

to all riparian owners, and all rights in and control of the waters of the canal are vested in the United States, and no persons can have use, either of water or works, except under permission, and subject to any regulations which may be imposed. Without such permission the use would constitute a trespass. In this case congress provides that permission may be granted through rules and regulations to be adopted by the executive department having charge of the works. It is true that congress might prescribe the rules, either in general terms or in detail, but they are clearly of administrative, rather than legislative, nature, and may be relegated entirely to any executive agency, either with or without direct provisions by congress. The discretion which is conferred, having regard to the use and care of the property of the United States, seems to appertain to the executive department, and to be of the class defined in *U. S. v. Eliason*, 16 Pet. 291, 301. The regulations so made constitute the only permission for using the water, and without permission there can be no claim of right to use, I presume, even without declaration by congress to that effect; but section 7 of the act of September 19, 1890, as amended by the act of July 13, 1892, clearly prohibits any use "unless approved and authorized by the secretary of war." I am of opinion that regulations for the purpose stated in the indictment may be established by the secretary of war, and that they have the "force of law" within those purposes when adopted and promulgated as directed by the act. *Gratiot v. U. S.*, 4 How. 80, 117. Therefore the motion to quash the indictment will be overruled.

UNITED STATES v. RILEY.

(Circuit Court, D. Kentucky. December 17, 1895.)

VIOLATION OF CIVIL SERVICE LAW—INDICTMENT AND PROOFS—VARIANCE.

An indictment under the act of January 16, 1883, charged a deputy collector of internal revenue with being unlawfully concerned in soliciting and receiving indirectly contributions for a political purpose from certain storekeepers and gaugers, whose names were to the grand jury unknown. On the trial it was shown that the contributions were received by another under defendant's control and supervision, and that the names of the storekeepers and gaugers from whom the contributions were received were in fact known to the grand jury. *Held*, that these proofs made out a case of "being concerned in receiving indirectly," within the meaning of the indictment, but that, as the names of the persons averred to have been unknown to the grand jury were in fact known to them, this made a fatal variance between the indictment and the proofs.

This was an indictment against William E. Riley for violating the provisions of the act of January 16, 1883 (section 11), forbidding any officer, etc., of the United States to "directly or indirectly solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription or contribution for any political purpose, whatever, from any officer, clerk, or employé, of the United States," etc. One Albert Scott was at the same time separately indicted for being concerned in the same transactions, and an opin-

ion was heretofore rendered overruling demurrers to these indictments. That opinion was entitled *U. S. v. Scott*, 74 Fed. 213. The present case, however (*U. S. v. Riley*), was first called for trial. The evidence for the government being completed, counsel for defendant have moved for a peremptory instruction in his favor.

William M. Smith, U. S. Atty.

A. E. Wilson, Burton Vance, and C. H. Gibson, for defendant.

TAFT, Circuit Judge. I have no doubt what my duty is in this case. It is a duty which I perform with great reluctance. The evidence in the case strongly tends to show that the defendant was a party, perhaps the chief party, to a conspiracy to evade a very important criminal statute of the United States,—that which denounces the offense, in a government officer or employé, of collecting for political purposes assessments or contributions from other employés. The evidence seems to show that there was an elaborate and deliberate conspiracy for that purpose, and that the defendant was perhaps the masterhand in carrying it out, and in devising the plan by which its discovery and proof should be difficult. What would be developed in his defense of course the court cannot state. The case for the government, however, is a strong one, and in that view the court is naturally reluctant to direct a verdict on what is, under the circumstances of this case, a technical ground.

It is objected that the defendant has not been given a fair opportunity to make out a defense, because he could not know until the trial the particular persons from whom these assessments were charged to have been collected. In this case the merits of that contention have no great weight. The assessment proven here is shown to have been a general assessment, with respect to which the defendant would seem to have had full knowledge or information. But the constitution requires that an indictment shall set forth the nature and character of the offense charged with sufficient particularity to enable him to make a defense, and certain rules have been laid down by the authorities which fix what are the material averments and what are the material specifications. With respect to larceny, it is necessary to state whose property it is which the thief has taken. With respect to embezzlement, or all crimes against property, the same rule obtains. With respect to this statutory offense, it seems to me by analogy that the name of the officer or employé of the United States from whom the political assessment has been received is equally essential to the validity of the indictment. The framer of this indictment was evidently of that opinion, because he attempted to explain the omission of the names by the usual averment that the names of the storekeepers or gaugers from whom this assessment was collected or received were unknown to the grand jury. Mr. Jolly, who was district attorney at the time this indictment was found, has explained the reason why this course was taken, which was that the grand jury and he did not think that they could trace the assessments collected from any particular gauger into the particular funds received by the defendant. But it seems to me that the evidence before the grand jury, as the evidence here,

made a case against Riley, showing that he was unlawfully concerned in receiving all the assessments which are proven to have been here collected. If that is the case, then the proof before the grand jury that any particular gauger paid an assessment was proof of the name of a person which should have been inserted in the indictment. My theory, and it seems to me the only proper theory, of the evidence is that Sheltman's reception of this money by direction of Riley, and under his control and supervision, was an unlawful reception of the moneys indirectly by Riley himself; at least that it showed Riley was unlawfully concerned in receiving indirectly the money; and therefore, if it could be definitely stated by the grand jury from what persons Sheltman's money was received, then it could be definitely stated from what persons Riley was concerned indirectly in receiving money; and as unquestionably it did appear to the grand jury that Sheltman had received political contributions from some 25 or 30 storekeepers and gaugers whose names were known to the grand jury, there is a fatal variance between the averment in the indictment that the names were unknown to the grand jury and the proof adduced before this jury. All the authorities sustain this view. *Rex v. Walker*, 3 Camp. 264; *State v. Wilson*, 30 Conn. 500; *White v. People*, 32 N. Y. 465; *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455; *Whart. Cr. Pl. & Prac.* § 112. I shall therefore direct a verdict in favor of the defendant in this case. The acquittal thus directed will not bar prosecution under an indictment in which the names of the persons solicited shall be correctly set out, and, but for the fact that the statute of limitations has now run against a new indictment, I should deem it my duty to direct the district attorney to begin proceedings looking to a reindictment of the defendant.

The opinion which I have already filed in the case upon the demurrer I shall modify in one respect, because I think, from an examination of the authorities, that it perhaps states the case too strongly. What I said was that it must appear in proof, to sustain the indictment, that the persons referred to were not actually known to the grand jury. I do not think that quite states the law; at least it may mislead. If it does not appear in proof one way or the other, then the finding of the indictment, and the averment in it that the necessary names were unknown, raise the presumption that the persons referred to were not known, even if they appear on the stand at the trial. It must appear affirmatively in proof that they were known to the grand jury before that can be used as a reason for asserting a variance, and therefore I shall modify the language of the opinion to read thus: "If it appear in proof, however, that the persons referred to as unknown were actually known to the grand jury, then there is a fatal variance." *Guthrie v. State*, 16 Neb. 667, 670, 21 N. W. 455; *Com. v. Gallagher*, 126 Mass. 54; *Com. v. Hill*, 11 Cush. 137; *Rex v. Bush, Russ. & R.* 372; *Whart. Cr. Pl. & Prac.* § 113.

The foregoing opinion was delivered in the absence of the jury. After the return of the jury, the court continued as follows: Gen-

lemen of the Jury: After listening to the arguments of counsel, and giving a consideration to the allegations of the indictment, I find that there is a fatal variance between the proof offered here and the averments of the indictment, in this: that the indictment avers that the names of the storekeepers and gaugers from whom the assessments were received by Rilev were unknown to the grand jury. In my opinion, all the evidence in the case tends to show—I mean the evidence for the government (what the evidence for the defendant would be I cannot say)—all the evidence now before the court tends to show that Rilev was unlawfully concerned in the receiving of the money which Sheltman received, and Sheltman is shown by the evidence to have received, with the exception of a percentage collected by Barnes, Heinig, and Neiman, all the assessments which Barnes and Heinig collected. The evidence brought out before you also shows that the grand jury were advised by the witnesses sworn before them of the names of some 25 or 30 storekeepers and gaugers from whom these assessments were collected. In my view of the law, it was therefore the duty of the grand jury to have included in the indictment the names of those who were known, and, this not having been done, the proof here does not sustain the indictment as it is charged. I must, therefore, direct you to return a verdict for the defendant. You do this upon the responsibility of the court.

UNITED STATES v. SCOTT.

(Circuit Court, D. Kentucky. October 7, 1895.)

1. INDICTMENTS—SINGLE TRANSACTION CONSTITUTING SEVERAL OFFENSES.

By the great weight of authority the prosecutor is at liberty to charge, in a single count, as a single offense, a single act or transaction in violation of law, although that act or transaction involves several similar violations of law with respect to several different persons. The application of this rule to indictments in the federal courts is not affected by the provisions of Rev. St. § 1024, in relation to the joinder of several offenses in different counts of the same indictment.

2. SAME—VIOLATIONS OF CIVIL SERVICE LAW — SOLICITING POLITICAL CONTRIBUTIONS.

In the statute making it an offense for any officer of the United States to “directly or indirectly solicit or receive or be in any manner concerned in soliciting or receiving” any assessment, etc., for any political purpose (Act Jan. 16, 1883, § 11), the expression, “being concerned in,” is not a legal term or conclusion which needs a specification of facts for completeness of description. It is a colloquial expression, equivalent to “being engaged in,” or “taking part in,” and sufficiently informs the accused of what the government intends to prove; and hence it is sufficient to charge the offense in the words of the statute.

3. SAME.

Failure of the indictment in such case to name the particular persons from whom the contributions were solicited or received does not render it bad on demurrer for indefiniteness, where it is further averred that the names of such persons were unknown to the grand jury.

4. SAME.

Averments that the accused solicited and received from another his contribution for a political purpose charge, by implication, that the solicitation and reception were for the same purpose as the contribution, and

no specific averment that the accused knew the purpose of the contribution is necessary; nor is the implication changed or weakened where the accused, instead of being charged with directly receiving the contribution, is charged with being unlawfully concerned in receiving it "indirectly."

5. SAME.

A charge that the accused was "knowingly" concerned in unlawfully receiving an assessment from officers or employes of the United States for a political purpose sufficiently charges him with knowledge that the persons from whom the contributions were received were officers or employes of the United States.

At the February term in 1893, Albert Scott, the defendant, was indicted in one indictment containing seven counts for different violations of section 11 of the act of January 16, 1883 (22 Stat. 403), entitled "An act to regulate and improve the civil service of the United States."

Section 11 is as follows: "That no senator or representative or territorial delegate of congress, or senator, representative or delegate elect, or any officer or employe of either of said houses and no executive, judicial, military or naval officer of the United States, and no clerk or employe of any department or branch or bureau of the executive, judicial, military or naval service of the United States shall directly or indirectly solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription or contribution for any political purpose, whatever, from any officer, clerk or employe of the United States or any department, branch or bureau thereof or from any person receiving any salary or compensation from moneys derived from the treasury of the United States."

The first count of the indictment charges that Scott while collector of internal revenue for the Fifth internal revenue collection district of the state of Kentucky, on the 15th day of October, 1890, in the district of Kentucky, "was then and there unlawfully concerned in soliciting a contribution of \$1,808 of said money indirectly from divers persons to the grand jurors aforesaid unknown, which said persons were then and there officers of the United States, to wit, internal revenue storekeepers and internal revenue gaugers, and internal revenue storekeepers and gaugers, duly appointed and acting as such within and for the Fifth internal revenue collection district of the state of Kentucky, and the names and numbers of said officers, to wit, said internal revenue storekeepers, and said internal revenue gaugers, and said internal revenue storekeepers and gaugers, are to the grand jurors aforesaid unknown, for a political purpose, to wit, a contribution for the use of a political party called the Republican party, but a further description of said political purpose is to the grand jurors aforesaid unknown, and cannot therefore be set out." The fifth count, in the same language, charges Scott with being unlawfully concerned in soliciting upon the 31st of October, 1892, a contribution of \$806.34 indirectly from persons similarly described, and for a purpose similarly stated. The sixth count of the indictment in the same words charges Scott with being unlawfully concerned in soliciting a contribution of \$912 on the 31st of May, 1892, indirectly from persons similarly described, and for a purpose similarly stated. The second count charges that Albert Scott, being a duly-appointed collector of internal revenue, etc., "was then and there unlawfully concerned in receiving a contribution of the lawful money of the United States, to wit, a contribution of eight hundred and fifty-nine and $\frac{88}{100}$ dollars of said money indirectly from divers persons to the grand jurors aforesaid unknown," which said persons were then and there officers of the United States, describing them as in the other counts, for a contribution similarly described. There is in this count no averment that Scott knew that the money received by him was for a political purpose. The third count charges Scott with being unlawfully concerned in receiving a contribution of the lawful money of the United States, to wit, a contribution of \$500, on the 30th day of June, 1892, indirectly from divers persons to the grand jurors unknown, who are described as in the other counts, for a purpose similarly described, and concludes with this averment: "And the

said Albert Scott then and there well knew that said contribution which he was then and there so concerned in receiving had been contributed by said storekeepers and said gaugers in said district for the political purpose aforesaid." The fourth count of the indictment charges Scott exactly as the third count, for receiving a contribution of \$500 on the 7th of November, 1892, and contains the same averment as to his knowledge. The seventh count charges that Scott, being a collector of internal revenue in the Fifth Kentucky district, "unlawfully was then and there knowingly concerned in receiving an assessment of \$1,000 from a great many, to wit, fifty, persons, whose names are to the grand jurors aforesaid unknown, which said persons were then and there officers of the United States, to wit, duly appointed and acting United States internal revenue storekeepers, and internal revenue gaugers, and internal revenue storekeepers and gaugers within and for the Fifth internal revenue collection district of the state of Kentucky, for a political purpose, to wit, for the use of the political party called the Republican party, and a further description of which said purpose is to the said grand jurors unknown." A general demurrer was filed to the indictment by defendant.

William M. Smith, U. S. Atty.

A. E. Wilson, Burton Vance, and C. H. Gibson, for defendant.

TAFT, Circuit Judge (after stating facts as above). The first question arising on the demurrer is whether the counts are bad for duplicity. Each count charges the defendant with either receiving or soliciting contributions from more persons than one. It is said that under the statute the soliciting or receiving of a single contribution from a single person is a distinct offense, and that when the contributions are received from several persons there are as many different offenses committed. It is a general rule of criminal pleading that the prosecutor is at liberty to charge in a single count as a single offense a single act or transaction in violation of law, although that act involves several similar violations of law with respect to several different persons. Thus it is established by the great weight of authority that larcenies from different individuals may be joined in one count when committed by the accused in the same single act. 1 Hale, P. C. 531; 2 Hale, P. C. 254; 2 Russ. Crimes, 127; 3 Chit. Cr. Law, 959; Com. v. Sullivan, 104 Mass. 552; State v. Hennessey, 23 Ohio St. 339; Hoiles v. U. S., 3 MacArthur, 370; State v. Holland, 5 Rich. Law, 517; State v. Thurston, 2 McMul. 382; State v. Newton, 42 Vt. 537; State v. Merrill, 44 N. H. 624; Wilson v. State, 45 Tex. 76; Lorton v. State, 7 Mo. 55; State v. Daniels, 32 Mo. 558; State v. Morphin, 37 Mo. 373. In Reg. v. Bleasdale, 2 Car. & K. 765, it was held that, where a man for several years had been stealing coal by an entry run by him into the seams of coal belonging to forty other coal-mine owners, he might be indicted on one count for all the thefts in his continuous series of coal mining. In Reg. v. Giddins, Car. & M. 634, it was held that, where the defendant had assaulted and robbed two persons at the same time and place, the robbery of both might be included in a single count. In State v. Nelson, 29 Me. 329, it was held that a defendant might properly be indicted in a single count for receiving stolen goods in one act of reception where the goods belonged to different owners. In Ben v. State, 22 Ala. 9, it was held proper to embrace in one count the poisoning of three persons where it had been accomplished by one act of the defendant. In Rex v. Benfield, 2

Burrows, 980, it was held proper to unite in one count of the indictment the publication of several obscene songs, where the act of publishing them was single. And the same rule prevails with respect to the libel of different persons. *Rex v. Jenour*, 7 Mod. 400. See, also, to the same general effect, *State v. Edmondson*, 43 Tex. 162; 2 Bish. New Cr. Law, § 888. See, also, 1 Bish. New Cr. Law, §§ 778, 1060-1064. There is little, if any, authority to sustain the proposition that it is not competent to join crimes of the character described committed by one single act or series of acts at the same time and place in a single count. The point of controversy which has arisen is whether, when a defendant has been convicted or acquitted upon an indictment for one of the separate offenses included in the many committed by a single act, such acquittal or conviction is a bar to a prosecution for another of the offenses involved in the same act; and upon this question the authorities are divided. *U. S. v. Beerman*, 5 Cranch, C. C. 412, Fed. Cas. No. 14,560, overruled by *Hoiles v. U. S.*, 3 MacArthur, 370; *Lorton v. State*, 7 Mo. 55; *Com. v. Andrews*, 2 Mass. 409; *State v. Thurston*, 2 McMul. 393.

Section 1024 of the Revised Statutes of the United States provides that:

"When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together or for two or more acts or transactions for the same class of crimes or offences which may properly be joined instead of having several indictments, the whole may be joined in one indictment in separate counts. If two or more indictments are found in such cases, the court may order them to be consolidated."

I do not understand that this section qualifies the rule as it prevailed at common law with reference to the uniting of charges in the same indictment in different counts, or the charging as a single offense in one count a single act or transaction, which might also be treated as involving several distinct offenses. In *Pointer v. U. S.*, 151 U. S. 396, 14 Sup. Ct. 410, it was held that this section left to the court to determine whether, in a given case, a joinder of two or more offenses in one indictment against the same person was consistent with the settled principles of criminal law. And so here, if the settled principles of criminal law permit the prosecutor to treat as one offense a single act involving several different and similar violations of law, there is nothing in the foregoing statute to prevent such pleading. It is easy to imagine circumstances under which the defendant by one act of reception or by one act of solicitation could have received or solicited contributions from many persons. In such a case the foregoing authorities seem to establish the propriety of embracing in one count the single act of solicitation or reception in all the aspects which it presents, with reference to the different persons whose contributions were solicited or received. It cannot be said, therefore, on demurrer, that the counts are bad for duplicity.

The next objection raised on the demurrer is that the description of the offenses charged is not sufficiently specific, because it fails to state how the defendant was unlawfully concerned in receiving or soliciting the political contributions. The statute makes it a mis-

demeanor for any officer of the United States "to be concerned" in soliciting or receiving a political contribution. The offense described was a new one. "Being concerned in" is not a legal term or conclusion which needs a specification of facts for completeness of description. It is a colloquial expression, equivalent to "being engaged in," or "taking part in," and sufficiently informs the defendant of what the government intends to prove. The general rule with respect to describing statutory crimes in an indictment is that it shall be sufficient to describe the offense in the words of the statute, unless it was the obvious intention of the legislature to require more particularity, or unless the close analogy between the statutory offense and a common-law offense requires the same detailed description in an indictment for the former as for the latter. *U. S. v. Gooding*, 12 Wheat. 474. In *Heard*, Cr. Pl. p. 173, it is said:

"Where a statute constitutes a new species of offenses, and does not refer certain acts to a known species of crime, it is sufficient to use the words of the statute."

In *U. S. v. Gooding*, supra, the statute prescribed a punishment for any one who, as owner of a ship, should aid or abet its being fitted out as a slaver. Two counts, in one of which a defendant was charged with aiding the fitting out, and in the other of which he was charged with abetting the fitting out, were held to be sufficiently specific, because in the words of the statute. If in such a case it was not necessary to be more specific by setting forth the means by which or manner in which the defendant aided or abetted, I do not think it is necessary here to show how the defendant was concerned in receiving or soliciting the contributions. In *U. S. v. Simmons*, 96 U. S. 360, where a defendant was charged with procuring another to do illegal distilling, it was said not to be necessary to specify the means or manner of the procurement. In the *Gooding* Case the indictment did not give the name of the person whom the defendant aided or abetted. In the *Simmons* Case it was deemed proper and necessary to set forth the name of the person procured. I do not think, however, that the phrase of the statute, "shall be * * * concerned in," suggests the absolute necessity for other human agency than that of the defendant in the commission of the offense, as did the word "procure" in the *Simmons* Case. Therefore the same particularity in mentioning the names of the defendant's partners in the misdemeanor, if there were such, would not be required.

The real indefiniteness contained in the counts in this indictment arises from the failure by the grand jury to name the particular storekeepers and gaugers from whom the contributions were solicited or received. The indictment charges that the names of those persons were to the grand jury unknown. It is well settled that where, in the description of the offense, it becomes necessary to specify the persons affected by the acts, the grand jury may, if it does not know the names of the persons, say so in the indictment. *Whart. Cr. Pl. & Prac.* § 111. If it appear in proof, however, that the persons referred to were actually known to the grand jury, then there is a fatal variance. *Id.* § 112. If the names subsequently become known to the prosecutor, the defendant may secure informa-

tion by a motion for a bill of particulars. *Id.* §§ 702-705; *Dunbar v. U. S.*, 156 U. S. 185, 192, 15 Sup. Ct. 325.

Third. It is objected to the first, second, fifth, sixth, and seventh counts that there is no sufficient averment in them that the defendant knew the purpose for which the contributions were made or solicited, or the official character of the persons from whom they were received or solicited. Where the statement of the act itself denounced in the statute necessarily includes a knowledge of the illegality of the act, no averment of knowledge is necessary. *Whart. Cr. Pl. & Prac.* § 164. To charge a man with soliciting a contribution from United States officers for a political purpose carries with it by implication a charge that the accused knew the purpose for which the contribution was solicited. The words "for a political purpose" may reasonably be construed to qualify not only the contribution, but the solicitation. Similarly, to charge that a man received from another his contribution for a political purpose, by implication charges that the reception was for the same purpose as the contribution; and the fact that, instead of being charged with directly receiving the contribution, the defendant is charged with being unlawfully concerned indirectly in receiving or soliciting such contribution, does not change the implication of the knowledge of the defendant. The seventh count charges that the defendant was knowingly concerned in receiving an assessment of a certain amount from 50 persons, officers of the United States, for a political purpose. The use of the word "knowingly" has always been held to supply the place of a positive averment that the defendant knew the fact subsequently stated. *Dunbar v. U. S.*, *supra*; 1 *Bish. Cr. Proc.* (3d Ed.) § 504. Nor was it necessary to set out the specific averment that the defendant knew that the persons from whom the contributions were received were officers of the United States. In *U. S. v. Northway*, 120 U. S. 327-333, 7 Sup. Ct. 580, where a defendant, president of a bank, was charged with aiding and abetting the cashier of the bank in the misapplication of its funds, it was held unnecessary to charge specifically that the defendant then and there knew that the person whom he was aiding and abetting was such cashier. It was held that the knowledge that the president had of the cashier was necessarily implied in the co-existence of the official relations of both to the same bank. And so here. The fact that the defendant was the collector of the Fifth internal revenue collection district of Kentucky, and that the persons from whom this money was charged to have been received were storekeepers and gaugers of the same collection district, and by law under the control and direction of the defendant as collector, necessarily implies that the collector knew the official character of the persons from whom the money was received or solicited.

This disposes of all the objections raised by the demurrer to the indictment. The question of the sufficiency of an indictment is frequently a perplexing one. I have had serious doubts as to whether the indictment under consideration was sufficiently specific. But Judge Barr, in passing upon a similar indictment against one Riley¹

¹ No opinion filed.

for similar offenses committed as the chief deputy collector of Scott, reached the conclusion that the indictment was good. Nothing but the clearest conviction that there was error in his ruling will justify me in reaching a different conclusion in the same court, where both indictments await trial. The demurrer will be overruled.

UNITED STATES v. TARANTO et al.

(Circuit Court, S. D. New York. April 21, 1896.)

CRIMINAL LAW—PASSING COUNTERFEIT BILLS—EVIDENCE—RES GESTÆ.

Upon a trial of an indictment charging the defendant and others with passing counterfeit bills, after evidence tending to show that he had supplied the bills to the persons who actually distributed them, the circumstances of the defendant, showing his situation and relations with other persons in whose possession bills from the same plate had been found in large quantities, are admissible in evidence as parts of the *res gestæ*, and as showing his facilities for supplying the bills and the commission of the offense.

(Syllabus by the Court.)

Motion for a New Trial on Exception to Evidence.

Nelson Smith and J. Palmieri, for the motion.

Wallace Macfarlane, U. S. Atty., and J. Hinman and Max Kohler, Asst. U. S. Attys.

BROWN, District Judge. Upon the trial direct evidence was given strongly pointing to the defendant Taranto as the person who had supplied the counterfeit bills sold by the other defendants; but on a search of his house, shop and premises, no counterfeit bills were found; nor any plate, or tools or other evidences of illicit business. He had a second-hand furniture shop in the basement, with two stands on the sidewalk adjacent. Under such circumstances it was competent for the government to show such relations of the defendant to others as might enable him to supply himself with such counterfeit bills if so disposed.

It was proved that he had previously been a partner with Bettini; that a large quantity of counterfeit five dollar bills were found in Bettini's house, made from the same plate as those which the evidence tended to show that the defendant had given to Rosa and Russo; and that Bettini's son and Giordani, who was arrested at Bettini's place, were seen about Taranto's premises. These were circumstances showing how Taranto might have obtained the bills in question. Such circumstances, even without any proof of actual concert of action with Bettini or any conspiracy between them were admissible as part of the *res gestæ*, as circumstances showing the situation and relations of the defendant, and his facilities for the commission of the offense. They were of the same character as proof of the defendant's business, his tools, his knowledge, his training; all of which may be given in evidence either in favor of the prisoner or against him in connection with the other circumstances of the case. Whart. Cr. Ev. (9th Ed.) §§ 753, 799.

Motion overruled.

UNITED STATES v. KUENTSLER.

(Circuit Court, S. D. New York. February 17, 1896.)

CRIMINAL LAW — PENSIONS—FALSE AFFIDAVITS — SPECIAL AND GENERAL ACTS — REV. ST. §§ 4746, 5421.

A special statute supersedes an incompatible general one. Section 4746, Rev. St., imposing a different and lighter punishment than section 5421, is alone applicable to the specific cases for which it provides, viz. procuring and presenting false affidavits or vouchers made by other persons. It does not include the making of a false pension affidavit, which is governed by the general provisions of section 5421. Upon an indictment under section 5421, therefore, charging the defendant with making and causing to be made "a certain false affidavit," a copy of which, signed by the defendant, was set forth in the indictment, *held*, on demurrer, that the offense charged was in fact the making of a false affidavit by the defendant, and fell within section 5421.

Demurrer to Indictment.

Wallace Macfarlane, U. S. Atty., and Max Kohler, Asst. U. S. Atty.

Kellogg, Rose & Smith, for defendant.

BROWN, District Judge. The indictment charges that the defendant on the 4th day of May, 1893, " * * did unlawfully, willfully, and knowingly falsely make and cause to be made a certain false writing, to wit, a false affidavit * * *" stating in substance that Lina Reed, an applicant for a pension, as the widow of James I. Reed, sergeant, was a widow, and had not remarried since the death of her husband; whereas in fact she was married to said Kuentsler. A copy of the alleged false affidavit forms a part of the indictment.

Upon a general demurrer to the indictment the counsel for the defendant contends that section 5421 of the Revised Statutes, which was taken from the act of March 3, 1823, is inapplicable to all matters connected with pensions, because superseded by the thirty-third section of the act of March 3, 1873, now forming section 4746 of the Revised Statutes, inasmuch as the latter provisions constitute particular legislation concerning offenses connected with pensions, while section 5421 and the act of 1823 are general. *U. S. v. Tynen*, 11 Wall. 88; *U. S. v. Auffmordt*, 122 U. S. 197, 209, 7 Sup. Ct. 1182; *Id.*, 19 Fed. 893.

While the principle invoked in behalf of the defendant is no doubt a sound one, I do not think it applicable to the present case, so far as affects this indictment. Sections 4746 and 5421 are incompatible, so far as they refer to the same precise offense; for the reason that the punishment that may be imposed by the former section is quite different from that which is permissible under the latter. Under the former statute the punishment may be by a fine of one dollar only, or of imprisonment for one day only; and it cannot exceed a fine of \$500 and imprisonment for more than three years. Under section 5421 imprisonment alone can not be imposed for less than one year, while it may be for ten years; nor can a fine alone be imposed without some imprisonment also; while there may be a