the court is adjourned over one or more intervening days, except where such adjournment is from Saturday to Monday. Harmon v. U. S., 43 Fed. 560, and U. S. v. Shields, 14 Sup. Ct. 735, 153 U. S. 88, followed.

14. SAME—SEVERAL WRITS.
A marshal may charge for travel upon two or more writs against different persons, served at the same place and time. Harmon v. U. S., 43 Fed. 560, followed.

15. SAME—EXPENSES—ELECTION.
A marshal cannot, where he holds, at the same time, warrants against different persons, which are served at the same place, charge for his actual expenses upon one of such warrants, and for travel upon the other or others, but must elect between his actual expenses and his statutory charges for travel.

16. SAME—SEVERAL PARTIES.
Nor can a marshal, where he holds one warrant against two or more persons, served at different places, charge for travel in going to serve it upon one, and his actual expenses for the additional distance to serve it on the other or others.

17. SAME—NO SERVICE.
A marshal cannot be allowed charges for travel to arrest when no service is made.

18. SAME—POOR CONVICTS.
A marshal is entitled to charge for travel to serve mandates to bring in poor convicts.

19. SAME—PARDON.
Or to serve a warrant of pardon.

20. SAME—ACCOUNTS—WRONG—FISCAL YEAR.
The fact that a marshal, in making up his accounts, has entered charges for services in the wrong fiscal year, is not a sufficient reason for disallowing such charges.

Geo. E. Bird, for petitioner.
Albert W. Bradbury, U. S. Atty.

WEBB, District Judge. In this proceeding the petitioner seeks to recover the amount of certain fees charged by him for official services as marshal of this district, which were included in his regular accounts, and disallowed by the comptroller. The accounts were all in due order presented to and approved by the court. Proof of required notice and service of the petition has been made. The United States, by the district attorney, demurs to the petition, and the demurrer has been joined. It only falls on the court to pass upon the legality of the charges for services, the performance of which the demurrer admits. The total demanded in the petition is the sum of $1,653, distributed over more than four years.

The items are numerous, but may be conveniently classified under a few heads:

Class 1. Service of warrants and other writs in criminal cases. In this class are included:

(a) Service of warrants for the arrest of persons charged with crimes, 14 items, amounting to $28.

The petitioner abandons his claim for these, as it is found that the same service had been charged and paid for in other accounts.

(b) Service of 67 mandates to bring in poor convicts for examina-

tion, upon their application for release from imprisonment, at $2 each,—$134.

The objection is that this service should have been performed by the jailer. But the jailer is not an officer of the United States, and the commissioner has no power to call upon him to perform any service. The United States uses the jails of the state for the confinement of prisoners under sentence or awaiting trial. The Revised Statutes of the United States (section 5539) subject prisoners so confined to the same discipline and treatment as convicts sentenced under the laws of the state, and place them under the control of the officer having charge of the jail under the laws of the state. Rev. St. §§ 1042, 5296, regulate the method of the discharge of poor convicts. Upon application to a commissioner, in writing, by the convict, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter. To discharge this duty, the commissioner properly issues his mandate that the prisoner, without whose presence he cannot perform the duty of hearing and determining the matter, be brought before him. These proceedings, in Harmon v. U. S., 43 Fed. 560, affirmed by the supreme court in 147 U. S. 268, 13 Sup. Ct. 327, are held to be proceedings in a criminal case; and the marshal is the proper officer to execute all precepts issued therein. The fees for services of this class should be allowed to the full amount of $134.

(c) Service of warrants for removal of prisoners confined in jails remote from the place of trial, to the jail in the city where the trial was to be had; seven prisoners, at $2,—$14.

Rev. St. § 1030, provides that no writ is necessary to bring into court any prisoner or person in custody, but the same shall be done on the order of the court or district attorney. This statute is broad enough in its terms to cover cases like these where the removal was for long distances, but within the same district, though it may be doubted if such cases were in contemplation when the statute was enacted. Probably the primary object was to cut off charges for warrants when the jail was near the courthouse. But, however that may have been, the statute must be construed as it stands; and I must hold that these warrants for removal, as warrants of court, were unauthorized, and must be dealt with simply as orders of the court, for which the charge of $14 cannot be allowed.

(d) Service of a warrant of pardon,—$2.

Satisfactory evidence has been produced that this service was made by the express direction of the department of justice, instructing also that the marshal should report to the department. It was essential that the warrant of pardon, granted by the President, should be delivered, and should be accepted by the convict. U. S. v. Wilson, 7 Pet. 150. The charge is the same as that allowed by the fee bill for the service of other warrants, and the marshal should be paid therefor.

(e) Service of warrant of commitment of four prisoners,—$8.

In U. S. v. Tanner, 147 U. S. 661, 13 Sup. Ct. 436, it was held that a warrant of commitment was not served on a prison keeper, within

the meaning of that clause of Rev. St. § 829, which allows the marshal "for travel, in going only, to serve any process, warrant," etc. That case does not decide the question here presented; at most, it raises a query. "If a warrant of commitment can be said to be served at all upon any person, it is upon the criminal himself, rather than upon the jailer," is the suggestion of the court.

Rev. St. § 829, gives the marshal fees:

"For service of any warrant, attachment, summons, capias, or other writs except execution, venire, or a summons or subpœna for a witness, two dollars for each person on whom service is made."

Is a "mittimus," in legal terminology, strictly and properly a "warrant"? If so, the rightfulness of the marshal's charge is clear, under the statute. The ordinary employment of the term "mittimus" is merely a matter of brevity.

Hawk. P. C. bk. 2, c. 16, § 3:

"And inasmuch as the statute of 31 Car. II., commonly called the 'Habeas Corpus Act,' seems to suppose that all persons who are committed to prison are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate; and the constant tenor of late books, practice, and opinions are agreeable thereto."

In St. 31 Car. II. we find these expressions:

"Unless the commitment were for treason or felony, plainly and especially expressed in the warrant of commitment;" "unless for treason or felony plainly expressed in the warrant of commitment;" "upon view of the copy of a warrant of commitment or detainer."

The mittimus must be in writing, under the hand and seal of the magistrate issuing it, showing his authority. It must be properly directed, and must set forth the crime alleged against the party with convenient certainty, and ought to have a lawful conclusion. Hawk. P. C. bk. 2, c. 16, §§ 13–16, 18.

In Hale, P. C., the mittimus is constantly styled the "warrant."

Volume 1, p. 122, after specifying what a mittimus should regularly contain, adds:

"Yet I am far from thinking the warrant void that hath not all these circumstances."

Page 123: "And therefore the justification in false imprisonment against the gaoler may be good by virtue of such a warrant;" "and it seems to me (contrary to the opinion of my Lord Coke) that, if an escape be suffered willingly by the gaoler upon such a general warrant, it will be felony in him;" "and, therefore, if the conclusion of the mittimus be to detain him until further order of the justice, it is true it is an unapt conclusion) * * * but the commitment is notwithstanding good, if there be any tolerable certainty in the body of the warrant for what it is."

Volume 2, p. 583: "And this leads me to the mittimus or the warrant to the gaoler to receive him." "But, if the conclusion be irregular, I think it makes not the warrant void."

Page 584: "If the matter of the mittimus be otherwise sufficient to charge him in custody, it is a lawful warrant."

"Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the mittimus of the justice, or *warrant* under his hand and seal containing the cause of his commitment." 4 Bl. Comm. 303.

"Then such justice shall, by his *warrant*, commit him to the common jail," etc. 1 Archb. Cr. Prac. & Pl. 165. At page 167: "The

following is the form of the *warrant* of commitment." And the form given is in all essentials like those issued by the circuit court and commissioners.

U. S. v. Johns, 4 Dall. 413, Fed. Cas. No. 15,481: "By the Court. Upon habeas corpus, we are only to inquire whether the *warrant* of commitment states a sufficient probable cause to believe that the person charged has committed the offense stated."

"Though there should be no doubt as to the validity of the *warrant* of commitment;" "notwithstanding the *warrant* of commitment be defective." Gross, J., in King v. Marks, 3 East, 164.

"Though the *warrant* of commitment be informal." Le Blanc, J., 3 East, 166.

These examples show plainly that, in legal sense, a mittimus is a warrant. If the word in the statute is to be taken in its ordinary and popular sense, no difference appears. In the International Dictionary "mittimus" is defined: "A precept or warrant granted by a justice for committing to prison a party charged with crime; a warrant of commitment to prison." Webster's Unabridged Dictionary, edited by Goodrich & Porter, defines it in the same terms. Worcester's definition is: "A warrant by which a justice of the peace commits an offender to prison."

It follows that the charge was justifiable, and should not have been rejected. Upon what theory the treasury officers acted it is not easy to understand. Presumably not on the authority of Tanner's Case, as, of the original charge for five services, four were disallowed, and one allowed, with travel one mile; nor with regard to the statute, for that provides "two dollars for each person on whom service is made."

Class 2. Fees of marshal for distributing venires, and paying constables, at 15 terms of court; amount disallowed, $256.

The propriety of this class of charges is sustained by Harmon's Case. But the statute provides that they shall not exceed at any court $50. At the December term, 1893, of the district court, the total charged is $60. The excess of $10 must be denied the marshal, and the balance, of $246, be held due to him.

Class 3. One charge, of $1.50, for expenses while endeavoring to arrest.

The objection is that the warrant was issued and served at Bangor, and it seems to have been assumed that in such case there could not have been any expense in endeavoring to arrest,—an assumption that disregards the time frequently consumed in seeking and finding a person accused of crime, even in the town of his residence. But, in addition to the admission of the demurrer, I have the testimony of the marshal that these expenses were actually and necessarily incurred. They are allowed.

Class 4. Discharge of poor convicts after examination by commissioners; 66 discharges, at 50 cents,—$33.

The petitioner argues that these fees are given to him by the clause of section 829, Rev. St., which allows, "for every commitment or discharge of a prisoner, fifty cents." The regulation of fees by

statute was first provided for by the act of February 26, 1853, and, without question, related to such services as were then required of officers according to the practice up to that date. The marshal was under the duty of committing prisoners either to await trial or in execution of sentence. When the term of confinement expired, because there was no indictment found, or when a prosecution was ended by the entry of a nolle prosequi, or by acquittal, the prisoners were, by order of court, discharged, and the marshal was the agent of the court in executing such order. For these services the fee of 50 cents was granted. It was not until June 1, 1872, that congress made an enactment for the relief of poor convicts retained in jail solely for inability to pay a fine or fine and costs. Prior to that date, the only way by which such convicts could be released from their imprisonment was by executive pardon. The act of June 1, 1872, now found in Rev. St. § 1042, directs the course to be pursued. If, upon examination, the commissioner is satisfied of certain facts, he is to administer to the convict a prescribed oath; "and," is the statute, "thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts." In this matter of discharge, no duty seems to rest on the marshal. The commissioner gives the certificate directly to the jailer or keeper of the jail, setting forth the facts, of which one is the discharge, the result of examination. I am inclined to think that the taking of the oath by the convict ipso facto operates as a discharge, and that, for further detention, he might have his action. But, however that may be, I cannot find in those proceedings any authority for allowing the marshal discharge fees, and therefore decide against the petitioner as to these charges, amounting to $33.

Class 5. Transportation of prisoners.

(a) At the date of filing this petition, it contained three items of this class. But later, upon the marshal's explanation, two of them have been allowed and paid in full. There is left only one charge, of $12.80, for transporting one George W. Williams, from Augusta to Portland, a distance of 64 miles.

The actual transportation on June 2, 1893, is proved. The computation is correct. The United States contends that, inasmuch as a commissioner of the circuit court was at that time resident at Augusta, it was the duty of the officer to take his prisoner before such commissioner for examination; and that failing to do so, and, instead, taking him to Portland, before the commissioner who issued the warrant, he cannot be allowed for transportation. This contention is based upon the following terms of the act of March 3, 1893 (27 Stat. 609):

"It shall be the duty of the marshal, his deputy, or other officer who may arrest a person charged with any crime or offence, to take the defendant before the commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him; and no mileage shall be allowed any officer violating the provisions hereof."

By Act Aug. 18, 1894 (28 Stat. 416), it is made the duty of the officer making the arrest "to take the defendant before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction under existing laws,"—for the rest of the sentence following the terms of the act of 1893 on this subject.

In this case the complaint was received and the warrant issued by a commissioner at Portland, and the prisoner was taken before him for examination. On the part of the petitioner it is argued that the act of 1893 cannot properly be construed to mean the commissioner who is nearest the place of arrest; that the qualification of nearness is confined to other judicial officers; that the words "the commissioner" are, by the arrangement of the language and the form of the sentence, to be taken independently of the provision as to other judicial officers, and must be interpreted as referring only to the commissioner who issued the warrant. And, in confirmation of this argument, the change made in the statute by the act of 1894 is referred to. It is contended that, by this change, congress has interpreted the pre-existing statute, and furnished the construction to be adopted by the court.

It is the province of the courts to construe the statutes enacted by the legislative branch of the government. A congressional interpretation of an existing statute will control the courts in the future, since it must be regarded as new legislation, but it is of no weight in deciding the construction as to accrued rights or liabilities. So, if it be admitted that, by this change in phraseology, congress expressed the opinion that the act of 1893 was to be construed as the petitioner contends, it would not thence follow that the court is bound to adopt that construction. But it is more probable that the later legislation was designed to remove all possible ambiguity in the earlier. If there were any such ambiguity in the particular question now before the court, it could appear only upon very nice criticism of the language for the purpose of escaping its obvious import. Following the general rule for the construction of statutes, that the intention of the legislature is to be resorted to where the language is ambiguous, it does not admit of doubt that the true meaning of the act of 1893 is the same as that of the act of 1894. I must therefore hold that the disallowance of this item of $12.80 was right.

(b) Sixty-three charges for transporting prisoner from jail to appear before the commissioner for examination as a poor convict; in each case one mile,—in all $12.60.

While the statute allows the marshal, for transporting criminals, 10 cents a mile for himself and for each prisoner, it is manifest that the fee is given only in case of actual transporting, and is intended to cover its expenses. When, as in these cases, the officer and the convict walked, there was no transportation, within the meaning of the statute, and the marshal's charges were not justified.

Class 6. Attendance of marshal and deputies, before commissioners, at examination of parties accused.

(a) The marshal's account contained charges in two cases for the attendance of himself and one deputy, amounting to $8.

The attendance of one officer only in each case was allowed, on the assumption that the attendance of more was unnecessary, and there was suspended $4, which has not since been allowed and paid. Harmon's Case establishes that the determination of the number necessary is a matter for the commissioner. The suspension of this charge of $4 was incorrect.

(b) Attendance of marshal before commissioner on 25 separate days, at examination of poor convicts, $50; and attendance of one deputy on 27 days, in like cases, $54.

Under the authority of Harmon's Case, the petitioner should be paid these items, amounting to $104.

Class 7. Travel of marshal from his home to attend court; distance, 168 miles.

The law in respect to these charges is plainly laid down in Harmon's Case, thus:

"This allowance is not expressly, or by any reasonable implication, restricted to a single travel at each term, but extends to every time when he may be expected to travel from his home to attend a term of court. If the court sits for any number of days in succession, he should continue in attendance, and is entitled to only one travel. But, if the court is adjourned over one or more intervening days, he is not obliged to remain at his own expense at the place of holding court, but may return to his home, and charge travel for going anew to attend the term at the day to which it is adjourned." Harmon v. U. S., 43 Fed. 560–565, affirmed 147 U. S. 268–279, 13 Sup. Ct. 327.

In U. S. v. Shields, 153 U. S. 88–92, 14 Sup. Ct. 735, it is decided that an adjournment from Saturday to Monday cannot be considered as an interruption of the term, or as a suspension of the business of the court, so as to bring the right to charge travel within the rule laid down in Harmon's Case.

Notwithstanding these authoritative expositions of the statute, the accounting officers lay down the rule: "When the adjournment was less than three days, the travel is disallowed." Moreover, they have, in dealing with these claims of the marshal, disregarded all difference between the circuit court and the district court. For example, the circuit court was adjourned from December 17th to January 2d. The marshal was in attendance on the district court December 31st, and, on its adjournment to January 5th, returned to his home, and has charged for travel to the circuit court on the 2d of January. This was disallowed, because there was only one day's adjournment. If the attendance upon the district court had continued to the day to which the circuit stood adjourned, there could have been no actual travel to be charged. But, where the travel was actually performed, it was properly charged. But the charges for travel to the circuit court on July 10, September 25, and October 22, 1893, and those of August 7, October 29, November 5, December 10, December 17, 1893, and of January 8 and 29, February 19, and March 19, 1894,—12 items of $16.80; a total of $201.60,—must be rejected, as they were all cases where the adjournment was from Saturday to Monday.

Class 8. Travel in going only to serve precepts, warrants, etc. Under this class are included:

(a) Charges for travel on two or more writs against different persons, served at the same place and time.

These charges were properly made. The marshal was authorized to make them, and should be paid. Harmon v. U. S., 43 Fed. 560–566.

(b) Charges for travel upon one warrant when, upon another in his hands, against a different person, at the same time and served at the same place, charges for actual expenses were made, and have been allowed and paid; also, charges where, having one warrant against two or more persons, travel was charged going to serve upon one, and actual expenses for the additional distance to serve on the other or others.

The petitioner contends that part of these charges are permitted by the last clause of section 829 of the Revised Statutes:

"In all cases where mileage is allowed to the marshal, he may elect to receive the same or his actual traveling expenses, to be proved on his oath, to the satisfaction of the court."

He maintains that the words "in all cases" are equivalent to "upon any process, warrant, attachment, or writ"; and that as he is allowed mileage on several writs in his hand at the same time, and served on different persons at the same place, he can, at his election, charge actual expenses on one and full mileage upon the other. As to the other part, where more than one person was served with the same process, he justifies it under that portion of section 829 which gives him travel in going to serve on the most remote person to be served, adding thereto the extra travel which is necessary to serve it on the others. In this case, he contends, it is optional with him to charge his actual expenses, instead of such extra mileages.

The argument is specious and unsound. The choice given is between mileage and expense of the trip, and was unquestionably given as a matter of consideration to the officer, and to protect him from pecuniary loss in the performance of his duty. While the allowance of mileage may be regarded as designed to reimburse him for his expenses, it is practically to some degree compensation for time and labor. When the mileage allowable will not cover the expense of the trip, the officer is protected by this privilege of waiving the mileage, and collecting what he has been compelled to pay out. If the mileage exceed his expense, he is not required to account for the surplus. All the mileage he might charge for going the trip must be waived if he elects to take his expenses. The impropriety of a different course is seen if the writs he was to serve were in suits commenced by different private persons. Both could not be made to pay the actual expenses of the marshal; yet, if his construction of the statute is right, that would result. Each suit is a case. Upon each writ served on different persons at the same place he would be justified in demanding full travel, and in each case might, at his pleasure, charge actual expenses instead. Or, if he makes the election of expenses on one writ only, upon which should the expense fall? It is certain, expenses will not be claimed when they are less than the mileage amounts to. Therefore one plaintiff would be subjected to unequal and excessive charge for the same service. When the question of claiming mileage for one part, and expenses on the other part, of the same service, is examined, it

is still weaker. The action of the accounting officers in rejecting items of the kinds described was correct. They amount to $50.10.

(c) Charges for travel to arrest when no service was made.

The statute gives "travel, in going only, to be computed from the place where the process is returned to the place of service, or when more than one person is served therewith, to the place of service which is most remote." The implication is obvious that, before any travel can be charged, service must be made. Without service there can be no computation of travel. It would be measuring distance with only a single point,—that of termination, and no point of beginning. These charges, amounting to $204.42, cannot be sustained.

(d) Travel to serve mandates to bring in poor convicts.

These are proper charges, for travel, in going only, to make the service, and should be paid, $17.28.

(e) Travel to serve warrant of pardon.

The warrant was sent from the department of justice to the marshal, with instructions to serve it, and make report to the department. It is familiar law that a pardon is inoperative till delivered and accepted. The travel was necessary under the order of the department, and is properly charged at $3.60; but, probably by inadvertence in the statement of differences, only $3.30 was actually withheld from the marshal, and for so much he still has a just claim.

Class 9. Sundry charges of actual expenses of traveling in service of process, warrants, etc.,—in all $57.70.

Of this total, $24.85 was for expenses in cases where no arrest was made; but the officer was allowed, and has received, the statute allowance for expenses while endeavoring to arrest. The excess of $24.85 cannot be allowed. The sum of $32.85, included in the above total of $57.70, is for charges of expense when on the same trip, but upon other warrants mileage was charged and paid. What has been said in regard to the marshal's right to have both mileage and expenses on the same trip, although it was to serve more than one warrant and on different persons, applies to these charges. They must be rejected.

Class 10. Fees for services in sundry civil cases, wherein the United States were plaintiffs,—$90.52.

The only objection made to these charges was that, in making his accounts, the marshal had entered them in the wrong fiscal year. Such an error does not deprive him of his right to compensation, and in this proceeding the regulation as to years does not influence. It may, however, be well to say that transferring the charges to the proper fiscal year would not in any year swell the marshal's emolument above his lawful maximum. These items are allowed.

Class 11. The only other charge is for expense for light, cleaning courthouse and lockup at Bath, at the September term, 1890, of the district court, charged among miscellaneous expenses.

The charge was for $6.50, and was properly vouched; but, upon the mistaken theory that it was charged against appropriation for "pay of bailiffs," etc., and was carried into the abstract as $8, the sum of $8 was withheld from the marshal. A term of the district court is, by the statute, assigned to be holden at Bath on the first

Tuesday of September of each year. The United States have no courthouse there, and the county has no jail. The county has always allowed to the United States the use of its courthouse, without any other charge than the actual cost of lights and the expense of cleaning after the court ends. On the same terms, the city of Bath extends to the United States the use of its city lockup for the detention of prisoners during the session of the court. This charge was for such expenses, and amounted to $6.50. The voucher was in the name of John W. Ballou, who attended to having the cleaning done, and settling with the gas company for light. Mr. Ballou is the sheriff of the county. In the same quarter's accounts of the marshal was a charge of Mr. Ballou as bailiff, attending the court, which amounted to $8. Evidently, the accounting officers did not understand the facts, and concluded that these were double charges for the same thing, and charged also in one case to the wrong appropriation. They accordingly disallowed and refused payment of $8. It was an unjustifiable disallowance, and the marshal should be paid the amount.

The result is that various claims specified in the petition, and amounting to $627.52, are improper charges, and are rejected; and the balance, of $1,025.48, was rightly charged. The demurrer is overruled. Judgment for the petitioner for $1,025.48, and costs, according to the statute.

Note. To avoid delay and expense of a threatened appeal, on that point, the petitioner has remitted the sum of $8 allowed for the service of warrants of commitment—as the same question is involved in another petition by him.

SAUNDERS v. UNITED STATES.

(District Court, D. Maine. April 2, 1896.)

No. 17.

1. UNITED STATES MARSHALS — FEES — ATTENDANCE BEFORE COURT AND COMMISSIONER.
   A United States marshal is entitled to charge for the attendance of himself and his deputies before United States commissioners on the same days on which the circuit or district courts are in session, and fees for attendance on those courts are charged and paid.
2. SAME—MITTIMUS.
   A marshal is entitled to charge fees for the service of warrants of commitment. Saunders v. U. S., 73 Fed. 782, followed.

Geo. E. Bird, for petitioner.
Albert W. Bradbury, U. S. Atty.

WEBB, District Judge. The petition in this case was filed April 15, 1895. Proof of service as required by the statute has been made. The claim of the petition is for fees for attendance of himself and deputies before United States commissioners, and bringing in and guarding prisoners, on the same days that the circuit or the district court was also in session, and fees for attendance on those courts was charged and paid. The time covered by the petition is from February 6, 1890, to March 8, 1894. For the marshal's personal

attendance 89 days, and for that of his deputies 91 days, in all 180 days, at $2 per day are charged, or $360, in the petition as originally filed. By amendment, charges of $4 on July 22, 1891, and $4 on September 19, 1891, are struck out, leaving claimed the sum of $352. The United States has pleaded that the services specified in the petition were never performed, and has also filed a counterclaim or account in set-off to the amount of $504, for moneys before paid to this petitioner, as the United States now contends, improperly, for the service of 252 warrants of commitment during the years 1890, 1891, and 1892, for which it is said no fees were by law allowed. The items included in the petition were never entered in the accounts of the marshal that were presented from time to time to the court, and approved, for the reason that it was understood that such charges would not be allowed; and now the United States contends that the charges are improper.

At the hearing, the government did not contest the actual attendance as charged, except as to four items, viz. November 2, 1891, in the case of Tripp, before Commissioner Bradley, $4; November 14, 1891, case of Rogers, before Commissioner Rand, $2; May 23, 1893, Johnson's case, before Commissioner Bradley, $4; September 21, 1893, case of Carleton et al., before the same commissioner, $4. But the proof is plenary as to all the other items in the petition, and as to the charges of May 23, 1893, and November 14, 1893. The charge of September 21, 1893, is proved to be a mistake of date. The service was actually rendered on the 20th day of September, and is so entered in the officer's calendar. I do not think this mistake is fatal to the petitioner's right to recover for this item. But the charge in Tripp's case, under date of November 2, 1891, for $4, has not been satisfactorily established by the evidence. Tripp, on his arrest, had, before that date, been fully examined by the commissioner, and, upon decision of probable cause, had been ordered to recognize with sureties for his appearance at the next term of the court, to answer, and, for want of recognizance, to stand committed. He failed to recognize, and was committed to jail. Later, he was able to find sureties, and was by the commissioner admitted to bail. The evidence fails to show that the prisoner was brought before the magistrate, or the actual attendance of the officers. This item of $4 is therefore disallowed.

In U. S. v. Erwin, 147 U. S. 685, 13 Sup. Ct. 443, the statute touching fees for the attendance of a district attorney before a commissioner on the same day that he also attended before a court is construed, and the right of the attorney to be paid for both attendances is upheld. The construction of the statute in that case must govern in this. If anything, under the statute, the case of a marshal is clearer than in respect to a district attorney; and the petitioner rightly claims, and is entitled to be paid, the items he has proved, amounting to $348, unless that right is canceled, in whole or in part, by the counterclaim of the government. Of the right of the United States to file a counterclaim, and to judgment upon it when properly proved, McElrath v. U. S., 102 U. S. 426, and U. S. v. Burchard, 125 U. S. 176, 8 Sup. Ct. 832, are conclusive.

The petitioner admits that he has been paid the several sums charged in the counterclaim, for serving warrants to commit. The question, therefore, is the lawful propriety of such charges. In another case of this same petitioner, decided this week (Saunders v. U. S., 73 Fed. 782), I fully and at some length considered the right of the marshal to be paid a statutory fee of $2 for service of a warrant to commit, and sustained the right. It is not necessary to repeat the opinion on this question filed in that case. I adopt what I there said, without qualification. It follows that no part of the United States' counterclaim is established, and the petitioner is entitled to judgment for so much of his demand as he has proved, or $348.

Judgment for the petitioner for $348 and costs is ordered.

VAN DUZEE v. UNITED STATES.

(District Court, N. D. Iowa, E. D. April 23, 1896.)

1. CLERKS OF COURTS—FEES—ORDER FOR BOOKS.
   Where the clerk of a United States court, pursuant to the practice of such court, makes an application to the court for books necessary in his office, and the court makes an order directing the marshal to furnish such books, the clerk is entitled to the statutory fees for filing such application, entering the order upon the record, and making and certifying two copies thereof for the marshal, to be attached to his original and duplicate accounts, but not to a fee for attaching his seal to such certificates.
2. SAME—JURY NOTICES.
   Where the rules of court require a notice of the drawing of juries to be posted up on the door of the clerk's office, the duty of posting such notice is properly to be performed by the clerk, but is not one for which he is entitled to compensation.
3. SAME—DOCKET FEE.
   Under Rev. St. § 828, the proper docket fee in criminal cases, where a plea of not guilty is first entered, but is subsequently withdrawn, and a plea of guilty entered, on which the case is disposed of, is one dollar.
4. SAME—COPIES OF INDICTMENT.
   The clerk is entitled to the statutory fee for filing demands made by defendants in criminal cases, for copies of the indictments against them, when by the standing rule of court the defendants are entitled to such copies, upon making demand therefor in writing, and the clerk is also entitled to the fees for making and certifying such copies.
5. SAME—FILING DOCUMENTARY EVIDENCE.
   When the court makes an order requiring the government to place in the hands of the clerk the several documents upon which it expects to rely as evidence in a criminal case, for the purpose of giving the defendant an opportunity to inspect the same, the clerk is entitled to the statutory fee for filing such several documents.
6. SAME—ENTRY OF SENTENCES.
   Where two or more parties are jointly indicted, tried, and convicted, the sentence imposed upon each should be separately entered, and the clerk is entitled to a separate fee for entering each sentence.
7. SAME—JURY LISTS.
   No fee is allowed or chargeable by the clerk for recording the names of persons forming the jury list, or for entering the names upon the tickets placed in the box for drawing.
8. SAME—COPIES OF PAPERS FOR DISTRICT ATTORNEY.
   The district attorney is entitled to obtain, at the expense of the government, copies of indictments and opinions of the court, needed in the prep-

aration of cases for trial, and the clerk is entitled to charge the fees for such copies in his accounts with the government.

9. SAME—APPLICATIONS FOR SUMMONS TO DEFENDANT'S WITNESS.
The clerk is entitled to fees for filing applications by defendants in criminal cases for orders directing witnesses to be summoned at the cost of the United States, and fees for entering the orders of court upon such applications.

10. SAME—PRACTICE.
All applications in criminal cases for summoning witnesses, copies of indictments, or other matters in which the action of the clerk is involved, should be made to appear, with the action thereon, on the records, or among the files of the court.

Action to recover for certain items of service rendered by the plaintiff as clerk for the United States courts in and for the Northern district of Iowa.

Alonzo J. Van Duzee, in pro. per.
Cato Sells, U. S. Dist. Atty., and D. W. C. Cram, Asst. U. S. Atty.

SHIRAS, District Judge. The plaintiff in this action is the clerk of the United States courts for this district, and sues to recover the sum of $327.71 as fees due him for services rendered by him as clerk, but which were not allowed him by the department at Washington. Several of the items included in the account attached to the petition are not now contested by the government, and likewise some of the items are not now claimed by plaintiff.

The first class of items in dispute is that wherein the clerk charges the statutory fee for filing applications made by him for orders directing the marshal to furnish books needed for the business of the courts, and the folio fee for entering upon the records the orders made upon such application by the court. Since these services were rendered, the department at Washington, by instructions issued to the marshal, has changed the mode of obtaining books for recording the proceedings of the court, but, as the proceedings for obtaining the books in question were had before these instructions were issued, the duty of the clerk must be determined by the practice formerly prevailing. When the services were rendered it was the practice of the court, when record or other books were needed by the clerk, to have the clerk file a brief application, setting forth the character of the book desired, and the need existing therefor. If the showing was sufficient, an order was granted, directing the marshal to furnish the book. This order the clerk entered upon the records of the court. Two certified copies of the order were furnished to the marshal, to be attached by him to his original and duplicate accounts, as evidence of his authority to procure the books. Under these circumstances I hold that the clerk is entitled to the statutory fee for filing the application, entering the order of the court upon the record, and for making and certifying two copies of the order for the use of the marshal; but under the ruling of the supreme court in U. S. v. Van Duzee, 140 U. S. 169–176, 11 Sup. Ct. 758, the clerk is not entitled to a fee for attaching the seal to such certification.

The next class of items in dispute is that which includes charges made by the clerk for preparing and posting up notices of the time

and place for drawing the juries for the several terms of court, and for filing such notice after the drawing has been had. Under the rule of this court, 10 days' notice of the drawing of juries is required to be given by posting up a written notice upon the front door of the clerk's office. This duty has always been performed by the clerk. It is now claimed by the government that it falls within the duty of the jury commissioner. In this view I cannot concur. All the necessary orders for drawing the juries are prepared by the clerk and signed by the judge, and I know of no rule that places the duty of giving notice of the time of drawing upon the commissioner. The difficulty, however, lies in the fact that there is no express provision in the fee bill for services of this character, and therefore it must be held, under the rule laid down in U. S. v. King, 147 U. S. 676, 13 Sup. Ct. 439, that these services are not such as to entitle the clerk to compensation, although properly performed by him as clerk of the court. These items are disallowed.

The next point at issue arises upon the question of the amount of the docket fee to be charged in criminal cases wherein a plea of not guilty is first entered by the defendant, but is subsequently withdrawn, and a plea of guilty is entered, upon which the case is finally disposed of. Section 828, Rev. St., provides that in cases wherein issue is joined, but no testimony is submitted, the fee shall be two dollars, but in cases which are dismissed or discontinued, or where judgment or decree is rendered, without an issue, the fee shall be one dollar. On part of the clerk it is claimed that the cases in question come within the two dollar clause, whereas on part of the government it is contended that they fall under the dollar clause. The section in question names three classes of cases in which a certain fee is allowed the clerk, the first being cases wherein issue is joined, and testimony is submitted; the second, wherein issue is joined, but no testimony is submitted; and the third, wherein the case is dismissed, discontinued, or judgment is rendered without an issue. It is apparent that these fees are not properly chargeable until the case is disposed of, and then the amount to be charged is dependent on the action had. If the case went to hearing upon an issue, and testimony was adduced thereon, then the fee to be charged is three dollars. If the case was disposed of upon some issue joined, which did not require testimony, as upon a demurrer, or upon an answer which admitted the facts, presenting only questions of law, then the fee to be charged is two dollars. If the case was dismissed, or if it was disposed of without an issue of law or fact being presented, as upon a default in a civil case, or upon a plea of guilty in a criminal case, then the fee to be charged is one dollar. The condition in which the case stands when finally disposed of is the criterion for the fee to be charged. The fact that originally a plea of not guilty was entered does not affect the question. Thus if, in a criminal case, a plea of guilty should be entered, but subsequently the court permitted the defendant to withdraw such plea and to enter a plea of not guilty, and upon the issue thus joined a trial should be had, and testimony should be introduced, I entertain no doubt the clerk could rightfully charge a fee of three dollars upon the ground that the

amount of the fee, lawfully chargeable, depends upon the mode in which the case was finally disposed of. I hold, therefore, that in criminal cases which are disposed of upon a plea of guilty, the fee to be charged is one dollar, even though it be true that originally a plea of not guilty was entered, but which was withdrawn before final action was had in the case.

The account sued on contains several items for filing demands by defendants in criminal cases for copies of the indictments pending against them, and for furnishing copies duly certified. The record rule of this court requires the clerk, whenever a demand therefor is made, to furnish a copy of an indictment to the defendant. Under the provisions of this rule the clerk is not required to furnish the copy unless demanded by the defendant. In order that the proper evidence of such demand may be preserved, the demand is required to be in writing, for otherwise the court, in passing upon the accounts of the clerk, would not have evidence that the demand had in fact been made, and therefore the practice is to have the demand made in writing, and by filing this in the case the proper evidence is preserved of the fact upon which the duty of the clerk to furnish a copy is made to depend. For filing such papers the clerk is entitled to the statutory fee. For the folio fee for making the copy and the fee for certifying under seal to the copy the clerk is entitled to the statuory amount, as was ruled in U. S. v. Van Duzee, 3 C. C. A. 361–366, 52 Fed. 930.

The next item in issue is that wherein the clerk charges the statutory filing fee for filing 696 papers and documents in connection with what are known as the Van Leuven and Kessel Cases. These were indictments for various alleged frauds in connection with the business of a pension agent or attorney carried on by Van Leuven. In all there were 43 separate cases filed. On behalf of the defendants application was made to the court for an order requiring the filing of the names of the witnesses before the grand jury, with a minute of the testimony as taken by the clerk of the grand jury, together with the written or documentary evidence which the government expected to introduce in the several cases. The court held that the government was not under obligation to furnish the names of the witnesses or the minutes of their testimony, but further ruled that it was due to the defendants that they should have opportunity to inspect and take copies of the particular documents, reports, affidavits, and the like which the government claimed were forged or falsified. In other words, the court in effect held that the defendants were entitled to a bill of particulars in the several cases, and that the defendants were entitled to an inspection of the original papers, for only by such an inspection could the defendants know whether the papers expected to be used against them were in fact prepared by or signed by the defendants; and therefore the court made an order that the government, in the several cases, should place in the hands of the clerk the several written papers, affidavits, and other documents which the government expected to rely upon in the prosecution of the case. In obedience to this order, the district attorney deposited with the clerk the papers in question, and

the clerk filed same in the usual manner. Ordinarily, when the government is directed to furnish a bill of particulars, the same is filed by the clerk, and I know of no reason why the same should not be filed as part of the proceedings in the given case. In the cases now under consideration the papers deposited with the clerk were so deposited separately, and not in such form that a single filing upon one cover might serve as a filing for the entire number. The clerk received the several papers in the form in which they were furnished him by the government, and marked them "Filed" in the usual manner. I hold that he is entitled to recover therefor.

The next question at issue arises upon the fact that two parties—Marlow and Canty—were jointly indicted for burglarizing a post office. A joint trial was had. A verdict of guilty was returned, and the defendants were sentenced to imprisonment in the penitentiary for a period of two years each, and to pay a fine of $100. The clerk made a separate entry of the sentence against each defendant. The government claims that the entry of sentence should have been joint, and that only a fee for one entry should be allowed. Where two or more parties are jointly indicted and convicted, the better practice is to enter the sentence separately against each one. In fact the court considers the case of each defendant separately when determining the sentence to be imposed, and no defendant is bound by or interested in the sentences imposed upon his co-defendants. In cases of joint indictments and trials, the proper course is to include in one entry the proceedings so long as they are in fact joint, but, when the matter of sentences is reached, then in fact the defendants are dealt with separately, and the sentences imposed upon each one should be so entered. In fact, the sentences pronounced against two or more may be similar in terms, but they are not joint, and hence the proper practice is to make a separate entry of the sentence against each defendant. Thus in 1 Bish. Cr. Proc. § 1035, it is said: "The punishment, we have seen, is to be several; and the sentence is, in form, several, not joint." I hold that in cases of joint indictment and trials the sentences against two or more defendants should be separately entered, and, when thus entered, the clerk is entitled to the proper fee for each entry.

Another class of items in regard to which question is made are those wherein the clerk charges for services in recording upon the book kept for the purpose the names and addresses of persons forming the jury list, and for entering the names upon the tickets placed in the box from which the juries are drawn. These services are proper, but under the ruling of the supreme court in U. S. v. King, 147 U. S. 676, 13 Sup. Ct. 439, it must be held that they were performed as part of the general duties of the clerk, and, as the fee bill makes no provision for compensation for such services, none can be allowed.

Exception is also taken to the charge made by the clerk for furnishing copies of indictments in several cases for the use of the district attorney, upon præcipes filed therefor, by the district attorney. It is the duty of the clerk to furnish a copy of any record or paper filed in his office to any one entitled thereto, and the fee

bill fixes the compensation to be paid therefor. There can be no question that for the copies made in these cases the clerk is entitled to the statutory fee, but the mooted question is whether the government is liable therefor. The plaintiff in the cases was the United States government, and it was for its use and benefit that the copies were furnished. It is suggested that the district attorney, as an officer of the court, had access to the original indictments, and therefore did not need the copies. While the district attorney could have access to the indictments in the clerk's office, he would not be permitted to remove the same. The district attorney does not reside at the place where the court is held, and where the indictments are kept, and he doubtless needed the copies in order that he might properly prepare the cases for trial. Under these circumstances the clerk would not have been justified in refusing to furnish copies for the use of the attorney for the government, and, as they were furnished for the benefit of the government, upon the direction of the district attorney, I see no reason why the cost thereof should not be paid by the United States. These items are allowed, including the fee for filing the præcipe or written order for the copies.

In item No. 17, a charge is made for copies of opinion furnished the district attorney. These opinions were given in writing by the court in the several cases against Van Leuven and Kessel, who were indicted for frauds against the United States in connection with various pension cases. The indictments were attacked by motion and demurrer. In some cases the indictments were held bad in whole or as to some counts, and in other cases the demurrers were overruled. Many of the defects existing were cured by procuring new indictments at a subsequent term. When the district attorney applied to the clerk for copies of these opinions, it was clearly the duty of the clerk to furnish them, and, as they were furnished to the attorney of the government, in order to aid him in the performance of his duty to the government and in furtherance of the interests of the government, I see no reason why the United States should not be held liable for the usual copy fee. This item is allowed.

Item 48 is for filing applications made by defendants, under the provisions of section 878, Rev. St., for orders of court directing defendants' witnesses to be summoned at cost of the United States, and for entering the orders of the court upon the application. Under the settled practice of the court these fees are proper, because it is made the duty of the clerk to file the applications and enter the orders upon the records. It is perhaps proper for me to say in this connection that in my judgment all applications made in criminal cases for summoning witnesses under section 878, for copies of indictments under the rule of this court, or for any other matter wherein the action of the clerk is involved, the evidence of such demand should appear either upon the records or among the files of the court, and the action or order of the court should in all cases be entered upon the records. In this way record or written evidence is always preserved of all action taken. If this is not done, the rights of parties may be left dependent upon the uncertain recollection of parties, to say nothing of the difficulty of procuring the

evidence after the lapse of some time, and when the parties are not in attendance upon the court.

The remaining items not included within the foregoing holding are all covered by the rulings of this court heretofore made in the several cases of Van Duzee v. U. S., and reported in 41 Fed. 571, 48 Fed. 643, and 59 Fed. 440; and, following the rulings therein made, plaintiff is allowed the items in question; it thus appearing that plaintiff is entitled in the aggregate to the sum of $247.11, for which amount judgment will be entered.

UNITED STATES v. PATRICK et al.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1896.)

No. 653.

1. INDIAN AGENCIES — EMPLOYMENT OF PHYSICIAN — AUTHORITY OF SECRETARY OF INTERIOR.
   The provision in the appropriation act of March 3, 1875, that the number and kind of employés at each Indian agency shall be prescribed by the secretary of the interior, gives him authority to employ physicians to attend Indians; and the fact that during 11 years the secretary had approved vouchers and directed payment of bills rendered by a particular physician employed at various times by an Indian agent is a sufficient determination by the secretary that one of the employés of such agency shall be a physician, to be called by the agent from time to time, to render medical services as the Indians require.

2. SAME—PRINCIPAL AND AGENT.
   Where the secretary of the interior had authority to employ physicians at an Indian agency, and his subordinate, the Indian agent, did employ them, and the secretary approved their bills, and directed the agent to pay them out of the public funds in his hands, *held*, that the United States and the secretary were bound by the agent's acts, both because of the ratification thereof, and because, by their action, they induced him to expend money which he would not otherwise have disbursed.

3. SAME—CLAIMS AGAINST UNITED STATES — REJECTION BY ACCOUNTING OFFICERS.
   Where, in an action by the United States to recover an alleged shortage due from an Indian agent, the government introduced a transcript from the books and proceedings of the treasury department, which, among other things, contained an opinion by one of the accounting officers disallowing a claim by the agent for one of the items sued for, and discussing the vouchers on which the claim was based, *held*, that this was conclusive proof that the claim had been presented to, and disallowed by, the accounting officers, as required by Rev. St. § 951.

4. SAME—PLEADINGS AND PROOF.
   In an action by the United States on the bond of an Indian agent, defendants pleaded that all the moneys with which the agent had been charged had been properly expended by him, and, at the trial, offered to prove a credit of a specified sum paid to physicians for services to Indians. *Held*, that the fact that defendants had not pleaded this claim for a credit did not render proof thereof inadmissible, it appearing that the United States were already correctly informed of the amount and character of the claim, by reason of its officers having examined and disallowed the same, and that these facts were proved by a transcript from the books of the treasury department, in the hands of the United States attorney, who had not moved to make the answer more specific.