

by the evidence that a partnership was in fact intended, but it is well settled that in a case at law tried by the court, and in which there is a special finding of the facts, this court can consider only whether, upon the facts found, the judgment rendered is right. *Jenks' Adm'r v. Stapp*, 9 U. S. App. 34, 3 C. C. A. 244, and 52 Fed. 641; *Skinner v. Franklin Co.*, 9 U. S. 676, 6 C. C. A. 118, and 56 Fed. 783; *Marston v. U. S.*, 34 U. S. App. 461, 18 C. C. A. 216, and 71 Fed. 496; *Phipps v. Harding*, 34 U. S. App. 148, 17 C. C. A. 203, and 70 Fed. 468; *Daube v. Iron Co.*, 46 U. S. App. 591, 23 C. C. A. 420, and 77 Fed. 713. The judgment of the circuit court is affirmed.

SHOWALTER, Circuit Judge (concurring). Randle sued Barnard and Ricksecker in assumpsit to recover a balance of rent reserved on a certain lease. Ricksecker was not served with process, and did not appear. The lease put in evidence was in the ordinary form, and was under seal. Randle was therein named as lessor, and Ricksecker as lessee. Barnard was not a party to the instrument. In law, the leasehold estate in its entirety was vested in Ricksecker. The court did not find that this leasehold estate, or any part of it, had ever been assigned to Barnard; nor is there any finding from which such assignment can be inferred. The matters put forward as indicating a partnership relation between Ricksecker and Barnard do not go to the extent of showing any alienation of the leasehold estate by the one to the other. Moreover, the lease itself provided in express terms against assignment. There was neither privity of estate nor privity of contract between Randle and Barnard,—nothing whatever on which to predicate, as between these two, the relation of landlord and tenant. I think, therefore, the judgment should be affirmed.

MEADS et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 475.

1. OFFICIAL BONDS—RECEIPT OF MONEY BEFORE IT IS DUE.

The receiver of a land district is liable on his bond for money received by him from entrymen before it was payable under a rule of the interior department, even giving to such a rule the force of an act of congress, since it is directory only, as it merely regulates the time and mode of payment of money which becomes due by virtue of other and independent law.

2. SAME—EFFECT OF DEPARTMENT REGULATIONS.

While department regulations duly promulgated have the force of law, in a limited sense, they cannot enlarge or restrict the liability of an officer on his bond.

Error to the Circuit Court of the United States for the Western District of Michigan.

Clark & Pearl, for plaintiffs in error.

John Power, U. S. Atty.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge. This suit was brought in the United States circuit court for the Northern division of the Western district of Michigan against the plaintiff in error Thomas D. Meads and the sureties on his official bond as receiver of public moneys at Marquette, Mich., for the land district of Marquette. Meads was appointed receiver for this land district June 5, 1890, and continued in office until March, 1894; and this suit is for the balance of money received by Meads during that term of office, and not paid out or otherwise legally accounted for. The money in question was received from persons proposing to make pre-emption and homestead entries, and the sum consisted in part of the purchase price of the public land, and in part of the fees of receiver and register, and entry fees. It is not necessary for the purpose of the questions here presented to distinguish between the sums paid as purchase price and those paid as fees. Among the various rules and regulations promulgated by the secretary of the interior and the commissioner of the general land office is rule 53, which reads as follows:

"The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the commissioner. In all cases, however, where a contest has been brought against an entry or filing on the public lands, and trial has taken place, the entryman may, if he so desires, in accordance with the provisions of the law under which he claims, and the rules of the department, submit final proof, and complete the same, with the exception of the payment of the purchase money or commissions as the case may be. Said final proof will be retained in the local land office, and should the entry finally be adjudged valid, said final proof, if satisfactory, will be accepted upon the payment of the purchase money or commissions, and final certificate will issue, without any further action upon the part of the entryman, except the furnishing of a nonalienation affidavit by the entryman, or, in case of his death, by his legal representatives. In such case, the party making the proof, at the time of submitting the same, will be required to pay the fees for reducing the testimony to writing. All provisions of the rules of practice, inconsistent with the above changes and modifications are hereby rescinded."

It will be observed that this rule is applicable to the case where contest arose in regard to the superior right in relation to the land of a particular entry, and was intended apparently to direct the procedure by the local officers pending such contest, and until its final settlement in the usual and proper way. The argument is that this particular regulation requires just what the previous regulations and their interpretation by the commissioner and the secretary required, and no more, and nothing different. It further appears that, with three or four unimportant exceptions, a contest arose in regard to the proposed entries on which the purchase price and fees were paid to the receiver, which constitute the items of the account now sued on. It is agreed that the sums were paid to the receiver, and the only defense made to the suit is that these payments, under rule 53, were made to the receiver in advance of the time when by that rule they could properly be made, and that the sums were not therefore paid to the receiver in the line of his duty and officially, but were paid to him in violation of rule 53, and that he received them as an individual, and as an agent of the party proposing to make pre-emption or homestead entries, and not as the agent or officer of the government, and that

the money is not therefore, in his hands, public money, for which the sureties on his bond are liable to account, according to the terms of the bond. Omitting the names of the sureties, the entire body of the bond is as follows:

"The condition of the foregoing obligation is such that whereas, the president of the United States has appointed the said Thomas D. Meads to be receiver of public moneys at Marquette, Michigan, by commission dated June 5, 1890, and said Thomas D. Meads has accepted said appointment: now, therefore, if the said Thomas D. Meads shall at all times during his holding and remaining in said office carefully discharge the duties thereof, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for the same, and for all public funds and property which shall or may come into his hands, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue."

The amount sued for was \$2,863.56, and the court below directed a verdict in favor of the government, upon which judgment was pronounced, and the case is brought here on writ of error.

Just what is the true intention and effect of the various rules promulgated by the land department upon this subject, as construed by the decisions of that department, has been the subject of much discussion at the bar; but, in the view we take of the case, we are relieved from the task of examining the regulations and decisions in detail with a view to reconcile the apparent conflict in such rules and decisions. As suggested, the contention of the plaintiff in error is that rule 53 determines the right and duty of the receiver, and thereby affects the obligation of the sureties on the official bond, and that the money was not due and payable to the receiver at the time when received, and the sureties are therefore released. This contention presents the question of the true nature and effect of a regulation such as rule 53 on the obligation of the bond, but we merely mention the question now, and will return to it in the further progress of the opinion.

It will be observed that the plaintiff in error assumes that this regulation has all the force and effect of a positive enactment of congress, and it is obvious that the importance thus claimed for the regulation is necessary, in order that the plaintiff in error may make any headway with his contention. Treating rule 53, then, as having all of the effect which the contention thus assumes, we are unable to agree that it follows as a result that the sureties are released from liability on the bond for these sums of money. The bond is executed pursuant to section 2236 of the Revised Statutes. The general provisions as to the time when payments may be made by homestead and pre-emption claimants will be found in sections 2267 and 2301 of the Revised Statutes. It is not suggested in the pleadings or in argument by the plaintiffs in error that the payments were prematurely made to the receiver, except by reason of the limitation contained in rule 53. The general enactments of congress upon the subject expressly provide that such payments shall be made by persons proposing to acquire rights in the public lands, and the manner of disbursing and otherwise accounting for public money so received is provided by general law. The entryman or homesteader, as the case may be, does not make payment of the purchase price or fees required under the au-

thority of rule 53, but under the statutes enacted by congress by which such sums are made due; nor does the receiver pay out or account for such money by authority of any rule or regulation of the department, but by authority of the laws enacted by congress. The assumption that this money becomes due and payable to the receiver by authority of rule 53 is the basis of the defendant's contention, and constitutes a manifest vice in the reasoning and conclusion by which it is sought to make good the defense in this case. Independently of the general law enacted by congress upon the subject, rule 53 would confer no rights and impose no obligations whatever on the receiver or the sureties on his bond. Rule 53 is obviously a regulation which affects only the time and mode of payment, and does not touch the right to make such payment, the obligation to receive it, and to disburse it. These rights and obligations are all fixed by general law. It is to be remembered that the obligors on an official bond of this character should be held to a strict accountability, as was said by the supreme court of the United States in the early case of *U. S. v. Prescott*, 3 How. 588, and by the supreme court of Tennessee in the well-considered case of *McLean v. Tennessee*, 8 Heisk. 24. It has often been decided that the laws enacted by congress and in force at the time of the execution of a bond of this character enter into and determine the obligation of the bond, as much as if incorporated by express reference to such law. Treated as equivalent to an act of congress on which the sureties might rely, still rule 53, as before stated; properly construed, could have no such effect as that claimed for it, but merely regulates the time and mode of payment of money which becomes due by virtue of other and independent law, and is in its nature directory only, and would not release the sureties. It is in this respect not different in character from a statutory requirement that officials intrusted with the collection of public revenue shall make quarterly or other fixed settlements, and promptly pay any balance found due upon such settlement. Such requirement being by positive statute, it might be made and has been a contention by the surety that he might rely on a proper enforcement of such statutory regulation, and that failure to require a settlement pursuant to such statute would have the effect to discharge the surety from liability for defaults occurring previously to the time fixed for such stated settlements. In *Crawn v. Com.*, 84 Va. 282, 4 S. E. 721, the supreme court of Virginia said:

"In the case of *Com. v. Holmes*, 25 Grat. 771, this court held, upon abundant authority, that the regulations prescribed by law for the settlement of such accounts at stated periods, being intended for the benefit of the government, to secure punctuality and promptness in its officers, were directory merely, and did not enter into and form part of the sureties' contract, so as to prevent the legislature from altering or extending the times of settlement at pleasure without the sureties' assent; and therefore, and from the nature of the officers' obligation and duties, and of the condition of the bond, such an extension did not operate as a discharge of the surety. We reaffirm that principle, and are of opinion that the sureties in this case are not discharged from liability for the official acts of their principal by reason of the extension of time for settlement granted to him."

And so in *U. S. v. Kirkpatrick*, 9 Wheat. 735, Mr. Justice Story, delivering the judgment of the court, said:

"It is said that the laws require that settlements should be made at short and stated periods, and that the sureties have a right to look to this as their security. But these provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its officers. They are merely directory to such officers, and constitute no part of the contract with the surety. The surety may place confidence in the agents of the government, and rely on their fidelity in office; but he has of this the same means of judgment as the government itself, and the latter does not undertake to guaranty such fidelity. No case has been cited at the bar in support of the doctrine, except that of *People v. Jansen*, 7 Johns. 332. In respect to that case, it may be observed that it is distinguishable from the present in some of its leading circumstances. But, if it were not, we are not prepared to yield to its authority. It is encountered by other authorities which have been cited at the bar; and the total silence in the English books, in a case of so frequent occurrence, affords strong reason to believe that it never has been supposed that laches would be fatal in the case of the government where it would not affect private persons. Without going more at large into this question, we are of opinion that the mere laches of the public officers constitutes no ground of discharge in the present case."

See, also, *U. S. v. Van Zandt*, 11 Wheat. 184; *U. S. v. Nicholl*, 12 Wheat. 505; *U. S. v. Boyd*, 15 Pet. 187.

These cases proceed upon the distinction between statutes which merely regulate in detail the mode and time of payment and those which determine the right to receive and the duty to pay. The one class of statutory provisions create the duty to pay, with the right to receive, and the duty to disburse; and such provisions are mandatory and essential, and determine the right and obligation, while provisions of the other class are directory, and affect merely the mode of exercising the right and discharging the duty. It was decided in *Dollar Sav. Bank v. U. S.*, 19 Wall. 227, that the provision of law as to the proper mode of assessment and collection of taxes did not affect the right to demand and the duty to pay the taxes imposed by general law, and that an ordinary action of debt would lie to collect such taxes without any assessment whatever. So in *King v. U. S.*, 99 U. S. 229, the collector had received from the treasurer of the Toledo, Wabash & Western Railway Company the sum of \$24,923.87, as a tax on interest paid on mortgage bonds of the company. No return had been made to the assessor, sworn to as required by law, and the defense was that this sum was paid to the collector, not upon any return made to the assessor, or any assessment made by him or the commissioner of internal revenue for such taxes, and that it was a voluntary deposit of the money in the hands of the collector at Toledo by the company, and not received by the collector in his official character; that it was not his duty to receive it for the government, under these circumstances; and that his act in receiving the same was unofficial. The point was that Chase, the collector, had no legal authority, as collector of internal revenue, to receive the money. In regard to this defense the court said:

"There can be no question that Chase understood himself as receiving the money for the government, and in payment of the taxes due. Nor is there any question that the treasurer of the railroad company intended it as pay-

ment to Chase in his official character as collector, and supposed he had paid the taxes by so doing; for Chase gave him three separate receipts, in which the taxes for each of the years we have mentioned are set out, and also the months of the year in which they accrued, which he signed officially as collector, and declared in each receipt that it was in full of the account." "The answer," said the court, "made to this by counsel, is that the debt was not due, or at least not payable, until the assessor had received and acted on the return made by the corporation. There is nothing in the statute which says this, in terms. If it be sound, it must be an implication, and we do not see how such an implication can arise. That such an assessment was not made long before was owing to the neglect of the company to make proper returns. Did that neglect make the taxes which should have been paid a year before any less a debt from that time? And can it be said they were not due at the time the statute says they should be paid, because the company failed to make the report which it was its duty to make?" If there could be any doubt upon this point, it was set at rest by the decision of this court in *Dollar Sav. Bank v. U. S.*, 19 Wall. 227, where the same objection was taken to a suit to recover this tax. The court held explicitly that the obligation to pay the tax did not depend on an assessment made by any officer whatever, but that, the facts being established on which the tax rested, the law made the assessment, and an action of debt could be maintained to recover it, though no officer had made an assessment. So that, both on principle and authority, we are of opinion that the judgment for the sum received by the collector and not paid over, with interest, is right, and must be affirmed. See, also, *U. S. v. Ferrary*, 98 U. S. 625."

So in *Miller v. Moore*, 3 Humph. 189, it was held, on motion against the sheriff, as tax collector, for unpaid taxes, not necessary for the plaintiff to show that the justices had returned proper tax lists as required by law, and that the taxes had been properly assessed as required. The court ruled that it was enough that authority was placed in the sheriff's hands to collect, and that he did in fact collect, the taxes. So in *McLean v. Tennessee*, 8 Heisk. 22, it was decided upon full consideration that certain sections of the Code of Tennessee which prohibited any officer from receiving or filing a bond not approved in the particular mode pointed out by the statute did not affect the obligation of the sureties on a bond accepted in violation of the statute, and under which the official in fact acted. It was said that these and similar provisions were for the further security of the public, and did not release the sureties, and in the same case it was held that a void levy of taxes which the taxpayers might have resisted was no defense against judgment on the bond for the taxes in fact paid by the people. The opinion proceeded upon the ground that taxes were justly due, and the obligation to pay at a proper time and in proper mode existed, and the fact that these taxes were received by the official without valid levy constituted no defense. So it was held that the failure of the county clerk to keep a revenue docket as required by law did not affect the right of the county to proceed by motion for judgment on the bond. And in *Fuller v. Calkins*, 22 Iowa, 301, in a suit against the deputy tax collector of internal revenue, the defense was that the money received was for taxes on incomes not levied, and not due until after the payment of the same to the deputy. This defense was overruled, and it was adjudged that although paid by the taxpayers before due, or before formally levied, yet, being received by the deputy collector as taxes, it came into his hands by virtue of his office, and he

was bound to pay over the same as collector. The court, in disposing of this case, said:

"The substance of the whole matter, however, is that, though the collector may not have been legally bound to receive this money at the time, yet he did receive it, and, as we are bound to presume, executed the usual and proper receipts, and entered the proper memorandum on the tax list at the time, or so soon as the same was placed in his hands. By so doing he was in no just sense the mere custodian or trustee of the taxpayers, holding the funds for their use, and alone liable to them, or individually to the government, for the faithful application of the funds. This was public money, funds in his hands by virtue of his office, revenue which he was bound to account for and pay over, and by the very terms of the bond the sureties were liable therefor. As was said in *Warren Co. v. Ward*, 21 Iowa, 84, the officer was perhaps not bound to take the money, but he did, accepting it as collector, and he is therefore bound for it as money received by virtue of his office."

A tax collector and his sureties are liable for penalties collected, and no question as to the legality of collecting the penalties can be made either by the collector or his sureties. *Wilson v. State*, 1 Lea, 317. It has been repeatedly held that a collector and his sureties on his official bond are liable for taxes collected on a void assessment, and so it is no defense to the collector and his sureties that the law imposing the particular tax collected is unconstitutional. So held in regard to the dog tax, the statute imposing which was afterwards declared unconstitutional. *Chandler v. State*, Id. 296.

Upon the question how far the acts of an officer are to be regarded as official, and to which the liability of the surety on his official bond extends, the ruling in the foregoing cases is strongly supported by analogy in decisions in respect of the liability of officers in the execution of court process. In *Lammon v. Feusier*, 111 U. S. 17, 4 Sup. Ct. 286, the marshal, having in his hand a writ of attachment on mesne process against property of Feusier, levied upon the goods of plaintiff in the action, who was a stranger to, and not named in, the process of attachment. The defense was that, as the writ commanded seizure of the property of the person named, the sheriff, in taking the property of a stranger, was not acting in the line of duty, and the sureties were not liable. The court, however, said that taking property of a person not named in the writ, or property exempt from attachment, was a breach of official duty, equally with the neglect to take attachable property of the person actually named. There has, it is true, been much difference of opinion in the courts of the several states upon this question, but, as pointed out in *Lammon v. Feusier*, the great preponderance of authority is in favor of the proposition that such act is official, and renders the sureties liable. In that case the supreme court of the United States expressly approved *State v. Jennings*, 4 Ohio St. 423, and *City of Lowell v. Parker*, 10 Metc. (Mass.) 309. In *State v. Jennings* the court said:

"The reason for this is that the trespass is not the act of a mere individual, but is perpetrated *colore officii*. If an officer, under color of a *fi. fa.*, seizes property of the debtor that is exempt from execution, no one, I imagine, would deny that he had thereby broken the condition of his bond."

And the court further said:

"True, it may sometimes be more difficult to ascertain the ownership of the goods than to know whether a particular piece of property is exempt from

execution; but this is not always the case, and, if it were, it would not justify us in restricting to litigants the indemnity afforded by the official bond, thus leaving the rest of the community with no other indemnity against official misconduct than the responsibility of the officer might furnish."

In *City of Lowell v. Parker*, a constable, being authorized by statute to serve only writs of attachment in which the damages were laid at no more than \$70, took property upon a writ in which the damages were laid at a much greater sum. The argument was that the constable had no more authority to make the seizure than if he had acted without any writ whatever, but the court overruled this objection, and said:

"He was an officer, had authority to attach goods on mesne process on a suitable writ, professed to have such process, and thereupon took the plaintiff's goods; that is, the goods of Bean, for whose use and benefit this action is brought, and who therefore may be called the plaintiff. He therefore took the goods colore officii, and, though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty."

Rule 53, then, regarded as having the effect of a duly-enacted law, would be merely directory as to the time when the official should or should not receive payments of a sum which was being paid, and which he was receiving by virtue of law independently of rule 53; and the rule would not, under any just interpretation, affect the surety's liability on the bond.

Judge Severens, who presided at the trial, stated his view of the question as follows:

"Payment of the price by the entry man is part of the transaction whereby he is to acquire title to the land. Rules prescribed by the department to the local land offices are for convenience in the transaction of business. Such is a rule requiring payment before action on proofs by those officers,—a rule designed to prevent vain proceedings there resulting from a subsequent failure to pay the purchase price. The money may properly be paid at any time while the proceedings for the purpose are in fieri, unless some statute or rule prohibits it, and none such has been shown to me. I have no doubt that if the money were not paid at the time of the application, but, upon notification from the land office that the proofs were held sufficient, it should then be paid, the proceeding would be perfectly valid, and the purchaser would have the right to a title. It is a matter of order only. The receiver is the agent of the government to make the sale. If an intending purchaser of land should, with his proposition to buy, pay the price asked by the owner to the agent of the latter appointed to make the sale, the agent would be accountable to his principal for the money, as between them. If the transaction should fail,—as, for instance, on account of defect in the owner's title,—the principal would be bound to make restitution. The agent would not be liable to the purchaser. It was known that he was acting as agent. He was not selling his own land, nor dealing with a matter of personal concern to himself. There are very cogent reasons for applying this rule of agency to such circumstances as these. My conclusion, therefore, is that, at whatever stage of the proceedings the money is paid by the applicant to the receiver upon his intended purchase, the receiver is bound to render an account thereof to the department. It is not his money. He does not receive it as the agent of the applicant. He has no such dual status. If the money was properly payable at the time of the application, it would make no difference whether the government exacted payment then, or was willing to waive payment until the proceeding should ripen."

With this we fully agree. As was pointed out by the learned circuit judge, the rule of the department does not in terms prohibit pay-

ment at any time, and it is only by implication that such a result is insisted upon.

We may now return to consider for a moment the real character and effect of rule 53 promulgated by an executive department of the general government, and we are very clear that rule 53 was an administrative regulation or order intended to prescribe suitable business methods of doing the work required of officers in the department. In its effect it raises a question of discipline and procedure between the head of the department and the subordinate officers or agents, and, while disobedience of the regulation might furnish sufficient and just ground for discharging an employé, it was not competent by such regulation as this to enlarge or restrict the rights or obligations growing out of the execution of the bond in question as determined by law. The department itself is a mere creature and administrative instrument under laws duly enacted by congress, and would be without power by such regulation to change the liability of the sureties and the rights of the government on a bond like this, executed for the purpose of securing the faithful discharge of trusts imposed by law, and not by this or similar regulations. Official bonds like that here involved are required for the purpose of protecting the public having business relations with the government through officers and agents, and also for the purpose of securing the government against fraud and insolvency on the part of its agents intrusted with collecting and accounting for public revenue; and if it be once conceded that the obligation of such bonds may be changed, and sureties thereby released, by mere department regulations, it is obvious enough that there would be a complete practical failure in the purpose for which such bonds are required and executed, as these department regulations would, in the nature of the case, vary to meet the differing views of heads of departments coming in and going out with changes of administration. In *Quinn v. Chapman*, 111 U. S. 445, 4 Sup. Ct. 508, it appeared that there was a rule in the land office forbidding the filing of a declaratory statement based upon a pre-emption right subsequent to the commencement of a contest between other parties for the same land, but the court held that the existence of such rule was no valid ground for rejecting a claim which was otherwise legally or equitably good under the general laws of congress. So in *Westervelt v. Mohrenstecher*, 22 C. C. A. 93, 76 Fed. 119, the action was upon the bond of the cashier of a national bank. The national bank act expressly provided that the cashier of a national bank should hold his office subject to the pleasure of the board of directors. The bank, by a by-law, provided, however, that the cashier should hold his office for one year, and should be elected annually; and the defense made by the sureties on the bond was that the default did not occur during the year for which they were sureties on the bond of the cashier, and that they were liable on the bond for the term of one year only. This contention was overruled, and it was adjudged that the by-laws were nugatory, being in conflict with the laws of congress on that subject, and that it was not competent by a by-law to modify or change the law of congress; that under the law of congress a cashier was appointed and held office subject to removal by the board of directors, and that the term of his

office continued from the time of his appointment until removal and another appointment in accordance with the acts of congress, and the sureties were liable for the entire term. In 20 Op. Atty. Gen. 24, the liability of disbursing agents for public moneys deposited in bank was considered by Judge Taft, then solicitor general. One Hay had been appointed by the secretary of the interior disbursing agent. He was a member and secretary of the board of town-site trustees of Oklahoma territory. The act of congress had expressly provided that the secretary of the interior should provide regulations for the proper execution of the trust; and among the regulations made by the secretary was one which undertook to define the duties of the disbursing agent, and, among other things, provided that he should "deposit all the sums received by him at least once a week, and, when practicable, daily, in some bank designated by the board," and should "pay the same out only on his checks countersigned by the chairman of the board of which he is secretary, which checks, after they are honored, shall be filed with his account as vouchers." The town-site board designated the Commercial Bank of Norman and the Commercial Bank of Guthrie as banks of deposit for the disbursing agent. Sums of money were on deposit in each at the time of their failure, and the question was whether Hay and his sureties on his official bond were liable for any loss arising from the failure of these banks. Discussing this question, the solicitor general said:

"A preliminary objection is made to his liability for the loss of a part of the sums on the ground that it was collected from assessments made and never in the treasury. It was, however, money properly paid into his hands as a special disbursing agent, and was public money while there, because the United States was responsible for its proper disposition, whatever that might ultimately be. His bond expressly bound him to account for all public moneys coming into his hands. The main question is whether the designation of the banks by the board of trustees as places of deposit relieved Hay from the loss. This must be answered in the negative. Hay was a disbursing officer of the United States, and was forbidden by sections 3639, 3620, Rev. St., to deposit the public money in his possession in any other place than with assistant treasurers of the United States, or in some place designated as a depository by the secretary of the treasury. The regulation of the secretary of the interior provided for the designation by the town-site board of a bank for the deposit of moneys in the hands of their secretary and disbursing agent must be construed in the light of the foregoing sections. The power of designation by the board is limited, therefore, to banks which are lawful depositories of public moneys within the statute. It is not claimed that either the Norman bank or the Guthrie bank was such a depository. The result is that Hay is not exonerated from liability on his bond arising from the failure of these banks."

And the view thus expressed was approved by the attorney general.

In *U. S. v. Symonds*, 120 U. S. 49, 7 Sup. Ct. 412, Mr. Justice Harlan, speaking for the court, said:

"The authority of the secretary to issue orders, regulations, and instructions, with the approval of the president, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by congress in reference to the navy. He may, with the approval of the president, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent

with *Gratlot v. U. S.*, 4 How. 80, and *Ex parte Reed*, 100 U. S. 13, upon which the government relies. Referring in the first case to certain army regulations, and in the other to certain navy regulations, which had been approved by congress, the court observed that they had the force of law. See, also, *Smith v. Whitney*, 116 U. S. 181, 6 Sup. Ct. 570. In neither case, however, was it held that such regulations, when in conflict with the acts of congress, could be upheld."

See, also, *U. S. v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764.

It is very true that these regulations duly promulgated by the department have the force of law, in a limited and just sense, especially when authorized or approved by congress. It is to be borne in mind, however, in considering the effect of such orders, that the power, authority, and purpose of the particular departments are well defined by the legislation of congress, and the department is organized for the purpose of giving practical effect in detail to such legislation, and for that purpose the department is vested with power to make all needful rules and regulations within the limits of the authority and purpose thus manifested by congress. In what was thus said it is implied that the general laws of congress with respect to the rights of the public in dealing with these official agencies, as well as the obligations arising out of the execution of these bonds, and the rights of the government thereunder, cannot be changed by mere department regulation. The recognition of such power and of such effect in a department order would, for reasons just indicated, as well as others, be dangerous to the government. There is no claim or suggestion, and, indeed, could not be, upon the record, that the sureties at any time had any knowledge of rule 53, or that anything was done or omitted to be done by them upon the faith of said rule. There is therefore no equitable feature in the position of the sureties by reason of which they should be favored by any nice or doubtful interpretation. Upon what has thus been said, and without further elaboration, it is sufficient to announce that the judgment of the circuit court was, in our opinion, clearly correct, and the same is affirmed.

SHELP et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 7, 1897.)

No. 346.

1. INDICTMENT—NEGATIVING EXCEPTIONS.

In an indictment for a statutory offense, it is only necessary to negative an exception in the statute when that exception is such as to render the negative of it an essential part of the definition of the offense.

2. SAME—SELLING INTOXICATING LIQUORS IN ALASKA.

In an indictment for selling liquor to Alaska Indians, contrary to the act forbidding the "importation, manufacture, and sale of intoxicating liquors" in Alaska, "except for medicinal, mechanical, and scientific purposes" (23 Stat. 28, § 14), it is not necessary to negative the exception mentioned in the statute.

3. CRIMINAL LAW—ACCUSED'S RIGHT TO LIST OF WITNESSES.

On an indictment for selling intoxicating liquors in Alaska, the accused has the right to have indorsed on the indictment only the names of the witnesses examined before the grand jury; this being the provision of the

Oregon statute made applicable by the act of congress. Rev. St. U. S. § 1033, requiring a list of all the witnesses to be furnished before the trial, applies only to trials for capital crimes.

4. SAME—MISCONDUCT OF COUNSEL—REVIEW ON ERROR.

Improper remarks of the prosecuting attorney in his address to the jury cannot be considered on error, where no objection was made thereto at the trial, and no exception taken.

5. SAME—CREDIBILITY OF WITNESSES—INSTRUCTIONS.

No witness is to be discredited merely because of his race or color; and, where counsel have asserted that comparatively little credit is to be attached to the evidence of ignorant and semibarbarous Indian witnesses, there is no error in the court's saying that both white men and Indians lie, and that the evidence of both is entitled to the same credit, and such credibility is to be determined by the same rules of law, when this is coupled with a correct statement of the jury's right to consider the intelligence, appearance, apparent candor, opportunities of knowledge, etc., of each witness.

6. SAME—MISLEADING INSTRUCTIONS—EXCEPTIONS.

If counsel are of opinion that any part of the charge requires the jury to consider outside matters not proved at the trial, it is their duty to call the attention of the trial court to the specific language complained of, so that a correction or explanation may be made. A general exception to the charge is insufficient to raise the point before an appellate court.

7. SAME—ARRAIGNMENT AND PLEA—FAILURE OF RECORD TO SHOW PLEA.

Until defendant has pleaded to the indictment, there is no issue to be submitted to the jury, and an omission to plead is fatal to the judgment in cases of misdemeanor, as well as infamous crimes.

8. SAME—REVIEW ON ERROR—INFERENCE AS TO ENTERING PLEA.

Where the record fails to show that any plea to the indictment was entered, the mere statement in the bill of exceptions that "the issue joined in the above stated case * * * came on to be tried," and the "jury was impaneled and sworn to try the issues between the said parties," does not authorize the appellate court to infer that a plea was in fact entered, but that the clerk failed to note it in the record.

In Error to the District Court of the United States for the District of Alaska.

This was an indictment against Archie Shelp and George Cleveland for unlawfully selling liquor to Indians in Alaska. The defendants, having been convicted in the trial court, sued out this writ of error.

Lorenzo S. B. Sawyer, for plaintiffs in error.

Burton E. Bennett, U. S. Atty., and Samuel Knight, Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This appeal is taken from a judgment of the district court of Alaska upon the conviction of the plaintiffs in error (hereafter designated as "defendants") of the crime of unlawfully selling intoxicating liquor. There are several assignments of error urged by counsel as being sufficient to justify a reversal of the judgment.

1. It is claimed by the defendants that the indictment is fatally defective because it does not negative the exceptions contained in the statute. The language of the indictment, in so far as it relates to this objection, is that the defendants "did unlawfully and willfully sell to Alaska Indians * * * an intoxicating liquor called

'whisky,' * * * without having first complied with the law concerning the sale of intoxicating liquors in the district of Alaska."

Section 14 of "An act providing a civil government for Alaska," under the provisions of which the defendants were indicted and convicted, reads as follows:

"That the provisions of chapter three, title twenty-three, of the Revised Statutes of the United States, relating to the unorganized territory of Alaska, shall remain in full force, except as herein specially otherwise provided; and the importation, manufacture, and sale of intoxicating liquors in said district except for medicinal, mechanical and scientific purposes is hereby prohibited, under the penalties which are provided in section nineteen hundred and fifty-five of the Revised Statutes for the wrongful importation of distilled spirits. And the president of the United States shall make such regulations as are necessary to carry out the provisions of this section." 23 Stat. 28; Rev. St. § 1955.

In *U. S. v. Nelson*, 29 Fed. 202, 209, and in the same case on writ of error to the circuit court of Oregon, 30 Fed. 112, 115, a similar indictment, which did not negative the exceptions in the statute, was held to be sufficient.

The exception stated in the statute does not either define or qualify the offense created by the statute. The offense designated in the statute is the sale of intoxicating liquors in Alaska. This can be properly stated without any reference to the exception. There is nothing in the exception that enters into the offense condemned by the statute. The exception is purely a matter of defense, which, if relied upon, could readily have been proven by the defendants. A careful examination of the authorities will show that it is only necessary in an indictment for a statutory offense to negative an exception to the statute when that exception is such as to render the negative of it an essential part of the definition or description of the offense charged. It is the nature of the exception, and not its locality, that determines the question whether it should be stated in the indictment or not. *State v. Ah Chew*, 16 Nev. 50, 54, and authorities there cited; *U. S. v. Cook*, 36 Fed. 896; *U. S. v. Cook*, 17 Wall. 168, 173; *State v. Van Vliet* (Iowa) 61 N. W. 241; *Bell v. State* (Ala.) 15 South. 557. The court did not err in refusing the motion in arrest of judgment.

2. It is contended that the court erred in allowing certain witnesses to testify on behalf of the government whose names were not indorsed upon the indictment, for the reason that no list containing the names of such witnesses was furnished to the defendants or their counsel. The statute of Oregon, the provisions of which are applicable to cases tried in the district court of Alaska, only requires that "the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment or endorsed thereon." Gen. Laws Or. 1843-1872, p. 348, § 61. This statute was fully complied with. The statute of the United States provides that, when a party is indicted for treason, a copy of the indictment and a list of the jury and of the witnesses to be procured at the trial, stating the place of abode of each juror and witness, shall be furnished to such person three days before the trial. In other capital cases the list must be furnished two days before the trial. Rev. St. § 1033. This

statute has no application to this case. There is no statute which requires a list of the witnesses to be furnished to a person indicted for a misdemeanor. If the indictment is not for a capital offense, the defendant is not entitled, as a matter of right, to a list of witnesses or jurors. *U. S. v. Wood*, 3 Wash. C. C. 440, Fed. Cas. No. 16,756; *U. S. v. Williams*, 1 Cranch, C. C. 178, Fed. Cas. No. 16,709; *U. S. v. Van Duzee*, 140 U. S. 169, 173, 11 Sup. Ct. 758, and authorities there cited.

3. It is claimed that there was such misconduct on the part of the United States attorney as to entitle defendants to have the judgment reversed. In his argument to the jury he said:

"That 'the result of the acts with which the defendants were charged was that a murder had been committed, and that the Indian who had committed the murder was in the penitentiary at San Quentin for such crime,' although no evidence whatever had been introduced of any murder having been committed; and further stated to the jury that 'the defendants went to the Indian village of Hoona, and sold whisky there,' although the defendants were not charged in said indictment with selling liquor at Hoona, and although there was no evidence that defendants had stopped at Hoona or sold liquor there."

And, further, he said:

"If these defendants were the good and innocent men that they try to make themselves out, why did they not bring witnesses to testify to their good character? although their character had not been put in issue."

It is a sufficient answer to this claim to state that no objection was made to the remarks of counsel at the trial, and no exception taken thereto. If the statement of counsel was improper, exception thereto ought to have been promptly taken. The question whether the remarks of counsel were improper cannot be considered by this court in a case where the point was not raised or exception taken until after the trial. It is undoubtedly within the power of the trial court, with or without objection, to promptly interfere when counsel attempt to influence the jury by a reference to facts not in evidence, or makes any appeal to prejudice the jury dehors the record, or comments upon the character of the defendant when his character has not been put in issue. But the rule is well settled that improper remarks of counsel not made the subject of an exception will not be considered on appeal. *State v. Regan*, 8 Wash. 506, 511, 36 Pac. 472; *State v. Foster*, 115 Mo. 451, 22 S. W. 468; *State v. Howard*, 118 Mo. 127, 146, 24 S. W. 41; *Hill v. State*, 42 Neb. 505, 528, 60 N. W. 916; *State v. Sorter*, 52 Kan. 531, 34 Pac. 1036; *Com. v. Weber*, 167 Pa. St. 153, 162, 31 Atl. 481; *State v. Hilsabeck* (Mo. Sup.) 34 S. W. 39; *Harvey v. State* (Tex. Cr. App.) 34 S. W. 623, 625; *Campbell v. People*, 109 Ill. 566, 577.

4. It is assigned as error that the evidence was insufficient to justify the verdict of the jury. This point was not urged by any argument, and is utterly devoid of merit. There was positive testimony as to the commission of the crime by defendants, which, if believed by the jury to be true, certainly justified the verdict, as will more fully appear hereafter.

5. The next error assigned is that the court erred in its charge to the jury. In order to fully understand the parts of the charge object-

ed to, it is essential to state briefly the general character of the testimony at the trial.

One Indian witness, on behalf of the government, testified as follows:

"My name is Dennis. I live at Chilkoot. * * * I know these defendants, * * * Their boat was anchored off the shore. The younger man (meaning the defendant Cleveland) waved his hat to me; picked up a keg; then drank out of a tin cup. When I came to their boat, they gave me whisky to drink, and told me to tell the other people at the village that they had plenty of whisky. I went and told at the village, and 12 of us came down in a canoe, and got whisky from the white men. I got two bottles and paid four (\$4) for it."

Several other Indians testified substantially to the same effect.

The defendants testified that they resided at Douglas; that on the 12th of August, 1894, they started on a prospecting expedition in a sloop; that they went to Bear Creek, on Douglas Island; that they left there, and arrived at Funter Bay, on Admiralty Island, August 16th, and left on the 17th, and arrived at Bartlett Bay on the 18th; left there on the 19th, and arrived at Hoona Sound on the 20th; and stayed there, prospecting around the sound, for 8 or 10 days.

The defendant Shelp, in the course of his testimony, said:

"I was never at Chilkoot in my life. I never saw, to my knowledge, any of the Indians who testified in this case. We had no whisky on board of our sloop; neither sold nor gave away any whisky to Indians."

It is also necessary to consider what was said by defendants' counsel in the argument to the jury, for it is evident that some of the sentences objected to in the charge were given by the court in reply thereto. In discussing the weight to be given to the evidence by the jury, one of the defendants' attorneys said:

"That the evidence of ignorant, half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath as understood by Christian people, and who had little or no appreciation of our religious ideas, from which the oath gets its binding force and efficacy, and who had no appreciation of the enormity of perjury,—that the evidence of such witnesses was not entitled to as much credit as the evidence of a witness whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalties of perjury."

The court, after referring to the remarks of counsel, charged the jury as follows:

(1) "It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law. (2) In weighing the evidence of witnesses, you have the right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness in giving their testimony, or the want of such candor or fairness, their interest, if any, in the result of this trial, their opportunities of seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell; and from these things, together with all the facts and circumstances surrounding the case, as disclosed by the testimony, determine where the truth of this matter lies. (3) You have the right to use your own knowledge of this country, the habits and disposition of the Indians, and your knowledge and observation of the fact that whisky peddlers cruise about this coast, going from one Indian village to another, selling vile whisky to the natives. (4) There is no evidence that these defendants located

a claim or drove a stake, and it is for you to determine from the evidence whether they were out prospecting with pick and pan and shovel, as honest miners, with a view of locating claims, or whether they were out with a keg of whisky and a tin cup, prospecting for the aboriginal native."

—To which charge of the court "the defendant then and there excepted, on the ground that the same is not the law, is misleading, tending to confuse the jury, and distract their attention from the evidence."

The portion marked "(1)" cannot be said to have misled the jurors. It was evident from the testimony that either the defendants or the Indians had lied, and it was not error for the court to call the attention of the jury to that fact, and point out what the jurors were entitled to consider in determining the truth. The statement that "the evidence of Indian witnesses is entitled to as much credit and weight as white men's" must be construed with reference to the other portions of the charge. No witness is to be discredited simply on account of his race or color. Every witness, whether white, dark, black, or yellow, unless otherwise disqualified by statute, is competent to testify. It may be that an Indian whose religious ideas have not been as fully developed as some white men's may have as keen a perception of the facts which transpired in his presence, and be as able to satisfy a jury of the truth of his statement, as any white man could be; and this may be true notwithstanding the fact that the white man might be able to express his ideas or knowledge of the principles of the Christian religion, or the nature of an oath, better than the Indian. Suppose an objection should be made to the competency of a witness who is a religious enthusiast that he thinks too much of God and too little of human nature, or to an Indian that he thinks too much of human nature and too little of God, to be considered worthy of belief; should either be considered as well founded? Certainly not. The truth is that, in law, both classes stand upon the same plane. The weight and credibility of every witness is to be determined in the manner set forth in the clause marked "(2)," which contains a clear and correct statement as to the duty of jurors in weighing the testimony of the witnesses, whether they be white men or Indians. In the light of the testimony in this case, it cannot be said that there was any error in the portion of the instruction marked "(4)." There is no evidence in the record to the effect that either of the defendants ever "located a claim or drove a stake." A judge has the right, and it sometimes becomes his duty, to state the facts. Is the judgment in any case to be reversed because, in that connection, he states the truth? The only debatable question as to the correctness of the entire charge is with reference to the language used in the part marked "(3)." The court had previously, in part "(2)," correctly charged the jury to consider certain things, "together with all the facts and circumstances, as disclosed by the testimony." The issue as to the guilt or innocence of the defendants was to be determined from the evidence given at the trial, without any reference to outside matters. Whatever the defendants did in their trip along the coast the jury had the right to consider. It mattered not what others may have done in cruising around the coast; the question, and the sole question, in-

volved in this case, was whether the defendants had sold liquor to an Indian. The fact that other people were in the habit of selling liquor to the Indians would be immaterial and wholly irrelevant. But, if defendants' counsel were of the opinion that the language used in clause "(3)" was susceptible of such a construction as to make it the duty of the jury to consider such outside matters (irrespective of the evidence given at the trial), it was their duty to have specifically called the attention of the court to that fact, so that the meaning of the language used could have been amended or explained so as to deprive it of such meaning, or a proper instruction might have been prepared by counsel, with the request that it be given to the jury. It is the duty of counsel to call the attention of the court specifically to the precise point, phrase, or sentence which is claimed to be erroneous, so as to give the court an opportunity, before the jury retires, to correct it. A general exception to a whole charge is insufficient.

The rule is well settled that an exception to an entire charge of a court, or to a series of propositions contained therein, cannot be sustained if any portion thus excepted to is sound. This rule is established in nearly every state of the Union, and in all of the national courts, and applies to both civil and criminal cases. *Harvey v. Tyler*, 2 Wall. 338; *Lincoln v. Claffin*, 7 Wall. 132, 139; *Beaver v. Taylor*, 93 U. S. 46, 54; *Cooper v. Schlesinger*, 111 U. S. 148, 151, 4 Sup. Ct. 360; *Railway Co. v. Jurey*, 111 U. S. 585, 596, 4 Sup. Ct. 566; *Insurance Co. v. Union Trust Co.*, 112 U. S. 250, 261, 5 Sup. Ct. 119; *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960; *Block v. Darling*, 140 U. S. 235, 238, 11 Sup. Ct. 832; *Bogk v. Gassert*, 149 U. S. 17, 26, 13 Sup. Ct. 738; *Allis v. U. S.*, 155 U. S. 117, 122, 15 Sup. Ct. 36; *Jones v. Railroad Co.*, 157 U. S. 682, 15 Sup. Ct. 719; *Newport News & M. V. Co. v. Pace*, 158 U. S. 36, 15 Sup. Ct. 743; *Thiede v. Utah Ter.*, 159 U. S. 511, 521, 16 Sup. Ct. 62; *Bonner v. State (Ala.)* 18 South. 227; *People v. Hart (Utah)* 37 Pac. 330; *Woods v. Berry*, 7 Mont. 196, 204, 14 Pac. 758; *State v. Mason (Mont.)* 45 Pac. 557; *Curry v. Porter*, 125 Mass. 94; *Yates v. Bachley*, 33 Wis. 185; *Hopkins Manuf'g Co. v. Aurora F. & M. Ins. Co.*, 48 Mich. 148, 11 N. W. 846; *Walsh v. Kelly*, 40 N. Y. 556. In *Harvey v. Tyler* the court said that justice itself and fairness to the trial court "require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter, and remove the ground of exception." In *Beaver v. Taylor* the court said: "If the entire charge of the court is excepted to, or a series of propositions contained in it is excepted to in gross, and any portion thus excepted to is sound, the exception cannot be sustained."

6. The record shows that George Cleveland, one of the defendants, waived arraignment, and entered his plea of "not guilty" to the indictment. It does not affirmatively show that Archie Shelp, the other defendant, was ever formally arraigned, or that any plea was ever entered by him to the indictment. The record is silent upon that question. No objection was ever made in the court below, either during the trial, or upon the motion in arrest of judgment, or upon the motion for a new trial, or in the bill of exceptions, nor is it assigned

as error upon the appeal to this court that defendant Shelp was put upon his trial without any plea being entered to the indictment. It is therefore claimed by the United States that the question ought to be considered as having been waived by the defendant. It is, however, admitted that this court can, in a proper case, "notice a plain error not assigned"; that a writ of error addresses itself to the record; and that, if the record itself discloses the ground upon which a reversal is sought, there is no necessity for a bill of exceptions. If the failure to plead is a mere matter of form, and not of substance, the judgment should not be reversed. Rev. St. U. S. § 1025. The authorities, however, are to the effect that, while the arraignment may be waived, the plea is absolutely essential. In capital or other infamous crimes, an arraignment and plea has always been regarded as matter of substance, and must be affirmatively shown by the record. *Crain v. U. S.*, 162 U. S. 625, 16 Sup. Ct. 952. Until the defendant has pleaded to the indictment, there is no issue to be submitted to the jury, and the omission to plead is fatal to the judgment, even after verdict. This rule applies as well to cases of misdemeanor as to cases of felony. *Douglass v. State*, 3 Wis. 820; *Aylesworth v. People*, 65 Ill. 301; *State v. Williams*, 117 Mo. 379, 22 S. W. 1104; *State v. Hubbell*, 55 Mo. App. 262; *McFarland v. State*, 18 Tex. App. 313; *Roe v. State*, 19 Tex. App. 90; *Bowen v. State*, 108 Ind. 411, 9 N. E. 378; *State v. Cunningham*, 94 N. C. 824; 1 *Bish. New Cr. Proc.* §§ 733, 1354, and authorities there cited.

The bill of exceptions shows "that the issue joined in the above-stated case between the said parties came on to be tried before the said judge and the jury which was duly impaneled and sworn to try the issues between the said parties." From this statement in the bill of exceptions it is argued by the government that this court should infer that a plea of not guilty was in fact entered, and that the clerk failed to note that fact in the record. We cannot, in the light of the authorities, draw any such inference. In *Crain v. U. S.*, the court, upon this question, said:

"Until the accused pleads to the indictment, and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try, and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury was sworn 'to try the issues joined.'"

In *Bowen v. State*, the court said:

"Under the decisions of this court, it can no longer be regarded as a subject of controversy that, where the record in a criminal cause fails to disclose affirmatively that a plea to the indictment was entered, either by or for the defendant, such record on its face shows a mistrial, and that the proceeding was consequently erroneous."

If the defendant stands mute, and refuses to plead, the court is authorized to enter his plea of not guilty. Rev. St. U. S. § 1032. But a trial without the entry of any plea by or on behalf of the defendant is invalid.

It follows from the views above expressed that the judgment of the district court as to the defendant Cleveland must be, and is hereby, affirmed, and that the judgment against the defendant Shelp must be, and is hereby, reversed, and the cause remanded for a new trial.

In re TSU TSE MEE.

(District Court, N. D. California. July 9, 1897.)

No. 11,338.

DEPORTATION OF CHINESE—COMMISSIONER'S DECISION—HABEAS CORPUS.

A judgment of conviction and deportation of a Chinese person by a United States commissioner, who has obtained jurisdiction, is conclusive on the question of the right of such person to remain in the United States, subject to appeal to the district judge of the district, as provided by section 13 of the act of September 13, 1888. That question cannot be reviewed on habeas corpus, either on the same or additional evidence.

This was a hearing upon return to a writ of habeas corpus issued in behalf of Tsu Tse Mee, a Chinese person, under sentence of deportation from this country.

Wm. Hoff Cook, for petitioner.

Bert Schlesinger, for the United States.

DE HAVEN, District Judge. The return to the writ of habeas corpus issued herein shows that the said Tsu Tse Mee was at the date of the issuance and service of said writ restrained of his liberty, for the purpose of deportation from the United States, by virtue of a judgment of conviction and deportation made by the commissioner of the circuit court of the United States for the Western district of Texas on the 9th day of March, 1897, in a proceeding in which the said Tsu Tse Mee was charged with having on the 16th day of February, 1897, unlawfully entered, and since remained, in the United States, in violation of the acts of congress commonly known as the "Chinese Exclusion Acts."

The judgment of deportation, as shown by its recitals, is based on the following facts, found by the commissioner:

"First. That the defendant, Ching Tsu Sing, alias Tsu Tse Mee, is guilty of having unlawfully entered the United States on the 16th day of February, 1897, as charged in bill of complaint. Second. That he is now, and was on the said date, a subject of the empire of China. Third. That, being unlawfully in the United States, he is not entitled to enter the United States, or to remain therein, having so entered."

To this return the petitioner filed an answer, and traverse, specifically denying all the facts so found by the commissioner; and upon the hearing had before the special referee and examiner authorized to inquire into the facts, and report to this court his conclusion from the evidence presented to him, the petitioner offered to prove:

"That Tsu Tse Mee never testified on any hearing before any commissioner at El Paso as to how he was in the United States, and that, as a matter of fact, he came to the United States, San Francisco, about twelve years ago, and has been a resident of San Francisco until about the middle of January, 1897, and had been a merchant of San Francisco during that time, and that the firm of which he was a partner dissolved partnership about the time he left San Francisco, to wit, about the middle of January, 1897, when he went from San Francisco to El Paso, without going beyond the boundaries of the United States, for the purpose of making collections at El Paso and other places in the United States along his route connected with the business of the firm,

which had dissolved partnership; and that he is not a laborer, and, under the laws of the United States, he is not required to have any certificate for being allowed to remain here."

This offered evidence was rejected by the special referee and examiner, and the petitioner now claims that such ruling was erroneous, and that he was thereby deprived of his right to disprove the facts set forth in the return to the writ, and thus to show the illegality of his imprisonment. In passing upon the question thus presented, it is necessary to consider the force and effect of the judgment of deportation set out in the return, and whether such judgment or determination is subject to attack in this collateral proceeding.

The authority of a commissioner of the circuit court of the United States to hear and determine a complaint charging a Chinese person with being unlawfully in the United States was given by section 13 of the act of September 13, 1888 (25 Stat. 476), and is as follows:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district. A certified copy of the judgment shall be the process upon which said removal shall be made, and may be executed by the marshal of the district or any officer having authority of a marshal, under the provisions of this section."

This provision in the law of September 13, 1888, is still in force. *U. S. v. Wong Dep Ken*, 57 Fed. 203.

It seems to me too clear to admit of any doubt that in a proceeding commenced against a Chinese person before a commissioner of a United States court, in the manner authorized by that section, after jurisdiction of the person charged has been obtained, and hearing had, a judgment by such commissioner of conviction and deportation is final and conclusive upon the question of the right of such person to remain in the United States, subject only to review on appeal by the district court of the district, as provided by that section. Such judgment is not, in a collateral proceeding, subject to review by any other court upon the same or upon other and additional evidence. The law must leave the final decision of every controversy somewhere, and, when a judgment or decision has been made in any case by the tribunal or officer duly appointed by law to hear and determine such case, no other court is authorized to re-examine or controvert the sufficiency of the evidence upon which such court or officer acted, or to retry such case upon its merits, unless specially authorized by law so to do. Yet this is precisely what the petitioner asks the court to do in this proceeding,—to hear evidence in relation to the right of Tsu Tse Mee to remain in the United States, and, in view of such evidence, to determine the question as to his right to remain as an original question, and as if it had not been already fully determined by the commissioner of the circuit court of the United States for the Western dis-

trict of Texas by the judgment of deportation set out in the return to the writ of habeas corpus issued herein. I feel satisfied that the court is not authorized in this proceeding to retry the same questions of fact determined by that judgment, and it follows therefrom that the special referee and examiner was justified in refusing to receive the evidence embraced in the petitioner's offer.

This conclusion is fully sustained by the cases of *In re Leo Hem Bow*, 47 Fed. 302, and *U. S. v. Don On*, 49 Fed. 569, and is also supported by the general principle governing courts in proceedings under the writ of habeas corpus, that such writ cannot be used as a substitute for a writ of error for the purpose of reviewing alleged errors either of fact or of law, and which might, upon an appeal, be found to have entered into the judgment imposing the imprisonment or restraint complained of. In all cases in which the return shows that the petitioner is restrained of his liberty by virtue of the judgment of a court, and such judgment is not assailed by the allegation of some extrinsic fraud, which, if it exist, would render it a nullity, the inquiry under the writ of habeas corpus is limited to the question whether the court rendering such judgment acted within or without its jurisdiction. Section 760, Rev. St. U. S., which gives to a petitioner in a proceeding like this the right to "deny any of the facts set forth in the return," and also to allege other matters which may be material in the case, and which section is relied upon by the learned counsel for the petitioner here, does not change the well-settled rule of law in relation to the conclusive effect of a judgment of a court of competent jurisdiction as to all matters properly before the court, and embraced in its judgment, as against a collateral attack. That the section just referred to does not have the effect claimed for it by the counsel for the petitioner here, and was not intended to enlarge the jurisdiction of a court or judge, issuing the writ of habeas corpus so as to permit in the proceeding under such writ a retrial and discharge of a person imprisoned by virtue of a valid judgment, is clearly shown by the learned and exhaustive opinion of the late Judge Blatchford in the case of *In re Stupp*, 12 Blatchf. 501, Fed. Cas. No. 13,563.

The writ issued herein will be discharged, and the said Tsu Tse Mee remanded to the custody from whence he was taken, to be deported to China, in accordance with the judgment of deportation set out in the return to the writ: and it is so ordered.

SAXLEHNER v. GRAEF et al.

(Circuit Court, S. D. New York. June 17, 1897.)

TRADE-MARK—UNFAIR COMPETITION.

A company which was the exclusive consignee in this country of the Hungarian Hunyadi Janos water, in order to distinguish it from imitations sold here, placed on its bottles a trade-mark of its own, not used by its consignors. Afterwards it ceased to import this water, and began selling another Hungarian water, using the same trade-mark, but with labels so distinctive as to challenge the attention of purchasers. *Held*, that this was no infringement of the rights of the owners of the Hunyadi Janos water.