

commit him to the care of the jailer. This should be done in writing. The protection of the liberty of the citizen, the safety of the jailer, the accuracy of his claim on the government, all require that no person should be imprisoned except upon an order distinctly stating when, by whom, and for what, he is imprisoned. So with the discharge of a person. How can a jailer safely discharge him without an order in writing? How can a jailer properly present his claim to the government unless he can produce a voucher showing when the custody ended, as well as when it began? How can a person in custody force his discharge, if he cannot establish by indisputable evidence that he has been discharged? If the evidence remain in parol, or *in pais*, the death, removal, or silence of the commissioner may imprison him indefinitely. These items for commitments and discharges are allowed.

The items for acknowledgments are proved thus: Recognizances were taken by the commissioner, and acknowledged before him. This acknowledgment is not a mere form, nor is it simply another mode of witnessing. It has been held that the acknowledgment and signature of the commissioner makes the recognizance binding, even if the parties do not sign it. *U. S. v. Pickett*, 1 Bond, 123. The recognizance must be acknowledged before the commissioner, and is binding because so acknowledged. This gives this form of obligation its distinctive character. A recognizance is more than an ordinary bond. It can be estreated and enforced as a judgment; and its name, "recognizance," that is to say, "acknowledgment," shows the importance of the acknowledgment before the commissioner. But this recognizance, though the recognizance be signed by several, is but one act. The parties acknowledge before the commissioner that they are bound, and his signature completes the act. *U. S. v. Pickett, supra*. But one fee can be charged for the acknowledgment on each recognizance.

The transcript of the docket for the circuit court was made under the peremptory order of the court. The charge for this is allowed. Let a decree be entered in accordance with this opinion.

THORNLEY v. UNITED STATES.

(District Court, D. South Carolina. February 25, 1889.)

UNITED STATES COMMISSIONERS—DOCKET FEES—PRIOR TO ACT CONG. AUG. 4, 1886.

United States commissioners are entitled to docket fees earned before the passage of act Cong. Aug. 4, 1886, which amended Rev. St. U. S. §§ 828, 847, and took away the right to such fees, allowed by the latter statute.

At Law.

Action by John L. Thornley against the United States for fees as commissioner.

Julius H. Heyward, for plaintiff.
H. A. De Saussure, Asst. U. S. Dist. Atty.

SIMONTON, J. The plaintiff is a commissioner of the courts of the United States in this district. He brings his action for docket fees for the period beginning 12th March, 1886, and ending 23d June, 1888; in all, \$517. Upon his account it appears that between 12th March, 1886, and 1st August, 1886, he charged 19 docket fees, to-wit 16 at \$3, \$48; and 3 at \$1, \$3; in all, \$51. He presented in his accounts forwarded to the department claim for these last-mentioned docket fees in due form. The department disallowed all docket fees anterior to July 1, 1886, and allowed all docket fees charged between July 1, 1886, and August 4, 1886. The amount thus disallowed is \$39. The other items of docket fees were never included in his accounts, and the claim has never been made upon or disallowed by the department, and has never been, until now, presented to the court.

In the case of *Calvert v. U. S.*, ante, 762, (decided this day,) it has been held that the provision inserted in the deficiency act of August 4, 1886, depriving commissioners of docket fees, was not a condition annexed to the special provision then made, and was not confined to that act; but that it was permanent in its character, and operated as an amendment to section 847, Rev. St. U. S. If this is so, the section remained the law until thus amended, and commissioners are entitled to the fees provided in it. When the amendment was passed, this plaintiff had performed certain services anterior to its passage, payment of which the section provides for, and has earned his money. The government then owed it to him. Let him have a decree for \$39. The rest of the account comes within the ruling in *Calvert's Case*, and must be disallowed. Since August 4, 1886, commissioners have lost the right to docket fees. It is unnecessary to decide whether a suit can be maintained in this court on a claim not passed upon by the treasury department.

SWAIN v. BOYLSTON INS. CO.¹

(Circuit Court, E. D. New York. February 12, 1889.)

PLEADING—AMENDMENT OF ANSWER—NEW DEFENSE—MATERIALITY.

In an action on a policy of marine insurance, on application to amend the answer by the insertion of a clause in the application for insurance warranting the vessel to be commanded by a certified captain, held, that if the clause operated as an inducement to the defendant to accept the risk, defendant was at liberty to avail himself of such defense under an amendment made since the trial. If the statement was one not material to the risk, defendant should not now be allowed to set it up as a bar in a case where his amendment as to representation gave him opportunity to prove in defense whatever fact he selected for a defense when he made his contract. Hence the motion was denied.

¹Reported by Edward G. Benedict, Esq., of the New York bar.