Branch of the National Home for Disabled Volunteer Soldiers their daily food or rations, and is the only place so provided at said national home, and is known as the mess room of the said Central Branch of the National Home for Disabled Volunteer Soldiers, situate on the grounds purchased, held, and used by the United States therefor; and the acts complained of herein consisted in causing oleomargarine to be served and furnished, on the 2d day of March, 1897, as food and as part of the rations furnished to the inmates thereof under appropriation made by the congress of the United States for the support of said inmates; and that no placard in size not less than 10x14 inches, having printed thereon in black letters not less in size than 1½ inches square the words 'Oleomargarine Sold and Used Here,' was displayed in said eating house. (4) The affidavit in the cause is made in conformity with an act of the general assembly of the state of Ohio (Ohio Laws, vol. 92, page 23) entitled 'An act to amend section 3 of an act entitled "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the state of Ohio," passed May 16, 1894': 'Section 1. Be it enacted by the general assembly of the state of Ohio, that section 3 of an act entitled "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the state of Ohio," be amended to read as follows: "Section 3. Every proprietor, keeper, manager or person in charge of any hotel, boat, railroad car, boarding-house, restaurant, eating-house, lunch-counter or lunch-room, who therein sells, uses, serves, furnishes or disposes of or uses in cooking, any oleomargarine, shall display and keep a white placard in a conspicuous place, where the same may be easily seen and read, in the dining-room, eating-room, restaurant, lunch-room or place where such substance is furnished, served, sold or disposed of, which placard shall be in size not less than ten by fourteen inches, upon which shall be printed in black letters, not less in size than one and a half inches square, the words 'Oleomargarine Sold and Used Here,' and said card shall not contain any other words than the ones above described, and such proprietor, keeper, manager or person in charge shall not sell, serve or dispose of such substance as for butter when butter is asked for or purported to be furnished or served." Sec. 2. Section 3 of the above recited act, passed May 16, 1894, is hereby repealed, and this act shall take effect and be in force from and after its passage.' "

By the act of March 3, 1865 (13 Stat. 509), the act of March 21, 1866 (14 Stat. 10), the act of January 23, 1873 (17 Stat. 417), the act of March 3, 1875 (18 Stat. 359), and the act of February 26, 1875 (18 Stat. 524), a national home for disabled volunteer soldiers was established, and the legislation above indicated has been embodied in sections 4825 to 4837, inclusive, of the Revised Statutes of the United States. These sections are now under chapter 3 of title 59 of "Hospitals and Asylums." Section 4825 establishes a board of managers of such home, who are to have perpetual succession, with the power of holding personal and real property, and of suing and being sued. They are also given the power to make rules and by-laws not inconsistent with the law, for the purpose of carrying on the business and government of the home, and to fix penalties thereto. Section 4829 provides that the officers of the home shall consist of a governor, a deputy governor, a secretary, and a treasurer, and such other officers as the managers may deem necessary. Section 4830 provides that the board of managers shall have authority to procure from time to time, at suitable places, sites for military homes for all persons serving in the army of the United States at any time in the War of the Rebellion, not otherwise provided for, who have been or may be disqualified for procuring their own support by reason of wounds received or sickness contracted while in the line of their duty during the Rebellion; and to have the necessary buildings erected,

having due regard to the health of location, facility of access, and capacity to accommodate the persons entitled to the benefits thereof. Section 4831 appropriates all stoppages or fines adjudged against officers and soldiers by sentence of court-martial, or forfeitures on account of desertion, and all moneys due deceased officers and soldiers unclaimed for three years after their death, to the establishment and support of the home. The managers are also authorized to receive donations, money, or property for the benefit of the home, and to hold the same for its exclusive use. Section 4832 provides who of the officers and soldiers of the government of the United States shall be entitled to the benefit of the national home. Section 4834 provides that the board of managers shall make an annual report of the condition of the home to congress. Section 4835 provides that "all inmates of the National Home for Disabled Volunteer Soldiers shall be subject to the rules and articles of war and in the same manner as if they were in the army." Under the laws of 1865–66 the first board of managers purchased real estate in Montgomery county, near Dayton, Ohio, and there erected buildings to constitute a national home. Since that time branches have been established in Augusta, Me., Milwaukee, Wis., and Hampton, Va. On April 13, 1867, the legislature of Ohio passed the following act:

"Section 1. That jurisdiction of the lands and their appurtenances, which may be acquired by donation or purchased by the managers of the National Asylum for Disabled Volunteer Soldiers within the state of Ohio, for the uses and purposes of said asylum, be, and is hereby ceded to the United States of America; provided, however, that all civil and criminal process issued under the authority of the state of Ohio, or any officer thereof, may be executed on said lands and in the buildings which may be located thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid; and provided further, that nothing in this act shall be construed to prevent the officers, employés and inmates of said asylum, who are qualified voters of this state, from exercising the right of suffrage to all township, county, and state elections, in the township in which the said national asylum shall be located."

The second section of the same act exempts all the property, real and personal, held by the board of managers for the uses and purposes of the asylum, from taxation and assessment, "so long as the same shall remain the property of the United States, for the uses of the national asylum."

In Sinks v. Reese, 19 Ohio St. 306, the question arose whether an inmate of the national home at Dayton had the right of suffrage as a citizen of the state of Ohio, and the supreme court of Ohio held:

"The inmates of the home, resident within such territory, being within the exclusive jurisdiction of a government other than that of the state within whose boundaries such asylum or territory may be situate, are not residents of such state, within the meaning of article 5, § 1, of the constitution of Ohio; and where the constitution of such state confers the elective franchise upon residents thereof alone, the inmates of such asylum resident within such territory are not entitled to vote at any election held within and under the laws of such state."

Thereupon congress, by the act of January 21, 1871 (16 Stat. 399), enacted:

"That the jurisdiction over the place purchased for the location of the 'National Asylum for Disabled Volunteer Soldiers' under and by virtue of the act

of congress of March third, 1865, entitled 'An act to incorporate a national military and naval asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States' and the act of March 21st, 1866, amendatory thereto and upon which said asylum is located, is hereby ceded to the state of Ohio and relinquished by the United States. And the United States shall claim or exercise no jurisdiction over said place after the passage of this act: provided, that nothing contained in this act shall be construed to impair the powers and rights heretofore conferred upon the board of managers of the National Asylum for Disabled Volunteer Soldiers incorporated under said act, in and over said territory."

In Renner v. Bennett, 21 Ohio St. 431, the supreme court of Ohio, in construing the act of congress of January 21, 1871, held that its effect was to restore to the state its jurisdiction over the territory, but without the power to violate the charter rights of the corporation, or rather of the United States, claiming and enjoying them through and by the corporation; thus putting the state in the same relation to this corporation that it sustained towards such of its own corporations as had an irrevocable and inviolable charter, and therefore that the territory upon which the home stood was within the jurisdiction of the state, and the inmates of the home were residents of the state, and were legal voters therein.

It is unnecessary, in my view, to consider the question what is the territorial jurisdiction of the state of Ohio over the land occupied by the national home at Dayton. Let it be conceded that the case presented upon the petition and the facts shown at the hearing is not different from what it would have been had the legislature of Ohio never passed any act ceding jurisdiction to the United States over the land acquired for the purpose of a national military home. In such a case, can it be maintained that the legislature of the state of Ohio may pass an act which shall regulate in any way the manner in which federal governmental functions shall be discharged by the board of managers of the national home as agents of the national government? It is very clear to me that the question must be answered in the negative. Nor can there be any doubt that the acts of the petitioner complained of, and made the ground for prosecution under the state law, were acts in pursuance of the authority of the national government reposed in it by the constitution of the United States. By that instrument congress is given power by taxation to provide for the common defense and general welfare of the United States. It is given power to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia, to suppress insurrections and repel invasions, to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, and to make all laws which shall be necessary and proper for carrying into execution these powers. In the case of U. S. v. Gettysburg Electric Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, it was held that the act providing for the condemnation of land for the purpose of fencing in and preserving the lines of battle at the battle of Gettysburg, and of making a national park of the same, was within the

power of congress. It was objected that the purpose of the act could not be for "the public use," within the powers of the general government. Upon this subject Mr. Justice Peckham, speaking for the supreme court, said:

"Congress had power to declare war, and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of this country, and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by congress, must be valid. * * * Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems, necessarily, not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. * * * The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing, and is connected with and springs from the same powers of the constitution. It seems very clear that the government has the right to bury its own soldiers, and to see to it that their graves shall not remain unknown or unhonored."

The same power that exists to create national parks and to create national cemeteries is exercised in the erection and maintenance of a national home to care for the defenders of the nation, who, though not killed, were disabled and wounded in the defense. The housing and feeding of such persons are, then, a federal governmental function and duty. When the government of the United States purchases land in a state for the purpose of discharging such a duty, it is not within the power of the state legislature to interfere with or regulate the mode in which it shall be performed. What it does for this purpose is exactly as much within its complete control as when its quartermaster furnishes food to its soldiers, or when its pension agents distribute money to its pensioners. It is entirely immaterial in what place, within the jurisdiction of the government of the United States, the duty is discharged. State lines cannot affect or modify the complete control which the federal government and its agents and officers duly authorized have over the manner of discharging it. The jurisdiction of the state government in such a case is excluded not because of the place where the act is done, but because that which is being done is the business of the United States, and such business is as completely be-

yond the influence and control of the state government as if it were not done within the territory of the state. It is in evidence that in the report made by the board of managers to congress, provided by law, an appropriation was asked for oleomargarine, and that the appropriation was made by congress to cover the proposed expenditure. Would it be contended that, if congress were to pass an act providing that oleomargarine should be served by its quartermaster in the messes of its troops, and a state were to pass a law forbidding the use of it as an unhealthful food, such a law could affect officers obeying the laws of congress in thus furnishing oleomargarine within the state's lines to the military forces of the United States, and would subject them to punishment before a state tribunal for violation of the state law? Clearly not. It seems hardly necessary to me to give illustration, to be found in many decisions of the supreme court of the United States, of cases in which it has been held that no state can pass a law which shall in any manner interfere with or prevent the due exercise of its constitutional functions by the United States government through its officers and agents.

In Ex parte Siebold, 100 U. S. 371, 394, Mr. Justice Bradley said:

"It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states. Here, again, we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time, and in the same place. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the constitution itself show which is to yield: 'This constitution, and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land.'"

Again, in the case of Tennessee v. Davis, 100 U. S. 257, 262, Mr. Justice Strong, quoting from Martin v. Hunter, 1 Wheat. 363, said: "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers," and then proceeded:

"It can act only through its officers and agents, and they must act with the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection, if their protection must be left to the action of the state court, the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a state may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal laws, in such manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecu-

tion, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it."

The same principle was upheld by Mr. Justice Miller in the case of In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658.

In my judgment, the governor of the soldiers' home was not subject to the law prescribing the manner in which oleomargarine should be served in eating houses, not because the place in which he was serving the oleomargarine was without the territorial jurisdiction of the state of Ohio, but because that which he was doing was an act of the government of the United States within its constitutional powers, and wholly beyond the control and regulation of the legislature of the state of Ohio. The petitioner is discharged.

In re SOUTHERN PAC. CO.

(Circuit Court, N. D. California. August 16, 1897.)

Nos. 12,247, 12,248.

CUSTOMS DUTIES—CLASSIFICATION—LIQUID CREOSOTE.

The liquid creosote of commerce is not a "distilled oil," within the meaning of paragraph 60 of the tariff act of August 27, 1894 (28 Stat. 509, 511), but is a "product of coal tar," within the meaning of paragraph 443 of said act, and entitled to free entry, not being otherwise specially provided for in the act.

Applications by the Southern Pacific Company for a review, under section 15 of the customs administrative act (Act June 10, 1890; 26 Stat. 131), of the decision of the board of United States general appraisers relative to the classification for duty of two importations of creosote merchandise. Both petitions were heard together.

John J. De Haven and F. B. Lake, for petitioner.
H. S. Foote, U. S. Atty., and Samuel Knight, Asst. U. S. Atty.

MORROW, Circuit Judge. These are two applications by the Southern Pacific Company for a review by this court, under section 15 of the customs administrative act (Act June 10, 1890; 26 Stat. 131), of the decision of the board of United States general appraisers relative to the classification for duty of two importations of creosote merchandise. Both petitions were argued together, and precisely the same testimony and the same questions apply to each. The merchandise in question was imported in casks, and is described in the invoices as "liquid creosote." It was imported from London, Great Britain, into the United States, at the port of San Francisco. The collector of the port at San Francisco classified this liquid creosote as a "distilled oil," dutiable at the rate of 25 per cent. ad valorem,

under the provisions of paragraph 60 of the tariff act of August 27, 1894, entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," and popularly known as the "Wilson Tariff Act." 28 Stat. 509, 511. The importer protested against the imposition of this duty, or any duty, on the ground that the creosote in question "is not a distilled oil, but is, at ordinary temperature, a solid, waxy crystal, the chief constituents of which are naphthaline, tar acids, and pitch, and as such should be admitted free of duty, under paragraph 443 of the act of August, 1894, as product of coal tar not specially provided for." Paragraph 60, under which the creosote was classified, provides:

"Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts, not specially provided for in this act, twenty-five per centum ad valorem."

Paragraph 443, one of the provisions placing articles on the free list, and under which, the importer contends, the creosote in question should be classified, provides:

"Coal tar, crude, and all preparations except medicinal coal tar preparations and products of coal tar, not colors or dyes, not specially provided for in this act."

The question to be determined is whether the creosote comprising these two importations is a "distilled oil," as found by the board of United States general appraisers, and therefore subject to a duty of 25 per cent. ad valorem, or whether it is a "product of coal tar," within the meaning of paragraph 443, and therefore entitled to free entry. The board of United States general appraisers overruled the protests of the importer, and found that the merchandise in question—

"Is a liquid substance, of a dark-brown color and tarry odor, of the specific gravity of 1.05028, and is known generally in commerce as 'dead oil' and 'creosote oil'; (2) that it is derived from coal tar by distillation, and is a distilled oil. Its chief constituents are naphthaline and its derivatives, along with the basic oils, parvoline, coridine, collidine, and leucoline, and bitumen dissolved therein, together with five per cent. of crude phenol of the carbolic and cresylic acid types."

While the board found that the merchandise comprising these two importations was known generally in commerce as "dead oil" and "creosote oil," it also found that it was derived from coal tar by distillation, and that it was a "distilled oil." Additional testimony was taken at San Francisco, upon an order of reference by the court. The evidence preponderates largely in favor of the proposition that the merchandise in question is known commercially as "creosote oil," or a "dead oil," and that it is the "product of coal tar" by fractional distillation. The testimony introduced on behalf of the government does not show satisfactorily that "creosote" is chemically or commercially, or even commonly, known and described as a "distilled oil." In Warren Chemical Manuf'g Co. v. U. S., 78 Fed. 810, this same question was before the court. In that case the board of United States general appraisers had classified certain coal-tar products as "products known as 'distilled oils,'" under paragraph 60. The importer

protested, claiming that it was simply a "product of coal tar, not a color or dye not specifically provided for," and therefore entitled to free entry under paragraph 443. It was held that inasmuch as it had not been shown that the article involved in that case was an oil in fact, or that it was chemically or commercially or commonly known as "distilled oil," the decision of the board should be reversed, and the article entitled to free entry under paragraph 443, as a "product of coal tar." While creosote may be termed an oil, still it is not known as a "distilled oil." It is true that the terms "distilled oils" and "products of coal tar," found, respectively, in paragraphs 60 and 443, are mere descriptive phrases. No question as to the commercial designation of the merchandise in question can arise, for what is known commercially as "creosote oil," or a "dead oil," is not specifically mentioned in either of these paragraphs, or in the act. The terms used seem to refer to the mode of manufacture, and it would appear that the board held the importations in question to be distilled oils because they were produced by distillation,—fractional distillation. But, while it is true that creosote is produced by distillatory processes, it is nevertheless also true that, according to the preponderance of the evidence, it is not known as a "distilled oil." That it is a "product of coal tar," there can be no doubt. Such being my view of the evidence, it will obviously be unnecessary to consider the other questions discussed by counsel. Even if I were in doubt as to which of these paragraphs applied, such doubt, under the rule of construction relating to tariff acts, would have to be resolved in favor of the importer. Hartranft v. Wiegmann, 121 U. S. 609, 7 Sup. Ct. 1240; Twine Co. v. Worthington, 141 U. S. 468, 12 Sup. Ct. 55. It may be further observed that, in the tariff act of 1883 (22 Stat. p. 493), congress made a decided distinction between "dead oils," which term is applied to "creosote," and "distilled oils"; thereby indicating and recognizing a difference between the two classes of oils, and precluding the inference that the term "distilled oil" might include "creosote," or a "dead oil." The revenue or tariff laws of the United States are regarded as constituting practically one system. U. S. v. Collier, 3 Blatchf. 325, Fed. Cas. No. 14,833. It is a well-settled rule of statutory construction that expired or repealed acts in pari materia with the act to be construed may be considered by the court in seeking the correct meaning of words and terms employed in the enactment to be construed. 23 Am. & Eng. Enc. Law, 315, and cases there collated. See, also, Reiche v. Smythe, 13 Wall. 162. I am of opinion, therefore, that the creosote comprising the two importations under consideration is not a "distilled oil," within the meaning of paragraph 60, but that, on the contrary, it is a "product of coal tar," within the meaning of paragraph 443, and as such is entitled to free entry, not being otherwise specially provided for in the act.

It is further contended by counsel for the government that under the latter part of section 4 of the act under consideration, which provides that "if two or more rates of duty shall be applicable to any imported article it shall pay duty at the highest of such rates," the creosote in question must be subject to the duty of 25 per cent. ad valorem provided for in paragraph 60. It is assumed, of course,

that the merchandise in question is both a "distilled oil" and a "product of coal tar," and that, therefore, the duty provided for "distilled oil," being the higher duty, should apply. The contention is untenable. In the first place, I am unable, as stated, to find from the evidence that the creosote in question is a distilled oil within the meaning of paragraph 60. In the second place, I do not regard the provision applicable to this case, for the simple reason that it cannot be said, strictly speaking, that there are two rates of duty which can apply to the merchandise in question. If I am correct in holding that creosote is a product of coal tar, within the meaning of paragraph 443, it then is not subject to any duty whatever, but is entitled to free entry. Under this condition of affairs, if the creosote be subject to duty at all, there is obviously but one rate of duty which is applicable. As was aptly remarked by the court in Matheson & Co. v. U. S., 18 C. C. A. 144, 71 Fed. 394, 395, "as one [paragraph] imposes duty, and the other exempts from duty, it is obvious that congress did not intend both provisions to apply to the same article." Without discussing the questions any further, I am of opinion, both from the evidence and under the law, that the ruling of the board of United States general appraisers relating to the two importations involved in these two petitions was erroneous, and should be reversed, and it is so ordered.

AMBERG FILE & INDEX CO. v. SHEA SMITH & CO.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1897.)

No. 371.

COPYRIGHT—SUBJECTS OF COPYRIGHT—LETTER FILES.

A system of indexes, constituting a letter file, being designed for use, and not for conveying information, is not a proper subject of copyright. 78 Fed. 479, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The Amberg File & Index Company, the appellant, filed its bill in the court below to restrain the alleged infringement of 30 copyrights granted to William A. Amberg for as many so-called index books, styled "Amberg Directory System of Indexing," constituting a complete index for the proper filing of letters and other papers. A demurrer to the bill was sustained and the bill dismissed for want of equity. The bill charges that all of the so-called books, taken together, constitute a series or set of indexes, primarily designed for use by large commercial houses conducting a large correspondence, and wherein letters and other papers or documents may be so filed to be readily accessible, and that no one of the several so-called books, nor any number less than the whole number, can be practically employed as a general index for correspondence or other documents. The letter-file index consists of a number of sheets loosely arranged, and provided with letters in the outer margins, after the manner of an index, so that letters can be slipped in between the sheets and there temporarily held until the space is filled, when the sheets can be removed from the box and permanently filed. The letters on the different loose sheets are arranged in alphabetical order, the spaces between the letters varying to correspond with the supposed volume of correspondence to be arranged thereunder. In order to ascertain the proper space to be allowed, the bill states that Amberg, in preparing the same in such manner as to adapt such copyrighted books for such use,