

entry which the statute permitted, but as well one which the statute forbade. All the argument which seeks to demonstrate that the provision which gives the right to be preferred in making an authorized entry, endows with the authority to make an illegal because prohibited entry, rests upon a mere misconception of the nature and character of the right of preference for which the statute provides. The argument assumes that the right of preference is in and of itself the equivalent of an entry, not controlled by the prohibition which the statute expresses, when in truth and in fact the right of preference is merely a privilege given to make the statutory entry of a particular tract of coal land in preference to others. And the misconceptions upon which the argument rests concerning the nature and character of the preference right for which the coal land statutes provide when duly appreciated at once demonstrates the irrelevancy of previous rulings of this court concerning the right of an entryman after entry or after the doing of acts made by the statute equivalent to an entry to dispose of the land embraced within the entry.

It follows from the construction which we have given the statutes in the opinion delivered in the *Keitel case*, No. 286, just decided, and for the reasons here stated, that the court below erred in sustaining the demurrer to the indictment.

Reversed and remanded for further proceedings in conformity to this opinion.

UNITED STATES *v.* HERR *et al.*

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLORADO.

No. 291. Argued October 22, 23, 26, 1908.—Decided December 14, 1908.

Decided on the authority of *United States v. Keitel*, *ante*, p. 370, and
United States v. Forrester, *ante*, p. 399.
157 Fed. Rep. 396, reversed.

211 U. S.

Opinion of the Court.

THE facts are stated in the opinion.

The Attorney General and The Solicitor General, with whom *Mr. Edwin W. Lawrence*, Special Assistant to the Attorney General, was on the brief, for the United States.¹

Mr. B. W. Ritter and *Mr. N. C. Miller* for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The court below sustained a demurrer to the indictment in this case, for the reasons which caused it to quash the first count of the indictment in the case of *United States v. F. W. Keitel*, *ante*, p. 370.

The indictment alleged a conspiracy to defraud the United States of coal lands in violation of § 5440, Rev. Stat. The conspiracy charged was, speaking in a broad sense, of the same general nature as that set forth in the first count of the indictment in the *Keitel case*. In the argument at bar, however, counsel differ as to the correct construction of the indictment here under consideration, the United States contending that the conspiracy to which the indictment related concerned entries based upon preferential rights, while on the part of the defendants in error it is insisted that the conspiracy related to only cash entries. In view, however, of our ruling in the *Keitel case*, No. 286, and the reasoning by which the decision in that case was held to be controlling in *United States v. Forrester et al.*, No. 287, just decided, the contentions referred to are irrelevant on this writ of error.

As it results from the opinions in the cases just referred to that the court below erred in sustaining the demurrer to the indictment, its order so doing must be reversed.

Reversed and remanded for further proceedings in conformity to this opinion.

¹ For abstract of argument see *United States v. Keitel et al.*, *ante*, p. 372.