UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, -against- SHELTON C. BURR, EUGENE H. BURR, CHARLES H. TOBEY and EDWIN WESLEY PRESTON.	INDICTMENT UNDER U.S. REVISED STATUTE SEC. 5480 AS AMENDED.

BRIEF FOR DEFENDANTS BURR

ON DEMURRER.

This is a demurrer to the indictment herein on the ground that the facts therein alleged are not sufficient in law, and do not state facts sufficient to constitute an offense against the United States.

The indictment is in two counts, which are substantially alike. They charge defendants with using the mails in connection with an alleged scheme to defraud, in connection with the promotion of a company to be formed to be known as "Peoples' Associated Oil Company." The scheme to defraud is alleged to have consisted, in the words "in general", through the promotion of a company to be formed for the ostensible purpose of acquiring and developing oil lands and leases, in which defendants should fraudulently acquire large personal holdings of stock, and become fiscal agents in consideration of the payment of large brokerage commissions upon sales of stocks to persons intended to be defrauded, and in order to create fictitious market value, and to procure money wherewith to make a show of activity, false and fraudulent pretenses, representations and promises were to be made concerning title to, situation of, and value of lands

to be worked by said Oil Company, and the probable amount of oil to be produced, and the business and financial ability and trustworthiness of its management.

POINT I.

THE INDICTMENT IS INDEFINITE AND UNCERTAIN IN ITS ALLEGATIONS, BY REASON OF THE USE OF THE WORDS "IN GENERAL" IN DESCRIBING THE SCHEME (P, 2, beginning of last paragraph).

It is, of course, well settled that the offense, under the Statute, consists of three factors, each of which must be fully and properly pleaded. First: A scheme to defraud; Second: The contemplated use of the mails in connection with it; Third: Actual use of the mails in execution of the scheme. (U.S. vs Hess, 124 U.S., 483; Stewart vs U.S., 119 F.R. 89 (C C A); U.S. vs Post, 113 F.R., 852).

By the insertion of the words "in general," in this indictment, in the description of the scheme, it is obvious that the whole scheme is left uncertain and indefinite in its description. The use of these words clearly indicates that the scheme, as set forth, was subject to modification, and accordingly defendant is left to mere surmise as to what the scheme is charged to have been. Non constat that a scheme in connection with which the two specific letters are alleged to have been mailed, was within the modifications or exceptions indicated, but not set forth by this use of the words "in general." Non constat but that the letters thus expressly specified did not relate to the alleged fraudulent scheme described in detail. Nor is a scheme described "in general" adequately set forth.

Under the authorities above referred to, it is obvious that this injection of the words "in general" leaves the scheme itself imperfectly and inadequately set forth.

Says the Circuit Court of Appeals in Stewart vs. U.S., supra, at page 94:

> "It was also incumbent upon the pleader to describe the scheme or artifice to defraud, which had been devised, with such certainty as would

clearly inform the defendants of the nature of the evidence, to prove the existence of the scheme to defraud, with which they would be confronted at the trial."

Also at page 96:

"We are of the opinion that it lacks that certainty of averment which should be found in an indictment or information, and that for this reason, if for no other, it ought to be quashed on a motion to that effect."

In U.S. vs Hess, supra, the Supreme Court said,

with respect to this very statute:

"The statute is directed against 'devising or intenting to devise any scheme or artifice to defraud', to be effected by communication through the post office. As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial. * * * * The absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner or the party from whose possession it was taken. * * * * * * * The essential requirements, indeed all the particulars constituting the offense of devising a scheme to defraud are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict."

In U.S. vs Post, supra, the Court said:

Not only must the indictment allege that the person had devised a scheme and artifice to defraud, but it must set out clearly and distinctly what the artifice was, wherein the fraud consisted, and the facts and circumstances by which it was to be accomplished. U.S. vs Hess, 124 U.S., 483. * * * * * The well established principle of criminal pleading, which requires direct, positive and affirmative allegations of every point necessary to be proven, is too well established to require extended consideration. Nothing in a criminal case can be charged by implication, intendment or recital, but every fact necessary to constitute the crime must be directly and affirmatively alleged."

POINT II.

THE SCHEME TO DEFRAUD IS IMPERFECTLY AND INADEQUATELY SET FORTH ALSO IN OTHER RESPECTS.

I. The indictment avers (p. 2, last paragraph) that the company was to be formed for "the ostensible purpose of acquiring and developing oil lands and leases." Nothing negativing such alleged avowed purpose is set forth, and the averment in question is obviously insufficient.

II. The indictment further avers that "the defendants should themselves fraudulently acquire large personal holdings of the capital stock of the said Peoples' Associated Oil Company." Nothing explaining or justifying the conclusion of law arising from the use of the word "fraudulently" appears anywheres in the indictment, and it does not appear in what manner it was planned that the alleged fraudulent acquisition should be brought about. As said in U.S. vs Post, supra:

> "There is no direct assertion of her intention further than by implication that she was fraudulently intending to get possession of such money, and convert the same to her own use without rendering to the person sending the same, any service or thing of value therefor. The use of the word 'fraudulently' is not alone a sufficient allegation of a fraudulent intent. The circumstances and declared intention must show the act to be such."

III. The reference (p. 5 top) to the representation that the lands of said Oil Company "were situated within the proven area of the Coalinga Oil District of California, notwithstanding that such lands were not only not within the said proven area, but were even outside the known limits of possible production of said district," is entirely too indefinite and uncertain for inclusion and an indictment.

POINT III.

THE INDICTMENT IS BAD BECAUSE IT DOES NOT ALLEGE THAT THE STOCK INTENDED TO BE SOLD, WAS NOT WORTH THE PRICE AT WHICH IT WAS TO BE SOLD.

The case of Miller vs U.S., 174 Fed. Rep. 35 (CCA) is here very much in point.

POINT IV.

THE ALLEGATIONS OF THE INDICTMENT, WITH RESPECT TO TIME OF THE COMMISSION OF THE OFFENSE, ARE CONTRADICTORY, REPUGNANT AND INDEFINITE, AND VITIATE THE INDICTMENT.

I. It will be observed that the indictment alleges (p. 1) that "before and at the time of the commission of the offense in this count of this indictment hereinafter set forth," defendants devised a scheme and artifice to defraud. The only date that appears anywhere in either count is the date of the mailing of the letter relied upon, which, in the first count, appears (p. 7) as September 19th, 1908. The theory of the pleader evidently is that the offense consists of the mailing of the letter merely, while as a matter of fact, under the authorities, all three elements above referred to, must exist, though the formation of the scheme must necessarily precede the mailing of the letter. The result is that this indictment in fact sets forth the formation of the scheme prior to the scheme underlying the particular offense charged, and leaves the fraudulent scheme, in execution of which the letter was mailed, undescribed. The only other horn of the dilemma is that some fraudulent scheme anterior to the fraudulent scheme relied upon by the pleader, is first averred, with the result that the indictment in question would be bad for duplicity. (U.S. vs Burns, 54 P.R., 331; U.S. vs Patty, 2 Fed. Rep. 664; Wiberg vs U.S., 163 U.S. 632, 647-9; Swearingen vs U.S., 161 U.S., 446, 450).

II. <u>The indictment is also bad for duplicity because two different alleged fraudulent schemes, one antedating the incorporation of the company, and one subsequent thereto, are set forth.</u>

It will be observed that the pleader, with respect to some of his averments refers to the incorporation of the company as a future and prospective act, (p. 2), while elsewhere the incorporation is described as having taken place and said defendants as having been elected its

directors and officials (pp. 2-3), and its stock issue as having been accomplished (pp. 6-7). Only one overt act, the mailing of a particular letter, is averred in each count, and necessarily the mailing of such letter could not be for the purpose of executing and carrying out so much of the scheme as had already been accomplished, for the letter must necessarily be mailed pursuant to the particular scheme referred to, and in consummating such scheme. (Rumble vs. U.S., 143 Fed. Rep. 772 (C C A); Durland vs U.S., 161 U.S., 306, 315).

III. The indictment is imperfect and bad, because no date is set forth with respect to the formation of the scheme to defraud, the date of the mailing of the letter being the only date specified, and apart from that, the averments beings merely as to a formation of the scheme some time prior thereto.

The formation of the scheme is an essential element of the offense, and some date with respect to this ought also be set forth, as also with respect to the alleged representations relied upon as false and fraudulent. It is obvious that the pleader has joined together a large number of representations made at different dates, before and after incorporation, and seeks to deprive defendants of the opportunity of fixing any of these down to any particular date. This is important (Ledbetter vs U.S., 170 U.S. 606, 612, where, however, the objection was urged first after verdict, U.S. vs Law, 50 F.R., 915; U.S. vs Potter, 56 F.R., 83, 95).

POINT V.

THERE IS NO ADEQUATE AVERMENT THAT THE LETTERS DESCRIBED WERE MAILED PURSUANT TO AND IN EXECUTION OF THE SCHEME TO DEFRAUD RELIED UPON.

All that is alleged is that defendants "for the purpose of executing the said scheme and artifice, and attempting so to do, did place and cause to be placed a certain writing enclosed in a post-paid envelope * * * * in the Madison Square Station, in the New York Post Office." The

Statute provides (U.S. Suppl. Rev. Stat., Vol. I, p. 595) "that persons who shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed, any letter, packet, writing, etc., in any post-office." Instead of averring that a letter was mailed in and for executing the scheme, even in the language of the statute, the pleader has referred instead, to some purpose on defendants' part of executing the scheme, which averment is broad enough to cover a letter within defendants' purpose, though in fact, it does not answer the statutory requirement of being in and for executing said scheme. This averment is inadequate. (Rumble vs U.S., 145 F.R., 772; Durland vs U.S., 161 U.S. 306).

POINT VI.

THE DEMURRER SHOULD BE SUSTAINED.

Respectfully submitted,

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