

fine of \$5,000 together with imprisonment for five years. The act of 1873 and section 4746 plainly contemplate a grade of offenses inferior to those contemplated by the act of 1823 and section 5421.

When the act of 1873 (now section 4746) was passed, the general act of 1823 was in force, and it was broad enough to cover almost all cases of frauds, or attempted frauds, upon the United States by means of false, fraudulent, or forged papers. The scope of section 33 of the act of 1873, which is in the same words as the present section 4746 of the Revised Statutes, is very much narrower. It covers only two classes of cases: (1) Where a person procures the making or presentation of a false or fraudulent affidavit concerning a pension claim; (2) where a person presents, or causes to be presented any post-dated power of attorney, or other pension voucher. The first class of cases, that of procuring the making or presentation of a false or fraudulent affidavit, does not apply to the person who makes the false affidavit, or to the person who presents it. It applies only to the suborner who induces or procures another person to make or to present the false affidavit. This offense, together with that of presenting a post-dated power of attorney or other voucher, was, by the act of 1873, distinguished and taken out of the general class of frauds against the United States already covered by the act of 1823, and made subject to lighter punishment. The two sections of the Revised Statutes are to be construed in the same way. Whatever is included within the provisions of section 4746, is in my judgment indictable under that section alone. This construction is reported to have been given to these acts by Judge Wheeler in 1886 (see 9 Cr. Law Mag. 707), and I concur in that view.

But the indictment in this case, though it uses the language "falsely made and caused to be made a false affidavit, etc.," includes as a part of the indictment a copy of the false affidavit itself, signed by the defendant. The evidence, therefore, must be limited to the making of the affidavit charged. It is impossible to contrive this indictment as meaning to charge the defendant with the offense of procuring another person to make a false affidavit; it means that the defendant himself made the false affidavit. That is not within the provisions of section 4746, but is embraced by section 5421.

The demurrer is, therefore, overruled.

UNITED STATES v. YENNIE et al.

(District Court, S. D. New York, February 26, 1896.)

CRIMINAL LAW—REMOVAL—LARCENY OF POSTAGE STAMPS—POSTMASTER'S ROOM—REV. ST. §§ 5475, 5476, 5478—JOINDER OF DIFFERENT OFFENCES.

An entry into a postmaster's room in the P. O. Building, and a theft of postage stamps by opening the locked vault in which they were kept, constitute a forcible breaking and entry into a post office in a part of the P. O. Building, punishable under section 5478, Rev. St. Breaking into such a room with the intent to commit larceny, and the actual stealing of stamps, constitute separate offences under sections 5475, 5478; but when both are parts of the same transaction, a single count stating these facts is not fatally bad; and any objection thereto is a question of practice not sufficient to prevent removal of the prisoner to the proper place for trial.

Application for Removal of Prisoners.

Wallace Macfarlane, U. S. Atty., and J. Hinman, M. J. Kohler,
and Wm. S. Ball, Asst. U. S. Attys.

Daniel O'Connell, for defendants.

BROWN, District Judge. Upon examination of the evidence returned upon the writ of certiorari, I am satisfied that there was sufficient probable cause to justify the Commissioner in holding the prisoners for trial upon all the charges contained in the indictment. There is reasonable and probable cause to hold them upon the charge of larceny of the postage stamps, under section 5475, and that this larceny was committed on the 3d of April, by opening the door of the postmaster's private room where the vault was in which the stamps were kept, and by opening the lock of the vault. This room being used by the postmaster for post office purposes was within the intent of section 5478; and such an entry for the purpose of stealing stamps would constitute a forcible breaking and entry into the post office, and punishable under section 5478.

The third count charges forcible breaking into the building with intent to commit larceny, and also that the defendants did then and there steal the postage stamps, &c. No doubt either of the two branches of this indictment would constitute a separate offence under sections 5475 and 5478. These are offences of the same kind, and of the same grade of punishment, though with different degrees of severity. It is contended for the defendants that this count is double, and therefore bad. The precise point was fully discussed in the case of *Com. v. Tuck*, 20 Pick. 356, and the objection overruled in cases like this, where both offences relate to and are parts of the same transaction.

Under objection made at the trial, the U. S. Attorney might nolle as to either part, and retain the other; or the jury might give a special verdict upon either part; and after a verdict the objection would not be sufficient for the arrest of judgment. The defect, if any, therefore, appears to be one of form and of procedure rather than of essence, and is not available upon a mere application to remove the prisoners to the proper district for trial. *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. 407; *Id.* 44 Fed. 677. But if this view of the third count is erroneous, under the cases just cited, the first two counts would require removal, as probable cause seems to be shown.

The application to remove must be granted.

J. & P. BALTZ BREWING CO. v. KAISERBRAUEREI, BECK & CO.

(Circuit Court of Appeals, Third Circuit. May 4, 1896.)

No. 11.

1. TRADE-MARK—DESCRIPTIVE WORDS.

The word "Kaiser," used in connection with a brand of beer, is not indicative of class, grade, style, quality, or locality, and may therefore be lawfully appropriated as a trade-mark.