driver, or the driver's master. In that case, equally with the other, he would be met by the defense that he also had failed to look out for the danger, and was thereby guilty of contributory negligence.

The case of Peck v. Railroad Co., 50 Conn. 379, would seem to be the most favorable authority for the defendants on this proposition; but in that case the decision was finally rested on the identification of the passenger with the carrier,—a doctrine which it was useless to discuss if the duty to look was required of the former. In the case of Dean v. Railroad Co., 129 Pa. St. 514, 18 Atl. 718, a guest riding with the driver was held precluded from recovering for injury received in a collision at a railroad crossing. The driver approached the crossing at a trot,—did not stop or check his horses. The plaintiff was familiar with the crossing, but failed to warn the driver of the danger. Under the doctrine of the Pennsylvania courts, it was the duty of the driver to stop, look, and listen before crossing the railway line. The plaintiff knew that the driver, from ignorance or inadvertence, did not stop. After becoming conscious of the driver's negligence, it was but reasonable that he should at least have given some warning of the danger, or be held to have voluntarily incurred the risk of the driver's recklessness. There is nothing in this case militating against the views here expressed. It is not claimed that Dr. Wright knew of the approaching train, or knew that Pyle failed to look to the north before attempting to cross the railway line. He had a right to assume that Pyle would exercise ordinary care until something occurred to give him notice of Pyle's negligence. The motion in each case must be denied.

UTZ et al. v. UNITED STATES.

(Circuit Court, D. New Jersey. June 25, 1896.)

1. LIMITATION OF ACTIONS—SUITS AGAINST GOVERNMENT.
   The presentation of a claim against the United States to the treasury department for examination and allowance, as required by law, bars the running of the statute of limitations during the time consumed in such investigation. U. S. v. Lippett, 100 U. S. 663, followed.

2. CONTRACT WITH GOVERNMENT—CARTAGE OF IMPORTED GOODS.
   Plaintiffs contracted with the United States to do all the cartage of merchandise in custody of the government, imported at New York, to the appraiser's store, and from the general order store and warehouse to the public store, for two years, at the rate of 18 cents per package, excepting sample packages, which were to be carted at one cent each. *Held*, that the low rate for sample packages was based on the fact that no duties were collected on them; that, consequently, the true test of a sample package, under the contract, was the fact of paying no duties; and that, for all dutiable packages, whether marked "sample" or not, 18 cents was to be paid.

This was a petition by William Utz, Thomas M. Garrett, and William Kirby, against the United States, to recover a sum of money alleged to be due under a contract.

Henry S. White and Charles A. Hess, for plaintiffs.
J. Kearney Rice, U. S. Dist. Atty.

GREEN, District Judge. The above-entitled cause coming on to be heard at a term of this court held on the 8th day of April, 1896, and the same having been tried before the court without a jury, the said court now makes the following findings:

As to Questions of Fact.

First. That the above-named petitioners were, at the times hereinafter named, co-partners in business, and the said William Utz was and is a resident of the city of Hoboken, in the county of Hudson, in the district and circuit aforesaid.

Second. That on the 15th day of January, 1886, the above-named petitioners and the defendants named above entered into an agreement, in writing, wherein and whereby the said petitioners covenanted and agreed that they would do all the cartage of the merchandise in the custody of the government of the United States, of dutiable goods imported at the port of New York, to the appraiser's store for examination, and sample packages and goods sent from the importing vessel and from general order store and warehouse to the public store under the direction of the collector of the said port, for the term of two years from the 16th day of January, 1886, for which cartage the said defendant promised to pay at the rate of 18 cents per package for all packages from the importing vessel and from general order store and warehouse to public store, with the exception of sample packages, and sample packages to be carted at the rate of 1 cent per package; that from the 16th day of January, 1886, to the 1st day of February, 1888, both inclusive, said petitioners conveyed to the public store under their said contract packages of dutiable merchandise to the number of 39,539, for the cartage of which said packages the said petitioners received payment at the rate of 1 cent per package; that the said 39,539 packages contained dutiable merchandise, and were such packages as, under said contract, the petitioners were entitled to the payment of 18 cents per package; that on the 9th day of May, 1893, the said petitioners duly presented to the treasury department of the United States their said claim, and under and by directions of the secretary of the treasury the said claim of the petitioners was audited by the collector of customs at the said port of New York at the sum of $4,501.77, and that sum was then and there found to be due said petitioners from the defendants; that no part of said sum has been paid by the defendants to said petitioners.

As Conclusions of Law.

First. That the said petitioners, William Utz, Thomas M. Garrett, and William Kirby, are entitled to judgment against the United States of America, the defendants, for the said sum of $4,501.77.

Second. That the claim of said petitioners, and this action brought to recover thereon, is not barred by the statute of limitations. It is quite true that the whole of this claim was due and owing from the defendant to the plaintiffs, if at all, for a period in excess of six years before the commencement of this action. The plaintiffs' right of action accrued in February, 1888. This suit was not begun until February 23, 1895. Apparently the statute was a bar to its successful prosecution; but the claim, as it appears from the evidence, was

presented to the proper department officer of the United States for allowance and payment within six years from the date of the first item in it, and during nearly the whole of the elapsed time it was held under consideration by that department, to which, when presented, it had been duly referred for investigation and settlement. That investigation resulted in an approval of the claim as just and lawful, and the plaintiffs were so notified. In fact, the proper officers of the government went so far towards completing the settlement as to obtain from the plaintiffs a receipt, in form of a release, for the amount of the award. At this point the proceedings were stopped. The plaintiffs' claim remained unpaid, and so remains to this day. This action was commenced within six years from the date of the notification to the plaintiffs that their claim was approved. It seems only just to hold that, during that time in which the defendant was, for its own satisfaction, investigating the claim, and to which examination and investigation the plaintiffs were compelled to submit their claim, the statute of limitations should be in abeyance. Surely it would be inequitable for the federal government to institute and enforce a mode of procedure for claimants, which, at the will of the government, might cause the claim to be barred by lapse of time. And so it has been held by the supreme court in U. S. v. Lippett, 100 U. S. 663, that the presentation of a claim against the government to the proper department, for investigation, allowance, and settlement, bars the running of the statute of limitations during the time consumed in such investigation; or, to put it in different phrase, that the actual commencement of an action to recover upon the claim will be regarded as of the same date as the presentation of the claim for investigation. And in the case referred to the supreme court held that the statute of limitations was not pleadable by the defendants, in an action against the United States in the court of claims, as a bar to a claim which had been presented for settlement at the proper department of the government within six years after it was due.

Third. The contract in this case concerns itself with two classes of goods imported into this country: those upon which duties were levied, and those which were, by law, free from duty. For the cartage of the former the plaintiffs were to receive 18 cents per package. For the latter, commonly called "samples," the rate was but 1 cent per package. Doubtless this very low rate of cartage was based upon the fact that from such "sample" packages the government derived no revenue by way of duties. On the other hand, on all those packages the importation of which produced revenue a very much larger rate for cartage was designedly allowed. It seems quite clear that the true test of a "sample" lay in the fact that it was undutiable. The mere marking of packages as "samples," by the shipper or others, could in no wise affect the rights of these plaintiffs under this contract. The criterion by which packages were to be classified is to be found in the character of goods which they contained, whether they were dutiable or nondutiable. For all packages carted the plaintiffs were to receive 18 cents per package, excepting those which were samples, i. e. nondutiable; for these but 1 cent was allowed. Under this construction of the contract the plaintiffs' claim is just, and should be allowed.

UNITED STATES v. ASH.

(District Court, D. Alaska. April 20, 1896.)

No. 532.

1. SALE OF INTOXICATING LIQUORS IN ALASKA.
   Section 14, Act Cong. May 17, 1884 (23 Stat. 24; Supp. Rev. St. p. 435), prohibits the importation, manufacture, and sale of intoxicating liquors in Alaska, except for medicinal, mechanical, and scientific purposes.
2. SAME—FACTS NECESSARY TO WARRANT CONVICTION.
   No question being raised under the exception provided by this statute, three facts only are necessary to be found to warrant conviction in this case: (1) That liquor was sold; (2) that the liquor was intoxicating; (3) that the sale was made by this defendant, either in person or through his agents, servants, or employés, acting for him or under his management, direction, or control.
3. SAME—SALE DEFINED.
   A sale, within the meaning of this statute, has the usual definition; i. e. the transfer of any piece of property or thing of value from one person to another person for current money of the United States.
4. SAME—JUDICIAL KNOWLEDGE.
   This court will assume judicial knowledge that the liquor commonly known as "whisky" is an intoxicating liquor, and that the drink commonly called a "whisky cocktail" is an intoxicating drink.
5. SAME—INTERNAL REVENUE TAX.
   The payment by the defendant of the tax imposed by the internal revenue laws of the United States, and the issuing to him of an internal revenue license thereunder by the treasury department, is no defense to this indictment.
6. SAME—REASONABLE DOUBT.
   As this is a criminal prosecution, every fact necessary to constitute the offense must be established by the evidence to your satisfaction beyond a reasonable doubt.
7. SAME—CONCLUSION.
   Therefore, findings from the evidence beyond a reasonable doubt that the defendant, either in person or by his agents, servants, or employés, sold the liquor commonly known as "whisky," or the drink commonly called "whisky cocktails," are sufficient to warrant a verdict of guilty.

This was an indictment against Harry Ash for selling intoxicating liquors in violation of section 14 of the act of congress of May 17, 1884 (23 Stat. 24; Supp. Rev. St. p. 435), prohibiting the sale of intoxicating liquors in Alaska.

Burton E. Bennett, U. S. Atty.
J. F. Maloney and Johnson & Heid, for defendant.

DELANEY, District Judge (orally). When congress provided the act establishing a civil government for this district, known as the "Organic Act," and which became a law on the 17th day of May, 1884, the following provision was incorporated into said act, to wit: "The importation, manufacture and sale of intoxicating liquors in said district, except for medicinal, mechanical and scientific purposes, is hereby prohibited." This is the law commonly known in this district as the "Prohibitory Liquor Law," and is the act under which the indictment in this case is brought. The indictment charges the defendant with having violated this provision of law on or about the 4th day of the present month by selling an intoxicating liquor commonly called "whisky." There is no

contention that any liquor was sold for medicinal, mechanical, or scientific purposes; consequently, if a sale was made, it was in violation of this statute. In order to warrant a conviction of this defendant, three material facts must be established in your minds from the evidence beyond a reasonable doubt: First, that liquor was sold; second, that the liquor was intoxicating; third, that the sale was made by this defendant either in person or through his agents, servants, or employés, acting for him, or under his direction, management, or control. A sale is the transfer of any piece of property or thing of value from one person to another person for a valuable consideration; i. e. for current money of the United States. The word "sale," as used in this prohibitory statute, means such a sale as I have thus defined, and the fact that such sale took place must be established to your satisfaction beyond a reasonable doubt from the evidence in the case.

Aside from finding that there has been such a sale, to warrant the conviction of the defendant, it is also necessary that the intoxicating nature of the liquor sold should be established. Upon this question there is an extraordinary diversity of information among the judges of the courts in this country. In one of the earliest decisions upon this question in the state of New York, wherein the opinion of the court was delivered by Chancellor Walworth, one of the most learned and eminent judges this country has produced, the court, in a most exhaustive opinion, declared its judicial knowledge as to what was an intoxicating drink in that state, and also went into further details concerning intoxicating liquors in other countries of the globe, and in the remotest times. In later years there seems to have been a disposition to deny or ignore judicial knowledge as to what constitutes intoxicating liquors, and the courts have manifested a desire to disavow any judicial knowledge on the subject. At the same time some of the courts have not hesitated to impute to juries an extensive knowledge and information in this regard. This court, however, will follow the precedent established by the decision of Chancellor Walworth upon this subject, and will assume judicial knowledge concerning intoxicating liquors. The rule laid down in New York appears to be the better one, and has met with the support of the courts of last resort in many of the other states of the Union. In a trial in the state of Wisconsin, where this question arose in 1883, the trial judge declared that a man must be almost a driveling idiot who did not know what beer was, and that it was not necessary to prove it to be an intoxicating liquor. Later the supreme court of that state, in passing on the charge of the trial judge, declared that his rulings in the case upon this question were not only clearly correct, but, if his peculiar manner gave them force and emphasis, it was not only proper, but commendable. This court therefore will neither stultify itself nor impeach its own veracity by telling you that it has not judicial knowledge that the liquor commonly known as "whisky" is an intoxicating liquor, or that the drink commonly called a "whisky cocktail" is an intoxicating drink. On the contrary, the court assumes judicial knowledge that both are intoxicating. Therefore, if you find from this evidence beyond

a reasonable doubt that whisky or whisky cocktails were sold, then you must find that an intoxicating liquor was sold.

As to the third proposition, that the sale must be by the defendant, the court charges you that, if you find from the evidence that either whisky or whisky cocktails were sold by any agent, servant, or employé of the defendant, acting for him or under his management, direction, or control, then the sale becomes the act of the defendant, and he is liable under this indictment.

All of these propositions are necessary to be established from the evidence beyond a reasonable doubt, to warrant the conviction of the defendant,—that is, there must be a sale of liquor; the liquor must be whisky or whisky cocktails, which the court has charged you are intoxicating liquors within the meaning of this statute; and the sale must be made by the defendant, either in person or by his agent, servant, or employé, acting for him or under his management, direction, or control.

In view of the offer of testimony made by the defendant, and the discussion of counsel concerning the same, as to the payment of the internal revenue tax by the defendant, and the issuing of the government license therefor, the court deems it necessary to place the law in reference to that matter before you. This prosecution is not for a violation of the internal revenue laws. Such a violation constitutes another and entirely different and distinct offense from the one set forth in this indictment; and, while the court feels that the policy of the government in accepting from liquor dealers in this district the internal revenue tax, and issuing the license therefor, while the present prohibitory liquor law remains in force, is unwise, unjust, and often deceptive and misleading, it is nevertheless the duty of the court to charge you that the payment of the internal revenue tax, and the receipt of the license by the defendant thereunder, constitutes no defense whatever to this prosecution; and you must not consider the offer to introduce such license on the part of the defendant, or the discussion which took place in regard to the same, in making up your verdict, as that question has nothing whatever to do with this case. It is your duty to come to conclusions upon questions of fact in this case from the evidence that has been produced and admitted upon the trial, and you have no right to go outside of the evidence to consider anything, either for or against this defendant, and in making up your verdict you must decide upon all the evidence admitted upon the trial.

Inasmuch as this is a criminal prosecution, it is governed by the same rules of law as are applicable to other criminal cases, and the defendant is entitled to the presumption of innocence until he is proved to be guilty; and the government must satisfy you from the evidence beyond a reasonable doubt that he is guilty. Therefore, if you find from the evidence beyond a reasonable doubt that whisky or whisky cocktails were sold by the defendant, either in person or by his servants, employés, or agents, acting for him, or under his management, direction, or control, then your verdict should be, "Guilty as charged in the indictment." If you do not

so find the defendant is entitled to be acquitted, and your verdict should be, "Not guilty."

The jury disagreed.

WHEELER v. UNITED STATES.

(District Court, N. D. California. August 7, 1896.)

No. 1,477.

CUSTOMS DUTIES—DRAWBACK—BEER BOTTLES.

Imported bottles and corks, re-exported filled with beer made in this country, are not "materials * * * used in the manufacture of articles manufactured or produced in the United States," within the meaning of section 25 of the act of October 1, 1890; and the exporter is consequently not entitled, under that section, to a drawback of the duties paid.

This was a suit by Robert S. Wheeler to recover $180.83, under section 25 of the revenue act of October 1, 1890, commonly known as the "McKinley Act," claimed to be due plaintiff as a drawback on imported materials, to wit, corks and bottles, on which duties had been paid, which materials, it was alleged, had been used in the manufacture or production of articles manufactured or produced in the United States, to wit, in the manufacture of bottled beer, afterwards exported to foreign countries. The corks and bottles on which drawback was claimed did not, however, enter into the manufacture, strictly speaking, of the beer, but were simply the coverings or packages for it. Demurrer to the complaint. Demurrer sustained, and judgment for the United States.

Page, McCutchen & Eells, for plaintiff.

H. S. Foote, U. S. Dist. Atty., and Samuel Knight, Asst. U. S. Dist. Atty.

MORROW, District Judge (after stating the facts). This case comes up on a demurrer to the complaint. The plaintiff claims $180.83 drawback on imported materials, on which duties have been paid, which materials, it is alleged, have been used in the manufacture or production of articles manufactured or produced in the United States, to wit, on corks and bottles used in the manufacture of bottled beer, afterwards exported to foreign countries. The allegations of the complaint, so far as they are material to a clear understanding of the points raised by the demurrer, are substantially as follows: On or about the 26th day of May, 1893, the plaintiff, being about to export from the port of San Francisco to a foreign country, to wit, Mexico, a certain consignment of bottled beer, or beer in bottles, amounting to 205 packages, containing each 60 pints, for the purpose of securing to himself the right of receiving a drawback on the imported materials whereof the same were made, filed with the collector of the port and revenue district of San Francisco an entry, in triplicate, stating where such merchandise was deposited, naming the conveyance by which, and the country to which, the same was to be exported, fully describing the said merchandise by marks and numbers, and identifying the materials used in the manufacture of