

✓bcc: Posthumous Pardon Subject File  
Misc. 85 PORTER, William Sydney; aka O. Henry  
DCS:KLM:cew

March 20, 1985

Honorable Jesse Helms  
United States Senate  
Washington, D.C. 20510

Dear Senator Helms:

I have been asked to respond to your letter of March 1, 1985 to the Attorney General requesting his assistance in obtaining a posthumous Presidential pardon for the author William Sydney Porter, better known as O. Henry. You make the request on behalf of O. Henry Festival, Inc., a committee of North Carolina citizens who are planning a festival to recognize the life and works of O. Henry.

It has been the long-established practice of the Department of Justice not to consider petitions for the granting of posthumous pardons. The basis of this practice is in large part the legal principle that a pardon, like a deed, must be accepted by the person to whom it is directed. Acceptance, of course, is impossible when the recipient is deceased. See U.S. v. Wilson, 7 Pet. 150 (1833); Burdick v. U.S., 236 U.S. 79 (1915); Meldrim v. U.S., 7 Ct. Cl. 595 (1871); Sierra v. U.S., 9 Ct. Cl. 224 (1873); 11 Op. Att'y Gen. 35 (1864). While I sympathize with the desire of the members of the festival committee to obtain a posthumous pardon for O. Henry, I hope they will understand the limitations upon the President in matters of this kind.

I regret that my reply cannot be favorable.

Sincerely,

David C. Stephenson  
Acting Pardon Attorney

P  
bcc: Office of Legislative and  
Intergovernmental Affairs,  
No. C-1148

bcc: Posthumous Pardon Subject File  
Misc. 85 PORTER, William Sydney; aka O. Henry  
DCS:KLM:cew

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Sincerely,

David C. Stephenson  
Acting Pardon Attorney

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(1885)  
P bcc: Office of Legislative and  
Intergovernmental Affairs,  
No. C-1148

JESSE HELMS  
NORTH CAROLINA

# United States Senate

WASHINGTON, D.C. 20510

MAR 01 1985 2:30

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March 1, 1985  
OFFICE OF  
DEPUTY ATTORNEY  
GENERAL

The Honorable Edwin Meese  
Attorney General of the United States  
Department of Justice  
Washington, D. C. 20530

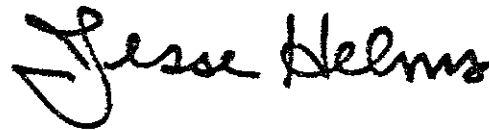
Dear Ed:

Enclosed is correspondence from a fine group of constituents in Greensboro, North Carolina who is planning a festival for April 7-14 to recognize the life and works of William Sydney Porter (O.Henry).

We appeal to your good office to consider granting a posthumous pardon to O.Henry. Previous contact with the Pardon Attorney's Office revealed that no legal precedent has been established for such cases. The request, however, is important to the City of Greensboro; and we want to explore every possibility.

I appreciate your review, comments, and suggestions on the matter. With kindest regards, I am

Sincerely,



JESSE HELMS: dy

Enclosure

cc: Mr. Seth Macon  
3803 Madison Avenue  
Greensboro, North Carolina 27403

MAR 18 11:28 AM '85

RECEIVED  
DEPT. OF JUSTICE

RECEIVED  
DEPT. OF JUSTICE  
MAR 18 1985



O. HENRY FESTIVAL  
Post Office Box 2047  
Greensboro, NC 27402

Marilyn Anderson  
Jane Armfield  
Carson Bain  
Charlotte Barney  
David Bass  
Ann Carroll Burwell  
Betty Cone  
Bonnie Cordes  
Barbara Rosson Davis  
Kathleen Bryan Edwards  
Eliisa Fuchs  
Evalyn P. Gill  
Laura Deane Gresham  
Mary Hoffer  
Sam Hummel  
Ann Terrill Johnson  
Peggy Johnson  
Marilyn O. Karmel  
Clifford B. Lowery  
Steve Lupton  
Seth C. Macon  
William J. Moore  
Peter Reichard  
Ann Snyder  
Bruce Stewart  
Jeaneane Williams

December 10, 1984

The Honorable Jesse Helms  
U.S. Senate  
Washington, D.C. 20510

Dear Jesse:

This is an atypical request from an unlikely special interest group.

A group of Greensboro citizens are working on big plans for a week-long Festival recognizing the life and works of William Sydney Porter (O. Henry) who is perhaps Greensboro's most world renowned native son.

Except for an excellent display in the Greensboro Historical Museum, there is little in our city to remind our people (and the people of North Carolina) that O. Henry was born here and spent his childhood here. We have already raised over \$100,000 to pay for the O. Henry Festival, which is scheduled here in Greensboro during the entire week of April 7-14, 1985. Attached is a list of activities being planned for the week. We have a state charter with approved IRS non-profit status.

Our centerpiece will be the unveiling of sculpture in the plaza of the Southern Life Center on Elm Street one block from the Museum honoring the O. Henry display.

The sculpture will be an open book (7½ x 11 feet) mounted on a three-foot high base. On the left page will be a bronze (relief) illustration from "Gift Of The Magi" and on the right will be readable copy from "Ransom of Red Chief." Peering from around the right side of the book will be a life-size bronze head of a little boy (Red Chief). About 25 feet away -- standing facing the open book and making notes on a pad will be a life-size bronze statue of O. Henry. Nearby will be a life-size bronze statue of his dog.

The Honorable Jesse Helms  
December 10, 1984  
Page 2

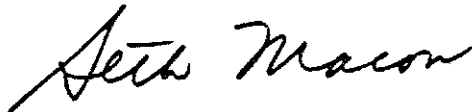
In addition to serving as Treasurer for the O. Henry Festival, I took the assignment of trying to secure a pardon for O. Henry, who was confined in Federal prison in Columbus, Ohio for alleged embezzlement from a Federal Bank in Austin, Texas. An official pardon would give our Festival national and international attention. If more specific information is needed or if a different type request should be made, we are ready to do whatever we can from here.

O. Henry is an international literary figure. He is better known and more widely recognized in other parts of the world than he is here. (That is one reason for our Festival.) We think there is much to gain and nothing to lose by such a pardon.

If I'm asking for the impossible, I would appreciate your thoughts on other possibilities.

Thank you for all you do to look after our best interests locally, statewide, and nationally.

Sincerely,



Seth Macon, Treasurer  
O. Henry Festival, Inc.

For identification, I am retired Senior Vice President of Jefferson Standard Life Insurance Company.

My address is: 3803 Madison Avenue  
Greensboro, N. C. 27403  
Telephone (919) 299-0841

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# O. HENRY'S OWN TRIAL

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Brief for W. S. Porter in the Appeal of  
His Case Filed by His Attorneys  
August 30, 1898

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With Foreword by  
**TRUEMAN E. O'QUINN**  
Attorney at Law  
Austin, Texas

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Reproduced from the Original Records of the U. S. Circuit Court of  
Appeals at New Orleans

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# FOREWORD

If O. Henry had understood the fine legal aspects of his own case, his dramatic might have prompted him to write another immortal short story with the inimitable Henry ending.

After serving nearly seven months in prison for a crime he always denied having killed, William Sidney Porter almost escaped the penalty of the law.

O. Henry—known in 1896 simply as Will Porter of W. S. Porter—was indicted in 1896, for embezzlement of funds of the First National Bank of Austin, Texas, fleeing to Central America, he returned to Austin February 5, 1897, and one year was tried in United States District Court on new indictments in which the charge made that Porter had been a fugitive from justice.

He was promptly convicted and sentenced to five years in prison. He was committed to the penitentiary at Columbus, Ohio, April 25, 1898. On the following December 3 the United States Circuit Court of Appeals at New Orleans decided his appeal.

"We find it stated in the brief for [defendant] that the trial judge refused to submit to the jury the question whether the [defendant] had fled from justice. If this statement were sustained by the record, a serious question would be presented; but we find nothing in the bills of exception to sustain the statement." (Emphases supplied).

The statement referred to by the court appears on page 15 of the following printed report published for the first time—which was filed in New Orleans August 30 by Ward & James, attorneys for W. S. Porter. The brief says:

"... the trial Court not only refused to direct an acquittal, upon motion of defendant, but also refused to submit to the jury the question of fact as to whether or not the defendant, during the period of time alleged in the indictments, was a fugitive from justice." (Emphases supplied).

Unfortunately, the record did not show such to be the fact. The absence of this fact from the record is unexplained. But if the record had shown that the trial judge refused this request, it is manifest that the appeals court would have reversed the court, and O. Henry would have had another chance before a jury of his town for the appellate court said in its concluding lines that

"An entirely different case would be presented if the [defendant] had requested the trial judge to submit the question of fact to the jury, and if, upon the judge's refusal to do so, the point had been duly preserved for review by us. The judgment of the lower court is affirmed." (Emphases supplied).

This was the final judgment of the courts of the land on the guilt or innocence of Porter, but it remained, years later, for O. Henry to write the final judgment on Will Porter of Austin. In "The Roads We Take," published in the New York "Id.," August 7, 1904, O. Henry said:

"It ain't the roads we take; it's what's inside us that makes us turn out the way we do."

Regardless of what anyone may think of the road Will Porter may have taken in life, the stuff inside him was the right kind for him to "turn out the way" he did.

TRUEMAN E. QUINN

1, Texas  
4, 1940

U. S. v. United States, 91 Fed. Rep. 404

Copyright, 1940  
Trueman E. Quinn

No. \_\_\_\_\_

## IN THE CIRCUIT COURT OF APPEALS

OF THE

UNITED STATES OF AMERICA

FOR THE

FIFTH CIRCUIT AT NEW ORLEANS, LOUISIANA.

W. S. PORTER, PLAINTIFF IN ERROR,

vs.  
UNITED STATES, DEFENDANT IN ERROR.

Writ of Error from the District Court of the United States  
of America for the Western District of  
Texas at Austin.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR

WARD & JAMES,

Attorneys for Plaintiff in Error.

No. \_\_\_\_\_

# IN THE CIRCUIT COURT OF APPEALS

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FOR THE

FIFTH CIRCUIT AT NEW ORLEANS, LOUISIANA

W. S. PORTER, PLAINTIFF IN ERROR.

vs.

UNITED STATES, DEFENDANT IN ERROR.

Writ of Error from the District Court of the United States  
of America for the Western District of  
Texas at Austin.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The consolidated cases in which this writ of error has been granted were prosecutions instituted by the government against W.S. Porter for the embezzlement of certain funds from the First National Bank of Austin,

1941

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pursuance of said judgment, was sentenced by the Court to a term of imprisonment of five years. From this judgment of conviction and sentence the defendant W. S. Porter thereupon presented his petition for writ of error to this Court, which, having been granted, he now prosecutes under the following assignments of error, which were duly and properly presented and filed with his petition.

#### FIRST ASSIGNMENT OF ERROR:

The Court erred in refusing to grant the motion of the defendant W. S. Porter to direct an acquittal in causes Nos. 1174 and 1175, on the ground that the offenses charged in said indictments are shown on the face of each of said indictments to have been committed more than three years before the finding of each of said indictments, and the same are therefore barred by limitation, because the testimony of the Government fails to show that the defendant W. S. Porter, since the alleged commission of the offenses charged therein, has at any time been a fugitive from justice, as defined by the Constitution and laws of the United States.

#### FOURTH ASSIGNMENT OF ERROR:

The Court erred in refusing to give special charge No. 4, requested by the defendant, in causes Nos. 1174 and 1175, to the effect that, as the Government in these causes had failed to show that the defendant had at any time been a fugitive from justice, since the alleged commission of the offenses charged in said indictments, as defined by the Constitution and laws of the United

States. The *First* indictment, which is No. 1143, charged the defendant W. S. Porter with the embezzlement from said bank of the sum of \$299.60 in *lawful tender money of the United States*, on the 12th day of November, 1895. This indictment was returned by the Federal grand jury into open Court on the 10th day of February, 1896. The *Second* indictment, which is No. 1174, charged the defendant W. S. Porter with the embezzlement from said bank of the sum of \$554.48 of the moneys and funds of said bank, on the 10th day of October, 1894, and was returned into open Court by the Federal grand jury on the 15th day of February, 1898. The *Third* indictment, which is No. 1175, charged the defendant W. S. Porter with the embezzlement of the sum of \$299.60 of the moneys and funds of the First National Bank of Austin, on the 12th day of November, 1894, and this indictment was returned into open Court by the Federal grand jury on the 15th day of February, 1898. This latter indictment charged the same offense as the one attempted to be charged in the first-mentioned indictment; and it was evidently procured by the Government for fear that the said first-named indictment might prove defective, and might not be sufficient to sustain a judgment of conviction. These three indictments were, subsequent to their return, consolidated by the Court; and the defendant W. S. Porter being arraigned and required to plead thereto, thereupon plead not guilty to each of them; and these three cases so consolidated were thereupon tried before a jury as one case, and a verdict of guilty was thereafter rendered, upon which the trial Court entered a judgment of conviction, and the defendant W. S. Porter, in

THIRD PROPOSITION UNDER FOREGOING ASSIGNMENTS OF ERROR:

The statute of limitation, being an act of grace on the part of the Government, is to be liberally construed in favor of a defendant charged with a criminal offense.

FOURTH PROPOSITION UNDER FOREGOING ASSIGNMENTS OF ERROR:

Where an indictment charges on its face the commission of an offense, which appears from said indictment to have been committed at a time sufficiently remote from the date of the finding of the indictment to bring the offense within the statute of limitation applicable thereto, and the Government seeks to avoid the statute of limitation by alleging that the defendant so charged has been a fugitive from justice for a period of time long enough to remove the bar of the statute, the burden of proof is then upon the Government to establish by competent testimony the fact that the defendant was a fugitive from justice, under the Constitution and laws of the United States, as alleged by the Government in its indictment.

STATEMENT:

The indictments in causes No. 1174 and 1175 were returned into the District Court of the United States for the Western District of Texas on the 15th day of February, 1898. The indictment in No. 1174 charges the embezzlement of certain funds on the 10th day of October, 1894, and the indictment in No. 1175 charges

ates, said indictments are barred by the three-years- statute of limitations, and the jury should therefore find the defendant not guilty.

FIFTH ASSIGNMENT OF ERROR:

The Court erred in refusing to give special charge No. 7, requested by the defendant in causes Nos. 1174 and 1175, defining the meaning of a fugitive from justice as used in the statute of limitations of the United States with reference to criminal offenses.

FIRST PROPOSITION UNDER FOREGOING ASSIGNMENTS OF ERROR:

To be a fugitive from justice is, that a person, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal processes to answer for his offense, has left its jurisdiction and is found within the territory of another state or country.

SECOND PROPOSITION UNDER FOREGOING ASSIGNMENTS OF ERROR:

Before one can be deprived of the benefits of the statutes of limitation as applicable to a criminal offense, the Government must prove, that the person charged with the offense has fled from the jurisdiction in which he is charged, and is found within the territory of another state or country.

the embezzlement of certain funds on the 12th day of November, 1894. Each of said indictments contains the further additional allegation:

“ Your Grand Jurors further say that between the dates 6th day of July, 1896, and the 5th day of February, 1897, the aforesaid W. S. Porter was a fugitive and fleeing from justice and seeking to avoid the prosecution in this Court for the offense hereinbefore set out” (Transcript page ).

The only proof offered upon the question raised by the foregoing allegation was as follows:

*By the Government:* “ That on the 6th day of July, 1896, W. S. Porter, then under indictment in two certain other indictments pending in this Court for the same two offenses charged in the two indictments Nos. 1174 and 1175, consolidated in this cause, failed to appear on said 6th day of July, when the two cases under which he then stood charged were called for trial, and his appearance-bond in said two cases was forfeited, and an *alias capias* in each of said two original cases in which he failed to appear was thereupon issued and placed in the hands of R. C. Ware, United States Marshal for the Western District of Texas, and that the same were never executed; that said R. C. Ware made search and inquiry in the State of Texas for the defendant W. S. Porter and could not find him.”

*By the defendant W. S. Porter:* “ That on the 5th day of February, 1897, the same being the next term of Court after the forfeiture of his bond he voluntarily appeared and surrendered himself, and gave a new bond; and that the forfeiture of his bond taken at the former term of the Court was set aside by Judge Boardman, and

that he has been in attendance upon the Court to answer said original indictments, at each term from the date of his voluntary appearance up to the time of this trial” (Transcript page ).

At the close of the testimony the defendant W. S. Porter moved the Court to direct an acquittal in causes Nos. 1174 and 1175, on the ground that the offenses charged in said indictments by the allegations thereof are shown to have been committed more than three years before the finding of said indictments, and that the testimony of the Government wholly failed to show that the defendant W. S. Porter had at any time been a fugitive from justice as defined by the Constitution and laws of the United States (Transcript page ). This motion was overruled by the Court (Transcript page ); and the Court's action in overruling the same was called to the Court's attention by Paragraph Two of defendant's motion in arrest of judgment. (Tr. page ).

Defendant also call to the Court's attention the question raised by the foregoing assignments of error by requesting Special Charges Nos. Four and Seven, properly charging the law applicable to the facts of this case (Tr. pages and ); and these charges were again called to the Court's attention by Paragraphs Five and Six of defendant's motion in arrest of judgment (Tr. page ).

The defendant's bill of exceptions No. 2, setting forth all the testimony on this question, agreed to by counsel for the government, and approved by the Court, properly reserved all the points raised by plaintiff in error for the consideration of this Court. (Tr. page ).

**AUTHORITIES:**

- Constitution of the U. S., Art. 4, Section 2.
- U. S. Revised Statutes, Section 1045.
- U. S. Revised Statutes, Section 5278.
- Roberts vs Reilly, 160 U. S., 80.
- U. S. vs. Rauscher, 119 U. S., 407.
- U. S. vs. O'Brian, 3 Dillon, 381.
- U. S. vs. Streep, 165 U. S., 365.

**SECOND ASSIGNMENT OF ERROR:**

The Court erred in refusing to grant the motion of the defendant to direct an acquittal in cause No. 1148 upon the ground that the Government had elected to charge in said indictment that the defendant had embezzled \$299.60 in *lawful legal tender money of the United States*, and the Government had failed to offer any proof of the embezzlement of any *lawful legal tender money*.

**THIRD ASSIGNMENT OF ERROR:**

The Court erred in refusing to give Special Charge No. 3 requested by the defendant, to the effect that as the Government had failed to prove the embezzlement of \$299.60 in *lawful legal tender money of the U. S.*, the case of the Government had failed, and the jury should find the defendant not guilty under the indictment in cause No. 1148.

**FIRST PROPOSITION UNDER FOREGOING ASSIGNMENTS OF ERROR:**

An allegation in an indictment which describes, defines and qualifies a matter legally to be charged as a descriptive averment, is required to be proved as laid.

**SECOND PROPOSITION UNDER FOREGOING ASSIGNMENTS OF ERROR:**

Where an indictment contains a necessary allegation which can not be rejected, and the pleader makes it unnecessarily minute in way of description, the proof must satisfy the description as well as the main part of the indictment.

**THIRD PROPOSITION UNDER FOREGOING ASSIGNMENT OF ERROR:**

Where an indictment contains the name of a thing necessarily alleged, to which is prefixed an unnecessary adjective or descriptive phrase, such word or phrase cannot be rejected, and if the proof fails to sustain the allegation, the variance will be fatal.

**STATEMENT:**

The charging part of the indictment in cause No. 1148 is as follows:

"One W. S. Porter did then and there unlawfully, knowingly and feloniously embezzle certain of the moneys and funds, of said Bank association to-wit: *The sum of \$299.60 in lawful legal tender money of the United States of America*" (Tr. page ).

The only proof offered by the Government to sustain this allegation is set out in defendant's *Bill of Exemption No. One*, which is in words as follows: "Be it remembered that upon the trial of the above numbered consolidated causes the Government, after having charged defendant in cause No. 1148 with the embezzlement of \$299.60 in lawful legal tender money of the United States of America, in support of said indictment only offered the proof of the embezzlement of \$299.60 of the funds of the First National Bank of Austin, Texas, and offered no proof whatever that the money and funds charged have been embezzled in said indictment, consisted of lawful legal tender money of the United States of America, and thereupon before said cause was submitted to the jury the defendant by his attorneys requested the Court to charge the jury that, as the Government had failed to offer any proof that the defendant had ever embezzled any lawful legal tender money of the United States of America from the First National Bank of Austin, as alleged in the indictment; which said charge the Court refused to give, to which action of the Court the defendant then did there excepted, because there was no proof whatever that the funds embezzled were lawful legal tender money of the United States of America."

After the testimony was all in, the defendant filed a motion to dismiss the indictment in cause No. 1148 and to direct an acquittal for the following reasons set out in his motion as follows:

1st. Because defendant says that it was admitted that the indictment in cause No. 1148 consolidated in his case is based upon the same acts, and charges the same offense as the one charged in the indictment in

cause No. 1175, and this defendant is now therefore being required to answer at the same time two distinct and separate indictments found by different grand juries upon the same identical charge.

2nd. Because there is no evidence to sustain the charge as set out in said indictment in cause No. 1148 in this, that the Government has elected to charge this defendant with the embezzlement of \$299.60 in lawful legal tender money of the United States of America, and no proof has been offered or even attempted by the Government to show the fraudulent conversion of any lawful legal tender money (Tr. page ). This motion was overruled by the Court (Tr. page ). and the Court's action in overruling the same was called to its attention by Paragraph 3 of the defendant's motion in arrest of judgment (Tr. page ). The defendant also called the Court's attention to this question by requesting the following Special Charge No. 3, as follows: "The jury are charged that in the indictment in cause No. 1148 herein the Government has charged the defendant W. S. Porter with the embezzlement of \$299.60 in lawful legal tender money of the United States of America, and the Government has failed to offer any proof that the defendant ever embezzled any lawful legal tender money of the United States from the First National Bank of Austin, Texas, and has therefore failed to make out its case against the defendant, and you will therefore find him not guilty under this indictment." This charge was refused by the Court (Tr. page ). and the Court's action in refusing the same is assigned as error in fourth paragraph of the defendant's motion in arrest of judgment (Tr. page ).

**AUTHORITIES:**

- United States vs. Brown, 3 McL. (C. C.) 233.
- United States vs. Kean, 1 McL., (C. C.) 429.
- United States vs. Howard, 3 Sumn., (C. C.) 12.
- Simpson vs. The State, 10 Tex. App., 681.
- Jones vs. State, 12 Tex. App., 424.
- United States vs. Howard, 3 Sumn. C. C., 12-15.
- Davis vs. State, 13 Tex. App., 215.
- Barkley vs. The State, 55 Ga., 179.
- Moore vs. State, 20 Tex. App., 275.
- Conway vs. The State, 4 Ind., 94.
- Withers vs. State, 21 Tex. App., 210.
- Com. vs. Butcher, 4 Gratt. (Va.), 545.
- Lloyd vs. State, 22 Tex. App., 646.
- Raunall vs. The State, 1 Tex. App., 461.
- Com. vs. Magowan, 1 Met (Ky.), 368; 71 Am. Dec. 480.
- Cravens case, Russ. & Ry., 14.

**SIXTH ASSIGNMENT OF ERROR:**

The Court erred in overruling the motion of defendant for a new trial.

**SEVENTH ASSIGNMENT OF ERROR:**

The Court erred in entering a judgment of conviction against this defendant upon the three indictments as consolidated herein.

**PROPOSITIONS:**

Same as under foregoing assignments of error.

**STATEMENT:**

Same as under foregoing assignments of error.

**AUTHORITIES:**

Same as under foregoing assignments of error.

**ARGUMENT.**

It is earnestly insisted by the plaintiff in error that a manifest wrong has been done him by the ruling of the trial Court upon the questions which are here presented for review. We respectfully submit that the trial Court was clearly in error in disposing of the question of limitation as applicable to the offenses charged in indictments 1174 and 1175. These two indictments charged the offenses alleged therein to have been committed on the 10th day of October and on the 12th day of November, 1894, respectively, and these to indictments were returned by the Federal grand jury on the 15th day of February, 1898. Under this state of the record it was incumbent upon the Government to establish by competent proof the fact that the defendant W. S. Porter had been a fugitive from justice, since the commission of the offenses alleged, for a sufficient period of time to remove the bar of the three-year-statute of limitations. To satisfy this prerequisite the Government only offered proof that on the 6th day of July, 1896, the defendant, then under indictment for the same offenses charged in the two foregoing indictments, failed to appear at a regular term of the Federal Court.

in which he was charged, and his bond was thereupon forfeited and an *alias capias* for him issued. It was thereupon proven by the defendant that on the 5th day of February, 1877, at the next term of the Federal Court in which he stood charged, he, the said W. S. Porter, voluntarily appeared and surrendered himself, and the forfeiture of his bond was set aside, and he has ever since been in attendance on the Court. At the close of the evidence the defendant moved the Court to direct an acquittal, because the indictments were found more than three years after the commission of the offences alleged, and given in evidence, and because the words "fleeing from justice," as used in the Constitution and laws of the United States, meant a fleeing from the justice of the United States or of some State, and it must be proven by the Government that when he was sought to be subjected to its criminal process to answer for the offences in these indictments, he had left the jurisdiction in which he was charged and was found within the territory of another State or country.

We earnestly insist that, under the rule laid down in *Strep vs. The U. S.*, 160 U. S., 365, the Government failed to offer sufficient proof to establish the fact that the defendant Porter was a fugitive from justice. There was not even an attempt made to show that the defendant had ever fled from the justice of the United States, or that he had at any time been a fugitive from justice beyond the territorial limits of the State of Texas, or that he had at any time removed himself beyond the reach of the criminal processes of the District Court of the United States for the Western District of Texas. It is apparent to us from the evidence that it was the

intention of the learned Judge, who delivered the opinion in the foregoing case, to lay down the rule that the Government must show affirmatively that the defendant, during the period of time in which he is alleged to have been a fugitive from justice, was fleeing from the justice of the United States or one of its sovereign states, and was during that period of time beyond the territorial limits of the State in which the offence was committed, and was fleeing from the justice of the Court in which he was charged.

An examination of the statement of the case, as made by Mr. Justice Gray, discloses the fact that on its trial it was proven by the Government that the defendant in that case *admitted* that he fled to Europe, during the period of the time in which the Government alleged that the statute of limitation was suspended, and therefore, upon his own admission, he was a fugitive from justice under the Constitution and laws of the United States.

In the case at bar the trial Court not only refused to direct an acquittal, upon motion of the defendant, but also refused to submit to the jury the question of fact as to whether or not the defendant, during the period of time alleged in the indictments, was a fugitive from justice, and also refused to submit a special charge requested by the defendant, properly defining what is meant by a fugitive from justice in the Constitution and laws of the United States.

Certainly the fact that the appearance-bond of the defendant was forfeited at a prior term of the Court should not be assumed by the Court as conclusive evidence that the defendant was a fugitive from justice from

t time forth, and particularly so in this case, when evidence, as set out in the bill of exceptions alleged by the trial Court, shows that the defendant untarily appeared at the next term, surrendered himself, and that the forfeiture was set aside.

Until the Government had at least made some effort to fix upon the defendant the character of a fugitive in justice, as defined by the Supreme Court of the United States, the defendant could not be required to furnish ample proof in rebuttal. The fact of the forfeiture of his bond, at the strongest, was merely a circumstance to be considered by the jury upon the question of his fleeing from justice, and this slight circumstance fully overcome by the defendant's proof that he untarily appeared at the next term of the Court, submitted himself willingly to its jurisdiction.

It cannot be argued that the defendant absented himself during this period of time for the purpose of securing any advantage over the Government in these prosecutions, because the Government could have had him indicted at the term of Court, at which he voluntarily appeared, and if this had been done such indictments would not have been barred by the three-year limitation of limitation.

In cause No. 1148 the Government charged the defendant W. S. Porter with the embezzlement from the National Bank of Austin, of \$299.60 in lawful tender money of the United States of America. Under this indictment the Government offered no proof whatever that the funds charged to have been embezzled consisted of lawful legal tender money of the United States. The Bill of Exceptions, which the trial

Court has allowed in this cause, admits the fact that the Government offered *no proof of this character whatever*. Upon this state of the record, at the conclusion of the testimony, the defendant moved the Court to direct an acquittal also upon this indictment, which motion the Court overruled, and thereafter the defendant again by a special charge requested the Court to direct an acquittal, and this charge too was refused.

It was unnecessary for the Government to have described the funds alleged to have been embezzled with such minuteness. The pleader might have alleged that the funds embezzled were simply *money*, of the value of \$299.60, and in such event, a conviction might have been sustained without proving the specific character of the funds embezzled; but having alleged the name of the thing embezzled according to a specific description, such descriptive word or phrase cannot be rejected.

In discussing the importance of the proof strictly corresponding with the allegations in an indictment, Judge Story has said: "No allegation, whether it be more or less the part which is descriptive of the identity of that which is illegally essential to the charge in the indictment, can ever be rejected as surplusage."

It has been held that where a bank-note has been described with great particularity as to its denomination, value, and name of the officer who signed it, the proof must correspond strictly with the allegations.

Suppose in the case at bar the Government had offered proof that the defendant W. S. Porter had embezzled a bank-check for 299.60; would such proof have sustained a conviction? Suppose the Government had proved that the defendant W. S. Porter had embezzled



295.00 of National Bank notes, and \$4.60 of U. S. postage stamps; would such proof have sustained a conviction under this indictment?

Certainly such evidence can not sustain a conviction, because the thing in each case embezzled is not *lawful tender money of the United States*. The only character of money under our law which is lawful legal tender money is either U. S. notes or gold and silver coin of the United States. R. S. U. S., 3585, 3586 and 3587.

The Government having failed to show the embezzlement by the defendant Porter of any such money, the trial judge should have directed an acquittal under this indictment.

In consideration of the propositions submitted herein we earnestly insist that the judgment of the trial court in the three consolidated cases should be reversed, and the prosecutions dismissed.

WARD & JAMES,

*Attorneys for Defendant W. S. Porter.*