

posted by an officer to be elected at the first election under the act strongly confirms the conclusion that there was no power in the old council to order the submission of the question of a bond issue to popular vote at that election.

In the light of these conclusions, the election gave no force to the acts of the new officers in issuing the bonds, because not held in accordance with the law by virtue of which, only, the bonds could be authorized. In *Allen v. Louisiana*, 103 U. S. 80, it was said by the supreme court:

"It is of no importance that two-thirds of the qualified voters of the city gave their assent to the subscription at the election which was called. It has been uniformly held that, until the legislature authorizes an election, a vote of the people cannot be taken which will bind the municipality, or confer upon the municipal authorities the power to make such a subscription. The legislative authority to obtain the popular assent is as essential to the validity of the election as it is to the subscription."

The plaintiffs in error rely upon the contemporaneous construction by the authorities of the new city of Ironwood to support the view that the election so held was a valid one, and that the bonds were properly issued. When the construction of the statute is in grave doubt, it is true that a contemporaneous construction of a local act by those immediately interested will have no slight weight in turning the scale in favor of that construction which will validate the acts of those who are called upon to execute the statute, and who have induced innocent third persons to part with value on the faith of the validity of their acts. *Van Hostrup v. Madison City*, 1 Wall. 291; *Meyer v. City of Muscatine*, 1 Wall. 384; *James v. Milwaukee*, 16 Wall. 159; *Savannah v. Kelly*, 108 U. S. 184, 2 Sup. Ct. 468; *Kirkbride v. Lafayette Co.*, 108 U. S. 208, 2 Sup. Ct. 501; *U. S. v. Moore*, 95 U. S. 760-763. But this rule has no application unless the construction is a doubtful one, and the ambiguity which arises from the language is so great as to compel the court to seize upon extraneous circumstances to aid in reaching a conclusion. The present is not such a case. The judgment of the court below is affirmed, with costs.

UNITED STATES v. JANES.

(District Court, S. D. California. March 9, 1896.)

INDICTMENT—PLEAS IN ABATEMENT—MISNOMER.

A plea in abatement for misnomer, in that defendant's full name was "John Frazer Janes," whereas he is indicted as "J. F. Janes," *held* bad, because it failed to further allege that defendant was not known or called by the name of "J. F. Janes," or that he had theretofore been known and called by the name of "John Frazer Janes."

This was an indictment against J. F. Janes for depositing nonmailable matter in the mails, in violation of Rev. St. § 3893. Heard on demurrer to the indictment.

George J. Denis, U. S. Atty.
Calvert Wilson, for defendant.

WELLBORN, District Judge. The defendant pleads in abatement of the indictment as follows: "That there is a misnomer of defendant, in that his full Christian name is not alleged in said indictment; that defendant's true full name is 'John Frazer Janes.'" To this plea the government has demurred, and urges, among other grounds of demurrer: First, that the plea fails to allege that the defendant was not known or called by the name of "J. F. Janes"; second, it does not allege that the defendant has hitherto been called and known by the name of "John Frazer Janes."

Both objections, I think, are well taken. "The certainty required of pleas in abatement is extreme. In the language of the old books, they must be certain 'to a certain intent in every particular.' They must leave, 'on the one hand, nothing to be supplied by intendment or construction; and, on the other, no supposable special answer unobviated.'" State v. Duggan, 15 R. I. 413, 6 Atl. 597. "Such a plea should * * * expose the defendant's proper name, as well as deny that he was known by the name stated in the indictment." Whart. Cr. Pl. § 423. "Pleas in abatement, in civil or in criminal causes, are not favored. Matters of form in them are regarded as matters of substance. They are construed most strongly against the pleader, and cannot be sustained unless they negative the existence of every fact, and repel every inference, however slight, crossing the matter relied on in the plea. Powers v. State, 4 Ala. 531; State v. Brooks, 9 Ala. 9; Roberts v. Heim, 27 Ala. 678. If the matter of the plea is the misnomer of the defendant in an indictment, the plea must not only aver the true name of the defendant, but must negative the fact that he is or was known and called by the name employed in the indictment. These are essential averments, as is shown by all approved precedents of the plea. The want, in the present plea, of a negation of the fact that the defendant was known and called by the name by which he was indicted, is fatal to its sufficiency. The negation cannot be implied from the affirmation that he was known and called by the name averred to be his true and correct name." Wren v. State, 70 Ala. 1. "The plea in abatement, interposed to the indictment by the defendant, is insufficient as a plea of misnomer. It should not only aver what the defendant's name is at the time of the issue joined, but that he has always, or at least hitherto, been called and known by such name. It is common practice to state that the defendant was baptized by such name, if such be the fact, but this is not now deemed necessary. 1 Bish. Cr. Proc. (3d Ed.) §§ 792, 686; 2 Whart. Prec. Ind. 1142." Bright v. State, 76 Ala. 96. "A plea of misnomer should not only state the true name of the accused, but should further allege that he was not known and called by the name under which he was indicted." Henderson v. State (Ga.) 22 S. E. 537. See, also, O'Connell v. Reg., 11 Clark & F. 155, and Wilson v. State, 69 Ga. 225.

The ruling above indicated makes it unnecessary to pass upon the other objections to the plea urged in the government's brief. The demurrer to the plea is sustained.

UNITED STATES v. JANES.

(District Court, S. D. California. March 9, 1896.)

1. VIOLATION OF POSTAL LAWS—OBSCENE MATTER.

Certain printed matter set forth in the indictment, being an article entitled "Ripe and Unripe Women," and a druggist's advertisement, addressed in part to the "Ladies of the Tenderloin District," held to be obscene matter, within the meaning of Rev. St. § 3893.

2. SAME—NEWSPAPER MATTER—INCLOSING IN WRAPPERS.

The inclosing of a newspaper, containing obscene matter, in a wrapper, does not prevent the mailing thereof from falling under the denunciation of the statute.

3. SAME—PREPAYMENT OF POSTAGE.

Prepayment of the postage on obscene matter deposited in the mails is not a constituent of the offense created by the statute.

4. SAME—INDICTMENT—DUPLICITY.

An allegation that defendant "did deposit, and cause to be deposited," obscene matter in the mails, is not such duplicity as vitiates an indictment.

This was an indictment in two counts against J. F. Janes, for violation of Rev. St. § 3893, by mailing a newspaper containing obscene matter. The case was heard on demurrer to the indictment.

The first count was based on an article entitled "Ripe and Unripe Women." The article was set out in full in the indictment, and contained, in suggestive language, a description of the physical appearance of the "Ripe Woman," and of the writer's idea of the thoughts excited thereby in the beholders; also, a description, in coarse, rude terms, of the "Unripe Woman," with a reference to unnatural practices and crimes, as among the causes of her condition. The second count was upon a druggist's advertisements, one of which extolled the merits of a certain remedy for venereal diseases, while the other was addressed to the "Ladies of the Tenderloin District," and called to their attention the writer's stock of a certain line of goods.

George J. Denis, U. S. Atty.

Calvert Wilson, for defendant.

WELLBORN, District Judge. This is a demurrer to the indictment. The grounds of demurrer are: First, that the publication set forth in the indictment is not obscene, nor otherwise in violation of section 3893 of the Revised Statutes of the United States, under which said indictment was found; second, that the indictment alleges that the newspaper containing the publication was inclosed in a wrapper; third, that the indictment does not allege prepayment of postage; fourth, that the indictment is duplicitous, in charging that the defendant "did deposit, and cause to be deposited," etc. These grounds I will take up in their order.

1. The printed matter set forth in the indictment falls, I think, under the denunciation of said section, as construed and applied in adjudicated cases. Among those cases are the following: U. S. v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14,571; U. S. v. Britton, 17 Fed. 731; U. S. v. Wightman, 29 Fed. 636; U. S. v. Chesman, 19 Fed. 497; U. S. v. Harmon, 45 Fed. 414; U. S. v. Smith, Id. 476; U. S. v. Martin, 50 Fed. 918.

2. As to the effect of inclosing the newspaper in a wrapper, the law, I think, is correctly expounded by Judge Ross, in the case of
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