

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO.
(Circuit Court of Appeals, Seventh Circuit. January 4, 1897.)

No. 280.

RAILROAD COMPANIES—GOVERNMENT AID—RAILROAD REPORTS.

Act June 19, 1878 (1 Supp. Rev. St. p. 194), requiring certain reports, prescribed by the auditor of railroad accounts, to be made by railroads to which the United States have granted any loan of credit or subsidy, in bonds or lands, or which have received from the United States lands granted to them to aid in the construction of their roads, does not apply to the railroads which were incorporated by the several states, and received from them the grants of land made to such states to procure the construction of railroads.

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

J. H. M. Wigman, for the United States.

George R. Peck, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

PER CURIAM. This action was brought by the United States to recover of the Chicago, Milwaukee & St. Paul Railway Company the penalty prescribed by the act of congress entitled "An act to create an auditor of railroad accounts and for other purposes," approved June 19, 1878, for neglect to make a report as required. 20 Stat. 169, c. 316, § 5. The circuit court sustained a demurrer to the declaration, and gave judgment for the defendant. The case is sufficiently stated in the opinion delivered in support of that ruling (*U. S. v. Chicago, M. & St. P. Ry. Co.*, 69 Fed. 89); and we fully concur in the conclusion there declared, that the statute under which the action was brought is not applicable. The judgment is therefore affirmed.

COUNTY OF LEWIS AND CLARKE v. UNITED STATES.

(District Court, D. Montana. November 20, 1896.)

No. 58.

1. FEDERAL PRISONERS IN STATE JAILS — KEEPING AND SUBSISTENCE — STATE STATUTE.

The Montana statute provides that persons may be committed under authority of the United States to any jail in the state "upon payment of the expenses of supporting such prisoners, ten dollars per month to the county, for the use of the jail, and all legal fees to the jailer." *Held*, that this means \$10 per month for all the prisoners so confined, and not \$10 per month for each one of them.

2. SAME—EFFECT OF STATE STATUTES.

A state statute authorizing the use of county jails for the confinement of United States prisoners on certain terms as to charges and fees is not binding on the United States, as, by Rev. St. § 5547, the keeping and subsistence of such prisoners is made a matter of contract, under the control of the attorney general.

R. R. Purcell, for plaintiff.

P. H. Leslie, U. S. Atty.

KNOWLES, District Judge. This is an action brought by the county of Lewis and Clarke, state of Montana, against the United States. It was instituted for the purpose of recovering a judgment against the United States for the rent of the county jail of said county. The United States, by its attorney, demurred to the petition, alleging that it did not state facts sufficient to constitute a cause of action. The chief difficulty, perhaps, in the case arises over the construction of the following statute of the state of Montana, to wit:

"Persons may be committed under the authority of the United States to any jail in this territory upon payment of the expenses of supporting such prisoners, ten dollars per month to the county, for the use of the jail, and all legal fees to the jailer, and the sheriff shall receive such prisoners and subject them to the same discipline and treatment, and be liable for any neglect of duty, as in the case of other prisoners; but the county, in no case shall be liable for the escape of such prisoner or prisoners." Comp. St. § 1275.

By the constitution of Montana the term "territory" in this statute was changed to that of "state." It is claimed that the \$10 per month in this statute means \$10 per month for each and every United States prisoner confined in any county jail. This meaning is only reached by the adding of additional words to the statute. It cannot be derived from the words as originally used in the statute. There is no such ambiguity in the statute as would, in my opinion, justify any court in adding any terms to the same. If the court should resort to the construction placed upon the statute by those who have been called to act thereunder, I think no such construction as is claimed was ever put upon its terms. The statute provides that persons may be committed to such jail. There is a provision providing for the payment of "the expense of supporting such prisoners" as may be confined in such jail, and then it is provided that there shall be paid "ten dollars per month to the county for the use of the jail." This evidently means for the use of the jail for the persons committed to it and for the prisoners confined in it, not for each person committed or confined. Again, this statute would not bind the United States, unless it in some way consented to its provisions. There are no allegations in the petition showing such consent. It seems to be assumed that the United States would be bound by the provisions of this statute in all cases. Section 5547, Rev. St. U. S., provides:

"The attorney general shall contract with the manager or proper authorities having control of such prisoners for the imprisonment, subsistence and proper employment of them and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners shall be confined."

In the preceding section of said statute it is provided that a court may sentence a criminal, when no United States jail or penitentiary is provided, to such state or territorial jail or penitentiary as the attorney general of the United States shall designate. It is evident from these two sections that it is expected the United States, by its attorney general, shall contract for the keeping and custody, under certain circumstances, of United States prisoners, in some state or territorial jail or penitentiary. It was not con-

templated that any state or territory by a statute could dictate to the United States what it should pay for the rent of any county jail. What the United States must pay for the rent of any jail must rest in contract, express or implied. No such contract is set forth in the petition. The demurrer is therefore sustained.

In re WISE.

(Circuit Court, N. D. California. December 14, 1896.)

CUSTOM DUTIES—CLASSIFICATION—TAPIOCA FLOUR.

Tapioca flour is not dutiable under paragraph 323 of Act Oct. 1, 1890, as a "preparation * * * fit for use as starch," but belongs to the free list as "tapioca," under paragraph 730. *Townsend v. U. S.*, 5 C. C. A. 488, 56 Fed. 222, followed.

Samuel Knight, Asst. U. S. Atty., for petitioner.
Charles Page, for importers, respondents.

McKENNA, Circuit Judge (orally). This case involves the consideration of the tariff act of 1890. It is contended by the collector of the port that the merchandise in question comes under section 1, par. 323, of the tariff bill of 1890, which reads as follows: "Starch, including all preparations, from whatever substance produced, fit for use as starch, two cents per pound." The importer contends that it comes under section 2, par. 730, which reads: "Tapioca, cassava, or cassada, free." The case is an extremely doubtful one. If the words in paragraph 323, "fit for use as starch," mean physically fit, if I may use that expression, the imported article satisfies the definition. The testimony shows it to be physically fit. If it means, however, "commonly used as such," as the Wilson bill expresses it, the merchandise is not within the definition. If we pass that difficulty, we meet another one,—what is tapioca? Paragraph 730 reads, "Tapioca, cassava, or cassada, free." What, then, is tapioca? The witnesses for the collector say there are only two forms of it,—flake and pearl. Some of them testify that they had never heard of the form tapioca flour. The testimony of the importers is that there are three forms,—pearl, flake, and the flour. But the witnesses may be discriminated, and the difference of their testimonies accounted for. Those of the government were chiefly acquainted with the retail trade, and their knowledge and experience were hence confined to the San Francisco market. Those of the importers were in the importing trade, and their knowledge extended to other markets as well as that of San Francisco. The testimony therefore establishes that while, possibly, in San Francisco, there are but two forms of tapioca, the pearl and the flake, in other markets and ports there is a third form, that of the flour. Interpreting, therefore, the words, "fit for use as starch," in paragraph 323, as "physically fit," there is a clear conflict between it and paragraph 730, which admits tapioca,—pearl, flake, and the flour,—free. But it is not neces-