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A TREATISE

ON

FEDERAL CRIMINAL LAW PROCEDURE

WITH

FORMS OF INDICTMENT.

BY

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PREFACE

The many years I have served as United States Attorney have convinced me that the majority of the bar will welcome a sort of compendium of Federal Law and Procedure and indictment forms, that may be of instant assistance to them, when called into a criminal case in the Federal Court.

No especial claim of originality is made for the pages that follow. Reference books, annotations, dictionaries, encyclopedæs, and reports of the Courts have been frequently and studiously consulted. A great portion of the work, however, has been taken from my own annotations, made during my service as an official.

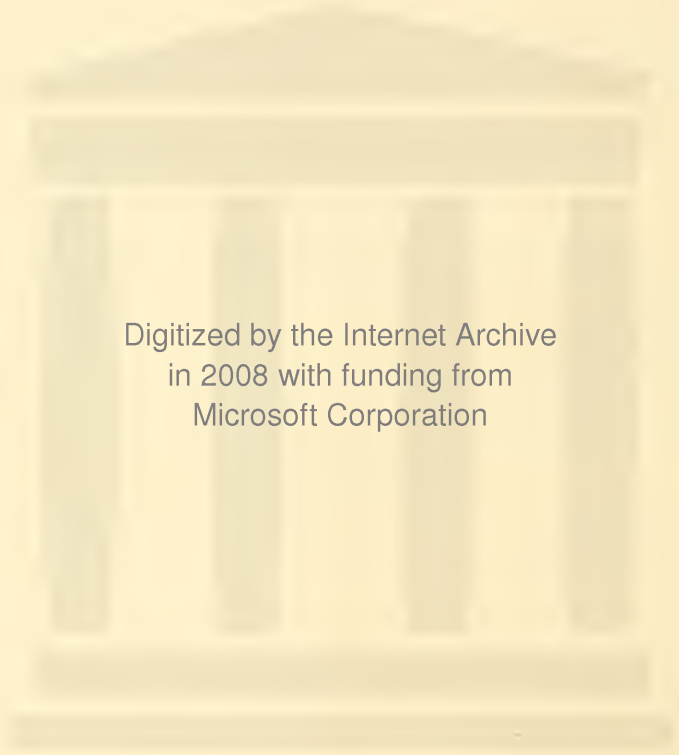
In the preparation of the volume, I have been conscientiously aided by my clerk and private secretary, Mr. J. A. Lantz.

The book is offered with the prayer that the labor of some fellow attorney may be somewhat lightened.

Yours very earnestly,

WILLIAM H. ATWELL.

August 1, 1910.



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FEDERAL CRIMINAL LAW

CHAPTER I.

THE UNITED STATES CONSTITUTION.

§ 1. **The United States Constitution.**—The Constitution of the United States provides in Section 2 of Article VI., that, "The Constitution and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land; the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

§ 2. Article V. of the Amendments to the Constitution provides:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

Article VI. of the Amendments provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense"

By Article III. of the Constitution, the judicial power is vested in a Supreme Court, and in such inferior courts as Congress may establish.

In Section 8, Article I., Congress is authorized specifically to establish naturalization laws, uniform bankrupt laws, to coin money, to establish post-offices and post-roads, to promote the progress of science and useful arts, and to make all laws necessary and proper for carrying into execution any of the powers vested by the Constitution in the government of the United States, or in any department or officer thereof.

§ 3. From these specific grants of power, as well as from the power that is inherent in sovereignty to pass such regulations as will conserve the liberties of the individual and the existence of the sovereignty, has come the Federal criminal law.

The power to establish post-offices and post-roads must necessarily include the power to preserve them after so being established; the power to coin money, the power to promote science and arts, and the power to make all laws necessary to promote the general welfare of the government is sufficient, when delegated by the people, for the foundation of a code, by the enforcement of which the liberty, property, and life of individuals is taken through the process of the Courts.

§ 4. There are certain well known guarantees of our republican form of government that are in the Constitution, most of which appear in the respective Constitutions of the various states. These guarantees are:

(1) The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it. (Section 9, Article I., Paragraph 2.)

(2) No bill of attainder or *ex post facto law* shall be passed. (Sec. 9, Art. I., Par. 3.)

(3) The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed. (Sec. 2, Art. III., Par. 3.)

(4) No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open Court. (Sec. 3, Art. III., Par. 1.) The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. (Sec. 3, Art. III., Par. 2.)

(5) The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. (Sec. 2, Art. IV., Par. 1.) A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime. (Sec. 2, Art. IV., Par. 2.)

(6) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. (Amendment IV.) Amendment V. guarantees that no person shall be held to answer unless upon presentment or by indictment, and that no person shall be twice put in jeopardy of life or limb, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; and Amendment VI. guarantees speedy trial in the proper jurisdiction, that he shall be confronted with the witnesses, be represented by counsel, and himself, entitled to process for witnesses.

(7) Amendment VIII. provides excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

§ 5. **Infamous Crimes as Meant in Art. V. of Constitution.**—In re Classen, 140 United States, 205, is the ranking Supreme Court decision as to what is an infamous crime, and that case holds that a crime which is punishable by imprisonment in a state prison or a state penitentiary, is an infamous crime, whether or not the accused is sentenced to hard labor; and the determination of the question rests upon what the statute provides, and not upon what the judge imposes. See also Fitzpatrick vs. United States, 178 U. S., 307; McKnight vs. United States, 113 Fed., 452; Good Shot vs. United States, 154 Fed., 258; Gritt Garritee vs. Bond, 102 Maryland, 383; State vs. Nichols, 27 R. I., 83; United States vs. Wynn, 9 Fed., 894; ex parte Wilson, 114 United States, 423; Mackin vs. United States, 117 U. S., 351; ex parte McClusky, 40 Fed., 74; Parkinson vs. United States, 121 U. S., 281; ex parte Bain, 121 U. S., 13; United States vs. Cadwallader, 59 Fed. 679; United States vs. Dewalt, 128 U. S., 393.

Section 335 of the new Federal Criminal Code, in effect January 1, 1910, contains this provision:

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies; all other offenses shall be deemed misdemeanors."

§ 6. **Jeopardy.**—Each American citizen, owing allegiance to two governments, state and national, is the beneficiary of both, and also liable to the pains and penalties of both. He that sells whiskey must comply with both state and federal laws, and a conviction or acquittal under the laws of either is no impediment or safeguard to prosecution from and by the other. One who sells whiskey without taking out either state or federal license is liable to prosecution by both governments.

The Courts have held, *in re* Boggs, 45 Federal, 475; U. S. vs. Barnhart, 22 Federal, 290, Fox vs. Ohio, 5 Howard, U. S., 434; Moore vs. Illinois, 14 Howard, U. S., 20, that the jeopardy clause in the Federal Constitution is not a limitation upon any state government, but I do not understand such holding to mean that if one were put in jeopardy twice by the state machinery, that he

would thereby be precluded from raising the question. While the jeopardy clause in the Federal Constitution was doubtless intended to relate to trials in the Federal courts, I am sure that the constitutional guarantee could be successfully relied upon by a citizen of a state, if the effort were made to place him in jeopardy twice by the state government.

It will be borne in mind that a former conviction or acquittal must be pleaded, and the protection is as ample whether the former trial resulted in a conviction or an acquittal. United States vs. Wilson, 7 Peters, 159; United States vs. Ball, 163 U. S., 662; ex parte Glenn, 111 Federal, 261.

§ 7. **Witness Against Self.**—That clause of Amendment V., which declares that no person shall be compelled in any criminal case to be a witness against himself is not limited to the defendant. It is a privilege that can be claimed by any witness. Counselman vs. Hitchcock, 142 U. S., 562; U. S. vs. Collins, 145 Federal, 711; *in re* Hess, 134 Federal, 111; United States vs. Præger, 149 Federal, 484; Hale vs. Henkel, 201 U. S., 67; Jack vs. Kansas, 199 U. S., 381; Burrell vs. Montana, 194 U. S., 578; Ballman vs. Fagin, 200 U. S., 195; Edelstein vs. United States, 149 Federal, 642; United States vs. Simon, 146 Federal, 92; *in re* Briggs, 135 N. C., 122; U. S. vs. Price, 163 F., 904.

There is nothing more barbarous than to compel disclosures which will degrade and convict the person so compelled. Voluntary appearance no violation or deprivation of constitutional guarantee, Pendleton vs. U. S.—U. S. Sup. Ct., October Term, 1909.

Section 860 of the Revised Statutes of the United States provides that no pleading of a party nor any discovery or evidence obtained from a party or a witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him or his property or his estate in any Court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture. An interesting case, showing the extent of the doctrine and the care with which the Courts have preserved it, is McKnight vs. the United States, 115 Federal, 981. In that case, the Circuit Court of Appeals for the Sixth Circuit condemned as unconstitutional a demand by

the District Attorney of the defendant for the original of a paper in evidence.

As to immunity from prosecution because of testimony before Grand Jury, see U. S. vs. Heike, 175 Fed., 852. When such is plead in bar burden is on the defendant, for discussion thereon see same case.

§ 8. Amendment VI. of the Constitution means a trial by a common law jury, which consisted of twelve men, Maxwell vs. Dow, 176 U. S., 586; Thompson vs. Utah, 170 U. S., 349, and to such a hearing as the terms and rules of the Court permit, Beavers vs. Haubert, 198 U. S., 86, and to such an explanation of the offense charged as to afford the defendant ample protection from any subsequent prosecution and to enable him to make his defense in the present one, United States vs. Cruickshank, 92 U. S., 557; United States vs. Martindale, 146 Federal, 291; United States vs. Green, 136 Federal, 641; Fitzpatrick vs. United States, 178 U. S., 309; Terry vs. United States, 120 Federal, 486; Milby vs. United States, 149 Federal, 641; Bartlett vs. United States, 106 Federal, 885. It is not necessary, however, to furnish a copy of the indictment to the defendant, United States vs. Vanduzee, 140 U. S., 173; United States vs. Jones, 193 U. S., 530; Balliet vs. United States, 129 Federal, 689, unless the prosecution is for treason or other capital offense, in which event Section 1033 of the Revised Statutes of the United States provides the procedure, which includes a copy of the indictment for the defendant. The only exceptions to the guarantee that the defendant shall be confronted with the witnesses against him are the introduction of dying declarations and the introduction of the testimony of a deceased witness who was sworn upon a former trial, and the testimony taken in stenographic form, such testimony to be supported by the oath of the stenographer, Kirby vs. United States, 174 U. S. 61; West vs. Louisiana, 142 Federal, 4; Flynn vs. People, 222 Illinois, 309; Robertson vs. Baldwin, 165 U. S., 281; Mattox vs. United States, 156 U. S., 240; Motes vs. United States, 178 U. S., 471.

Section 878 of the Revised Statutes of the United States authorizes the issuing of process for indigent defendants when such defendants make affidavit in accordance therewith, but a

rule of the court limiting such witnesses to four is not unreasonable.

§ 9. It is well for the attorney whose practice has been largely confined to the state courts to ever bear in mind that the rules and forms of practice and methods of pleading that are adopted by Federal Statute for procedure in the Federal Courts, do not apply to any extent in the trial of Federal criminal law. It is entirely immaterial what the state statutes provide with reference to procedure in criminal cases, so far as the Federal Courts are concerned. The Federal statutes alone control in criminal matters. In Logan vs. United States, 144 U. S., 301, the Supreme Court held that even Section 858 of the Revised Statutes of the United States, which, in its concluding paragraph, seems to program the line of competency for witnesses in the Courts of the United States did not relate to criminal trials or witnesses in criminal cases. The Court in that case said:

"For the reasons above stated, the provisions of Section 858 of the Revised Statutes, that 'the laws of the state in which the court is held shall be the rules of decision as to competency of witnesses in the Courts of the United States, in trials at common law and in equity and admiralty,' has no application to criminal trials; and, therefore, the competency of witnesses in criminal trials in the Courts of the United States. . . . is not governed by a statute of the state."

Criminal cases in the Federal courts are governed and controlled by Federal statutes and Federal decisions, and state statutes and state decisions are inapplicable. Jones vs. United States, 162 Fed., 419; United States vs. Reid, 12 Howard, 363; Starr vs. United States, 153 U. S., 625; Jones vs. United States, 137 U. S., 211; Simmons vs. United States, 142 U. S., 148; Lang vs. United States, 133 Fed., 204; U. S. vs. Davis, 103 Fed., 457; U. S. vs. Hall, 53 Fed., 353; U. S. vs. Stone, 8 Fed., 239.

CHAPTER II.

GENERAL PROVISIONS APPLICABLE TO THE PRACTICE.

33. No Authority to Suspend Sentence.
34. Correction of Sentence; Control of Court Over Sentence After End of Term; New Trial, Motion for, When to Be Made; May Be Made in Court of Appeals; Null and Void Criminal Judgment, Whether May Be Corrected, and How.
35. Remission of Penalty on Forfeited Recognizance.
36. Bail After Affirmance of Judgment.
37. Severance, Separate Trials; Discretion of Court.
38. *Habeas Corpus,* Conclusions of Law Therein, Instead of Statement of Facts.
39. Immunity Under Commerce Act, by Reason of Testimony.
40. Improper Person in Grand Jury Room.
41. Private Prosecutors Unknown in Federal Courts.
42. Proof of Witness' Former Conviction.

§ 10. Article III. of the Constitution of the United States provides in substance that the judicial power of the United States shall be vested in a Supreme Court, and in such inferior Courts as Congress may establish. Passing by the courts of the District of Columbia and the territorial courts, there are but two Federal courts in all the states of the Union, in which indictments and informations may be lodged and tried, to wit, the Circuit and District Courts.

§ 11. The present United States Commissioners, that correspond in a general way to magistrates, justices of the peace, and other state examining officers, were, under the old law, called Commissioners of the Circuit Courts; but by the Act of May. 1896, all Circuit Court Commissioners were abolished, and thereafter it became the duty of the District Court of each judicial district in the United States to appoint such number of persons as it might deem necessary, to be known as United States Commissioners. This Act of May, 1896, was an amendment to the old Section 627 of the Revised Statutes. The Criminal Code of 1910 does not change the Act of 1896.

A United States Commissioner, however, is not a Court. In the case of *in re* Sing Tuck, 126 Federal, 397, the Court held a United States Commissioner to be neither a court nor a judge, nor vested by law with any part of the judicial power of the United States. A United States Commissioner is an inferior officer of a court, appointed by the court under authority of

Congress, with defined and circumscribed powers. United States vs. Case, 8 Blatchf., 250; United States vs. Schumaan, 2 Abb. U. S., 523; *in re* Kaine, 14 Howard, 103; United States vs. Clark, 1 Gall., 497. See also *in re* Grin, 112 Federal, 795; Rice vs. Ames, 180 U. S., 371; Wright vs. Henkel, 190 U. S., 62; Beavers vs. Henkel, 194 U. S., 87, as to other powers of United States Commissioners, under proper appointment from the Court.

In 100 Federal, page 950, *in re* Perkins, it was held that a United States Commissioner cannot punish for contempt, and the doctrine is reiterated that a United States Commissioner does not, and cannot, hold a United States Court, but is a part of the Court appointing him; and when there be disobedience to his process or authority, the Commissioner properly refers such disobedience to the Court by whose authority he exists, which Court pursues the proper methods for contempt proceedings. In United States vs. Wah, 160 Federal, 207, the above doctrine has been reiterated, and it is clearly stated and argued, citing authorities, that United States Commissioners are neither judges nor courts, nor do they hold courts, though at some times acting in a quasi-judicial capacity, nor do they possess the power of courts, except in so far as the Acts of Congress conferring certain authority and imposing certain duties on them, especially confer the same.

We, therefore, have, as originally stated, but two *nisi prius* courts in the states.

§ 12. **Prosecution Begun by Indictment.**—While there remain some few statutes that impose punishments sufficiently light to permit prosecution to be begun by information, most prosecutions must be begun by indictment.

§ 13. **Grand Jury and Indictment.**—The Treasury, the Post-office, the Internal Revenue and other departments of the Government have in active service what may be termed agents or inspectors. It is the duty of these officials to be diligent in the discovery of offenses against the Federal law, and to report such discoveries to the proper District Attorney, and upon his advice make complaint or affidavit before the proper United States Commissioner. From such Commissioners' cases, and from re-

ports of various agents upon which affidavits or complaints have not been ordered, the prosecution presents to a grand jury evidence bearing thereon. This body of inquiry, under Section 808 of the Revised Statutes, must consist of not less than sixteen nor more than twenty-three men, twelve of whom must vote in favor of a bill before it can be returned. Section 1021, R. S. After the return of a bill into Court, if there be any dilatory plea that the defendant thinks to urge, he must speed to do so. A delay of five days in presenting such a plea may be fatal to him; and in the presentment of such a plea, there must be specifically set out the causes and particulars of the injury to him. In Agnew vs. United States, 165 United States, 36, a delay of five days was noted in treating the plea as insufficient. See also Lowden vs. United States, 149 Federal, 675, and Wilder vs. U. S., 143 F., 439. Under a statute declaring that the names first drawn from a jury box shall constitute the grand jury, and the latter the petit jury, a grand jury from which jurors whose names were first called were improperly excused, and their places filled by persons whose names were thereafter drawn from the box, was illegal. After an indictment is returned, the District Attorney may, by proper order, remit the same to the Circuit Court, if it was returned into the District Court; or, if it was returned into the Circuit Court, he may, by proper order, have it remitted to the District Court. Section 1037, R. S. Such remission, however, cannot be demanded by the defendant, nor will such remission be suffered to continue the case. Barrett vs. United States, 169 U. S., 228. These remissions from one court to another are allowed in order to facilitate the public business. United States vs. Haynes, 26 Federal, 857; *in re* Haynes, 30 Federal, 767; Kelley vs. United States, 27 Federal, 616. If, however, the prosecution happens to be by information, there is no provision in the statute for remitting the information from one of these courts to the other, and the Courts have held that 1037 must be strictly construed, and that the word indictment does not include an information. United States vs. Tiernay, 3 McCrary, 608; 16 Fed., 513. A copy of the indictment is not furnished as a matter of course to defendants. When a prosecution is for treason, however, or other capital offense,

then a copy of the indictment, and a list of the jurors and witnesses must be delivered to the defendant, in the first instance at least three days before trial, and in the last instance for at least two days before trial, in accordance with Section 1033. In other cases, however, copy of the indictment is unnecessary. Balliet vs. United States, 129 Fed., 689; Jones vs. U. S., 162 F., 417; Ball vs. U. S., 147 F., 32.

§ 14. **Preliminary Proceedings.**—We have heretofore noticed the provisions relating to the appointment of United States Commissioners. If warrant is secured prior to indictment, such warrant is issued under the hand and seal of the United States Commissioner, and the offender is brought before him for preliminary hearing, and is entitled to make his bail before that officer. The general authority for such procedure is found in Section 1014. If one be arrested in a district different from that in which he is indicted, he is entitled to be taken before the nearest United States Commissioner, who inquires into his identity, and fixes bail for his appearance before the proper Court of the proper district. If the prisoner cannot make the bail, application is made to the District Judge for a warrant of removal, under Section 1029.

The latest authority seems to be that upon proper application, the District or Circuit Court may inquire into the validity of the indictment, so far as the jurisdiction is concerned, before ordering the defendant moved to the district in which the indictment was found. In United States vs. Smith, 173 Federal, this doctrine was announced, and the Court refused to remove the publisher of a newspaper in Indianapolis to the District of Columbia for trial. To the same effect is Findley vs. Treat, 205 U. S., 20; also 131 Fed., 968; U. S. vs. Green, 136 Fed., 618; United States vs. Peckham, 143 Fed., 625; 119 Fed., 93; *in re* Benson, 130 Fed., 486; United States vs. Green, 100 Fed., 941; Pereles vs. Weil, 157 Fed., 419. Probable cause is the only question to be inquired into when removal on indictment is asked. *In re* Quinn, 176 F., 1020.

§ 15. Under Section 1014, all bail bonds and recognizances are to be as near like those in the state court as the difference in codes and practice will permit. *In re* Belknap, 96 Fed., 614;

U. S. vs. Hunt, 166 U. S., 1063; U. S. vs. Lois, 149 Fed., 277. In United States vs. Zarafonitis, 150 Federal, 97, the Court held that all proceedings for holding an accused person to answer to a criminal charge before a court of the United States are assimilated to those under the laws of the state in which the proceedings take place, and the sufficiency of a bail bond taken in such proceedings is to be determined by the law of the state. though in Hardie vs. United States, 71 Fed., 158, the Court held that a bail bond taken before a United States Commissioner, though affidavit and information charge no offense, is good, and may be enforced. The United States may enforce a forfeited bail bond of recognizance by an action at law or *sire facias.* United States vs. Zarafonitis, 150 Fed., 99; United States vs. Insley, 54 Fed., 221. In 170 Federal, 613, United States vs. Lee, the court held that an indemnified surety may be refused, and in the same Federal Reporter, at page 476, in United States vs. Marrin, the Court held that a defendant who goes where he can be arrested, and thus causes a breach of his bond, renders his sureties liable.

§ 16. **Challenges.**—Section 819 of the Revised Statutes allows the defendant twenty challenges, and the United States five peremptory challenges, when the offense is treason or capital. On the trial of any other felony, the defendant is entitled to ten; and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges. Under Section 335 of the 1910 Code, however, all offenses which may be punished by death or imprisonment for a term exceeding one year are felonious, and all other offenses misdemeanors, and it is now an easy matter to determine just how many challenges the defendant is entitled to. If, however, there be more than one defendant, and the trial is had without severance, the defense will be allowed no more challenges than if there were but one defendant on trial, R. S. 819.

In a note to Jeff Harrison vs. United States, 163 U. S., 140, as reported in the 41 Lawyers Reports Annotated, at page 104, is a very valuable compilation of the decisions involving the following points:

As to trial by jury, how affected by Seventh Amendment to the Constitution, New York Supreme Court Justices vs. United States, reported in 76 U. S., 282.

As to jury, of what number; practice in regard to; illness or insanity of one; thirteen or eleven jurors; wrong person serving as juror by mistake; Silsby vs. Foote, 14 Howard, 218; 14 Law Ed., 394, and the notes on page 394 of the 14 Law Ed.

As to causes of challenges of jurors and their qualifications, Clinton vs. Englebrecht, 80 U. S., 449, 13 Wallace; 20 Law Ed., 659, and the note.

As to discharge or withdrawal of jurors before verdict, effect of, United States vs. Perez, 9 Wheat., 578; Vol. 6, Law Ed., 165.

As to impeachment of verdict by jurors; affidavit of parties or third persons; affidavits of jury to sustain verdict Doss vs. Tyack, 14 Howard, 296; 14 Law Ed., 428, and note thereunder.

Challenges to jurors; challenges to the array and to the panel; challenges to individual jurors; peremptory and for cause, full and complete note on page 104 of Book 41, Law Ed.

§ 17. **Indictment and Return of Same.**—The indictment should always be returned into open Court by the entire grand jury. The best practice is for the grand jury to be poled when they report an indictment. Of course, there must be at least sixteen present when indictments are presented, which sixteen must include the foreman.

In 172 Federal, page 646, Reingar vs. United States, the Circuit Court of Appeals held that an indictment delivered by the foreman alone to the clerk of the Court when Court was not in session, is not a bill of indictment within the meaning of the Constitution. I am sure this opinion states the law.

In the same volume of the Federal Reporter, in the case of the United States against Breese, the District Court, upon a somewhat different state of facts, holds a little bit differently, but the Reingar case, cited supra, is undoubtedly the law.

Endorsements on Indictments.—In the case of Williams against the United States, 168 U. S., 382, the Supreme Court held that endorsements on the margin of an indictment, referring to certain statutes which do not support it, although they may have been erroneously supposed to do so by the District Attorney who

drew it, do not make the indictment invalid, if it properly charges an offense under another statute. The exact words of the Court are as follows:

"It is said that these indictments were not returned under that statute (5481), and that the above endorsement on the margin of each indictment shows that the District Attorney of the United States proceeded under other statutes that did not cover the case of extortion committed by Chinese Inspector under color of his office. It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force. The endorsement on the margin of the indictment constitutes no part of the indictment, and does not add to or weaken the force of its averments. We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute."

To be in good form, the bill should be signed upon the cover by the prosecuting officer and by the foreman of the Grand Jury, and should be endorsed, "A true bill," and should bear the file marks of the clerk; but if the bill be signed inside by the prosecuting officer and by the foreman of the Grand Jury, the Courts hold that such signatures are sufficient.

It is entirely immaterial what provisions the various states may make with reference to the forms of indictment therein; the Federal statutes control in the enforcement of the Federal criminal law.

§ 18. **Consolidation of Indictments.**—By Section 1024 of the Revised Statutes, several charges against the same person may be included in the same indictment, and separate indictments against the same person for the same class of crimes may be consolidated by the order of the Court. Williams vs. United States, 168 U. S., 388; Pointer vs. United States, 151 U. S., 396; Logan vs. United States, 144 U. S., 301. In the case of United States against Dietrich, 126 Fed., 670, the doctrine is made clearer by being distinguished, and the Court there holds two persons cannot be indicted in the same count, one for giving, and the other for receiving bribe.

The case of McElroy vs. United States, 164 U. S., 76, does not in decision or dictum differ from the above authorities. The inquiry in that case was, "whether counts against five defendants can be coupled with a count against part of them, or offenses charged to have been committed by all at one time, can be joined with another and distinct offense committed by part of them at a different time." The Court in that case held that the statute did not authorize that to be done, and speaking thereupon, said: "It is clear that the statute (1024) does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which they all are tried." This decision, of course, does not interfere with the statute, or the doctrine announced by Mr. Justice Harlan in the Williams case, cited supra, that, "The indictments against the same person charging offenses of the same kind, provable by the same sort of evidence, can be consolidated and tried together without embarrassing the accused in making his defense." This doctrine is approved in Olson vs. United States, 133 Fed., 852; Dolan vs. United States, 133 Fed., 447, and distinguished, but not controverted, in Betts vs. United States, 132 Fed., 240.

§ 19. **Question of Duplicity in Indictment.**—It is too late to raise the question of duplicity after verdict by motion in arrest of judgment. Morgan vs. U. S., 148 F., 190; Bishop's New Crim. Proc., Vol. 1, §§ 442, 443; U. S. vs. Bayard, 16 F., 376; Proler vs. U. S., 127 F., 509; Conners vs. U. S., 158 U. S., 408. The safe practice is to raise all questions speedily by exception or demurrer.

§ 20. **Confessions.**—Because of the adoption by many of the States of statutes which prescribe certain conditions limiting or admitting confessions of those charged with crime in evidence, it is well to bear in mind that no statute bearing thereon has been passed by Congress. The Fifth Amendment to the Constitution and Section 860 of the 1878 Revised Statutes, that bear upon such testimony, are as follows:

"....Nor shall any person be compelled, in any criminal case, to be a witness against himself."—Fifth Amendment to the Constitution.

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceedings, or for the enforcement of any penalty or forfeiture; provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying, as aforesaid."—Section 860, 1878 Revised Statutes, U. S.

Of course, the limitations and meaning of Section 860 have been determined and decided repeatedly. In 170 Federal, 715, Cohen vs. United States, the Court held that it applied to bankrupt schedules, and that, therefore, such schedules were not admissible against the bankrupt. The contrary was held in United States vs. Brod, 176 Federal, page 165, and the latter is perhaps the ranking authority. In United States vs. Bell, 81 Federal, 830, the Court held that the constitutional protection was broader than Section 860, and in passing upon a prosecution for perjury, alleged to have been committed in a statement made before a Pension Examiner by an ignorant person, such statement was excluded on the proposition that while the person appeared before the Examiner, and submitted to the examination, yet such appearance was not conclusive that the statement was voluntary, and that the constitutional right of the person to remain silent had not in fact been infracted.

The sole legal test in the Federal courts, of a confession is, whether the same was free, voluntary, and without compulsion or inducement of any kind. The fact that a confession was made while the party was under arrest is entirely immaterial, but it devolves upon the prosecution to show that the confession was voluntary. The authorities conflict somewhat as to whether the Court or the jury shall determine this question. The better authority seems to be that the Court shall determine it, because, manifestly, the admission of a confession to a jury, under the thought and instruction that it must determine, first, whether the same was voluntary before they can give it consideration, would be entirely inadequate to sufficiently safeguard the interest of the defendant. At page 588 of Bishop's Criminal Procedure, that authority holds that the prosecution, in making the

opening statement to the jury, should not make any detailed statements that show a confession to have been made, for the reason that the admissibility of such confession must first be passed upon by the Court. At page 619 of the same volume, the same author again announces that whether a confession is voluntary or not is to be determined by the Court, and cites Ellis vs. State, 65 Miss., 44; 7 Am. St., 634; State vs. Crowson, 98 N. C., 595; Corley vs. State, 50 Arkansas, 305; also Section 1220 of the First Volume of Bishop's Criminal Procedure.

Underhill on Criminal Evidence, at page 161, paragraph 126, says that the preliminary question, Was the confession voluntary? bearing directly upon its competency as evidence, must be, according to the majority of the cases, decided by the Court as a mixed question of law and fact. This statement is supported by a long list of authorities, some of which go to the point of holding it error for the Court not to determine this question before the confession is submitted to the jury. From a careful consideration of such authorities, it may be stated that the weight of the same is for the preliminary determination by the Court of this question, before permitting the confession to go to the jury.

In discussing the statement that the prosecution must show that the confession is voluntary, Underhill, at page 161-162 of his work on Criminal Evidence, states that many of the cases sustain this proposition, and require the state to show by some evidence that the confession was freely and voluntarily made, but that other authorities sustain, at least in the absence of evidence to the contrary, the very reasonable theory that a confession, like every act or utterance which is the result of human agency, is presumed to have been voluntary until the contrary is shown. This latter view would throw the burden of proving that the confession was involuntary upon the accused; but which ever position is right, the defendant is always entitled to show, by preliminary evidence, that the confession was not voluntary, and it is the duty of the Court, in determining the competency of the confession, not only to consider the evidence of the state, but the evidence elicited by the accused in his favor, as well. In State vs. Fidment, 35 Iowa, 545; Rufer vs. State, 25 Ohio, 464; State vs. Miller, 42 La., 1186; Simmons vs. State, 61 Miss., 243; Com-

monwealth vs. Culver, 126 Mass., 464; State vs. Kinder, 96 Mo., 548, the refusal, before the confession was admitted, to allow counsel for the prisoner to cross examine the witness as to the voluntary character of the confession, or to allow the accused to testify and explain his mental condition when it was made, or to show by the evidence of others, that it was improperly obtained, were reversible error.

In Hopt vs. Utah, 110 U. S., 574, the Court said that, "the admissibility of such evidence (confessions) so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases, as the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all attendant circumstances, the Courts have wisely forborne to mark with absolute precision the limits of admission or exclusion." This latter utterance, therefore, is the authority that binds in the United States Courts.

It was also said, in Wilson vs. United States, 162 U. S., 613, 40 Law Ed., 1090, that statements by an accused, not under oath, voluntarily made in answer to questions of a Commissioner, not as a confession of guilt, but as explanations to avert suspicion from himself, are not inadmissible because the Commissioner failed to inform him that he could have the aid of counsel, or to warn him that his statements might be used against him, or to advise him that he need not answer. This reasoning, of course, finds its support in the existence of extraneous facts which have been discovered through the statements of the accused, or otherwise, and such statements are, therefore, admissible, though made involuntarily, or though made to conceal guilt, and a different rule relates to them from that which respects confessions which are guarded by the great probability that the prisoner has been influenced by his expectation of punishment or of immunity, to speak what is not true.

The leading case respecting a judicial determination of what is voluntary and what is not voluntary, is the case of Bram vs. United States, 168 U. S., 532, 42 Law Ed., 568. In that case, the accused was an officer of a ship upon which a triple murder had been committed. He and a subordinate officer were placed

in irons, and carried into port. The prisoner Bram was taken before a detective at Halifax, who searched him, and stripped him, and took what the bill of exceptions called "extraordinary liberties" with him, and thereupon questioned him as follows:

"When Bram came into my office, I said to him, 'Bram, we are trying to unravel this horrible mystery. Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you commit the murder.' He answered, 'He could not have seen me. Where was he?' I said, 'He states he was at the wheel.' 'Well,' said he, 'he could not see me from there.' I said, 'Now look here, Bram, I am satisfied that you killed the Captain from all I have heard from Brown, but,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not leave the blame of this horrible crime on your own shoulders.' He said, 'Well, I think, and many others on board the ship think, that Brown is the murderer, but I don't know anything about it.' He was rather short in his replies."

Because of the admission of this testimony or confession, the Supreme Court of the United States reversed the judgment of conviction, and granted a new trial. Compendiously stated, the rulings upon the same, by that Court, were as follows: The use which was made of the prisoner's statement precludes the prosecution from saying that it was not used to his prejudice, and after so using the testimony the prosecution will not be heard to assert that the confession was not prejudicial, because it did not tend to prove guilt. The sole question with reference to the voluntary character of an alleged confession depends on whether the making of the statement was voluntary and without inducement or compulsion, and not whether the particular communications contained in it were voluntary or not. The mere fact that a confession is made to a police officer while the accused is under arrest, in or out of prison, or is drawn out by his questions, does not necessarily render a confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements made by the prisoner are voluntary.

The above decision is cited and applied in Sorenson vs. United States, 143 Federal, 820, by the Circuit Court of Appeals for the Eighth Circuit, to the protection of a defendant from the

use of a confession which was secured from him by a Post-Office Inspector, who had advised the defendant that he, the Inspector, had an absolutely good case against him for robbing the post-office, and advised him that the thing for him to do was to plead guilty and throw himself on the mercy of the Court, and that by doing so, the offense against the State laws would probably be overlooked.

It may be stated, therefore, as a general proposition, that the sole question for determination in the Federal practice, is, whether the confession was voluntary,—that is, made without inducement or offer or promise of any sort.

§ 21. **Admissibility of Documentary Evidence Secured Illegally.** —In line with the thought that we have been pursuing is the inquiry as to whether documentary evidence, letters, papers, etc., secured in violation of the Constitutional provision guaranteeing the private citizen against illegal searches and seizures, can be used in evidence against the party from whom they were so secured. The case of Adams vs. New York, 192 U. S., 586, 48 Law Ed., 577, by the Supreme Court, holds that the admissibility of documentary evidence, tending to establish the guilt of an accused of the offense charged, is not affected because it was secured in violation of the prohibition against unreasonable searches and seizures, and the self-incrimination of an accused is not affected by the introduction in evidence against him of certain private papers found in the execution of a search warrant, where he did not take the witness stand in his own behalf, as was his privilege, and was not compelled to testify concerning the papers or make any admission about them. This was a case that originated under the gambling paraphernalia statute of New York City, and the officers, armed with a search warrant under that statute, secured certain private papers that were not called for, nor included, in the search warrant, but which were decidedly damaging testimony against the defendant, and upon this state of facts the direct question above suggested was passed upon. The Supreme Court lays down the rule in the following terms, quoting from Greenleaf, Volume 1, Paragraph 254-a:

"It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from

the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The Court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question. . . . . Evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular, or even in an illegal manner. A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass, he may be held responsible civilly, and perhaps criminally, but his testimony is not thereby rendered incompetent."

§ 22. **Comments or Improper Argument of District Attorney.**— Too much care cannot be given by counsel to words they use in addressing the jury. Attorneys for the prosecution and the defense should be jealous indeed to guard themselves from remarks that are unsupported by the testimony, or that are individual opinions rather than legitimate deductions from the law and the evidence. One of the abuses of the modern practice is the proneness of the attorneys defending to express unbounded belief in the innocence of their client, even to the staking of personal reputation. Great censure also is due the prosecution for intemperate and immoderate expressions, due ofttimes to the vehemence of opposing counsel but never excused. The only remedy the prosecuting officer has against such unfair argument is to appeal to the trial judge. Defending counsel can save the point by bill of exception, and present the language of the prosecuting officer to the appellate court for review. Trial judges should, therefore, be extremely careful to enforce, by proper ruling, not prejudicial to the interests of the prosecution or the rights of the defendant, a fair argument, devoid of personal opinions, and as free from prejudicial and inciting statements as fair discussion will permit. In the case of Williams against the United States, 168 U. S., 382, the defendant was convicted of extortion in exacting money from Chinese immigrants for permission to land and remain in the United States. The defendant proposed to show by witnesses that while he was acting in such official position, there were more females sent back to China than ever were sent back before or after. The repre-

sentative of the government objected to this evidence, as irrelevant, saying in open court, and presumably in the hearing of the jury: "No doubt every Chinese woman who did not pay Williams was sent back." The Supreme Court said: "The observation made by the prosecuting attorney was, under the circumstances, highly improper, and not having been withdrawn, and the objections to it being overruled by the Court, it tended to prejudice the rights of the accused to a fair and impartial trial."

In Hall against the United States, 150 U. S., 76, a judgment of the trial Court was reversed, because the District Attorney was permitted to make an argument, against the objection of the defendant, not based on evidence, which tended to prejudice the jury against the defendant. See also People vs. Mull, 167 N. Y., 247. In the case of Lowdon against the United States, 149 Fed., 677, this question was raised: The attorneys for the defendant had insisted that six men could not return a verdict, nor could eleven; that it required twelve. The District Attorney, in answering that argument, said in substance that it was true that six could not return a verdict, nor could eleven, and, that, as matter of fact, it did take twelve; but that he would hate to be the obstinate juror, for fear when he returned home, his friends and neighbors, who possibly were not versed and familiar with the various technicalities and intricacies of the law might conclude that the jingle of the broken banker's unlawful and illy gotten gold in his pocket had influenced his action. The Court, in that case, held that the argument was improper, and said: "We would not embarrass free discussion, so essential to proper administration of the law. We would not regard many hasty but exaggerated expressions of attorneys made in the heat of debate, which are not expected to become factors in the formation of the verdict. We wish to follow established rules, and to avoid introducing another element of uncertainty in the trial of criminal cases by making a new precedent for the reversal of judgments. The difficulty of drawing a line between legitimate and improper arguments admonishes us that the trial judge often has a delicate and difficult task imposed on him; but, under the circumstances of this case, considering the character of argument, the refusal of the trial judge

to interfere at the time the objection was interposed, or to correct the probable effect of the argument by a subsequent instruction, and because it does not appear affirmatively to us that no injury was done to the defendants, we are constrained to hold that the judgment should be reversed and a new trial granted. See also Allen vs. United States, 115 Fed., p. 4.

So, also, the District Attorney may not comment in argument upon the failure of the defendant to offer evidence of his previous good character. McKnight vs. United States, 97 Fed., 208; Bennet vs. State, 86 Ga., 401; Davis vs. State, 138 Ind., 11; Fletcher vs. State, 49 Ind., 124; Thompson vs. State, 92 Ga., 448; the People vs. Evans, 72 Mich., 367; Lowdon vs. U. S., 149 F., 677.

Neither can the defendant, by questions, be compelled to disclose evidence against himself, as, for instance, he cannot be asked to produce the original, else a certified copy will be permitted. McKnight vs. United States, 115 Fed., 972.

See U. S. vs. Snyder, 14 F., 554, where District Attorney comments on failure of defendant to testify in his own behalf. See also Dimmick vs. U. S., 121 Fed., 638.

§ 23. Having already noticed something of the latitude permitted the District Attorney or prosecution in argument before the trial jury, it will not be out of place to call attention to the limits within which the prosecuting officer must work in the grand-jury room in seeking an indictment or presenting evidence to the grand jury upon which he expects an indictment to be returned. In United States vs. Wells, 163 Federal, 313, Judge Whitson reviews, at some considerable length, authorities along this line, and from that opinion may be deduced the following rules and limits:—The District Attorney has no right to participate in, nor be present, during the deliberations of a grand jury, nor to express opinions on questions of fact, or as to the weight and sufficiency of the evidence. The District Attorney should not comment upon and review the evidence and apply the law thereto for the purpose of securing an indictment. He should not express an opinion that the defendants are guilty, and that the grand jury should return an indictment against them. He should not be present while the jury is balloting upon

the persons under investigation; and while the mere presence of the prosecutor during the taking of a vote, through inadvertence, and without intending to influence any action, is not necessarily fatal to a bill, yet where the prosecutor expresses his opinion and urges the finding of an indictment, it is clearly shown that the grand jury must have been influenced thereby, and an indictment so returned will be quashed.

§ 24. **Jury.**—The right of trial by jury is the most priceless boon enjoyed by the people under any government. Text-book writers, newspaper writers, politicians, and theorists may thunder as they will against the miscarriages of justice from the jury box; the system is not only established for all time, but is as necessary as a bill of rights. No judge, however learned, no set of judges, however impartial, can approximate the justice that is found and dispensed by the layman juror. A mind trained in the law, or in any other science or profession, holding the utmost purity of thought, is still short of an ability to appreciate and weigh justly the motives that actuate those who are permanently, or occasionally, or unfortunately only once, charged with crime or offense. The very people with whom the unfortunate walked, and the very people who suffered or won as the unfortunate suffered or won understand best the power that makes or unmakes an intent of the human heart. That the Federal judge is permitted to give expression to his opinion to the jury is no argument for the abolition of the jury. The jury is strong, because it has twelve men on it, and, therefore, twelve sets of different opinions, and the addition of a judge's opinion, coupled with the statement that such opinion is not to influence or bind any member of the jury, but strengthens the desire upon the part of the individual jurors to think for themselves, and thus bring to bear the best thought for the determination of the human problem upon which they sit. Not the least part of the gloriousness of American jurisprudence and court history is due to the fact that the American court, appellate or supreme, views with sacredness and honor the verdict of the jury, and only for well-known reasons will there be a disturbance of the same. The latitude given the Federal judge in the matter of his charge is to be entered with great care. The cream of the

decisions seems to indicate that a judge should never permit the jury to know just what he thinks individually of the guilt or innocence of the party on trial, but that he may indicate, by instructions or otherwise, his opinion upon a particular piece of evidence, so that the truth or falsity of that particular testimony may be determined with as much ease as possible by the jury, it being the object of a Court to ascertain the truth, and to seek every light possible that will assist in finding just where the truth in fact does lie. The Constitution of the United States provides for trials by jury, as do also the Amendments, which have been denominated by the Supreme Court and by great thinkers as the bill of rights of the American people. Congress has provided, in the Revised Statutes, for jury trials in both the Circuit and District Courts of the United States, and has authorized the waiving of a jury in the trial of civil cases in the Circuit Court, but has not authorized the waiving of a jury in the trial of civil cases in the District Court. United States vs. St. Louis Railway Company, 169 Fed., 73; Low vs. United States, 169 Fed., 86.

It is quite certain that a jury cannot be waived by one who is charged with a felony, and it seems that the great weight of authority is against the permission of a waiver of a trial by twelve jurors when the crime is infamous or a high misdemeanor. In Dickinson vs. United States, 159 Federal, page 801, the Circuit Court of Appeals for the First Circuit, speaking through Judge Putnam, reviews the American authorities with reference to the waiver of one on trial of his right to be tried by a jury of twelve, when one of the originally selected twelve becomes ill or from other cause must be excused. In that particular case, the juror who became ill was excused by consent, which consent was in writing of both the defendant and his counsel. The case being tried was one denominated by the Federal statutes as a misdemeanor, which, however, under the new Code, is infamous, because the punishment was penitentiary. In that case, the majority of the Court holds that the second Section of Article III. of the Constitution demands a trial by jury, and that Thompson vs. Utah, 170 U. S., 343, has authoritatively determined that a jury for a criminal cause is to consist of twelve men, and that the Amendments to the Constitution relating to

jury trial do not in any measure explain or abrogate or lighten the second Section of the original Article III., and that in the trial of criminal cases, not only the defendant is interested in the maintenance of Constitutional guarantees, but that the people themselves are interested and concerned.

It is true that District Judge Aldrich, in the foregoing opinion, dissents, and in a well-reasoned and authority-supported paper; but one cannot well escape the force of the suggestion that if a defendant may waive one and be tried by eleven, why could he not waive eleven and be tried by one. The safe rule, therefore, for all District Attorneys is, to see that there is a full panel, and if sickness or other unavoidable interference causes the judge to excuse a member of a jury, that the trial then be discontinued and begun all over again before the regulation number. I have no doubt that a defendant and his counsel may consent in writing and bind themselves in writing as strongly as a document can be worded, and yet, in the event of conviction, successfully raise the point by way of motion in arrest of judgment, and cause a reversal of the case. Dickinson vs. United States, 159 Fed., 809.

The case of Schick vs. United States, 195 U. S., 65, and the case of Callan vs. Wilson, in 127 U. S., 549, are discussed and differentiated in the Dickinson case, cited supra; and while the Schick and the Callan cases are relied upon as authority by District Judge Aldrich in his dissent, the majority opinion seems better founded, and I would counsel the following of the Dickinson case until the same is expressly overruled by higher authority. See also 4 Fed. Statutes, p. 391.

§ 25. **Care of Jury.**—Text-book writers, judges, and statute makers cannot well formulate rules with reference to the care of juries that can be invariably followed. Under most jurisdictions, jurors in the trial of criminal cases are kept together and not permitted to separate, being under the constant surveillance of bailiffs or deputies. This care and espionage of the jury is not necessarily due to the distrust of the jury itself, but is oft-times considered as a right belonging to the jury. When that body has returned its verdict, no one should question its sincerity, honesty, and cleanness, and every safeguard that keeps

the jury from unauthorized and outside persons, thereby making improper advances impossible and improbable, lends weight and force and purity to its verdict, and thus tends to convince the most common mind of the righteousness of the ultimate conclusion. It is not alone necessary to avoid evil—the thoughtful man avoids the appearance even thereof. Newspapers, letters, conversations with outsiders, telephone messages, and telegrams should all alike be kept from the jury, or else go to the jury under the surveillance of the Court.

In Marrin vs. United States, 167 Federal, 951, the Court refused to set aside a verdict upon a motion made by the defendant to the effect that newspapers relating to the case had been read by the jurors during the trial; and while the facts disclose that the jurors themselves testified that they were not influenced by the newspaper statements, yet it does seem that we would have felt a great deal better had there been no such case reported. Of course, after a juror has rendered his verdict, he is slow to answer that any part thereof was shaped or rendered or assisted by anything that he may have read in a newspaper. It is a safer plan to keep the papers from the jury, and if prejudicial articles do come into the hands of the jury and this fact be ascertained by the Court, the jury should be discharged, or, if the fact is not known until after the verdict, then a new trial should be granted, unless it clearly appears that no prejudice was worked to the defendant. In the case of Callahan vs. Chicago, 158 Federal, 988, the Court held that he would not permit the jurors to testify to the effect upon themselves of an attempt made to influence their verdict. They were permitted to testify to any facts showing attempts of others to improperly influence their verdict, but it is for the Court to determine whether or not the attempts shown are of a character that the verdict may have been improperly influenced thereby.

§ 26. **Evidence of Good Character.**—If there be a difference in the rule of evidence as adopted by the various appellate Courts of the different states, respecting the admission of testimony as to the good character of the defendant, the rule in the United States Courts, as outlined in the case of Edgington vs. United States, 164 U. S., 361; 41 Law Ed., 467, is that evidence of a

defendant's general reputation for truth and veracity is admissible on a prosecution, not merely to give weight to his personal testimony in the case, but to establish a general character inconsistent with guilt, whether he has testified or not; and a charge to the jury that if they have hesitancy as to the defendant's guilt, then they may consider as important the testimony as to his good character, is erroneous, as limiting the effect of such testimony to a doubtful case. The identical language of the Court upon this question is as follows:

"It is not necessary to cite authorities to show that in criminal prosecutions the accused will be allowed to call witnesses to show that his character was such as would make it unlikely that he would be guilty of the particular crime with which he is charged; and as here the defendant was charged with a species of *crimen falsi*, the rejected evidence was material and competent.....It is impossible, we think, to read the charge without perceiving that the leading thought in the mind of the learned judge was that evidence of good character could only be considered if the rest of the evidence created a doubt of defendant's guilt. He stated that such evidence 'is of value in conflicting cases,' and that if the mind of the jury 'hesitates on any point as to the guilt of the defendant, then you have the right and should consider the testimony given as to his good character.' Whatever may have been said in some of the earlier cases to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it, the other evidence would be convincing."

§ 27. **Instructions of the Court.**—Section 722 of the Revised Statutes of the United States do not in any measure bind the Federal Judge in the method or form of the instructions he delivers to the jury. The statutes and decisions of the state within which he holds his Court are not binding upon him in the matter of procedure in criminal cases, and he may deliver a written or an oral charge as he sees fit. *In re* Stupp, 12 Blatchf., 509; U. S. vs. Egan, 30 Fed., 608. The personal conduct and adminis-

tration of the judge in the discharge of his separate functions is neither practice, pleading, nor a form nor mode of procedure within the meaning of the statute, and a state statute regulating the manner in which the Court shall charge the jury is not within this statute. 4 Fed. Statute, 567; Mudd vs. Burrows, 91 U. S., 441; Indianapolis, etc., vs. Horst, 93 U. S., 300; Grimes Dry Goods Co., vs. Malcolm, 164 U. S., 490; Lincoln vs. Power, 151 U. S., 442; U. S. Mutual Association vs. Barry, 131 U. S.

In Tennessee vs. Davis, 100 U. S., 257, the Court held with reference to Section 722, that, "examined in the most favorable light, the provision is a mere jumble of Federal Law, Common Law, and State Law, consisting of incongruous and irreconcilable regulations, which, in legal effect, amount to no more than a direction to a judge sitting in such a criminal trial to conduct the same as well as he can, in view of the three systems of criminal jurisprudence, without any suggestion whatever as to what he shall do in such an extraordinary emergency, should he meet a question not regulated by any one of the three systems." At Common Law, it is entirely within the discretion of the trial judge whether instructions to the jury shall be in writing; and in the absence of statutes providing otherwise, the whole charge may be delivered orally, and the action of the trial judge in so doing will not be reviewable on appeal or error. Smith vs. Crichton, 33 Maryland, 103; Baer vs. Rooks, 50 Fed., 898; Gulf Ry. Co. vs. Campbell, 49 Fed. 354.

The most careful way, however, is in writing, and there is little doubt that any judge, upon proper request, would gladly charge the jury in writing. If special instructions be desired, they must be requested in writing before the retirement of the jury, and the best practice is to give them to the judge before he delivers his charge. All exceptions to the Court's charge must be in open Court, and before the jury retires, and no bill will be granted, unless such action is taken.

§ 28. **Opinion of Court.**—A long line of decisions supports beyond contradiction the right and, under some circumstances, even the duty of the judge to express his opinion upon the testimony, which expression, in most state jurisdictions would be a charge upon the weight of the evidence, and, therefore, reversible

error; but it is well settled that the Federal judge has this right. In Simmons vs. United States, 142 U. S., 148, the Court said: "It is so well settled by a long series of decisions of this Court that the judge presiding at a trial, civil or criminal, in any Court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact, which he submits to their determination, that it is only necessary to refer to a few cases; namely, Vicksburg, etc., vs. Putnam, 118 U. S., 545; United States vs. Philadelphia Company, 123 U. S., 113; Lovejoy vs. United States, 128 U. S., 171." These decisions have been followed repeatedly. Sebeck vs. Plattseutsche, 124 Federal, 18; Ching vs. United States, 118 Fed., 543. In the Ching case, the Court held that it was not error for the trial judge to express an opinion as to what the verdict should be, if afterward he qualified his statements, and in Breese vs. United States, 106 Fed., 686, it was held that an expression of the judge that the defendant is guilty was not error, he having cautioned the jury that they were the sole judges, and that his opinion should not govern. See also Doyle vs. Union Pacific R. R. Co., 147 U. S., 430; Allis vs. United States, 155 U. S., 123; Wiborg vs. United States, 163 U. S., 556; Woodruff vs. U. S., 58 Fed., 767; Spurr vs. U. S., 87 Fed., 708; Hart vs. U. S., 84 F., 799; Smith vs. U. S., 157 F., 722.

§ 29. **Court Cannot Comment on Lack of Evidence.**—One well marked limitation is that pointed out in Mullen vs. United States, 106 Fed., 892, in a decision by the Circuit Court of Appeals for the Sixth Circuit, which holds in substance that where no testimony has been offered as to the previous good character of the accused, the presumption of such good character exists in favor of the accused, of which, upon a request to that effect, a jury should be instructed, and the Supreme Court, in Coffin against United States, 156 U. S., 432, having said that the presumption of innocence stands as evidence in favor of the accused, as does also the presumption of good character stand as evidence. Such presumptions existing it is the duty of the Court to let the jury know of such presumptions, and it was, therefore, error for the trial judge to tell the jury that the defendants, whether

of good character or bad character, were presumed to be innocent, because the law presumed them to be of good character.

§ 30. **Further Limitations.**—In Hickory vs. United States, 160 U. S., 408, and in Starr vs. United States, 153 U. S., 616, the Supreme Court said in substance that where there is sufficient evidence upon a given point to permit the point to go to the jury, it is the duty of the judge to submit it calmly and impartially, and if the expression of an opinion upon such evidence becomes a matter of duty, under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided, and all deductions and theories not warranted by the evidence should be studiously avoided. See also Hicks vs. United States, 150 U. S., 442.

Were there testimony, therefore in the record, touching the question of character, it would not be error for the judge to assist the jury by such views as he entertained respecting character, its formation and effect, provided he then leave the jury free to decide the disputed matter of fact for themselves. See also McKnight vs. United States, 97 Fed., 210.

§ 31. **Verdict.**—A verdict in a criminal case which finds the defendant guilty upon certain counts of the indictments on which the trial was had, not guilty upon others, and which reports a disagreement as to the remaining counts, is entirely proper, and it is not error to receive such verdict and to enter judgment thereon as to the counts which were finally disposed of. Dolan vs. U. S., 133 F., 440.

§ 32. **Sentence and the Correction Thereof.**—Certain sections of Chapter IX. of the 1878 statutes, relate to the place and term of sentence. Each Federal district is not provided with a Federal prison, but the statutes of all of the states of the Union provide for the reception of Federal prisoners upon the payment terms therein prescribed. Section 5541 permits the Court to sentence the prisoner, if the term be longer than a year, to either a jail or a penitentiary. In this connection, it must be understood that a sentence must be longer than one year before the Court can direct that it shall be served in the penitentiary. Haynes vs. United States, 101 Federal, 817; *in re* Bonner, 151 U. S., 252.

5542 leaves it optional with the Court, in imposing sentence to hard labor, as to whether it shall be jail or penitentiary.

There is no direct Federal statute exacting when convicted prisoners shall be sentenced. The authority for the sentence of a convict, therefore, under the Federal system, must be found in the general proposition that the Federal Courts are authorized to pronounce all decrees and judgments necessary. Specific penal statutes, with fixed terms of punishment, demand, therefore, sentence by the Court upon the convicted person.

§ 33. **No Authority to Suspend Sentence.**—For years, and perhaps now in some of the Districts, judges have suspended sentence, when in their opinion such action was called for by the facts of the particular case. Such practice is, beyond question it seems, the exercise of pardoning power, and the usurpation by the judiciary of a power especially inhibited to them, and belonging to an entirely different branch of the Government. The Judge, in administering the law, is as surely bounden to society that all of its mandates shall be correctly observed, as he is not to lay the weight of his finger unjustly upon the defendant. In United States vs. Wilson, 46 Federal, 748, Judge Beatty denounced the practice, and observed, in substance, that while there was no question of the power and authority of a Court to temporarily suspend its judgment for the purpose of hearing and determining motions and other proceedings which may occur after verdict, and which may be properly considered before judgment, or for any other good reason, yet the suspension of a judgment upon the good behavior of the prisoner, or for any other reason that is not concerned with the case, is an exercise of arbitrary and unlawful power. He says:

"It operates as a condonation of the offense, and an exercise of a pardoning power, which was never conferred upon the Court."

§ 34. **Correction of Sentence.**—Under Section 5546 and its Amendment, as shown at page 111, First Volume Supplement, the Attorney General of the United States designates the particular Federal penitentiary to which prisoners from a given district shall be sentenced. These designations, because of various reasons, must, from time to time, be changed. Most of the Fed-

eral statutes fix the maximum of the punishment, and leave it discretionary with the Court to come within such limits. Some of the statutes carry hard labor, and some do not. Because of all these and perhaps other reasons, mistakes are sometimes made by the Court, and sentences that are void or invalid are imposed. There seems to be no question under the authorities, that the Court which has rendered a judgment or sentence may, during the term of its rendition, and before any part of it has been executed or suffered, revise and vacate it, or change, correct, or amend it in form or substance, or may modify, diminish, or increase it within the limits allowed by law, and in fact may render a new judgment, in accordance with its authority, duty, and discretion. United States vs. Harmison, 3 Saw., 556; *ex parte* Caset, 18 Fed., 86; Bassett vs. United States, 9 Wallace, 38; *ex parte* Lange, 18 Wallace, 163; Reynolds vs. United States, 98 U. S., 145; *in re* Bonner, 151 U. S., 242; Williams vs. U. S., 168 U. S., 382; *ex parte* Waterman, 33 Federal, 29; U. S. vs. Harmon, 68 Federal, 472; *in re* Groves, 117 Federal, 798.

The authorities also seem to be a unit upon the proposition that after the term has passed, the Court has no further control over a valid judgment or sentence which it has rendered, and cannot vacate, reform, or change it, or pronounce a new sentence. *Ex parte* Friday, 43 Federal, 916; U. S. vs. Malone, 9 Federal, 897; U. S. vs. Pile, 130 U. S., 280; U. S. vs. Patterson, 29 Federal, 775. Independently of some statutory provision, it is thoroughly settled that the practice of the Federal Courts with reference to granting new trials in criminal cases follows the Common Law, so that the Court has no jurisdiction over such motion after the term expires at which the sentence was pronounced. Chitty's Criminal Law, 651; Indianapolis R. R. Co. vs. Horst, 93 U. S., 291; Newcomb vs. Wood, 97 U. S., 581; Belknap vs. U. S., 150 U. S., 588; Kingman vs. Western Mfg. Co., 170 U. S., 675; Capital Traction Co. vs. Hof, 174 U. S., 1. Where, however, there is a local statute of the state, by which a motion for a new trial in a criminal case is justified, even though the term be ended at which the sentence and judgment was passed, it seems to be an open question as to just what course the Federal Courts would follow. In Trafton vs. U. S., 147 Federal, 513, the Circuit

Court of Appeals for the First Circuit declined to pass upon this question, referring it back to the District Court for first investigation, without themselves indicating either for or against such practice.

So, also, the respectable weight of authority seems to indicate that a sentence which is null and void may be corrected at the same term in which it was entered, even though the prisoner has been in prison thereunder. People vs. Dane, 81 Mich., 36; *ex parte* Gilmore, 71 California, 624; *in re* Bonner, 151 U. S., 242; *in re* Christian, 82 Federal, 885.

While for some time it may have been considered doubtful as to whether the sentencing Court, after the term, could recall before it the prisoner, and re-sentence, for the purpose of correcting a null and void judgment, it seems now to be determined upon the weight of authority and sound public policy, that such action may be taken. At Common Law, it could be done on a writ of error *coram vobis.* In recent times, it has often been done by motion. Bank of United States vs. Moss, 6 Howard, 38; Bronson vs. Schulter, 104 U. S., 410; Phillips vs. Negley, 117 U. S., 665; *in re* Wright, 134 U. S., 136; *in re* Welty, 123 Federal, 126; *ex parte* Peeke, 144 Federal, 1020; U. S. vs. Carpenter, 151 Federal, 216; Francis vs. U. S., 152 Federal, 157. In addition to these authorities is the ranking authority of the Supreme Court of the United States in *in re* Bonner, 152 Federal, 252, wherein the Court says:

"But in a vast majority of cases, the extent and mode and place of punishment may be corrected by the original court without a new trial, and the party punished as he should be, whilst relieved from any excess committed by the Court of which he complains. In such case, the original Court would only set aside what it had no authority to do, and substitute directions required by the law to be taken upon the conviction of the offender."

The above expression was written in a case where many terms had elapsed; but the Supreme Court directed that the prisoner, who, upon his application for an *habeas corpus,* had been released from the penitentiary custody, should be transmitted to the original Court for the steps to be taken in accordance with

the excerpt above. Ballew vs. U. S., 160 U. S., page 195, affirms the Bonner case, and takes action in harmony therewith.

§ 35. **Remission of Penalty on Forfeited Recognizance.**—An application to a Federal Court which has entered judgment on a forfeited recognizance in favor of the United States, for a remission of the penalty for which such judgment was rendered under Rev. Stat. 1020, which gives the Court power to remit the whole or any part of such penalty, "when it appears to the Court that there was no willful default of the party," is not a motion to vacate the judgment, and may be entertained after the term at which the judgment was entered. U. S. vs. Jenkins, et al, 176 F., 672.

§ 36. **Bail After Affirmance.**—The affirmance by the Circuit Court of Appeals of a judgment of conviction in a criminal case is the end of the proceedings in error, and that court has no power to continue defendant's bail, nor to admit him to new bail pending his application to the Supreme Court for a writ of certiorari, but the court may, for good cause shown, defer the beginning of his sentence for a reasonable time. Walsh vs. U. S., 177 F., 208.

§ 37. **Severance.**—Severance and separate trials were not a Common Law right, but were permitted at the discretion of the Court, in all grades of offenses, including misdemeanor and felony. It is generally presumed that persons jointly indicted are to be tried jointly, but when, in a particular instance, this would work injustice to a party, the Court, under the Common Law, will permit a severance and separate trials. Some of the States, by statute, authorize and guarantee this as a right. In the Federal Courts, however, the rule is the Common Law rule stated above. The application for severance may come from either the defendant or the prosecution, and there are authorities which hold that a request by the prosecuting officer for a severance will be granted as a matter of right, 1 Bishop Crim. Procedure, page 649.

Re-stating the Common Law rule, it is, that the trying together of joint defendants promotes convenience and justice; and unless the contrary appears, the trial will be joint. If, however, there be antagonistic defenses, or important evidence not adduci-

ble upon joint trial; or where the husband and wife are jointly indicted, and the testimony of the wife would not be admissible against the husband; or if the testimony would be prejudicial against one and incompetent against another; or where there be a contention of one which is not admissible against another,— the Court may, in his discretion, grant separate trials.

In United States vs. Marchant and Colson, 25 U. S., page 479; 6 Law Ed., 700, the Supreme Court of the United States held, speaking through Justice Story, that,

"Where two or more persons are jointly charged in the same indictment with a capital offense, they have not a right by law to be tried separately, without the consent of the prosecutor; but such separate trial is a matter to be allowed in the discretion of the Court."

See also 19 Vol. Enc. of Pleading and Practice, page 521.

In Ball vs. United States, 163 U. S., 663, 41 Law Ed., 300, the Supreme Court held, in a case where two defendants moved that they be tried separately from Ball, a co-defendant, alleging as a cause for such motion that the Government relied on his acts and declarations made after the killing, and not in their presence or hearing, and because he was a material witness in their behalf, that the question whether defendants jointly indicted should be tried together or separately, was a question resting in the sound discretion of the Court below; and it not appearing that there was any abuse of that discretion in ordering the three defendants tried together, or that the Court did not duly limit the effect of any evidence introduced which was competent against one defendant and incompetent against others, Sparf vs. U. S., 156 U. S., 51; 39 Law Ed., 343, such discretion would not be reviewed on writ of error.

In Cochran against the United States, 147 Federal, 206, the Circuit Court of Appeals for the Eighth Circuit affirms this position, but holds that United States Courts held in territories which are governed by local statutes which give a right of severance, that the United States Courts will, in such jurisdictions, grant the local right.

In Richards against the United States, 175 Federal, page 911, the Circuit Court of Appeals for the Eighth Circuit held that

the request of defendants charged in the same indictment, for separate trials is addressed to the discretion of the Court, and its action in refusing the same will not be reviewed in the absence of clear indications that serious prejudice resulted therefrom to one or more of the defendants.

§ 38. **Habeas Corpus.**—Under the Federal practice, the return to a writ of *habeas corpus* must recite facts; and when it recites facts, verity will be imported thereto until impeached. Petitions that merely allege conclusions of law, such as that the respondent had a right to detain the petitioners, are held to be insufficient, and do not controvert the allegations of illegal detention alleged by the petitioner. In Stretton vs. Shaheen, 176 Federal, 735, the Circuit Court of Appeals for the Fifth Circuit held that a return to a writ of *habeas corpus* obtained on behalf of immigrants upon petitions alleging their illegal detention by an Inspector, which alleged no facts, but merely as a conclusion of law that the respondent had the right to detain the petitioners, were insufficient. In Streton vs. Rudy, 176 Federal, 727, the same Court held that where a return shows a state of facts under which the petitioner is lawfully held, that if there be no evidence controverting such facts, the petitioner will be remanded to the custody of the officer, and it is error to release the petitioner under such a state of facts, and cites Japanese Immigrant Case, 189 U. S., 86, 47 Law Ed., 721, and Chin Yow vs. U. S., 208 U. S., 8; 52 Law Ed., 369.

§ 39. **Immunity.**—Since the passage of the Federal Sherman Anti-Trust and Interstate Commerce Act, so-called, the question has arisen whether the immunity from prosecution therein guaranteed means a shield from any prosecution, or a protection against successful prosecution. In the case of Heike vs. United States, decided May second, 1910, the Court passed upon this question, and approved Brown vs. Walker, in 161 U. S., 591, in which the Constitutionality of the Immunity Statute was sustained, and said in substance that a shield against successful prosecution, available to the accused as a defense, and not immunity from the prosecution itself, is what was secured by the Act of February twenty-fifth, 1903, as amended by the Act of June thirtieth, 1906, providing that no person shall be prose-

cuted or subjected to any penalty or forfeiture for, or on account of, any prosecution, matter, or thing, concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under the said Acts.

The facts of the Heike case were that Heike was indicted with others for alleged violations of the Customs laws of the United States, in connection with the fraudulent importation of sugar, and also for conspiracy under Section 5440 of the Revised Statutes of the United States, to defraud the United States of its revenues. Heike appeared and filed a special plea in bar, claiming immunity from prosecution under the aforementioned Act. The plea set up, in substance, that Heike had been called upon to testify before the grand jury, in matters concerning the prosecution against him, and had thereby become immune from prosecution under the law. The Government filed a replication, and the issues thus raised were brought to trial, the result of which was a verdict for the Government upon the issue; and thereafter Heike asked to be permitted to plead over, and he then plead not guilty. The Court then held that the judgment on the special plea was not a final judgment from which an appeal could be had, and rendered a decision as above indicated.

§ 40. **Improper Person in Grand-Jury Room.**—An expert accountant who is not an attorney-at-law, appointed by the Attorney General "a special assistant" to a United States Attorney, to assist in the investigation and prosecution of a particular case is not an "officer of the Department of Justice," within the meaning of Act June 30, 1906, C. 3935, 34 Stat. 816, and cannot be authorized by the Attorney General to conduct or assist in the conducting proceedings before the grand jury—and his presence in room which results in bill is ground for quashing same. U. S. vs. Heinze, 177 F., 770. See also U. S. vs. American Tobacco Co., 177 F., 774, as to this and sufficiency of other abatement pleas and time for filing same.

§ 41. **Private Prosecutors Unknown in Federal Courts.**—The Federal statutes provide for the appointment of District Attorneys and their assistants, for the purpose of prosecuting offenses against the Federal laws. Judge Hammond, in United States vs. Stone, 8 Federal, 232, held that private prosecutors are un-

known to the practice of the Federal Courts, the District Attorney being alone authorized to prosecute; and in speaking of this matter, he said:

"Under our Federal practice, from the earliest times, and by force of the statute, the District Attorney is the only prosecutor known to our law; and as a matter of fact, in this Court at least, no private prosecutor has ever been recognized. Act of 1879, Chapter XX., Section 35, (1 St., 92); Revised Statutes, Sec. 771; U. S. vs. Mundel, 6 Coll., 245; U. S. vs. McAvoy, 6 Blatchf., 418; U. S. vs. Blaisdell, 3 Ben., 132, where the Court refused to recognize an agreement of the Executive Department not to prosecute the offender, and said, that, 'when there is no District Attorney in commission, the Government cannot prosecute in this Court,' I Bishop Criminal Pr., Sec. 278. It is impossible, therefore, for anyone to occupy the place of a private prosecutor in this Court."

§ 42. **Proof of Witness' Former Conviction.**—In the absence of a Federal statute on the subject, the incompetency of a witness, by reason of his prior conviction of a felony, cannot be shown upon his examination, but only by the production of the record, or an exemplified copy of it. Rise vs. United States, 144 Federal, 374. If the guilt of the party should be shown by oral evidence, and even upon his own admission, (though in neither of these modes can it be proved, if the evidence be objected to), or by his plea of guilty which has not been followed by a judgment, the proof does not go to the competency of the witness, however it may effect his credibility; and the judgment itself, when offered against his admissibility, can be proved only by the record, or in proper cases, by an authenticated copy, which the objector must offer and produce at the time when the witness is about to be sworn, or at furthest, in the course of the trial. I Greenleaf on Evidence, Fourteenth Edition, 375; 457.

CHAPTER III.

POSTAL CRIMES.

Note.—The first numbers indicate the old Sections; then follows a dash, and after the dash the numbers indicate the Sections in the new Code.

§ 43. Jurisdiction of State and Federal Courts.
44. Section 3833 as to Jurisdiction.
45. Breaking Into and Entering Post-Office: 5478—192.
46. Unlawfully Entering Postal-Car, or Interfering with Postal-Clerk: New Code, 193.
47. Assaulting Mail Carrier with Intent to Rob; Robbing Mail and Injuring Letter-Boxes or Mail Matter, and Assaulting Carrier: 3869, 5466, 5472, and 5473—197 and 198.
48. Obstructing the Mails: 3995—201.
49. Ferryman Delaying the Mail: 3996—202.
50. Postmaster or Other Employee Detaining or Destroying Newspapers: 5471—196.
51. Postmaster or Employee of Service Detaining or Destroying or Embezzling Letter: 3890, 3891, and 5467—195.
52. Stealing, Secreting, Embezzling, Etc., Mail Matter or Contents: 3892, 5469, and 5470—194.
53. Obscene Matter, Etc., Non-Mailable, and Penalties: 3893—211.
54. Libelous and Indecent Wrappers and Envelopes, Etc.:
55. Use of Mails for Fraudulent Purposes: 5480, I Sup., 694—215,.
56. Civil Statute Against Fraudulent Use of Mail: 3929.
57. Fraudulently Assuming Fictitious Address or Name: 5480; I Sup., 695—216.
58. Lottery, Gift Enterprises, Circulars, Etc., not Mailable: 3894; I Sup., 803; II Sup., 435—215.
59. What Is a Lottery or Chance.
60. Land Schemes.
61. Issuing of Stock.
62. Other Cases Under the Lottery Statute.
63. Postmasters Not to Be Lottery Agents: 3851—214.
64. False Returns to Increase Compensation: 3855; I Sup., 417; I Sup., 419; Sec. 2, p. 602, 27 St. L.—206.
65. Civil Remedy.

66. Collection of Unlawful Postage: 3899—207.
67. Unlawful Pledging or Sale of Stamps: 3920; 20 St. L., 149—208.
68. Failure to Account for Postage and to Cancel Stamps: I Sup., 249—209
69. Issuing Money-Orders Without Payment: 4030—210.
70. Counterfeiting Money-Orders, Etc., and Fraudulently Issuing the Same Without Having Received the Money Therefor: 5463; I Sup., 518; I Sup., 593—218.
71. Counterfeiting Postage Stamps, Domestic or Foreign: 5464, 5465 —219, 220.
72. Misappropriation of Postal Funds or Property by Use or Failure to Deposit: 4046 and 4053—225.
73. Rural Carriers Responsible Under the Foregoing Section.
74. Stealing Post-Office Property: 5475—190.
75. Other Minor Offenses of the New Code: 3829—179; 3981—180; 3982—181; 3983—182; 3984—183; 3985—184; 3986—185; 3987 —186; 3967—187; 3979—188; 5474—199; 3977—200; 3988—204; 4016—203; 3922, 3923, 3924, and 3925—205; 3878, I Sup., 247, II Sup., 507—217; 3887 and I Sup., 578—221; 3947 and I Sup., 45—222; I Sup., 593 and 33 St. L., 823—223; False Claims, 224; Employees in Contracts, 412—226; I Sup., 135, and 467—227; II Sup., 778, and 30 St. L., 442—228; 4013—229.
76. All Persons Employed in Service, Whether Taken Oath or not, Employees: 230 and 231.

§ 43. **Postal Crimes.**—The provisions of Section 3833 that give jurisdiction to all civil and criminal causes arising under the postal laws to state and territorial courts, do not constitute such courts Federal courts; and if either a civil or a criminal cause be instituted in the state courts involving the United States Postal Laws, such cause may be removed to the Federal courts, under the second section of the Act of March third, 1875. In the case of New Orleans National Bank vs. Merchant, 18 Federal, page 841, which was a bill for injunction filed in the state District court against the United States Postmaster at New Orleans, seeking certain relief against the enforcement of the sections of the Revised Statutes relating to fraud orders, and which action was removed into the Federal Court under the second section of the Act of March third, 1875, Circuit Judge Pardee held that while Section 3833 of the Revised Statutes confers jurisdiction upon the courts of the state in certain instances, as courts of the state, yet it does not thereby make them Federal courts, and

cases instituted therein are properly removable to the Federal court.

§ 44. **How Is the Section Used.**—It would seem, therefore, that 3833 is really a section of convenience. Since there are state justices of the peace and committing magistrates at nearly all points, the state or Federal officer who discovers a violation of the postal laws may instantly get a warrant therefrom without waiting to communicate with the more remote and less accessible Federal Commissioner. The accounts for the state justices of the peace and committing magistrate for services of this sort are presented for approval in open court, just as United States Commissioners are, and are paid by the Department at Washington.

§ 45. **Breaking Into and Entering Post-office.**—We now come to a consideration of the various sections of the Criminal Code, starting with offenses against the postal service and system, because they are the most common violation. Section 5478 of the old statutes is altered very little by Section 192 of the new Code. The words "hard labor" are left out of the new statute, but under Section 338 of the new Code, the omission of the words "hard labor" from any provision of the new Code prescribed in the punishment, is not construed as depriving the Court of the power to impose hard labor as a part of the punishment in any case where such power existed under the old statute.

The new Section also contains the following words, "with intent to commit in such post-office or building, or part thereof so used," that were not in the old statute. These words were doubtless added by the codifiers, to call the attention of the pleader to the fact that Congress had no jurisdiction to prescribe a penalty for entering a building, or for committing an offense in a building, unless such building was actually used as a post-office or such offense was committed in that part of said building so used as such post-office.

In the 16 Federal, page 235, United States against Campbell, the Court sustains a demurrer to an indictment which charged forcible breaking into a building, which building was then and there used in part as a post-office of the United States, "with the intent then and there, *in said building*, to commit the crime of larceny." In passing upon the demurrer, the Court said that,

"a building used in part as a post-office may contain many rooms besides the one or more used as a post-office. That there is some portion of it not so used is necessarily implied in the phrase 'used in part as a post-office.' To break into such a building with the intent to steal the purse of the lodger in a room therein that is in no way used as a post-office, nor connected with it, except that it is under the same roof, does not appear to me to be an act which the United States may punish, upon the ground that it is necessary to do so in the execution of the power granted to Congress to establish a post-office." Mr. Justice Storey, in United States vs. Coombs, 12 Peters, 76, said: "If the section admits of two interpretations, one of which brings it within, and the other presses it beyond, the constitutional authority of Congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous."

The idea, therefore, is that the statute meant to punish the breaking into a building used in part as a post-office, with the intent to commit larceny in that part of the building so used as such post-office. To the same effect is the case of *in re* Byron, 18 Federal, page 723; also United States vs. Williams, 57 Fed., 201; also United States vs. Shelton, 100 Fed., 831; United States vs. Martin, 140 Fed., 256; United States vs. Saunders, 77 Fed., 170.

In the 30 Federal, 232, United States vs. Lantry, the Court held that the prisoners were not entitled to the presumption that they had hidden themselves within the building, merely because they had been seen with other persons lawfully within the premises before they were closed for the night. In this same case, the Court refused, upon *habeas corpus*, to go beyond the finding of a Commissioner, as to the probable guilt of the prisoners, and followed the authorities of *in re* Fowler, 4 Fed., 303, and *in re* Day, 27 Fed., 678.

The case of Considine vs. United States, which holds that a violation of Section 5478 is a misdemeanor, and not a felony, and, therefore, but three challenges are permitted the defendant, will

not now be considered binding against defendants under the new Code, for the reason that the punishment is felonious within the meaning of such offenses as defined by Section 335 of the new Code. Section 819 of the Revised Statutes allows the defendant charged with a felony ten challenges; therefore, one being prosecuted under Section 192 would be entitled to ten instead of three challenges.

The word "forcible" when used in a criminal statute in describing night-time or day-time burglaries, comprehends the opening of a door or the raising of a window or the raising of a latch, in fact, the use of any force in making an entry. In 74 Federal, 221, United States vs. Yennie, it was held that an entry into a postmaster's room in the post-office building, by opening the door, was a forcible entry within the meaning of the statute. This case is also interesting in that it determines that an indictment is good, even though in the same count it charges the forcible entry and the theft of the property, and that while such allegations constitute separate offenses under old Sections 5475 and 5478, yet they are offenses of the same kind and the same grade of punishment, though with different degrees of severity, and upon the authority of Com. vs. Tuck., 20 Pick., 356, the Court holds that both offenses relate to and are parts of the same transaction, and may, therefore, be included in the same count without error, though perhaps the best practice not to do so. See also Horner vs. United States, 143 U. S., 207; *ex parte* Peters, 12 Fed., 46.

Sorenson vs. United States, 143 Federal, 820, and Sorenson vs. United States, 168 Federal, 785, are cases arising under Section 5478, and which do not decide any point with reference to the statute or an indictment thereunder. They contain, however, some interesting questions of practice with reference to circumstantial evidence and other matters not necessary to here discuss.

§ 46. **Unlawfully Entering Postal Car or Interfering with Postal Clerk, Etc.**—Closely akin to the statute just discussed is Section 193 of the new Code, which inhibits entering by violence a post-office car, or any apartment in any car, steamboat, or vessel assigned to the use of the mail service, and also denominates as an offense any wilful or malicious assault or interference with

any postal clerk in the discharge of his duties in connection with such car, steamboat, vessel or apartment, and also punishes any one who shall wilfully aid or assist in either.

Neither this section, nor the substance thereof, was included in the old Revised Statutes. There was a provision largely similar passed by the Fifty-seventh Congress, as shown at page 1176 of the 32 Statute at Large. That provision has, however, been broadened by the omission of some words and the substitution of others.

A close reading of the statute indicates that the authorities that relate to entering of a post-office or a building used in part as such office, cited under the old statute 5478 and under the new Section 192, would be in a large measure applicable to this section.

§ 47. **Assaulting Mail Carrier with Intent to Rob, and Robbing Mail and Injuring Letter Boxes or Mail Matter, and Assaulting Carrier, Etc.**—Under this heading, for convenience, is placed Sections 197 and 198 of the new Code. Section 197 is a combination of the old Sections 5472 and 5473.

Section 198 comprehends the meat of old Sections 3869 and 5466. 3869 had already been amended by the Act shown on page 1175 of the first part of Volume 32 of the Statutes at Large, which was an act of the Fifty-seventh Congress. The present section, as it now stands, is intended to protect more certainly the numberless rural route and star route boxes and mail receptacles.

It must be understood that no mail receptacle is protected under this statute, unless the same has been established, approved, or designated by the Postmaster General. The indictment should, therefore, allege such approval, designation, and establishment, and the proof must so show. As to just what sort of proof the Court will admit, no inflexible rule can be given. The Courts understand that it is impossible to bring the Postmaster General or some informed subordinate from his office into the various Districts of the Union, and testify to such action at Washington, and they, therefore, sometimes admit the testimony of the local postmaster that the receptacle is the proper one, or sometimes they admit the receptacle itself, which has stamped thereon the

words designated, established, or approved by the Postmaster General. So also, some of the printed regulations of the Post-office Department give the dimensions and styles and description of the various receptacles, and these are sometimes admitted. The books contain no particular line of precedents with respect to such proof.

Section 197 of the new Code, which is, as above stated, a substitute for 5472 and 5473 of the old statute, eliminates some of the uncertainties that were in the old statutes, and as the new section now stands, it is easily understood. The following cases were interesting under the old section: United States vs. Reeves, 38 Fed., 404, which determined in line with the academic authorities, the meaning of the words "dangerous weapon," the responsibility of one aiding or advising the offense, the meaning of the words "attempt to rob," and the further decision that the offense is committed where it is shown that the mail or any part thereof is taken fraudulently from the possession of the carrier, against his will, by violence or putting him in fear. In Jeff Harrison vs. United States, 163 U. S., 140, the only point decided was that a violation of 5472 was a felony, and on the prosecution for which the defendant was entitled to ten peremptory challenges under Section 819. United States vs. Hare, 2 Wharton Crim. Cases, 283, 26 Federal Cases, 148; U. S. vs. Wilson, 28 Federal Cases, 699; U. S. vs. Bowman, 5 Pac. Rep., 333.

§ 48. **Obstructing the Mail.**—Section 201 of the new Code takes the place of Section 3995 of the old, and enlarges the same by adding the words "car, steamboat, or other conveyance or vessel," and changes the punishment, which was, in the old statute, a fine of not more than a hundred dollars, to a fine of not more than one hundred dollars, or imprisonment for not more than six months, or both. These changes, however, do not render valueless the many cases arising under the old section.

In Salla vs. United States, 104 Fed., 544, the Court of Appeals for the Ninth Circuit held that an indictment charging defendants with conspiring "to unlawfully, wilfully, maliciously, and knowingly" delay and obstruct, etc., the passage of a railway car and train, "which said railway car and train were then and there carrying and transporting the mails of the United States," was

insufficient to charge a violation of Section 3995, since it failed to charge that the defendants knew that said car and train were carrying the mails. In other words, the authorities are a unit upon the proposition that the indictment must allege, and the proof must show, that the defendants knew that the vehicle they obstructed carried the United States mail.

By an act of the Fifty-seventh Congress, second session, page 1176 of the first part of Volume 32, Statutes at Large, Congress determined "that every special delivery messenger, when actually engaged in carrying or delivering letters or other mail matter under contract, directly or indirectly, with the Post-office Department, or employed by the Post-office Department," shall be deemed a carrier or person intrusted with the mail, and having custody thereof, within the meaning of certain Sections of the Revised Statutes, which included old Section 3995.

It has been directly decided that two or more may conspire to commit the offense of obstructing the mail, as shown in Conrad vs. United States, 127 Fed., 798. Other interesting cases bearing upon the old section are the following: United States vs. Kirby, 74 U. S.; 19 Law Ed., 278, and see also note; *in re* Debs, 158 U. S., 564; Clune vs. United States, 159 U. S., 590; United States vs. Cassidy, 67 Fed., 698; United States vs. Thomas, 55 Fed., 380; United States vs. Sears, 55 Fed., 268; United States vs. Woodward, 44 Fed., 592; United States vs. Kane, 19 Fed., 42; United States vs. Claypool, 14 Fed., 127; United States vs. De Mott, 3 Fed., 478.

An officer in possession of a civil warrant against a mail carrier is not justified in arresting the mail carrier, though the carrier be not detained longer than necessary for the execution of the warrant. United States vs. Harvey, 8 Law Rep., 77. In United States vs. Barney, 3 Am. Law Journal, 128, the Court held in substance that the law did not allow any justification of a wilful and voluntary act of obstruction to the passage of th email, such as the seizure by its lawful owner of a stolen horse found in a mail stage, or the arrest of its driver for debt. On the other hand, in United States vs. Hart, Pet. C. C., 390; S. C. 3 Wheeler's Criminal Case, 304, the Court held that the Act was not to be so construed as to prevent the arrest of the

driver of a carriage transporting the mail when he was driving through a crowded city at such a rate as to injure the lives of the inhabitants. So also, it is understood that mere service of process on a mail carrier, without detaining him, is not an obstruction of the mail. United States vs. Harvey, 8 Law Rep., 77.

It seems, however, to be settled that while a mail carrier is not liable to arrest upon civil process,—that he is liable to arrest on a charge of any criminal offense, as a violation of the law against the sale of liquor. Penny vs. Walker, 64 Maine, 430; S. C. 18 American Rep., 269.

The safest practice, however, in view of the public interest in the speeding of mails, is for the officer to make the arrest after the carrier has delivered his charge, which is not at all difficult to accomplish.

§ 49. **Ferryman Delaying the Mail.**—Section 202 differs little from the old statute 3996, and reads as follows:

"Whoever, being a ferryman, shall delay the passage of the mail by wilful negligence or refusal to transport the same across any ferry, shall be fined not more than one hundred dollars."

The penalty of the old statute was ten dollars, and required that a delay should be for ten minutes, but the new section evidently means any delay that is wilful.

§ 50. **Postmaster or Other Employee Detaining or Destroying Newspapers.**—Section 196 of the new Code, which reads as follows:

"Whoever, being a postmaster or other person employed in any department of the postal service, shall improperly detain, delay, embezzle, or destroy any newspaper, or permit any other person to detain, delay, embezzle, or destroy the same, or open, or permit any other person to open, any mail or package of newspapers not directed to the office where he is employed; or whoever shall open, embezzle, or destroy any mail or package of newspapers not being directed to him, and he not being authorized to open or receive the same; or whoever shall take or steal any mail or package of newspapers from any post-office or from any person having custody thereof, shall be fined not more than one hundred dollars, or imprisoned not more than one year, or both."

replaced Section 5471 of the old statutes, and contains practically nothing new except that the wording is changed somewhat, and the punishment is enlarged.

For some reasons there were few prosecutions under 5471, and so far as reported decisions is concerned, the books contain none. *Ex parte* Friday, in 43 Federal, page 920, cited by some annotations, really does not bear upon the section other than to cite it as an instance of the power of a Court to impose hard labor, even though the term be less than one year. In State vs. Nichols, 50 Louisiana Ann., 699, the statute is cited.

At page 512 of the First Volume of the Supplement, being an Act of the Forty-ninth Congress, which applies alike to all of the statutes relating to offenses against the postal service, committed by persons employed therein in connection with the immediate delivery service, whether temporarily or permanently, or whether under oath or not:—

"That any person employed to make immediate delivery of letters or other mail matter under the provisions of this Act, or the Act of which the same is amendatory, shall be deemed an employee of the postal service, whether he may have been sworn or not, or temporarily or permanently employed, and as such employee shall be liable to any penalties or punishments provided by law for the improper detention, delay, secretion, rifling, embezzlement, purloining, or destruction of any letter or other article of mail matter, or the contents thereof, entrusted to him for delivery, or placed in his custody."

§ 51. **Postmaster or Employee of Service Detaining or Destroying Embezzling Letter, Etc.**—Section 195 of the new Code, which reads as follows:

"Whoever, being a postmaster or other person employed in any department of the postal service, shall unlawfully detain, delay, or open any letter, postal card, package, bag, or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or station thereof established by authority of the Postmaster General; or shall secrete, embezzle, or destroy any such letter, postal card, package, bag, or mail; or shall steal, abstract, or remove from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than five hundred dollars, or imprisoned not more than five years, or both,"

takes the place of Sections 3890, 3891, and 5467 of the old statutes.

The new law, as above quoted, does not contain the inhibition against the holding of office by a postmaster who unlawfully detains letters or mail matter, but largely increases the punishment. The three old sections were a source of considerable confusion, and with the making of the new section, which plainly states, in commensurate words, the elements of the offenses therein included, this will be largely removed.

The system of postal supervision and preservation by and through efficient Inspectors, ofttimes makes it necessary to use what have been termed "decoy" letters. A series of thefts may be reported at a certain office, and by a process of elimination the Inspectors conclude that the thefts occur during a certain watch. There may be more than one man upon this watch, and it is entirely unjust to suspect all of them. Decoys are, therefore, used. These decoy letters are sometimes called "test" letters. The question arose as to whether or not such letters could be the subject of the offense described and punished by 5467, and the other articles akin thereto. It is now settled, beyond dispute, that such letters may be the subject of the offenses defined. In Hall vs. United States, 168 U. S., 631; 42 Law Ed., 607, the point was raised as follows, which is taken from that case:

"The evidence showed that the Government detectives prepared a special delivery letter designed as a test or decoy letter, containing marked bills, and delivered it, bearing a special delivery stamp, to the night-clerk in charge of Branch Station "F" of the post-office. The defendant was not a letter carrier, but a clerk employed at that office, whose duty it was to take charge of special delivery letters, enter them in a book for that purpose, and then place them in course of transmission. The letter in question was addressed to Mrs. Susan Metcalf, a fictitious person, 346 East Twenty-fourth Street, New York City, a fictitious number. The letter was placed by the night clerk with other letters upon the table, where such letters were usually placed, and the deproperly entered the other letters, but did not enter this letter. fendant, entering the office not long after, took this letter, along with the others on the same table, removed them to his desk, and On leaving the office, not long after, the omission to enter the letter having been observed, he was arrested, and the money contents of the letter, marked and identified by the officers, were found upon his person. The officers testified upon cross examina-

tion that the address was a fictitious one; that the letter was designed as a test letter, and that they did not intend that the letter should be delivered to Mrs. Susan Metcalf, or that address, and that it could not be delivered to that person at that address."

Upon this state of facts, the Supreme Court held that the facts stated an offense, and the evidence was entirely sufficient to sustain the conviction upon the latter part of Section 5467, which did not include the words "intended to be conveyed by mail." The Court cites Good vs. United States, 159 U. S., 663; 40 Law Ed., 297; Montgomery vs. United States, 162 U. S., 410; 40 Law Ed., 1020.

It will be observed that the new statute uses the word "such," which means, beyond any question of a doubt, a letter, postal-card, package, bag, or mail, which was intended to be conveyed by mail, or carried or delivered by a carrier, messenger, agent, or other person employed in a Department of the Postal Service, or forwarded through, or delivered from, any post-office or station. If, therefore, the testimony of the Government Inspector should disclose that he did not intend that the decoy or test should be carried or delivered or conveyed by mail, or forwarded through, or delivered from, any post-office, then and in that event, the new section would not be sufficiently broad to prosecute an employee who stole a decoy or test letter. Hall vs. U. S., 168 U. S., 631. The last portion of the old statute 5467 made it an offense for any such person, to wit, employee, to take any of the things mentioned therein out of any letter, packet, bag, or mail of letters, which had come into his possession as such employee; which is vastly different in its broadness from the present statute.

The case of Ennis vs. United States, 154 Federal, 842, decides that a piece of mail matter which had been set aside by a dishonest employee to be later taken, and which was discovered by an inspector, and taken to the addressee, from whom the inspector secured permission to open the packet, and thereupon marked certain bills, and placed them in the said packet, and then returned the packet, where the employee had left it, such employee afterwards taking the packet: held, that the packet, at the time it was returned by the Inspector, had not ceased to be mail matter, and that the defendant was, therefore, properly convicted of

embezzling the same, in support of which the Court cites Scott vs. United States, 172 U. S., 343; 43 Law Ed., 471, and also argues that a letter delivered to the wrong address, and re-mailed with the canceled stamp thereon, if stolen after being re-mailed, would appear to be an offense under the section. In the case of Bromberger vs. United States, 128 Federal, 346, the Court held that a letter properly stamped, with the receiving stamp of the office thereon, and placed in a carrier's pigeon hole at a postal station, with other letters addressed to a real person on his route is "intended to be conveyed by mail," and its abstraction by the carrier, and the taking of the money therefrom constitutes an offense under 5467, although it was placed there by postal inspector for the purpose of testing the carrier's honesty.

The difference between the Bromberger case and the Hall case is, that the test or decoy in the Bromberger case was addressed to an actual person, and was intended for delivery to such person, while in the Hall case, it was a fictitious address, and no such delivery could be made. Under the new statute, therefore, the indictment must allege, and the proof must show, that the matter was intended to be conveyed by mail, or carried or delivered by a carrier, messenger, agent, or other person employed in a Department of the Postal Service, or forwarded through or delivered from any post-office or station thereof, established by authority of the Postmaster General, and if the decoy or test be to a fictitious person, at an address where the delivery cannot be made, it would not, under the new statute, be an offense.

Under the authority of Shaw vs. United States, in 165 Federal, page 174, the indictment must allege lawful possession, but under the authorities of United States vs. Trasp, 127 Federal, 471, and Bowers vs. United States, 148 Federal, 379, and United States vs. Falkenhainer, 21 Fed., 624, it is not necessary to allege the ownership of the packet. The employee, under the present section, whether he be postmaster or other person, can offend against the new law only when he is such employee, has mail entrusted to him, or has mail in his possession when the same was to be conveyed and delivered as hereinbefore shown. So, too, it will be noticed that the new section makes it an offense to secrete, embezzle, or destroy any such letter, postal card, package, bag, or

mail, and also makes it an offense to steal, abstract, or remove from any such package, bag, or mail, any article or thing therein, and does not make use of the word "value." In other words, any article, whether of value or not, and any letter or packet, whether it has any article in it or not, under this new section, is protected by its provisions, and it is thought that this broadness comes by reason of its comprehending the elements of 3890 and 3891, as well as those of 5467. Other cases bearing upon these three sections are Alexis vs. United States, 129 Fed., 60; Chitwood vs. United States, 153 Fed., 551; United States vs. Kerr, 159 Fed., 185; United States vs. Wilson, 44 Fed., 593; United States vs. Lacher, 134 U. S., 624; United States vs. Delany, 55 Fed., 475; United States vs. Gruver, 35 Fed., 59; United States vs. Byrne, 44 Fed., 188; Walster vs. United States, 42 Fed., 891; United States vs. Matthews, 35 Fed., 890; Rosencrans vs. United States, 165 U. S., 257; *in re* Wight, 134 U. S., 136; U. S. vs. Taylor, 37 Fed., 200; Jones vs. United States, 27 Fed., 447; U. S. vs. Hamilton, 9 Fed., 442; Scott vs. United States, 172 U. S., 343.

§ 52. **Stealing, Secreting, Embezzling, Etc., Mail Matter or Contents.**—Section 194 of the new Code is in substitution of Sections 3892 and 5469 and 5470 of the Code of 1878, and by the wideness or latitude of punishment and generality of its phraseology, includes all of the offenses enumerated in the old sections. 3892 was limited originally to the taking of mail for the purpose of prying into the business or secrets of another, and 5469 originally was for the taking of mail matter by theft or other unlawful method by any person not employed in the postal service. It is only by being familiar with Section 5467 and 3891 and 3890, as heretofore treated, that we conclude that 5469 related to persons other than postal employees. Under the terms of Section 194, as it now reads, one who, by misrepresentation or pretense, secures from a post-office mail directed and intended for another, is liable to the penalties of that section. For instance, one who calls for the mail of another, representing that he has authority to receive the same, and thereafter commits unlawful act with the mail, is subject to the penalty. The authorities cited *supra* in the construction of Section 195 are applicable to decoy and test letters under 5469 of the old statute or 194 of the new stat-

ute. The authority of the United States vs. Meyers, 142 Federal, 907, with reference to 5469, seems to be applicable to the needs of an indictment and proof under new Section 194. The indictment must allege that the stealing, taking, or obtaining by fraud of any letter or other mail matter and the embezzlement of the same or its contents must be either fraudulent or unlawful, and an indictment which leaves this open to inference is defective. Thus, an indictment which by inference may allow the letter charged to have been taken to have been delivered to and received by the defendant through a mutual mistake, is insufficient. Mail matter that has been delivered by the Postal Department to its address thereby passes from the protection of the Federal Government. A letter addressed to John Smith, in care of Jones, and delivered to Jones, and thereafter stolen or embezzled or treated unlawfully, cannot be made the subject of the above article. It must still be in the custody of the Post-office Department before one can be prosecuted under the Federal statutes for an unauthorized and unlawful act with reference thereto. Thus, a letter delivered by the Post-office Department to the desk of the addressee, upon which it was placed by the mail carrier in the absence of any one to receive it, is not protected by any Federal statute. In United States vs. Safford, 66 Federal, 942, one was arrested upon an information charging him with embezzling a letter containing an article of value, which had been in the United States Post-office at St. Louis and had not been delivered to the person addressed, but that the letter had been placed by the mail carrier upon the desk of the addressee, from whence it was stolen by the defendant. The Court held that Congress only intended to secure the sanctity of the mail while it was in the custody of the Postal Department en route from the sender to the person to whom it was directed. Beyond the protection of the mail while discharging the functions of postal service with respect to it, the Federal Government has no rightful power or legal concern.

Thus, a letterr directed to a person, care Kimball House, when delivered by a carrier at the office of the Kimball House, is delivered to the person to whom it was addressed, within the meaning of the law; and the duty of the postal authorities with re-

spect to such letter having been fully performed in accordance with the direction of the sender, a subsequent wrongful taking of such letter by another is not an offense under said section, nor one cognizable by the Courts of the United States. United States vs. Lee, 90 Fed., 256. See also U. S. vs. McCready, 11 Fed., 225.

It is not thought that United States vs. Hilbury, reported in 29 Fed., 705, is good authority. The judge in that case charged the jury in substance that a letter in care of F. Kressel, directed to A, and delivered by the mail carrier to Kressel, and taken by an authorized person from Kressel after such delivery, was a violation of 3892. Clearly, the letter had been delivered, so far as the Postal Department was concerned, and the protection and custody and jurisdiction of the United States had ceased. The entire weight of authority is against the decision in 29 Federal, just above cited, and the following decisions support the doctrine of 66 and 90 Federal, cited *supra:*—United States vs. Persons, 2 Blatchf., 104; United States vs. Driscoll, 1 Lowell, 303; U. S. vs. Sander, 6 McClain, 598; U. S. vs. Thoma, 28 Fed. Cases 16471; U. S. vs. Huilsman, 94 Fed., 486; U. S. vs. McCready, cited *supra*, 11 Fed., 225, must be distinguished from the weight of authority, and it is thought that the learned judge there used expressions ill advisedly that seem to support the decision in the 29 Federal.

It must also be borne in mind that one who secures lawfully from the Postal Department a letter belonging to another, and who thereafter forms the design to commit an unauthorized act, as defined by the statute, with reference thereto, is not amenable to the Federal statute. It is true that the intent is usually presumed from the act itself, Reynolds vs. U. S., 98 U. S., 145, but if it could be clearly shown that the original taking was lawful and thereafter the unlawful design was formed, the Federal offense would be incomplete. United States vs. Smith, 11 Utah, 433; United States vs. Wilson, 44 Fed., 593; United States vs. Inabnet, 41 Fed., 130. This intent should be left to the jury by proper charge, not only when raised by the evidence of the defense, but upon the Government's case itself; in other words,

it is a part of the facts that must be proven by the Government, inferred though it may be by the jury from the facts of the case.

Section 194, as now enacted, reads as follows:

"Whoever shall steal, take, or abstract, or by fraud or deception obtain, from or out of any mail, post-office, or station thereof, or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal-card, package, bag, or mail, or shall abstract or remove from any such letter, package, bag, or mail, any article or thing contained therein, or shall secrete, embezzle, or destroy any such letter, postal-card, package, bag, or mail, or any article or thing contained therein; or whoever shall buy, receive, or conceal, or aid in buying, receiving, or concealing, or shall unlawfully have in his possession, any letter, postal-card package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been so stolen, taken, embezzled, or abstracted; or whoever shall take any letter, postal-card, or package, out of any post-office or station thereof, or out of any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post-office or station thereof, or other authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or shall open, secrete, embezzle, or destroy the same, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both."

The following cases may be of interest relating to the original three sections that this section is substituted for:—United States vs. Trosper, 127 Fed., 476; Brown vs. United States, 148 Fed., 379; United States vs. Jones, 80 Fed., 513; United States vs. Hall, 76 Fed., 566; United States vs. Thomas, 69 Fed., 588; Grimm vs. United States, 156 U. S., 604; Goode vs. United States, 159 U. S., 663; Montgomery vs. United States, 162 U. S., 400; Hall vs. United States, 168 U. S., 632; Scott vs. United States, 172 U. S., 343; United States vs. Dorsey, 40 Fed., 752; Walster vs. United States, 42 Fed., 891; United States vs. Wilson, 44 Fed., 593.

It will be noticed that the new section leaves out the word "value" with reference to any article so contained in the mail matter. It simply uses the word "article" without stating that the same shall be of value, as did the old law.

§ 53. **Obscene, Etc., Matter, Non-mailable, and Penalties.**—Section 211 of the new Code reads as follows:

"Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed, and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine or thing may, or can be, used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose, and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, or shall knowingly take, or cause the same to be taken from the mails, for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.'

This takes the place of 3893 of the old statute. It contains one word, the exact limits and meaning of which when used in criminal law, do not seem to be well defined by any line of decisions. The word "filthy," as used in the new section, has never before been used in 3893 or any of its predecessors. The Century Dictionary defines filthy to mean, foul, dirty, nasty, polluted, low, contemptible, mean, and gives as synonyms, impure, corrupt,

gross. In Reg. vs. Wood, 5 El. and Bl., 49, 85 E. C. L., 49, show was held not to be filthy. In United States against Benedict, 165 Federal, page 222, the Court said that the present statute, (that is, 3893), did not protect against "offensive, filthy, and vulgar language," when conveyed by a sealed wrapper, unless the language will have, or may have, an immoral effect in a sense relating to sexual impurity upon those into whose hands the written language may come. The Courts all along have almost universally construed Section 3893 to be directed against such impurity as related to sexual matters and gave rise to libidinous thought. If the addition of the word "filthy" in the new statute broadens the construction, it will be welcome indeed, because under the present authorities, the old section permitted a perfect sluice of vulgarities and coarseness and obscenity to pass through the United States mails unchallenged and unprosecuted. For instance, the courts have held that the use of the word "son-of-a-bitch" in a sealed envelope is not an offense. It would seem that under the dictionary definition of the word filthy, as quoted above, the law would now comprehend the use of the word "bitch" and the phrase "son-of-a-bitch" and "whore" and "prostitute" and a great many others that are used in an abusive way toward the recipient of the mail. This, however, remains to be seen, and the construction of the new statute will be welcomed if it now inhibits the use of such expressions.

An indictment under 211 must surely be as certain in its allegations as the decisions demanded under 3893, and must, therefore, allege that the defendant knowingly deposited or caused to be deposited, and the best practice would seem to be to allege that he so deposited or caused to be deposited with knowledge of the contents or import of the writing or printing, as the case may be. Such allegation is not specially required under the authority of Price vs. United States, 165 U. S., page 308; 41 Law. Ed., page 727, but it is decidedly the best pleading. Rosen vs. United States, 161 U. S., 29; 40 Law Ed., 606. The mailing of obscene matter in answer to decoy requests, such requests being made by postal inspectors for the purpose of fixing absolutely the guilt of the sender or of an advertiser, are in violation of the statute, and may be the basis of prosecutions. Price against United

States, cited *supra,* and Rosen vs. United States, cited *supra;* Shepherd vs. United States, 160 Federal, page 584. The indictment must also allege that the matter is non-mailable. United States vs. Clifford, 104 Fed., 296, but the indictment need not set out the obscene matter. An allegation that the matter is too obscene, lewd, and lascivious to be set out and made a part of the records of the Court will satisfy the statute. 105 Federal, page 59; Tubbs vs. United States, 94 Fed., 356; and the Rosen and Price cases cited *supra.*

The old question as to whether a private sealed letter came within the meaning of the statute was definitely settled by the Supreme Court in the case of Grimm vs. United States, 156 U. S., 604, which was followed by Andrews vs. United States, 162 U. S., 420, which distinctly held that the mailing of a private sealed letter containing obscene matter, on the envelope of which nothing appeared except the name and address, was an offense within the meaning of the statute.

Recurring again to the sort of obscenity at which the statute is directed, we find the case of United States vs. Lamkin, 73 Fed., 459, where it was held that the statute did not punish for the mailing of a letter which was written for the purpose of seduction or to obtain a meeting for an immoral purpose, provided such letter was free from lewd, and indecent language, expressions, or words. This case seems to be in conflict with the great weight of authority, and with the spirit of the statute. Assignations attempted to be made through the United States mail, however chaste the language, are in direct violation of the statute. United States vs. Martin, 50 Fed. Rep., 918. In the Martin case, a letter from a man to an unmarried woman, proposing a clandestine trip to a neighboring town and a return the next morning, the man to pay expenses and five dollars besides, was held to be an obscene letter within the meaning of the Act. In line with the Martin case, seems to be the case of Dunlop vs. United States, 165 U. S., 486, in which it was held that newspaper advertisements giving information where courtesans could be found, came within the Act, although such advertisements were couched in the most chaste and elegant language. In Swearingen vs. United States, 161 U. S., 446; 40 Law Ed.,

765, the Supreme Court held that the words "obscene," "lewd," and "lascivious," as used in the statute signified that form of immorality which has relation to sexual impurity, and have the same meaning given them at Common Law in prosecutions for obscene libels, and, therefore, do not extend to language although it may be exceedingly coarse and vulgar, and plainly libelous, if it has not a lewd, lascivious, and obscene tendency, calculated to corrupt and debauch the mind and morals. This definition supports, it would seem, the line of authorities upholding the Martin decision, cited *supra,* and also limits the purpose of the original statute to such obscenity. In the Swearingen case, the prosecution was for the mailing of a paper which contained the coarsest possible language toward another, and the language would unquestionably have been construed "filthy," had that word been included in the statute, unless the Courts are to determine that the word "filthy," as used in the new statute, was purposelessly used by Congress. To the same effect is United States vs. O'Donnell, 165 Federal, 218; United States vs. Benedict, 165 Federal, 221; Konda vs. United States, 166 Fed., 91. The question as to whether the matter is obscene within the meaning of the law, as defined by the judge, must be submitted to the jury. It is quite true that there are some decisions to the contrary, but all of the reasoning, as well as the weight of authority, seems to be that the question should be left to the jury, because it is a question of fact. In Konda vs. United States, 166 Fed., 93, the Court said:

"In our judgment, a defendant in a criminal case has the absolute right to require that the jury decide whether or not the evidence sustains each and every material allegation of the indictment. Material allegations are allegations of fact, and each, as much as any other, enters into a verdict of guilty. If the judge may decide that one or another material allegation is proven, he may decide that all are proven, and so direct a verdict of guilty. In a civil case, the judge may exercise the power of directing a verdict for the plaintiff, when there is no conflict in the evidence, and the only inference that can be drawn by reasonable minds as to the ultimate facts in issue favors the plaintiff. This power, we opine, grew out of the practical administration of the fundamental power of review on a motion for a new trial, the findings of the jury. In the civil cases above

supposed, if the jury should return a verdict for the defendant, the judge would set it aside; and he would continue to set aside verdicts in that case until one should be returned that was in accord with the undisputed facts; so he cuts off the possibility of useless verdicts by directing in the first instance, the jury to return the only verdict he will let stand. But in a criminal case, if the jury returns a verdict for the defendant, the judge, no matter how contrary to the evidence he may think the verdict is, cannot set it aside and order a new trial. Therefore, since the judge is without power to review and overturn a verdict of not guilty, there is no basis on which to claim the power to direct a verdict of guilty. Our conclusion is that an accused person has the same right to have twelve laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting. Inasmuch as jurors are rightly trusted in close and difficult cases, to maintain the peace and dignity of organized society, surely they may be relied on in the plain and simple ones.'

In Knowles vs. United States, 170 Federal, page 410, the Court assumes a similar position, and says:

"Upon this record, the only question before us is, whether the article is obscene, lewd, or lascivious, within the meaning of the statute. If it was fairly open to the construction of falling within either of these classes, it was the plain duty of the Court to submit the question of its character to the jury. In all indictments under this statute, there is a preliminary question for the Court to say whether the writing could, by any reasonable judgment, be held to come within the prohibition of the law. That is like the question of law in a case of negligence, as to whether there is any substantial evidence of negligence. It leaves a wide field for the sound, practical judgment of the jury to determine the true character of the writing and its probable effect upon the minds of readers. Whenever reasonable minds might fairly reach different conclusions as to the character of the writing, it is the duty of the Court to submit the question to the jury,"

and cites Rosen vs. United States, 161 U. S., 29; United States vs. Bennett, 16 Blatchf., 342; United States vs. Davis, 38 Fed., 326; United States vs. Harmon, 45 Fed., 418.

Under a plea of not guilty, each and every necessary element alleged in the bill of indictment must be proven beyond a reasonable doubt by the sovereignty, and each of such elements, and the proof thereof to the measure indicated, is to the satisfaction

of the jury, and any peremptory charge against the defendant is violative of his rights.

It is entirely immaterial that one who mails impure matter, within the meaning of the statute, has a pure motive; if the matter mailed is obscene, he is guilty. So, also, the freedom of religion, and the freedom of the press, cannot be used as defenses to prosecutions under these statutes. Knowles vs. United States, 170 Fed., 411; Davis vs. Beason, 133 U. S., 333; 33 Law Ed., 637.

In 118 Federal, page 495, United States vs. Moblenski, the Court held in substance that the matter must tend to corrupt the morals of the person to whom it is addressed. This decision is not thought to be supported by the best authority. The addressee might, as a matter of fact, be so morally obtuse as to be beyond further injury or corruption, but the letter might fall into the hands of innocent persons; and the test is, whether the contents would bring the blush of shame to the cheek of virtue, not whether the contents would bring the blush of shame to the cheek of vice. See 160 Federal, page 700, United States vs. Musgrave, which holds that the law relates to the reading matter, and not to the state of the mind of the receiver. Under the Common Law, and for time immemorial, it was an offense to utter obscene language in public places, or near a dwelling house, or in the presence of women, and the purpose, therefore, of the Federal statute, it would seem, is to protect the innocent and pure against having obscenity intruded upon their notice.

The section, so far as it relates to the prevention of conception and articles intended therefor, would require that the bill of indictment describe the thing advertised. United States vs. Pupke, 133 Fed., 243. A somewhat broader holding is in United States vs. Somers, 164 Fed., 259. See also Lee vs. United States, 156 Federal, 948. It is also held that a corporation may violate this section. United States vs. Herald, 159 Federal, page 296.

A deposit, under this Section, in a United States post-office, is a deposit in a post-office box. Shepherd vs. United States, 160 Fed., 584.

By an amendment to an Act in May, 1908, Congress provided that the term "indecent," as used in the old Section 3893, shall

include matter of a character tending to incite arson, murder, or assassination; but it is not thought that any statement in the new Code would authorize such meaning for the word "indecent" in Section 211. Federal Statutes Annotated, Supplement 1909, page 525. Other cases bearing upon this statute are the following:—Evans vs. United States, 153 U. S., 587; Grimm vs. United States, 156 U. S., 608; Rinker vs. United States, 151 Federal, 755; *in re* Rapier, 143 U. S., 110; Barnes vs. U. S., 166 Fed., 113; United States vs. Musgrave, 160 Fed., 700; Hansom vs. United States, 157 Fed., 749; United States vs. Harris, 122 Fed., 551; United States vs. Moore, 104 Fed., 78; United States vs. Chase, 135 U. S., 117; United States vs. Reid, 73 Fed., 289; United States vs. Clark, 43 Fed., 574.

Postmark.—In U. S. vs. Noelke, 1 Fed. Rep., 426, which was followed in U. S. vs. Williams, 3 Fed. 484, the Court held that the postmark upon the envelope made a *prima facia* case that the letter had been deposited in the United States mail.

§ 54. **Libelous and Indecent Wrappers and Envelopes, Etc.**—Closely akin, and for the same practical purpose, to Section 211, is Section 212 of the new Code. This section was the result of a series of acts, which resulted finally in the Act of September, 1888, First Supplement, 621, which is practically identical with the new Section 212. Originally, scurrilous epithets by the Act of 1872, on postal cards and envelopes were alone prohibited. By the Act of March 3, 1873, the word "indecent" was added; by the Act of July 12, 1876, the words "lewd, obscene, or lascivious" as adjectives and the words "delineations, terms, or language" as nouns, were inserted; and finally, by the Act of September 26, 1888, Section 212 reads as follows:

"All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms of manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared non-mailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier, and shall

be withdrawn from the mails under such regulations as the Postmaster General shall prescribe. Whoever shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, or shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

Every decision and construction of the Act of 1888 is material aid in understanding the present law, because, as before stated, they are practically identical.

The Court must submit to the jury the determination of whether or not a delineation or other display is calculated to reflect injuriously upon the character of the person addressed. The reasons for this are just as strong as those urged in support of the submission of any other question of fact upon a plea of not guilty to the jury. The Court cannot determine, as a matter of law, that any particular delineation or display is in violation of the statute. Of course, it is not meant to here indicate that the Court may not express his opinion thereon. He always has this right.

In United States vs. Dodge, 70 Federal, 235, the proprietor of a collection agency adopted a method of proceeding by which, on failure of debtors to pay on first demand, a dunning letter was sent through the mails, enclosed in a pink colored envelope, and if this did not receive a favorable response, another letter was sent enclosed in a black envelope, addressed in white letters. The purpose of these letters was universally known to the post-office employees. Having been arrested on a charge of violation of the Act of September 26, 1888, in respect to non-mailable matter, he sued out a writ of *habeas corpus,* and the Court held that the use of such envelopes was a delineation within the meaning of the statute, and that whether the effect was to reflect injuriously upon the character or conduct of the addressee was a question for the jury, upon a trial for the offense, for which reasons the prisoner was remanded. While the Court did not pass upon the identical question as to whether the determination of the injurious character of the delineations was for the jury, and not the

Court, yet the decision is strongly persuasive. In United States vs. Brown, 43 Federal, 135, upon a demurrer to an indictment under this statute, the Court said:

"The respondent is indicted for depositing for mailing and delivery matter, upon the envelope of which the words 'Excelsior Collection Agency were printed in large letters, and calculated by the terms and style of display, and obviously intended to reflect injuriously upon the character and conduct of the person addressed....To make a matter non-mailable and to constitute the offense, that the delineation is calculated and obviously intended to so reflect, must be apparent from an inspection of the envelope....The manner of display might indicate clearly whether the words were placed there for injurious reflection upon that person, or for legitimate transmission of the contents of the envelope through the mails...Whether the display of the words upon the envelope would support the averments of the indictment, would be a question of fact for a jury."

See also United States vs. Olney, 38 Federal, 328.

What Is Outside Cover or Wrapper?—A very interesting and vital question is raised by the case of the United States vs. Gee, 45 Federal, 194, wherein the District Judge held, that, "the statute applied only to matter exhibited upon an enclosing wrapper or cover and not to matter which is contained in the body of the thing mailed; that the statute being one constituing a criminal offense, it cannot be extended by construction to cases where there is no wrapper at all, even though such cases may be within the reason and policy of the enactment." This decision was with reference to a case arising upon the mailing and delivery of a large number of four-page printed circulars about the size of a sheet of note paper, upon the four pages of which was printed matter; being an account of certain dealings between the defendant and another; that these circulars, as deposited for mailing and delivery, had no separate wrapper or cover over them, but were folded twice into oblong shape, and the postage stamps placed upon the circulars themselves.

The evident purpose of the statute was to prevent patrons of the Post-office Department from sending through the mails such matter as would or might easily attract the eye of the distributing or handling clerks, by reason of its being uncovered. It is submitted that an attack upon another on a printed page of a news-

paper or circular, upon which page the clerk or clerks must look to find the address of the one to whom the paper is going or must be delivered, is as apt to injure the addressee as though the matter were upon a postal-card or an envelope, or upon a cover containing a newspaper, and that the one so offending placed it upon the outside for that particular purpose. The Century Dictionary, in defining the word "cover," says, "It is something which is laid, placed, or spread over, as the cover of a box, or the cover of a dish, or the cover of a bed, or the cover of a book." It is thought that the cover of a box, a dish, a bed, or a book, is a part of the article itself, and thus, the cover of a box is a part of a box, the cover of a dish is a part of the dish, the cover of a bed is a part of the bed, and the cover of a book is a part of a book. In United States against Burnell, 75 Federal, 824, District Judge Wolson distinguishes the Gee case, and disagrees with it. The Burnell case was an indictment against the proprietor of a collection agency for having mailed and caused to be mailed a certain newspaper, on the first page of which a motto showed that its purpose was to collect debts, and a large part of the paper contained notices warning the public against persons alleged to have failed to pay their debts or asking information as to such persons. It appeared that when an account was sent to the agency for collection, the alleged debtor was notified that if not paid, the account would be advertised in such newspaper as being for sale, and the paper contained many such advertisements. It was apparent that the object of the paper was to coerce the payment of money. In mailing the paper, where more than one copy was to be sent to the same post-office, the name of the persons to whom the copies were to be delivered were placed on the front (outside) page. Then the papers for the office are rolled together in a package in one wrapper, and on that wrapper was written the name of the post-office. When the package reached the post-office, the office employees tore off the package wrapper, that they might find the names of the persons to whom the papers were to be delivered, and every clerk or carrier attached to that office through whose hands a copy thus sent had to pass, must look at this front (outside) page to ascertain the name of the addressee. Upon this state of facts,

Judge Woolson held that "if the obnoxious matter is on the 'outside cover,' the statute is made against its mailing, even though such cover be not an 'enclosing wrapper or cover,' but overspreads or overlays the pamphlet or paper mailed."

This opinion is interesting and exhaustive, and clearly upholds that construction of the statute which makes it an offense to publish upon the outside page of a newspaper statements that reflect injuriously upon the character of the addressee.

Duns and Postal-Cards.—In United States against Smith, 69 Federal, 971, the following language has been held to come within the Act, when upon a postal-card: "You have been fighting time all along... I will garnishee and foreclose, but I dislike to do this if you will be half white." In United States vs. Davis, 38 Federal, 326, the following was held to be a violation: "You are sharp. All of you are on the beat." In United States vs. Olney. 38 Federal, 328, the Court submitted the following language to the jury, and the jury held that it was a violation, to wit: "Mr. Editor: I thought that you were publishing a paper for the wheel, but I see nothing but rotten democracy. I am a republican and a wheeler, and you can take your paper and democracy and go to hell with it." So also, the following were held to be violations: "Your rent was due Thursday, February 25, 1892, and has not been paid, and if not paid by Thursday, March 3, 1892, I will place the matter in the hands of an officer," United States vs. Elliott, 51 Federal, 807. "You have promised, and do not perform, and I see very plainly you do not intend to pay any attention to my letters or your agreements," U. S. vs. Simmons, 61 Federal, 640. In United States vs. Boyle, 40 Federal, 664, the Court held that this language, to wit, was not a violation: "Please call and settle account, which is long past due, and for which our collector has called several times, and oblige," but in the same decision the Court held that the statement, "If it is not paid at once, we shall place the same with our lawyer for collection," was not mailable, and was a violation. For other cases bearing upon this section, see United States vs. Pratt, 27 Federal, Cases No. 16082; United States vs. Jarvis, 59 Fed., 357; *in re* Barber, 75, Federal, 980; United States vs. Smith, 11 Fed., 663; *ex parte* Doran, 32 Federal, 76; U. S. vs. Durant, 46 Fed-

eral, 753; U. S. vs. Loftin, 12 Fed., 671; U. S. vs. Elliott, 51 Fed., 807.

Of course, when the matter is obscene, lewd, or lascivious, then the authorities cited under Section 211 are applicable.

§ 55. **Use of the Mails for Fraudulent Purposes.**—The reliability, speed, and universality of the conveniences of the post-office establishment affords a revenue-bringing vehicle for the unscrupulous. Many sorts of frauds and schemes and artifices have, from time to time, flourished for a season. A proposition attractively stated in print, and addressed to a specific person, seems to contain much more magnetism than spoken words or general advertising. Just what per cent. of the inhabitants of the United States are credulous, has perhaps never yet been determined, but the success of the fakir would seem to indicate that a very large part of the people, while they may not believe everything they see, do believe nearly everything they read, especially if it be addressed directly to them. Section 5480 of the old Code was an Act intended to bring to justice those who made this improper use of the mails. On March 2, 1889, 25 Stat. at Large, 873, I Vol. Sup. 694, this section was amended, broadening and bettering it.

Section 215 of the new Code contains all of the elements of the last amendment, with some additional words and eliminations that make the Act comparatively complete. The new Section also makes the punishment commensurate with the offense, the penalties of the old statute being entirely too light. Section 215 reads as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'saw-dust swindle' or 'counterfeit-money fraud,' or by dealing or pretending to deal in what is commonly called

'green articles,' 'green coin,' 'green goods,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting to do so, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

Elements of the Offense.—The indictment must charge, and the proof must show, (a) the devising of a scheme or artifice to defraud; (b) that such scheme or artifice to defraud is to be effected by opening or intending to open correspondence with such other person or persons through the post-office establishment or by inciting such other persons to open communication with them; and, (c) that a letter or packet or some other mail matter enumerated in the statute must be deposited or caused to be deposited for mailing and delivery in the United States mail. United States vs. Long, 68 Fed., 348; Milby vs. U. S., 109 Fed., 638; U. S. vs. Post, 113 Fed., 852; Horman vs. U. S., 116 Fed., 350; Hume vs. U. S., 118 Fed., 689; Stuart vs. U. S., 119 Fed., 89; Ewing vs. U. S., 136 Fed., 53; Brown vs. U. S., 143 Fed., 60; Rumble vs. U. S., 143 Fed., 772.

Whether the element which I have called "b" is to be present in violations under the section, remains to be seen, because the old section differed from the new in that the old contained the words "to be effected by either opening or intending to open correspondence or communication with any person, ... or by inciting such person or any person to open communication with the person so devising or intending," which the new does not contain. The new section simply demands, (1) the formation of

a scheme or artifice to defraud; (2) "shall for the purpose of executing such scheme or artifice, ... place or cause to be placed, any letter, etc.,...to be sent or delivered by the post-office establishment." It thus would seem, in the absence of the words "other person," that one might, in the execution of a scheme to defraud, wherein the use of the mails was contemplated, as required by the statute, devise a scheme, within the meaning of the statute, so as to subject himself to the penalty of the statute, and only use the mail in addressing communications to himself. This was not possible under the old statute. In Erbaugh vs. United States, 173 Fed., 434, the Circuit Court of Appeals for the Eighth Circuit held that one who devises a fraudulent scheme to be effected by opening or intending to open correspondence or communication with himself, by means of the post-office establishment of the United States, is guilty of no offense under 5480. The elements, therefore, of an indictment under the new statute, are the same as those under the old statute, with the possible exception, as indicated above, that one may, under the new statute, be guilty of the offense, even though he use the mail only for the purpose of addressing himself, and not for addressing his intended victim or victims.

Broadly speaking, the section "includes everything designed to defraud, by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. ... It was with the purpose of protecting the public against all such intentional efforts to despoil and to prevent the post-office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise." 5 Fed. Stats. Durland vs. United States, 161 U. S., 306. See also Horman vs. U. S., 116 Fed., 350. In U. S. vs. Sherwood, 177 F., 596, Court simplifies indictment. In Foster vs. U. S., 178 F., 165, C. C. A., held scheme need not be repeated in second and succeeding counts, if laid well in first and appropriately referred to.

Threatening Letter.—A scheme to extort money by threatening to injure the reputation and character of others by accusing

them of heinous crimes in default of payment of a large sum of money to the accusing, is a scheme to defraud, within the meaning of this section. Fed. Stats. Ann., 5, page 976. Horman vs. United States, 116 Fed., 350, which affirms the lower court in the case of the United States vs. Horman, 118 Fed., 780.

Matrimonial agency, good indictment, see Glinn vs. U. S., 177 F., 679.

Ordering Goods Without Intention to Pay.—A fruitful source of revenue for this class of frauds has been the use of the mails in ordering goods and merchandise, for which they did not intend to pay. The Courts have very justly held that such acts evidence the formation of a scheme within the meaning of this section, and the intent to not pay is drawn from the facts of the particular case, as, for instance, misrepresentation as to the solvency of the person or firm ordering, misstatement as to the sort of business engaged in, speedy sale of the goods and merchandise when received at a price below cost or at cost, and other facts that evidence no legitimate intent to engage in a legitimate business. United States vs. Woodson, 35 Fed., 358; United States vs. Staples, 45 Fed., 195. It must be borne in mind that the intent not to pay must exist before the credit is sought—must precede the order for the goods. United States vs. Wootten, 29 Fed., 702.

In United States vs. Evans, 153 U. S., 584, Mr. Justice Brown says:

"If a person buys goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense, even if he be disappointed in making such payment. But if he should purchase them knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the states."

Indictment.—It is absolutely necessary that the indictment allege the sort of a scheme or artifice, which sort must include a determination to use the Post-office establishment, and in addition must allege that the defendant deposited or caused to be deposited in the Post-office for mailing and delivery, mail matter, in pursuance of the scheme.

It is true that proof under this allegation will support a conviction if it shows that the defendants agent deposited the matter, and this even though the defendant may have been in another district. In Hume vs. United States, 118 Federal, 689, which was a case under the old statute, when the punishment made the offense a misdemeanor, Judge Shelby, speaking for the Circuit Court of Appeals, held that even assuming that the offense is a felony, the presence of the defendant at the time the letters are mailed, in furtherance of a scheme denounced by the statute, is not necessary to make him a principal in the crime. So., also, in United States vs. Fleming, 18 Federal, 907, it was held that it was not necessary, in order to make out the offense, that the defendant actually, with his own hands, placed a letter or packet in the post-office. If the proof show that it was done through his agency or direction, by an agent or employee, employed and directed for that purpose, it is sufficient to meet the allegations of the bill and the demands of the statute.

It should also be borne in mind in this connection that under the authority of United States vs. Loring, 91 Federal, 881, which seems to have been generally followed, it is not necessary to set out all of the letters in full in the indictment, nor to give the substance of their contents; nor is it necessary that it should appear from the letters that they were part of the fraudulent scheme. The indictment may make a general allegation that there were various and sundry and divers letters deposited and caused to be deposited to divers and sundry persons to the grand jurors unknown, if such allegations be true, and then set out particularly and accurately one letter, and if the defense desires to know the names and addresses upon the letters covered in the blanket portion of the indictment, they may obtain the same from the prosecuting officer by a proper request for a bill of particulars, addressed to the Court.

A letter set out particularly in the indictment will support a charge under the statute, even though the letter may be ever so formal, provided the letter was sent by the defendant with a view of executing his scheme to defraud. Durland vs. United States, 161 U. S., 306. Letters, however, which do not seem to have been written for the purpose of accomplishing any fraud,

are not an offense, of course. United States vs. Ryan, 123 Fed., 634; United States vs. Owens, 17 Fed., 72; Stewart vs. U. S., 119 Fed., 89. Similar letters to the one set out in the bill are always competent testimony, and may be introduced on the question of intent. United States vs. Watson, 35 Fed., 358; and under the authority of the United States vs. Sauer, 88 Fed., 249, the venue of the prosecution is determined by the point of mailing the letter or the packet, and prosecution must be had in the district in which the letter or packet was mailed. The Circuit Court of Appeals for the Ninth Circuit, speaking through Judge Wolverton, in Walker vs. United States, 152 Fed., 111, determined that all letters intended in some way to be utilized in connection with the scheme, are admissible, and quotes in support of that doctrine, the expression of Justice Brewer in the Durland case, cited *supra*, in these words:

"We do not wish to be understood as intimating that in order to constitute the offense, it must be shown that the letters so mailed were of a nature calculated to be effective in carrying out the fraudulent scheme. It is enough if, after having devised a scheme to defraud, the defendant, with a view to execute it, deposits in the post-office letters which he thinks may assist in carrying it into effect, although, in the judgment of the jury, they may be absolutely ineffective therefor."

In Lemon vs. United States, 164 Federal, 953, Circuit Judge Adams, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"The contention that the statements and letters set out in the several counts of the indictment negative the alleged fraudulent scheme, cannot be sustained. The mailing of a letter in the execution or attempted execution of a fraudulent scheme, is the gist of the offense denounced by the statute. It is that act, and it alone, which confers jurisdiction upon the Courts of the United States to punish devisors of fraudulent schemes. The letter which is mailed is not required to recite the whole scheme or be in itself effective to execute it. All that is imperatively required is that the letter mailed should be one calculated or designed to aid or assist in the execution or attempted execution of a scheme or device."

The Circuit Court of Appeals for the Third Circuit quotes with approval *in re* Henry, 123, U. S., 373, followed in De Barr,

179, U. S. 320, the following: "The Act forbids, not the general use of the post-office for the purpose of carrying out a fraudulent scheme or device, but the putting in the post-office of a letter or packet, or the taking out of such a letter or packet from the post-office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation."

Miller vs. United States.—The Circuit Court of Appeals for the Seventh Circuit, in the case of Miller vs. U. S., 174 Fed., 35, seems to run dangerously near an antagonistic decision to the Durland case, decided by the Supreme Court, cited *supra*. It is true that the Miller case holds that the indictment charged no offense because it did not charge that the stock sold was not worth the price paid for it, but the decision in reaching this particular point, which it decides, contains many expressions that might lead the practitioner to infer a dangerous broadness as to what is not comprehended within the meaning of the statute. It is true that all the decisions are a unit upon the proposition that there must be an intention to injure the person addressed or sought to be reached, by defrauding him of something which he already has, but it must be equally ever present in one's mind that the statute inhibits the formation of a scheme or artifice to defraud, wherein misrepresentations are made through the United States mail for the purpose of securing something of value from the person to whom such representations are made. In the Miller case, the devisor of the scheme to defraud was the President of a corporation. The corporation decided to increase its capital stock from $250,000 to $400,000. The corporation was an actual manufacturer, employing from one hundred to one hundred fifty men, the plant and good will of which was worth many thousands of dollars. The defendant represented through the mails, for the purpose of selling this increased stock, that the corporation desired to open branch houses for the sale of its goods and to employ therein managers at fixed salaries, besides a share of the profits, and that the company was earning a profit of twenty per cent. and paying six per cent. divident to holders of its stock out of its net earnings; that as a matter of fact the company was not earning twenty per cent., or any per cent., and was not paying any dividends; that pursuant to these rep-

resentations, the stock was sold in blocks of five thousand dollars each.

I do not fuss with the Court for determining that the indictment should have alleged that the stock was not worth what the purchasers paid therefor, but it does seem to me that the allegations otherwise contained a full and complete statement of such a case as comes easily within the meaning of the statute. There was a determination to increase the stock; the determination to increase the stock was due to the fact that the defendant needed money. In order to realize the money, representations were made with reference to the earning capacity of the plant, which, therefore, conrolled the value of the stock, and made it desirable or undesirable. The representations made with reference to the stock and the plant, its earning capacity, and dividends, were untrue and false, and made through the United States mail. It is not thought that any safe counselor would advise his client to engage in a similar enterprise.

Punishment and Number of Counts.—That paragraph of the 1889 Amendment, which related to the number of offenses committed within a certain given time, and which was construed in Hall vs. United States, 152 Federal, page 420, and which has been the occasion of some difference of opinion, is not entered into this statute. Late decisions, however, upon that old section, are the following: United States vs. McVickar, 164 Federal, 894; Lemon vs. United States, 164 Fed., 953.

A consideration of the following cases, for the purpose of finding illustrations of the effectiveness and limitation of the statute, will be interesting: United States vs. Smith, 166 Fed., 958; U. S. vs. Raish, 163 Fed., 911; Faulkner vs. U. S., 157 Fed., 840; U. S. vs. Dexter, 154 Fed., 890; Booth vs. U. S., 154 Fed., 836; Gourdain vs. U. S., 154 Fed., 453; Dalton vs. U. S., 154 Fed., 61; Francis vs. U. S., 152 Fed., 155; Van Dusen vs. U. S., 151 Fed., 989; U. S. vs. White, 150 Fed., 379; Brooks vs. U. S., 146 Fed., 223; U. S. vs. Hess, 124 U. S., 483; *in re* Henry, 123 U. S., 372; Stokes vs. U. S., 157 U. S., 187; Streep vs. U. S., 160 U. S., 128; Brown vs. U. S., 143 Fed., 60; U. S. vs. Etheridge, 140 Fed., 376; Betts vs. U. S., 132 Fed., 228; Packer vs. U. S., 106 Fed. 906; Tingle vs. U. S., 87 Fed., 320; U. S. vs. Smith, 45 Fed., 561.

§ 56. **The Civil Statute.**—Section 3929 of the old statute, amended by the Fifty-first Congress, as shown at page 804 of the first Volume of the Supplement, Act of September 19, 1890, gives the Postmaster General power to deny the use of the United States mails to those conducting fraudulent schemes. Interesting cases growing out of the exercise of such power are Missouri Drug Company vs. Wyman, 129 Fed., 623, which recites exhaustively and learnedly cases bearing upon this question, and mentions and distinguishes the leading case of Magnetic Healing vs. McAnulty, 137 U. S., 94; 47 Law Ed., 90; Donnell Company vs. Wyman, 156 Federal, 415; Appleby vs. Chiss, 160 Fed., 984; Putnam vs. Morgan, 172 Fed., 450. The weight of authority under this statute seems to be that a Court will inquire into the evidence that was submitted to the Postmaster General, and upon which that official acted, but will not determine the weight of the evidence. The Postmaster General, being in the Executive Department of the Government, and empowered with certain duties that involve judgment and discretion, is not bound by the discretion and judgment of the Courts, provided he have before him evidence upon which to base his act.

More is not said with reference to this statute and this interesting jurisdiction of the Post-office Department, for the reason that its discussion does not belong in this work, it relating to civil remedies.

§ 57. **Fraudulently Assuming Fictitious Address or Name.**—The meat of Section 216 in the new Code was an Amendment to the old Section 5480 of the Revised Statutes, and was an Act of the Second of March, 1889, 25 St. L., 873; First Supplement, 695.

In the new Code, however, the assumption of a fictitious, false, or assumed title, name, or address, for the purpose of conducting, prompting, or carrying on in any manner, by means of the Post-office establishment, any scheme or device mentioned in Section 215 of the new Code, or any other unlawful business, is made a separate section.

The same punishment, however, is carried for violations of this section as that provided for violations of Section 215.

It is not sufficient, under this section, that one assume a false or fictitious name or title to carry on a business, unless such

business be unlawful or denounced by the terms of Section 215. In other words, a business that is lawful in itself, even though conducted under an assumed, fictitious, or false name, and though furthered through the post-office establishment, would not be an offense under this statute. In United States vs. Smith, 45 Federal, 561, in passing upon a case where a person devised a scheme which contemplated that he should assume the role of a Chinese physician and pretend to possess curative power, and to be able to minister to those ailed certain Chinese herbs, but who in fact never fitted up such apartments, nor put into execution the scheme, other than to make such representations, the Court held that the business must be specifically charged and its unlawful character disclosed, for it is not an offense, within the statute, to assume a fictitious name in a lawful business.

In Tingle vs. United States, 87 Federal, 320, the Circuit Court of Appeals for the Fifth Circuit held that the indictment was defective, because it failed to allege in appropriate words that the alias and fictitious and false name set out in the indictment, to wit, Otho Aronson, was not in fact the name of a real person, and under this allegation in the bill, the Court charged the jury that they could convict the defendant whether or not Aronson was a real person, and this charge the Court held to be erroneous.

In other words, the decision would seem to indicate, though it does not so decide, that to be entirely safe, the prosecution must satisfy itself that the assumed name is not in reality the name of some actual person before it chooses to make the allegation in the bill. If the assumed name were in fact the name of a genuine person, then it is thought that the bill could not allege, and stand the test, that the name so used for the unlawful business was in fact fictitious and false. There should be appropriate allegations under a different portion of the law, or rather, as the law now stands, the case would be a fraudulent use of the mail, under Section 215, instead of Section 216.

§ 58. **Lottery, Gift-Enterprise, Etc., Circulars, Etc., Not Mailable.**—Thomas, in his interesting volume which treats exhaustively some postal offenses which include lottery violations, calls our attention to the fact that the lottery as a method of gambling

has prevailed from the remotest antiquity. In England, Italy, France, Germany, Austria, Spain, Holland, Denmark, Japan, China, Mexico, and many of the South American Republics, lotteries not only have flourished, but still live and thrive. The life of the lottery in the United States was active and fortune producing. The public conscience, however, first pricked in some of the old countries, notably England, aroused itself in the United States, and various state legislatures attempted to rid this country of this system of gambling. It was not until 1872, however, that Congress took a hand in the fight, giving us Section 3894 of the old Statute, which, while a move in the right direction, was rather puny, and not at all strong enough to combat the gigantic power and force of the deep-rooted evil. Later, September 19, 1890, 26 St. L., 465, First Volume Supplement, 803, came a substitute for 3894, under which much effective prosecution was had. On March 2, 1895, 28 St. L., 963, Second Volume Supplement, 435, came an assisting and auxiliary Act, which left in force all of the old statutes, and provided some new provisions. This was the last lottery act before the new code. Under this legislation, the lottery, and practically every other scheme involving a chance or draw, has been driven from this country. The law inhibits the passing of lottery matter either through the mails or by any private carrier from one state to another, or from another country to the United States, or from the United States to another country. The sending of lottery matter, as defined in the statute, which includes letters or circulars or any sort of an advertisement relating thereto, by any of the post-office facilities, for never so short a distance, is a violation: the sending of any such matter by private conveyance from one state to another state, or across the border from one country to another country, is a violation.

The new law, or Section 215, reads as follows:

"No letter, package, postal card, or circular, concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise or similar scheme offering prizes dependent in whole or in part

upon lot or chance; and no check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme; and no newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of such lottery, gift enterprise, or scheme, whether such list contains any part or all of such prizes, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier. Whoever shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both; and for any subsequent offense, shall be imprisoned not more than five years. Any person violating any provision of this section may be tried and punished either in the district in which the unlawful matter or publication mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed."

It will be noticed that every possible term indicating latitude in the old statutes has been incorporated into the new section, and in addition thereto, authorizes the trial of any offender in either the district wherein the matter was deposited in the mails, or in the district where the same was taken from the mails. The statute, however, continues to contain the original weakness of the old statutes, to wit, an indictment which charged merely the depositing of a lottery ticket, etc., purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, etc., would not be sufficient to sustain a conviction where the proof only showed the deposit of tickets, etc., evidencing a drawing that had already taken place. The tickets, to make an offense under that portion of the statute, must be for a future drawing; otherwise, it would not be a share or interest in or dependent upon the event of a lottery, etc. It is quite true that the indictment could include other portions of the statute, as, for instance, that the tickets, even though repre-

senting a past drawing, were advertisements of the lottery, and, therefore, contraband and unlawful. In France et al vs. United States, 164 U. S., 674; Book 41 Law Ed., 595, the Supreme Court of the United States, speaking through Mr. Justice Peckham, said:

"The lottery had already been drawn; the papers carried by the messengers were not, then, dependent upon the event of any lottery. The language as used in the statute looks to the future. The papers must purport to be or represent an existing chance or interest, which is dependent upon the event of a future drawing of the lottery. A paper that contains nothing but figures, which in fact relate to a drawing that has already been completed, and one that is past and gone, cannot properly be said to be a paper certificate or instrument as described in the statute. It purports to show no interest in or dependent upon the event of any lottery. If the lottery has been drawn, the interest is no longer dependent upon it. The condition upon which the bet or the interest was dependent has happened; the solution of the problem has already been arrived at; the bet has already been determined. The bare statement of that solution or determination, placed on paper, does not impart to that paper the character of a certificate or instrument purporting to be or represent a ticket, etc., dependent upon the event of a lottery. From the statement upon the paper, the agent may acquire the knowledge which will enable him to say who has won, but the book or the paper does not purport to be, and is not, a certificate, etc., within the Act of Congress."

It may, therefore, be contended that Section 213 is no broader in the way of remedying this defect than was the original law. The Act of March Second, 1895, still stands as the only Act that makes it against the law to transport by private carrier from one state to another. In 125 Federal, page 617, United States vs. Whelpley, the Court held that the Act of 1895 did not prohibit the transportation of lottery tickets from a state to the municipaliy of the District of Columbia, and also that the section did not prohibit the transportation of lottery tickets from one state "through" another state or states, where the ultimate destination of the shipment was not within one of the United States. See also United States vs. Ames, 95 Federal, 453, which held that the transportation of lottery tickets from a state to a territory is not within the statute. In this last case, however, the

point of great importance to the life and validity of the Act of March second, 1895, was, whether Congress had the power, under the Commerce clause of the Constitution, to prohibit the transportation of lottery matter from one state to another state in the United States, by carriers or persons that were not government utilities. Circuit Judge Jenkins held the law to apply fully. Thereafter, in the same case, styled Champion vs. Ames, in 188 U. S., 321; 47 Law Ed., 492, Mr. Justice Harlan, speaking for the Court, settled for all time the effectiveness of the new Act. The writer had the honor to draw the indictment passed upon in that case, and each of the defendants was afterwards convicted at the Dallas Division of the Northern District of Texas. In that opinion, Mr. Justice Harlan, after reviewing extensively the authorities, the Court having ordered a re-argument, said:—

"It was said in argument that lottery tickets are not of any real or substantial value in themselves, and, therefore, are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value.... These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would have paid to them the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them, and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the Act of 1895....We are of the opinion that lottery tickets are subjects of traffic, and, therefore, are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states."

§ 59. **What Is a Lottery or Chance?**—In Horner vs. United States, 147 U. S., 449, the Supreme Court of the United States in effect determined that whatever amounted to a distribution

of prizes by lot was a lottery, no matter how ingeniously the object of it might be concealed. In United States vs. Wallis, 58 Federal, 942, the Court held that the language of the statute is sufficiently comprehensive to include any scheme in the nature of a lottery, and it may be sufficient to say, said the Court, that this embraces the elements of procuring through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value. When such are the chief features of any scheme, whatever it may be christened, or however it may be guarded or concealed by cunningly devised conditions or screens, it is, under the law, a lottery. So, in Randall vs. State, 42 Texas, 585, the Court determined that Courts will not inquire into the name, but will determine the character of the transaction or business in which parties are engaged. Mr. Thomas, in his work, cited *supra*, has collaborated a number of definitions, from which the following are taken:

"A lottery is a sort of gaming contract, by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks."—*American and English Encyclopedia of Law.*

"Any scheme whereby one, in paying money or other valuable thing to another, becomes entitled to receive from him such return in value, or nothing, as some formula of chance may determine."—*Bishop of Statutory Crimes*, Section 952.

"Lottery, in its popular acceptation, is a distribution of prizes by lot or chance; and when the chances are sold and the distribution of prizes determined by lot, this constitutes a lottery."—Buck vs. State, 62 Ala., 432; Solomon vs. State, 62 Ala., 83.

"The generally accepted definition of a lottery is, that it is a scheme for the distribution of prizes for the obtaining of money or goods by chance."—People vs. Noelke, 94 N. Y., 137.

"Any device whereby money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery, is a lottery ticket."—Smith vs. State, 68 Md., 170; Bayland vs. State, 69 Md., 170.

"A lottery is a scheme, device, or game of hazard, whereby, for a smaller sum of money or other thing of value, the person dealing therein, by chance or hazard or contingency, may or may not get money or other thing of value, of greater or less

value, or in some cases of no value at all, from the owners or managers of such lottery."—State vs. Lumsden, 89 N. C., 572.

"Whatever may be the name or character of the machine or scheme, if in its use a consideration is paid, and there is gambling, the hazarding of small amounts to win larger, the result of winning or losing to be determined by chance, in which neither the will nor skill of man co-operates to influence the result, it is a determination by lot."—Loiseau vs. State, 22 Southern Rep., 138.

"Both by reason and authority, a lottery is a game—a game of chance."—Korten vs. Seney, 68 N. W., 824.

It must also be constantly borne in mind that a scheme may come within the meaning of the lot or chance or lottery clause of the above acts, even though every investor secures something; that is to say, even though there be no blanks. United States vs. Horner, cited *supra.* So in Seidenbender vs. Charles, 4 Serg. and Rawle, 151, (8 Am. Dec., 682), and Dunn vs. State, 40 Illinois, 465.

This class of cases covers and inhibits the so-called land scheme, where each adventurer secures a lot of land, but the lots are of unequal value, yet each being secured for the same price. The Supreme Court of Pennsylvania said upon this point:—

"If it be said that in this case there are no blanks, we answer that no material difference arises from that circumstance. Some of the most fraudulent lotteries ever known have been those in which there were no blanks. They are an imposition on the folly of mankind; for of what importance is it if a man who pays a considerable sum for a ticket has a prize of very little value."

So in the Dunn case, cited *supra,* the Supreme Court of Illinois said, the case showing that prizes in that scheme ranged in value from a cheap trinket to a grand piano:—

"If it differs from ordinary lotteries, the difference is chiefly in the fact that it is more artfully contrived to impose upon the ignorant and credulous, and is, therefore, more thoroughly dishonest and injurious to society."

§ 60. **Land Schemes.**—One of the most universal violations and attempts to violate the lottery statute are the various and sundry schemes for the sale and distribution of town-lot additions. A tract of land will be secured contigious to some city or town,

the same will be plotted into lots, and upon one or two of such lots a building will be erected, and then the entire addition put on the market at a uniform price per lot, there being some sort of an arrangement whereby the investors are to determine which one shall secure the important lot. This identical scheme has been denounced by the Supreme Court of Pennsylvania in the Seidenbender vs. Charles case, cited *supra*. In that case the evidence showed that a party possessed of a tract of land on the banks of a river divided into town lots, which he sold for three hundred thirty dollars each, the specific lot to be awarded to each purchaser by lot. The lots were of unequal value. The one on which the house was erected was valued at eleven thousand dollars; another having a barn on it was valued at three thousand dollars, and two of the others had wooden buildings thereon. While the lots abutting on the river were peculiarly valuable, the great mass which laid back from the river, and which were unimproved, bore no proportion to the price at which the tracts were sold.

This scheme was denominated a lottery.

Throughout the country this and similar decisions are being avoided by having the purchasers determine among themselves how the lots shall be divided, in which division there will be no drawing; as, for instance, a community of trustees will be appointed, and these trustees will pretend to auction the lots. It is thought, however, that all such schemes are really within the pale of the law, because the real incentive moving toward the purchaser in all these cases is the thought that he may secure the valuable lot.

§ 61. **Issuing of Stock.**—The Post-office Department and its force of inspectors, and particularly the Assistant Attorney General for that Department, has been most efficient in rendering service to the general public by declaring fraudulent a great many so-called stock concerns, insurance companies, building and loan associations, tontine policy corporations, that pretend to issue stock or certificates, or to loan money at some future date to such customers as would pay in small installments at short and stated periods. By applying figures and reasons to the respective plans of these fraudulent concerns, these officers of the

people determined that it was impossible for the concerns to carry out the contracts made, and when such conclusion has been reached, a fraud order has followed under the statute cited *supra,* and ofttimes the perpetrators have been convicted. Such a scheme was denounced and a conviction followed in the case cited at page 477 of the 156 Federal Reporter, Fitzsimmons vs. United States. That was a scheme by which certificates were issued by a corporation on each of which the holder agreed to pay one dollar per week, subject to forfeiture for non-payment, and about seventy-five per cent. of which payments were paid into a "mutual benefit credit fund" until all certificates prior in date had matured and been cancelled, when his own certificate should mature, and he should be paid from such fund a sum of two dollars for each week such certificate had been in force, provided there were in such fund the amount, which was not to exceed the sum of one hundred sixty dollars.

§ 62. **Other Cases.**—Other cases bearing directly and indirectly upon the statute under discussion, by reason of their having arisen under some of the preceding statutes, are the following:

United States vs. Irvine, 56 Fed., 375.
United States vs. Rosenblum, 121 Fed., 180.
United States vs. Fulkerson, 74 Fed., 619.
United States vs. McDonald, 65 Fed., 486.
McDonald vs. United States, 63 Fed., 426.
United States vs. Conrad, 59 Fed., 458.
United States vs. Politzer, 59 Fed., 273.
United States vs. Lynch, 49 Fed., 851.
United States vs. Bailey, 47 Fed., 117.
United States vs. Horner, 44 Fed., 677.
Ex parte Jackson, 96 U. S., 727.
In re Rapier, 143 U. S., 110.
Horner vs. United States, 143 U. S., 570, and 147 U. S., 449.
McDonald vs. U. S., 171 U. S., 689; also 87 Fed., 324.

U. S. vs. McCrory, 175 Fed., 802, holds incidental use of mails insufficient.

§ 63. **Postmasters Not to Be Lottery Agents.** — Section 214 makes it an offense punishable by not more than one hundred dollars fine, or imprisonment for not more than one year, or both,

for any postmaster or other person employed in the postal service, to act as an agent for any lottery, or under color of purchase or otherwise to vend lottery tickets, or to knowingly send the same by mail, or to deliver any letter or package or postal card or circular or pamphlet advertising any lottery, etc., which is a substantial re-enactment of the old Section 3851 of the Revised Statutes, the new section being somewhat broader and covering more territory. In Louisiana lottery cases, 20 Federal, 628, the Court held that the word "send" as used in the old section, signifies forwarding in the mail through the officers of the government.

§ 64. **False Returns to Increase Compensation.**—Section 3855 of the old statutes provided the basis for fixing the compensation and salary of postmasters of the fourth class. That statute was subsequently amended in some detail by the Act shown at page 186 of the First Volume of the Supplement, and later by the Act shown at page 417 of the First Volume of the Supplement, and still later by the Act shown at page 419 of the First Volume of the Supplement, and still later by Section 2 of the Act shown at page 602 of the 22 Statute at Large.

The pay of officers of this class is graded in this last act upon the amount of stamps canceled. For instance, on the first fifty dollars or less per quarter, one hundred per cent.; on the next one hundred dollars or less per quarter, sixty per cent.; on the next two hundred dollars or less per quarter, fifty per cent; and on all the balance forty per cent., the same to be ascertained and allowed by the Auditor of the Treasury for the Post-office Department in the settlement of the accounts of such postmasters, upon their sworn quarterly returns. To guarantee fidelity in these returns and these reports, Congress enacted Section 1 of the 20 St. L., page 141, which provided a punishment for any false return made by a postmaster to the Auditor for the purpose of fraudulently increasing his compensation. This includes what has been technically termed "false cancellation;" and while it is one of the most difficult offenses to prove in the postal service, such proof has repeatedly been made by the placing of proper watches and counts upon the outgoing

mail matter from the office, and by the estimating of the sale of stamps, computing of box rents, drop letters, etc.

Section 206 of the new statute increases the penalty and is much more comprehensive than the old statute, and reads as follows:

"Whoever, being a postmaster or other person employed in any branch of the postal service, shall make, or assist in making, or cause to be made a false return, statement, or account to any officer of the United States, or shall make, assist in making, or cause to be made, a false entry in any record, book, or account, required by law or the rules or regulations of the Post-office Department to be kept in respect of the business or operations of any post-office or other branch of the postal service, for the purpose of fraudulently increasing his compensation or the compensation of the postmaster or any employee in a post-office; or whoever, being a postmaster or other person employed in any post-office or station thereof, shall induce, or attempt to induce, for the purpose of increasing the emoluments or compensation of his office, any person to deposit mail matter in, or forward in any manner for mailing at, the office where such postmaster or other person is employed, knowing such matter to be properly mailable at another post-office, shall be fined not more than five hundred dollars, or imprisoned not more than two years, or both."

Few cases under this criminal statute have been reported. United States vs. Snyder, page 554 in the 14 Federal, and the same case in the 8 Federal, at page 805, do not contain any suggestions that will be of much benefit to the practitioner. This case simply determines that one may aid and abet a postmaster in committing the offense, and that evidence of other acts and doings of a kindred character are admissible to illustrate or establish the intent or motive in the particular act charged and being tried, which is, of course, the recognized doctrine in all criminal cases.

In United States vs. Wilson, 144 U. S., 24, affirmed in the 26 Court of Claims, 186, and 27 Court of Claims, 565, it was held that a postmaster was entitled to his salary under a designation by the Postmaster General, even though he was not commissioned by the President until some months thereafter.

§ 65. **Civil Remedy.**—The following cases relate to that portion

of the old statute, 20 St. L., 141, which relates to the civil feature in which the government is interested in the way of fixing the compensation, withholding the same, and recovering the same. A Postmaster General having allowed the commissions, he cannot recover the same without due process of law. United States vs. Case, 49 Fed., 270; United States vs. Hutcheson, 39 Fed., 540; United States vs. Miller, 8 Utah, 29.

The Postmaster General may determine, under the arbitrary power given him, what is right and reasonable in the matter of compensation, when the false return has been made. United States vs. Joedicke, 73 Fed., 100. A certified copy of an order of the Postmaster General to recover money against a postmaster for false returns, is *prima facie* evidence of the fact of such falseness. United States vs. Dumas, 149 U. S., 283; Joedicke vs. U. S., 85 Fed., 372; U. S. vs. Carlovitz, 80 Fed., 852; U. S. vs. Case, 49 Fed., 270; U. S. vs. McCoy, 193 U. S., 599.

§ 66. **Collection of Unlawful Postage.**—Closely akin to the foregoing section, and for the protection of the public, both in the way of extortion and to insure uniform service, is Section 207 of the new Code, which reads as follows:

"Whoever, being a postmaster or other person authorized to receive the postage of mail matter, shall fraudulently demand or receive any rate of postage or gratuity or reward other than is provided by law for the postage of such mail matter, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both."

It is a practical re-enactment of the old Section 3899, with the exception that the new section increases the punishment by adding the imprisonment feature. It is also more wholesale in its terms, since it uses the word "mail matter" while the old section used the word "letters."

§ 67. **Unlawful Pledging or Sale of Stamps.**—To further guarantee uniformity in the service and one price to all, and to conserve the government property and prevent its use by its official, and to restrict the salary of the Postmaster or other person employed in the post-office within the limits of that fixed by law, Congress passed old Section 3920 of the Revised Statutes, and later an addition at page 141 of the 20 St. L., both of which

acts are now included in the new section 208, in the following words:

"Whoever, being a postmaster or other person employed in any branch of the postal service, and being intrusted with the sale or custody of postage stamps, stamped envelopes or postal cards, shall use or dispose of them in the payment of debts, or in the purchase of merchandise or other salable articles, or pledge or hypothecate the same, or sell or dispose of them except for cash; or sell or dispose of postage stamps or postal cards for any larger or less sum than the values indicated on their faces; or sell or dispose of stamped envelopes for a larger or less sum than is charged therefor by the Post-office Department for like quantities; or sell or dispose of, or cause to be sold or disposed of, postal stamps, stamped envelopes, or postal cards at any point or place outside of the delivery of the office where such postmaster or other person is employed; or induce or attempt to induce, for the purpose of increasing the emoluments or compensation of such postmaster, or the emoluments or compensation of any other person employed in such post-office or any station thereof, or the allowances or facilities provided therefor, any person to purchase at such post-office or any station thereof, or from any employee of such post-office, postage stamps, stamped envelopes, or postal cards; or sell or dispose of postage stamps, stamped envelopes, or postal cards, otherwise than as provided by law or the regulations of the Post-office Department, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both."

Under the provisions of this section, the indictment must allege, and the facts must show, that the stamps used by the postmaster had been received by him officially from the government, because the use of stamps by a postmaster procured from another source, is not prohibited by the statute, as the word "intrusted" is used with reference to the sort of stamps protected by the Act. United States vs. Williamson, 26 Federal, 690. The new section is as strong in its inhibition against the use of stamps by a postmaster in the payment of merchandise, even though he place the money value of the stamps in the till of the post-office. In United States vs. Douglas, 33 Fed., 381, the Court in charging the jury, said:—

"The defendant, testifying on his own behalf, admitted that he had used stamps on several occasions in paying for merchandise and remitting money for the purpose of making change.

He says that he did this not dreaming that it was wrong, and that in every instance he put the money value of the stamps so used in the till of the post-office; in fact, thus purchasing the stamps from himself. The Act of Congress forbids any disposition by a postmaster of stamps intrusted to him, except the sale of them at their face value for cash to third persons. He cannot use them in purchase of goods, or in payment of debts nor can he purchase them from himself for any such purpose. By his own admission, therefore, he has violated the law, and if you believe him, you must find him guilty on the indictment."

In Palliser vs. United States, 136 U. S., 267; 34 Law Ed., 514, the Supreme Court of the United States, speaking through Mr. Justice Gray, held that the word "cash" in the Act forbidding a postmaster to sell or dispose of postage stamps except for cash, means ready money or money in hand. A sale on credit is not a sale for cash. That case further determines that an offer to a postmaster, promising him that if he would put postage stamps on certain circualrs and send them at the rate of fifty to one-hundred, that the writer would remit to him the price of the stamps, that such an offer was the tender of a contract for the payment of money to induce the postmaster to sell stamps on credit, in violation of his lawful duty, and that an offer of a contract to pay money to a postmaster for an unlawful sale by him of postage stamps on credit is not the less within the statute, (the Court was then considering Section 5451 of the old Revised Statutes), because his commission on the sale would be no greater than upon a lawful sale for cash. In United States vs. Walter Scott Stamp Company, 87 Federal, 721, Circuit Judge Lacombe, in passing upon a civil action of replevin brought by the government against a concern that had in its possession a great number of stamps, decided that the possession of stamps by persons outside of and unconnected with the Post-office Department is not presumptively unlawful.

§ 68. **Failure to Account for Postage and to Cancel Stamps.**— Section 209 of the new Code, reading as follows:

"Whoever, being a postmaster or other person engaged in the postal service, shall collect and fail to account for the postage due upon any article of mail matter which he may deliver, without having previously affixed and canceled the special stamp

provided by law, or shall fail to affix such stamp, shall be fined not more than fifty dollars,"

relates evidently only to what is commonly known as special or due postage. It was originally a part of the Act of March 3, 1879, as shown at page 249 of the First Volume of the Supplement, and was Section 27 of that Act.

§ 69. **Issuing Money Order Without Payment.**—Section 210 of of the new Code reads as follows:

"Whoever, being a postmaster or other person employed in any branch of the postal service, shall isue a money order without having previously received the money therefor, shall be fined not more than five hundred dollars."

The only difference between it and 4030 of the Revised Statutes, which was directed at the same offense, is that the new Code contains no minimum fine, and does not denounce the offense as a misdemeanor. In view of the lightness of the punishment and the dire consequences of issuing money orders without having received the money therefor, it is believed that Section 210 was intended merely for the punishment of postal employees who through negligence, and not by reason of any fraudulent design, issue a money order without previously having received the money therefor. Practically the entire money-order funds of the government are at the disposal of each employee who has authority to issue money-orders, and a punishment so light as that affixed under this section would be entirely disproportionate to the grievousness of the offense, and all fraudulent issues, therefore, of money orders, by postal employees, should or may be prosecuted under Section 218 of the new Code, as they were under 5463 of the old statutes and amendments thereto.

§ 70. **Counterfeiting Money Orders, Etc., and Fraudulently Issuing the Same Without Having Received the Money Therefor.**—Section 218 of the new Code embraces all the features of 5463 of the old statute, the Act of the third of January, 1887, First Supplement, 518, and the Act of the eighteenth of June, 1888, First Supplement, 593, and reads as follows:

"Whoever, with intent to defraud, shall falsely make, forge, counterfeit, engrave, or print, or cause or procure to be falsely made, forged, counterfeited, engraved or printed, or shall willingly aid or assist in falsely making, forging, counterfeiting,

engraving, or printing, any order in imitation of or purporting to be a money order issued by the Post-office Department, or by any postmaster or agent thereof; or whoever shall forge or counterfeit the signature of any postmaster, assistant postmaster, chief clerk, or clerk, upon or to any money order, or postal note, or blank therefor provided or issued by or under the direction of the Post-office Department of the United States, or of any foreign country, and payable in the United States, or any material signature or endorsement thereon, or any material signature to any receipt or certificate of identification thereon; or shall falsely alter or cause or procure to be falsely altered in any material respect, or knowingly aid or assist in falsely so altering any such money order or postal note; or shall, with intent to defraud, pass, utter, or publish any such forged or altered money order or postal note, knowing any material signature or endorsement thereon to be false, forged, or counterfeited, or any material alteration therein to have been falsely made; or shall issue any money order or postal note without having previously received or paid the full amount of money payable therefor, with the purpose of fraudulently obtaining or receiving, or fraudulently enabling any other person, either directly or indirectly to obtain or receive from the United States or any officer employed, or agent thereof, any sum of money whatever; or shall with intent to defraud the United States or any person, transmit or present to, or cause or procure to be transmitted or presented to, any officer or employee or at any office of the government of the United States, any money order or postal note, knowing the same to contain any forged or counterfeited signature to the same, or to any material endorsement, receipt, or certificate thereon, or material alteration therein unlawfully made, or to have been unlawfully issued without previous payment of the amount required to be paid upon such issue, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

An indictment under the forging or counterfeiting feature of this section must contain no incompatibility of purport and tenor clauses, and it is decidedly the safer plan for the bill to set out in *hec verba* the instrument, and the pleader must take careful notice that the instrument so set out does not differ in any respect from that portion of the bill giving the purport of the forged instrument.

The old Common Law rule that a fictitious name could not be subject to forgery, for the reason that there would be no one to

be defrauded, has a marked exception under this statute. In *ex parte* Hibbs, 26 Federal, 421, which was a case that arose by reason of a postmaster issuing a money-order on the application of a fictitious person payable to a certain bank, to which he at the same time wrote in the name of such person, directing that the amount of the order be collected and remitted to him in a registered package, which he intercepted as it passed through his office, converting the contents to his own use, the Court held that the Act of the postmaster constituted forgery, both at Common Law and under the statute, to wit, 5463.

In United States vs. Royer, 122 Federal, 844, the government elected to prosecute a clerk in a post-office authorized to issue money orders, who had issued money orders in payment of his private debts, under Section 4046 of the Revised Statutes, for an embezzlement of money order funds. Clearly, he was also guilty of a violation of Section 5463, after having issued the orders without first having received the money therefor, but the decision of the Court in that case shows to what extent an employee empowered to issue money orders may depredate upon the Government funds. In Vives vs. United States, 92 Federal, 355, Judge Pardee, speaking for the Circuit Court of Appeals for the Fifth Circuit, with reference to the defendant's use of money order funds by drawing money orders without previously receiving the money therefor, and which was a prosecution for embezzlement under 4046, said that the intention of the employee to return the money to the Government when a settlement of his account would have been due was no defense under the law. In United States vs. Long, 30 Federal, 678, Judge Speer, in charging the jury, said that forgery, being the fraudulent making or alteration of a writing to the prejudice of another man's right, and that one may be guilty of such forgery if he fraudulently signs his own name, although it is identical with the name of the person who should have signed. He further holds in the same case that the signature to a receipt on a money order is a material signature in the meaning of the law.

It may be here remarked that that portion of the statute which relates to the forgery of a material endorsement or signature to

a money order or any receipt thereon, is the portion of the law most frequently violated.

It must be continually borne in mind that the indictment must charge, and the proof must show that the forgery or other acts committed under this section were so committed with the intention to defraud. In United States vs. Morris, 16 Blatchf. (United States), 133, 26 Federal Cases No. 15813, the Court held that even though an indictment charged the defendant with having forged a material endorsement upon a post-office money-order with the intent to defraud a certain private person, the same was sufficient, because it was still an act which the United States had the authority to punish, for the better protection of money orders lawfully issued by the United States.

Judge Thayer, in United States vs. Crecilius, 34 Federal, page 32, said that the word "alter", as used in this statute, described an act or acts not distinctly covered or embraced by any preceding word.

Under the statute as it is now drawn, there is practically no act, alteration, erasure, or change that can be made to a money order with fraudulent intent that is not by some of the terms of the statute fitted with the meaning of the same.

§ 71. **Counterfeiting Postage Stamps, Domestic or Foreign.**— Sections 5464 and 5465 of the old statutes protected from forging and counterfeiting the stamps and envelopes and other output of the Post-office Department which were for the purpose of paying postage, whether of this or a foreign country. These two statutes, with some change in punishment, have become Sections 219 and 220 of the new Code, and they read as follows:

"Sec. 219. Whoever shall forge or counterfeit any postage stamp or any stamp printed upon any stamped envelope or postal card, or any die, plate, or engraving therefor; or shall make or print, or knowingly use or sell, or have in possession with intent to use or sell, any such forged or counterfeited postage stamp, stamped envelope, postal card, die, plate, or engraving; or shall make or knowingly use or sell, or have in possession with intent to use or sell, any paper bearing the water-mark of any stamped envelope, or postal card, or any fraudulent imitation thereof; or shall make, or print, or authorize or procure to be made or printed, any postage stamp, stamped envelope, or postal card of the kind authorized and provided by the Post-office De-

partment, without the special authority and direction of said Department; or shall, after such postage stamp, stamped envelope, or postal card has been printed, with intent to defraud, deliver the same to any person not authorized by an instrument in writing, duly executed under the hand of the Postmaster General and the seal of the Post-office Department, to receive it, shall be fined not more than five hundred dollars, or imprisoned not more than five years, or both."

"Sec. 220. Whoever shall forge, counterfeit, or knowingly utter or use any forged or counterfeited postage stamp of any foreign government, shall be fined not more than five hundred dollars, or imprisoned not more than five years, or both."

It will be observed that each of the sections fails to include any word with reference to intent, and in the absence of any such word, and under the authority of United States vs. Coppersmith, 4 Federal, 198, and United States vs. Field, 16 Federal, 779, it would seem that an indictment does not have to charge fraudulent intent in alleging the ingredients of a counterfeiting or forging charge. It is quite apparent that the observations in the two cases just cited that these offenses are not felonies, by reason of the repeal of the old statute, when the Act of June 8, 1872, became effective, is forceless under the new sections, because the new Code itself denominates all offenses felonies where the punishment may be confinement for a year.

Notwithstanding the severity of the punishment and the meaning usually given to the words "counterfeit" or "forge" in criminal statutes, which invariably implies venality and corruption, the language of these sections would seem to indicate that it was the intention of Congress to so denounce in definition, and by severe punishment, and to prevent, if possible, even experimenting in the reproduction of facsimiles of postage stamps, envelopes, cards, etc., like those made by the Government, because it may be argued that no one would trouble himself to facsimile such a small article, unless he intended to work injury. On the other hand, this may be one of those statutes in which Congress has neglected to include all of the elements of the offense, and it thereupon devolves upon the pleader to draw his bill sufficiently broad to define the offense, even though the statute do not do so.

§ 72. **Misappropriation of Postal Funds or Property by Use or Failure to Deposit.**—Section 225 of the new Code, reads as follows:

"Whoever, being a postmaster or other person employed in or connected with any branch of the postal service, shall loan, use, pledge, hypothecate, or convert to his own use, or shall deposit in any bank or exchange for other funds or property, except as authorized by law, any money or property coming into his hands or under his control, in any manner whatever, in the execution or under color of his office, employment, or service, whether the same shall be the money or property of the United States or not; or shall fail or refuse to remit to or deposit in the Treasury of the United States, or in a designated depository, or to account for or turn over to the proper officer or agent, any such money or property, when required so to do by law or the regulations of the Post-office Department, or upon demand or order of the Postmaster General, either directly or through a duly authorized officer or agent, shall be deemed guilty of embezzlement and every such person, as well as every other person advising or knowingly participating therein, shall be fined in a sum equal to the amount or value of the money or property embezzled, or imprisoned not more than ten years, or both. Any failure to produce or to pay over any such money or property, when required so to do as above provided, shall be taken to be *prima facie* evidence of such embezzlement and upon the trial of any indictment against any person for such embezzlement, it shall be *prima facie* evidence of a balance against him to produce a transcript from the account books of the Auditor for the Post-office Department. But nothing herein shall be construed to prohibit any postmaster depositing, under the direction of the Postmaster General, in a national bank designated by the Secretary of the Treasury for that purpose, to his own credit as postmaster, any funds in his charge, nor prevent his negotiating drafts or other evidences of debt through such bank, or through United States disbursing officers or otherwise, when instructed or required so to do by the Postmaster General for the purpose of remitting surplus funds from one post-office to another,"

supplants and takes the place of 4046 and 4053, Revised Statutes of 1878. The prosecution frequently comprised in one indictment against the same defendant violations of the two old statutes, laying a count under 4046 and then a count under 4053. These statutes are for the purpose of affording another guaran-

tee that the government shall take no chances whatever in the result of the judgment of its employees. A postmaster or a postal employee may be honest, and intend to only temporarily use the funds that belong to the Government which are in his custody or possession, but such honest intent with reference to the subsequent replacing is no protection against prosecution under this statute. Any use or appropriation or the failure to deposit, as required by the regulations, constitutes embezzlement within the meaning of this section. The Act not only protects money, but it likewise protects any property that may belong to the Postal Department.

The law of embezzlement is statutory. It originated in a bungling attempt to amend the Common Law of larceny, and is indeed a sort of statutory larceny. The methods of use or appropriation, therefore, denounced in the statute, are sufficient to describe this particular statutory embezzlement. In United States vs. Gilbert, 25 Federal Cases No. 15205, the Court used the following language:

"It is evident that an embezzlement such as is contemplated by this section may be proved in either one of two ways: first, by showing that in point of fact the postmaster has converted to his own use money order funds; second, by his failure to pay over such funds when required either by the law or regulations, or when demand is made by an officer authorized for that purpose.... Although it is true that the funds were subsequently paid into the post-office, and although it may also be, and probably was, true that these funds, when thus converted, were intended and expected to be replaced, so that the Government should sustain no loss, which go very far toward mitigating the offense, yet it is obvious that the enforcement of this section in all its strictness is essential to this class of government funds, and to the discouragement of postmasters from even temporarily using them for private purposes. The intention of replacing them, however honestly entertained, cannot be accepted as an excuse or apology for violating the law, as one may be disappointed by unexpected circumstances, and thus not only endanger the moneys of the Government, but involve himself in difficulty and criminal prosecution. The law intends that funds of this character should be kept absolutely separate and sacred, as the best method, not only of keeping the funds themselves secure, but of guarding the officers themselves from temptation and delinquency. A diversion of money order funds in any way

whatever prohibited by this section, or for any time, however short, constitutes embezzlement under this Act."

See also United States vs. Royer, 122 Federal, 844, which applied the doctrine of refusing to permit the postal employee to use Government money order funds in the payment of private debts by issuing money orders upon blanks in the employee's possession; also Vives vs. United States, 92 Federal, 355. The indictment, under this section, must allege that the funds were intrusted to the employee, so as to show the fiduciary capacity. U. S. vs. Royer, 122 Federal, 844. It will be noticed that the Act provides that a transcript from the account books of the Auditor for the Post-office Department, showing a balance against the officer, shall be *prima facie* evidence of such embezzlement. This provision, while seemingly harsh, is salutary; for otherwise, the officer could contend that as a matter of fact there was no balance against him, during which period of ascertainment he could be enjoying the use of the funds. In United States vs. Swan, 7 N. M., 311, that portion of the statute was held to be constitutional, and the Court there held that this provision was not in conflict with that section of the Constitution which provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. See also Faust vs. United States, 163 U. S., 454; 41 Law Ed., 224.

In an indictment against a public officer for embezzlement of public funds alleged to have been in his possession as such officer, the rule applied that it is sufficient to charge that he embezzled same, without more, see U. S. vs. Mason, 179 F., p. 552, which case also holds bill sufficient which specifies amount of money and states grand jury is unable to give further information of description.

In United States vs. Young, 25 Federal, 710, the Court passes upon a state of facts, and concludes that they indicate that the prisoner was an adroit criminal rather than an insane man, and, therefore, fixed responsibility upon him for the temporary use of Government money, under this statute. It must also be borne in mind that in indictments under this section, against employees of the postal service other than postmasters, it is not necessary to allege nor to prove the want of consent of a postmaster to the

embezzlement of money order funds. Foust vs. United States, 163 U. S., 454; 41 Law Ed., 224. It must also be remembered that indictments under this section, under the authority of Moore vs. United States, 160 U. S., 269; 40 Law Ed., 424, must allege that the funds came into the possession of the defendant in his official character and by virtue of such employment, and specifically set out the sort of employment he was engaged in for the Government.

§ 73. **Rural Carriers Responsible Under This Section.**—In United States vs. Mann, 160 Federal, 552, District Judge Speer held that the post-office regulations authorizing rural letter carriers to take and receipt for money from patrons of their routes, to purchase and forward money orders to the persons for whom they are designed, did not make the money so received and receipted for by rural carrier from patrons of his route, to be used in the purchasing and forwarding of money orders, while in the possession of such carrier, and before surrender at the post-office, "money order funds," for the embezzlement of which the carrier could be prosecuted under Section 4046. This was the construction placed upon the statute with reference to embezzlements by rural route carriers by many of the trial courts, though there was some difference of opinion. It became and was, however, very necessary that such funds should be protected, and the provision in the new section which protects the money "or property coming into his hands, or under his control in any manner whatever, in the execution or under color of his employment or service, whether the same shall be the money or property of the United States or not," clearly protects all such funds, and gives to the statute a color and meaning badly needed.

The reasoning with reference to allegations in the indictment in Dimmick vs. United States, 121 Federal, 638, though upon Section 5492 rather than the one under discussion, may be interesting, because under that statute, similarly worded, the Circuit Court of Appeals for the Ninth Circuit held that the jury must find, in order to convict the defendant, that the failure to deposit was intentional and wilful, and that these words intentional and wilful must be read into the statute.

§ 74. **Stealing Post-office Property.**—Section 190 of the new Code enlarges the punishment, and simplifies old Section 5475, and reads as follows:

"Whoever shall steal, purloin, or embezzle any mail bag or other property in use by or belonging to the Post-office Department, or shall appropriate any such property to his own or any other than its proper use, or shall convey away any such property to the hindrance or detriment of the public service, shall be fined not more than two hundred dollars, or imprisoned not more than three years, or both."

The indictment under this section simply contains the ordinary elements for the charging of statutory theft, or Common Law larceny. That portion of the statute which relates to the use of any property demands in the bill of indictment to properly plead the offense the use of the word showing intent and wilfulness. An innocent use or mistaken use under this section it is not thought would be an offense. In United States vs. Yennie, 74 Federal, 221, the Court held that a count might be laid under this Section and a count under 5478 in the same indictment, without being duplicitous.

§ 75. **Other Offenses.**—The new Code, in addition to the offenses heretofore mentioned, creates and re-enacts sections relating to the following:

Conducting Post-office without authority: Section 179, old Revised Statutes 3829.

Illegal carrying of mail by carriers and others: Section 180, old Section 3981.

Conveyance of mail by private express forbidden: Section 181, old Section 3982.

Transporting persons unlawfully conveying mail: Section 182, old Section 3983.

Sending letters by private express: Section 183, old Section 3984.

Conveying of letters over post roads: Section 184, old Section 3985.

Carrying letters out of the mail, on board a vessel: Section 185, old Section 3986.

When conveying letters by private person is lawful: Section 186, old Section 3987.

Wearing Uniform of carrier without authority: Section 187, old Section 3867.

Vehicles, etc., claiming to be mail carriers: Section 188, old Section 3979.

Deserting the mail: Section 199, old Section 5474.

Delivery of letters by master of vessel: Section 200, old Section 3977.

Vessels to deliver letters at post-office; oath: Section 204, old Section 3988.

Letters carried in a foreign vessel to be deposited in a post-office: Section 203; old Section 4016.

Using, selling, etc., canceled stamps, and removing cancellation marks from stamps, etc.: Section 205; old Section 3922, 3923, 3924, and 3925.

Poisons and explosives non-mailable: Section 217, Old Section 3878; First Supplement, 247, and Second Supplement, 507.

Enclosing higher class in lower class matter: Section 221, old Section 3887 and First Supplement, 578.

Postmaster illegally approving bond, etc.: Section 222, old Section 3947 and First Supplement, 45.

False evidence as to second-class matter: Section 223, old Section, First Volume Supplement, 593 and 33 St. L., 823.

Inducing or prosecuting false claims: Section 224.

Employees not to become interested in contracts: Section 226; old Section 412.

Fraudulent use of official envelopes; Section 227; old Acts, First Supplement, 135 and First Supplement, 467.

Fraudulent increase of weight of mail: Section 228, old Act, Second Supplement, 778, and 30 St. L., 442.

Offenses against foreign mail in transit: Section 229; old statute 4013.

§ 76. Section 230 provides that every person employed in the postal service shall be subject to all penalties and forfeitures for the violation of laws relating to such service, whether he has taken the oath of office or not, and Section 231 provides that the words "postal service" wherever used in this chapter, meaning chapter on offenses against the postal service, shall be held and deemed to include the Post-office Department.

CHAPTER IV.

COUNTERFEITING AND OTHER OFFENSES AGAINST THE CURRENCY, COINAGE, AND OTHER SECURITIES.

§ 77. By the terms of Section 147 of the new Code, which is a substantial re-enactment of old Section 5413, the words "obliga-

tion or other security of the United States" are defined to mean all bonds, securities of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, certificates of deposit, bills, checks or drafts for money drawn by or upon authorized officers of the United States, stamps and other representatives of value of whatever denomination, which have been or may be issued under any Act of Congress, and the words "gold certificates" and "silver certificates" were not in the old section.

When, therefore, in this chapter, or in any of the sections cited and treated, the words "obligation or other security of the United States" are used, they will be understood to mean and include the securities above mentioned, and any other representative of value issued by authority of Congress. Judge Wheeler, in discharging Houghton from the custody of the state officers, who held him for violation of a state statute against counterfeiting, held, 7 Federal, 657, that the bills issued by national banks are securities of the United States, which Congress has power to protect by punishing the counterfeiting of them. He also held in the same case that the United States, in pursuance to Constitutional and statutory law, have the exclusive right to prosecute for counterfeiting Federal obligations, even though there be a state statute against the same offense, and that a Federal Court will, upon *habeas corpus*, discharge a defendant held by the state authorities for the offense of counterfeiting. To the same effect is the decision by the same judge in the 8 Federal, 897, *ex parte* Houghton. In United States vs. Albert, 45 Federal, 552, Judge Pardee held that an indictment which charged the defendant with uttering and publishing a certain false, forged, and altered United States Treasury Warrant, was insufficient to sustain a verdict of guilty, when the evidence showed that the defendant had really negotiated a genuine check, drawn by an authorized officer of the United States upon an Assistant Treasurer, but had forged the endorsement of the name of the payee. Of course, the indictment could have been drawn so as to allege the forgery of the endorsement, which would have been entirely sufficient, under the statute; but, inasmuch as the indictment charged the whole instrument to be false

and forged, the proof did not sustain the charge, because, as a matter of fact, the instrument itself was not forged, but genuine, the only forged part being the endorsement.

The Circuit Court of Appeals for the Second Circuit, in Krakowski vs. United States, 161 Federal, page 88, held that it was not sufficient to warrant a conviction under Section 5430, which makes it a criminal offense for any person to have or retain in his control or possession "after a definitive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury, or some other proper officer of the United States," where the proof showed that the defendant had in his possession paper which might be used to make counterfeit obligations or securities. In other words, the Court held that that portion of the section included as penal having in possession without authority, of the distinctive paper itself or of some paper adapted to the making of Government obligations and securities. 5430, it will be borne in mind, is

§ 78. **New Section 150** upon which the following cases may be cited:

United States vs. Williams, 14 Fed., 550.

United States vs. Smith, 40 Fed., 755.

United States vs. Stevens, 52 Federal, 120.

United States vs. Barnett, 111 Federal, 369.

United States vs. Pitts, 112 Federal, 522.

United States vs. Conners, 111 Fed., 732.

§ 79. **The Neall Case.**—The Circuit Court of Appeals for the Ninth Circuit, in the case of Neall vs. United States, 118 Federal, 699, determined that one who forges a certificate of deposit purporting to have been issued on behalf of the United States to an enlisted soldier, by signing thereto the name of the person described as an officer and deputy Paymaster General, has forged an "obligation of the United States," and an indictment therefor which alleged in the same count an intent to defraud both the United States and a soldier in the army, was not bad for duplicity, because, said the Court, it is impossible in such a case

to aver or prove with certainty a specific intent to defraud either one rather than the other, and the law will impute to the act an intent to defraud all who might have been thereby defrauded.

That the intent involved in the old statute and in the new is general, is also determined in the case of United States vs. Jolly, 37 Federal, 118. In De Lemos vs. United States, 91 Federal, 497, the Circuit Court of Appeals for the Fifth Circuit quashed an indictment for forgery under old Section 5414, where the proof showed the forgery of an endorsement on a draft, because the indictment failed to charge that the genuine draft with the forged endorsement, constituted together a forged obligation of the United States. In other words, the decision is in line with the Albert case referred to above. In the De Lemos case, the Court said that an indictment which avers that the draft itself constituted the obligation which was forged, and which, by every averment, shows that the forgery consisted in the false making of the endorsement, is in itself repugnant, and does not properly lay the offense.

§ 80. **Forging or Counterfeiting United States Securities.**—Section 148 of the new Code takes the place, and is in the same words as old Section 5414, and what has been observed and the citations that have been given are authorities upon this new section, which reads as follows:

"Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than five thousand dollars and imprisoned not more than fifteen years."

Bearing in mind what has been said with reference to obligation or other security of the United States, it will be interesting to cite in this connection Section 149 of the new Code, which takes the place of the old Section 5415, and which reads as follows:

"Whoever shall falsely make, forge, or counterfeit, or cause or procure to be made, forged, or counterfeited, or shall willingly aid or assist in falsely making, forging or counterfeiting, any note in imitation of, or purporting to be in imitation of, the circulating notes issued by any banking association now or hereafter authorized and acting under the laws of the United States; or whoever shall pass, utter, or publish, or attempt to pass, utter,

or publish, any false, forged, or counterfeited note, purporting to be issued by any such association doing a banking business, knowing the same to be falsely made, forged, or counterfeited; or whoever shall falsely alter, or cause or procure to be falsely altered, or shall willingly aid or assist in falsely altering, any such circulating notes, or shall pass, utter, or publish, or attempt to pass, utter, or publish as true, any falsely altered or spurious circulating note issued, or purporting to have been issued, by any such banking association, knowing the same to be falsely altered or spurious, shall be fined not more than one thousand dollars and imprisoned not more than fifteen years."

In the same connection, and in place of old Section 5431, is new Section 151, which relates to the passing, selling, concealing, etc., of forged obligations, and which reads as follows:

"Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than five thousand dollars and imprisoned not more than fifteen years."

Attention is also called to Section 162 of the new Code, which reads as follows:

"Whoever shall so place or connect together different parts of two or more notes, bills, or other genuine instrument issued under the authority of the United States, or by any foreign government, or corporation, as to produce one instrument, with intent to defraud, shall be deemed guilty of forgery, in the same manner as if the parts so put together were falsely made or forged, and shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

Sections 156, 157, 158, 159, 160, and 161 of the new Code elaborately include the offenses originally comprehended in the first volume of the Supplement, page 429, known as the Act of May 16, 1884, 23 St. Large, page 23, and relate to the offenses of counterfeiting notes, bonds, etc., of foreign governments, passing such forged notes, bonds, etc., counterfeiting notes on foreign banks, passing such counterfeited bank notes, having in possession such forged notes, bonds, etc., and having unlawfully in possession, or using, the plates for any such notes, bonds, etc.

The leading cases under the old act, and, therefore, ranking precedents under the new sections from 156 to 161 inclusive, are, United States vs. Arjona, 120 United States, 479, and Bliss vs. United States, 105 Federal, 508. In the Arjona case, the Supreme Court of the United States upheld the constitutionality of the Act, and said that the United States not only had the power, but that it was their duty to prevent and punish the counterfeiting within their jurisdiction of the notes, bonds, and other securities issued by foreign governments, or under their authority, and that an act to prevent transgression against foreign securities did not have to declare the offense to be an offense against the law of nations. In Bliss vs. United States, the Court of Appeals for the First Circuit, in affirming a judgment of conviction against Bliss for counterfeiting a number of the notes of the Dominion of Canada of the same series and bearing consecutive numbers, held that the counterfeiting of the same at different times, although all apparently of the same series and apparently from the same plate, constituted distinct offenses, and a conviction for one is no bar to a prosecution for the other.

§ 81. **Forging and Counterfeiting United States Securities and National Bank Notes.**—We now return to a discussion of Sections 148, 149 and 151, heretofore referred to. In these sections, together with Section 162, will be found practically all of the safe-guards that protect the genuine, and prosecute for the forging or counterfeiting of the government obligation or national bank note. Until the adoption of the New Code, there was no statute similar to the new Section 162. Prosecutions for alterations of genuine bills of small denominations, by erasing and pasting and changing the numerals and wording thereon, were had under 5414, which is now Section 148.

We instantly understand that one who prepares, with bad intent, an instrument that pretends to be an obligation of the United States or national bank currency, is within the purview of the statutes. There is a nice question, though, that hinges about the latitude and meaning of the word "imitation" and the word "similitude" as found in these old statutes and in the new ones. In Logan vs. United States, 123 Federal, 291, the defendant had robbed a train and secured a lot of forty thousand

dollars of unsigned national bank notes, consigned by the Comptroller of the Currency to the National Bank of Montana, and thereupon signed fictitious names to the notes as President and Cashier of the bank, and passed them. The first question raised by the defense was, that inasmuch as the signatures to the notes were those of fictitious persons, no forgery could be laid, which objection the Court overruled, citing United States vs. Turner, 7 Peters, 132, 8 Law Ed., 633, and said:

"The fact that the names signed as President and Cashier were fictitious is of no importance. The public mischief is the same whether the names forged are those of the genuine officers or of fictitious persons."

To the other defense raised that such performances did not constitute the crime of forging notes under Section 5415, the Court answered that national bank notes to which signatures have been forged, and which have been put in circulation, are redeemable by the Act of July 28, 1892, 27 St., 322, and this redemption clinches the offense, rather than acting as a defense thereto, and a conviction of the defendants was affirmed.

§ 82. **Confederate Money.**—In United States vs. Wilson, 44 Federal, 751, Judge Hallett, in passing upon an indictment against Wilson for having passed a Confederate States note, said:

"It is only necessary to say that the offense defined in this section and in other sections which have been referred to in argument upon this motion, is that of passing, uttering, or publishing any counterfeit note. The note must purport to be issued by such an association doing a banking business. This, so far as disclosed, was not a counterfeit at all. It was a genuine note; that is to say, it was a genuine note of the Confederate States of America, and therefore, it was not counterfeit in the sense of this statute, or of any statute, and then it was not on its face, or in any way, a note of any national bank, or of the United States. There were no words to make it such. The counterfeit referred to in the statute must, at all events, have a greater resemblance to the current money of the United States than to anything else. This note, in the size and shape and color, and in the denomination of the figures upon it, has some resemblance to the current notes in circulation as money, but that is not enough to make it a counterfeit of the circulating notes of the United States."

To the same effect is United States vs. Kuhl, 85 Federal, 624,

the Court saying that an ordinary Confederate States five-dollar note does not bear to the national currency the similitude contemplated in Revised Statutes 5430, notwithstanding such notes are frequently accepted by mistake as money. In this same case, the Court said that the "similitude" contemplated in Revised Statute 5430 is such a likeness or resemblance as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary care and observation, when dealing with a supposed honest man.

§ 83. **Other Securities, Including State Bank Notes.**—Judge Hanford, in 91 Federal, United States vs. Fitzgerald, left the question of similitude and similarity and imitation to the jury, upon a case against Fitzgerald for having in his possession a hundred shares of the capital stock of the Denver Mining Company, of the par value of one thousand dollars, the certificate of which stock, in its size, quality of paper, style of printing, resembled a United States bond for the sum of one thousand dollars, and further resembled a United States bond for the said amount in that it had the words "The United States" printed across the face thereof, and the paper also had heavy green border and scroll work resembling somewhat the ornamentation of United States bonds. In leaving the question to the jury, he said:

"The similitude must be in such a degree as to furnish a resemblance so near to the Government obligations or securities that it could be used to deceive a person of ordinary intelligence, who is acting with ordinary care in a business transaction. The resemblance is sufficient for the purpose if you believe that it would probably deceive a person taken unawares in dealing with a person who he believed was acting honestly."

In United States vs. Stevens, 52 Federal, 120, District Judge Paul held in substance that a note that was originally issued by a duly authorized state bank, which was a legal note at the time of its issuance, but afterwards became utterly worthless by the insolvency of the bank, subjected the holder thereof to prosecution under Section 5430, if it was in his possession with intent to sell or otherwise use it, and pass it, as a genuine note or obligation of the United States. It is not thought that this is good law. Congress certainly has no authority to prevent the issuance

of state bank notes. It simply taxes them out of existence, and one who passed a worthless state bank note, contending that it was a genuine United States obligation, would only be an offender against the state law for cheating or swindling. His statement with reference to the instrument does not, within the meaning of the law, constitute it a forgery, nor give it such likeness and similitude as will make it contraband under the Federal statute.

Judge Bellinger, in United States vs. Conners, 111 Federal, 734, decided that a bill or note issued by the state bank of New Brunswick, New Jersey, which thereafter became insolvent and worthless, but which was alleged in the indictment to be in the possession of Conners for evil purposes, and that the same was in similitude of an obligation and security issued under the authority of the United States, was not in the "similitude" within the meaning of Section 5430, since it did not purport to be an obligation or security of the United States, and an indictment for a violation of that section did not charge an offense where it showed that the instrument referred to was such a bank bill.

In United States vs. Beebe, 149 Federal, 618, Judge Archbald, in passing upon a case which was based upon the defendant passing a genuine note, which had theretofore been issued by a state bank, even though at that time the note was worthless, and may have had some resemblance, by reason of its color, to a United States note, determined that no offense against the United States had been committed. He said:

"There must at least be such a resemblance if not simulation, as is not only calculated to deceive a person of ordinary intelligence, but as enables us to say with some degree of certainty that in disposing of or using it, the party charged was evidently trying to palm it off as a genuine obligation of the United States ..... (citing and distinguishing cases). A broader ruling would make all state bank issues obnoxious; with regard to which, it may also be further observed that state currency is not prohibited, but is simply taxed out of existence; notwithstanding which, if anyone desires to put out notes or bills to pass as money, there is nothing to prevent it, to say nothing of being charged with counterfeiting, if they happen to prove worthless. .....The Federal Government is only concerned with protecting the people against spurious or counterfeited imitations of

the money to which it gives currency, and to those the Act is to be confined. It cannot, indeed, be extended further, without entrenching upon the reserved rights of the states, which we must be careful to respect, if the dual form of government which we have is to be preserved."

§ 84. **Allegation of Knowledge.**—These statutes being highly penal, and being given life only when there is evil intent, make it absolutely necessary that the indictment allege, and the proof show, either by circumstantial or direct evidence, the intent to defraud in making, forging, or altering, and the knowledge of such falseness, before the passing is unlawful. The Circuit Court of Appeals for the First Circuit, in Gallagher vs. United States, 144 Federal, page 87, held that in a prosecution under Section 5415, for passing false or forged national bank notes, knowledge that they were falsely made is an essential element of the offense, and there must be some evidence of such knowledge, circumstantial or otherwise, aside from proof merely that the spurious note was passed. The Court says:

"The fact of knowledge may be proven in a variety of ways. There should, however, always be some evidence tending to show knowledge beyond that which results from mere proof that the spurious bill was passed. This rule results from the nature of the transaction, because, as is very well known, spurious notes are so skilfully fashioned that one might naturally and innocently, as is oftentimes the case, receive and pass them in the whirl of business. In such a case, intent and guilty knowledge, within the meaning of the statute, would be absent; hence, the rule requiring something more than evidence of the mere passage of the counterfeit paper."

It is very true that such evidence may be gathered from a field of circumstances, the manner in which the payment was made, the fact that a large bill was offered when the defendant had convenient change at hand; the placing of the money quietly and sliding it along the table or counter or receptacle; previous attempts to pass the same coin or bill and the rejection thereof, or the frequent passing of the same sort; conflicting statements, etc., etc. In United States vs. Carll, 105 United States, 611, the Supreme Court held that the allegation knowingly and wilfully was absolutely necessary to the validity of the indictment.

§ 85. **Description.**—Accurateness and preciseness are indis-

pensable in the allegations of the indictment, when it comes to describing the false instrument passed or made. In United States vs. Howell, 64 Federal, 110, the Court held that an indictment which specified the particular kind of obligation, the denomination of such obligation, the allegation that the bill purported to be a United States note, and giving the denomination thereof, was sufficient. It is thought, however, to be the better practice to set out the main features of the front and back of the bill or security. Of course, it is not meant to say that pictures or impossible delineations, or even difficult drawings, are to be incorporated in the bill, but the large numbers and wording, and identifying issues or series of both the front and back of the bill should be specifically set forth. It is fatal variance for the indictment to incorrectly describe the alleged counterfeit bills in respect to the bill number, U. S. vs. Mason, 12 Blatch, (U. S.) 497. If the grand jury does not have the bill it may so allege and describe as well as the circumstances will permit, U. S. vs. Howell, 64 F., 110.

§ 86. **Circulating Bills of Expired Corporation.**—Section 174 of the New Code practically re-enacts Section 5437. We have seen that under ordinary circumstances, unless there be some fatally misleading similarity, imitation, or similitude, the passing of the note of a defunct bank is not a Federal offense. Section 174 of the New Code inhibits the issuing or uttering of any note or obligation or bill or check or draft by any officer of an expired banking corporation. The statute, of course, does not apply to one who is not, or was not, connected with the institution during its life.

§ 87. **Mutilating or Defacing National Bank Note.**—Section 5189 of the old statutes has been so changed as to read as follows, in Section 176 of the New Code:

"Whoever shall mutilate, cut, disfigure, or perforate with holes, or unite or cement together or do any other thing to any bank bill, draft, note, or other evidence of debt, issued by any national banking association, or shall cause or procure the same to be done, with intent to render such bank bill, draft, note, or other evidence of debt unfit to be re-issued by said association, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both."

Under the old statute, the person doing the things therein denounced was liable to a penalty of fifty dollars, recoverable by the association, but under the new statute, the act becomes an offense punishable by indictment. Under the present section, as well as under the old statute, the prosecution must allege, and the proof must show that the mutilation, defacing, etc., of the note, bill, or draft, must have been with the intent to unfit the same to be re-issued by the association issuing it.

§ 88. **Imitating National Banking Notes with Printed Advertisement Thereon.**—Section 175 of the New Code takes the place of Section 5188, and reads as follows:

"It shall be unlawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use any business or professional card, notice, placard, circular, handbill, or advertisement in the likeness or similitude of any circulating note or other obligation or security of any banking association organized or acting under the laws of the United States which has been or may be issued under any act of Congress, or to write, print, or otherwise impress upon any such note, obligation, or security, any business or professional card, notice, or advertisement, or any notice or advertisement, or any matter or thing whatever. Whoever shall violate any provision of this section shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both."

The new section becomes an offense wherein the penalties are recovered by the public prosecutor through indictment or information. Under the old statute, the offender was liable to a penalty of one hundred dollars, recoverable on the suit of the informer, one-half of which went to the informer. Under the authority of United States vs. Laeseki, 29 Federal, 699, the penalty provided by the old section could only be recovered by a *qui tam* action brought by an informer, and could not be recovered by indictment at the instance of the Government.

This section is intended alone for the purpose of protecting national bank notes, and does not, by construction or otherwise, relate to the protection of any other government security or obligation. The statute really contains two offenses: the one against making any token, advertisement, circular, etc., in the likeness or similitude of any circulating note or other obligation; and the other is directed against the placing of any writing,

printing notice, or any other advertisement upon one of the circulating notes or bills of the national bank currency. "Advertisement" to be read into entire statute, Kaye vs. U. S., 177 F., p. 147.

§ 89. **Imitating United States Securities or Printing Business Cards on Them.**—Closely akin to the section above discussed is new Section 177, which reads as follows:

"It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use any business or professional card, notice, placard, circular, hand-bill, or advertisement, in the likeness or similitude of any bond, certificate of indebtedness, certificate of deposit, coupon, United States note, or other obligation or security of the United States which has been or may be issued under or authorized by any Act of Congress heretofore passed or which may hereafter be passed; or to write, print, or otherwise impress upon any such instrument, obligation, or security, any business or professional card, notice, or advertisement, or any notice of advertisement of any matter or thing whatever. Whoever shall violate any provision of this section shall be fined not more than five hundred dollars."

This section takes the place of old Section 3708, and is more severe in penalty. The penalty of the old section was not recoverable except upon the suit of an informer, and the authority of the United States vs. Laescki, 29 Federal, 699, governed. The new section authorizes prosecution by information or indictment, and by the government, instead of waiting for an informer to move. This statute, like the preceding, protects from defacement securities, moneys, notes, and other obligations of the United States, and also prevents the making, for advertising purposes, of any card or other circular in likeness or similitude to any such government security or obligation.

§ 90. **Notes of Less Than One Dollar Not to Be Issued.**—Section 3583 of the Revised Statutes of the United States, that has been the law since 1878, has simply been re-enacted in Section 178 of the New Code, which went into effect January 1, 1910. This section reads as follows:

"No person shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation for a less sum than one dollar, intended to circulate as money, or to be received

or used in lieu of lawful money of the United States; and every person so offending shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both."

The old section simply had the additional words, "at the discretion of the Court." These words were left off of the new section, which, however, does not alter the punishment, because the same is in the discretion of the Court under the new section, and he may assess either or both, as he pleases.

There seems to be no doubt, so far as the decisions are concerned, that a personal check drawn upon a bank in the settlement of an obligation, and not to be circulated as money, is entirely lawful, and is not interfered with by the above section. So early as 1878 the Supreme Court of the United States, in the case of the United States against Van Auken, 96 U. S., page 366, determined that the section was intended to prevent the issuance of tokens which were to circulate as money. That decision has since been followed, directly and persuasively, in Hollister vs. Merchant Institute, 111 U. S., 63; United States vs. White, 19 Federal, 724; in re Aldrich, 16 Federal, 370; United States vs. Rousopulous, 95 Federal, 978; Zion Institute, etc., vs. Hollister, 3 Utah, 301; Martin Lumber Company vs. Johnson, 70 Ark., 219; 66 S. W., 925.

Of course, anything I have said here does not mean that individuals or business concerns should issue, for the payment of help, any sort of a token that the employees could not immediately take to a bank and receive the cash thereon.

The statute is simply for the purpose of confining the power to issue money in the Constitutional channel, to wit, the hands of Congress, and not to individuals, or firms, or concerns.

§ 91. **Counterfeiting Gold or Silver Coins or Bars.**—Without substantial alteration, old Section 5457 and the Amendment, as contained in the First Supplement, 128, becomes Section 163 of the new Code, in the following words:

"Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or shall willingly aid or assist in falsely making, forging, or counterfeiting, any coin or bars in resemblance or similitude of the gold or silver coins or bars which have been, or hereafter may be, coined or stamped at the mints and assay offices of the United States,

or in resemblance or similitude of any foreign gold or silver coin, which by law is, or hereafter may be, current in the United States, or are in actual use and circulation as money within the United States; or whoever shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into any foreign place, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any person or persons whomsoever, or shall have in his possession any such false, forged, or counterfeited coin or bars, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any person or persons whomsoever, shall be fined not more than five thousand dollars and imprisoned not more than ten years."

The same care in the drafting of indictments, in the alleging of the fraudulent intent, is necessary, as in prosecutions for passing other forged instruments. When the indictment is for forging or making, the allegation of knowledge is unnecessary, because the law presumes that one who makes has knowledge of its falseness. U. S. vs. Otney, 31 Federal, 68; U. S. vs. Bicksler, 1 Mackey, 341; U. S. vs. Peters, 2 Abb. (U. S.), 494; U. S. vs. Russell, 22 Federal, 390. When, however, the charge is for passing, knowledge must be alleged and shown. Of course, such knowledge may be shown by either direct or circumstantial evidence, but there must be something from which the jury can conclude, beyond a reasonable doubt, that the person passing had knowledge that the coin was spurious; otherwise, the act is entirely innocent.

§ 92. **Resemblance or Similitude.**—The same difficulties have been encountered and overcome by the Courts under the coin statutes as were discussed under Sections 148 and 149, supra. A coin or bar would not be called counterfeit, within the meaning of a criminal statute, unless there appeared to be some resemblance or similitude and an effort to make such resemblance and similitude. It would seem to be the better public policy to accept the test prescribed in United States vs. Hargrave, 26 Federal Cases No. 15306, where it was said that it was not a question whether the spurious coin would deceive a person of ordinary skill and caution, but whether it was capable and designed to be used for deceiving the incautious and unskillful, to test which seems to be more broadly determined in the following words, to

wit: "If the spurious article has not a resemblance strong enough to deceive persons exercising ordinary caution, then the passing is not a crime," as cited in and supported by Second Volume Federal Statutes Annotated, page 311; United States vs. Aylward, 24 Federal Cases No. 14484. A very fair test is that prescribed in United States vs. Hopkins, 26 Federal, 443, where the Court said:

"It is not necessary that the resemblance should be exact in all respects. The resemblance is sufficient if the coins are so far alike that the counterfeit coin is calculated to deceive a person exercising ordinary caution and observation in the usual transaction of business, though the counterfeit would not deceive a person who was expert, or has particular experience in such matters."

See also U. S. vs. Abrams, 18 Federal, 823; U. S. vs. Russell, 22 Federal, 390. In United States vs. Lissner, 12 Federal, 840, the Court held that the removal of an appreciable amount of the silver from a coin, which was replaced with an inferior metal, amounted to counterfeiting.

In United States vs. Owens, 37 Federal, 112, District Judge Hammond held that in a prosecution under a general statute of the sort under discussion, it was not essential for the indictment to aver that the alleged counterfeits were in the likeness and similitude of genuine notes (coins) authorized by the act of Congress under which they purported to have been issued. Such an allgation may be necessary under a special statute, but in providing a general law for forgery, such specific allegation is unnecessary. The words "false, forged, and counterfeited obligation of the United States" are sufficient to imply that the alleged counterfeit purports to be a genuine obligation of the United States, and are a sufficient averment that there is, or was, outstanding, authorized by law, genuine obligations of the sort the alleged imitation was intended to be a forgery or counterfeit.

An indictment under this section must aver the intention to defraud, but it need not specify the person, if, as a matter of fact, the grand jury does not know in particular, and the indictment may, therefore, allege that the forging and having in possession was for the purpose of defrauding persons to the grand jurors unknown, if such be the facts. Of course, in a count for

passing or uttering, the indictment should allege the intent to defraud the person upon whom the coin was passed. Whether for having in possession or for passing, there must be, as above stated, an allegation of knowledge with reference to its viee. U. S. vs. Bejandio, 1 Woods, 294.

§ 93. **Counterfeiting Minor Coins.**—Section 5458 of the old statutes is displaced by Section 164 of the New Code, in the following terms:

"Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or shall willingly aid or assist in falsely making, forging, or counterfeiting any coin in the resemblance or similitude of any of the minor coins which have been, or hereafter may be, coined at the mints of the United States; or whoever shall pass, utter, publish, or sell, or bring into the United States or any place subject to the jurisdiction thereof from any foreign place, or have in his possession any such false, forged, or counterfeited coin, with intent to defraud any person whomsoever, shall be fined not more than one thousand dollars and imprisoned not more than three years."

This statute, it will be noticed, includes all of the elements and ingredients, both with reference to allegation and proof that have been treated under Sections 163, 148 and 149. It must be understood that the minor coins referred to in the section are those defined and created by Section 3515 of the old statute, which were a five-cent piece, a three-cent piece, and a one-cent piece. An indictment, therefore, which charged the forging and counterfeiting of minor silver coinage is contradictory, and alleges no offense. U. S. vs. Bicksler, 1 Mackey, 341.

§ 94. **Making or Uttering Coins in the Resemblance of Money.**—New Section 167, in the following words:

"Whoever, except as authorized by law, shall make or cause to be made, or shall utter or pass, or attempt to utter or pass, any coins of gold or silver or other metal, or alloys of metals, intended for the use and purpose of current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be fined not more than three thousand dollars, or imprisoned not more than five years, or both,"

displaces old Section 5461. Sections 163 and 164, above mentioned, relate alone to gold and silver coins or bars, and the minor

coinage, while Section 167 is what may be termed a blanket statute, that denounces as unlawful, any making, uttering, or passing, etc., of any coin, whether of gold or silver or other metal, *intended for the use and purpose of current money,* and this whether the design be in imitation of any United States obligation, or whether it be in original design.

This statute, if enforced, is capable of being used for much good, in the stamping out of the practice of certain large industries, that pay their labor, and thus enforce a practical serfdom, with checks or due bills or trade vouchers which pass as current money in the camp or town that such industry owns or dominates. The fact part of the statute is found in the words "intended for the use and purpose of current money," and, of course, this can be made to appear either by direct or circumstantial testimony. The jury should be instructed that the tokens were intended for the use and purpose expressed in the statute, and they should so find, beyond a reasonable doubt, before a conviction could be had.

§ 95. **Making or Issuing Devices of Minor Coins.**—For the protection of the minor coinage, as defined by old statute 3515, as hereinbefore noticed, the old section 5462 becomes Section 168 in the New Code, which reads as follows:

"Whoever, not lawfully authorized, shall make, issue, or pass, or cause to be made, issued, or passed, any coin, card, token, or device in metal, or its compounds, which may be intended to be used as money for any one-cent, two-cent, three-cent, or five-cent piece, now or hereafter authorized by law, or for coins of equal value, shall be fined not more than one thousand dollers, and imprisoned not more than five years."

In United States vs. Roussopulous, 95 Federal, 977, the Court held that circular metal tokens, which, though of similar color, differed in size and wholly undesigned from any coin of the United States, and are only from one-sixth to one-fifteenth the weight of the coin the nearest the same size, and which do not purport to be money or obligations to pay money, but contain the names of business concerns, with the statement that they are good for a certain value in merchandise, are not tokens in the likeness and similitude of coins of the United States, nor intended to circulate as money, and to be received and used in lieu of lawful

money, within the prohibition of Section 5462, Section 3583, or the Act of February tenth, 1891.

It will be borne in mind, however, that Section 168 is not nearly so broad as Section 167. It is true of 168, as it was of 167, that there must be an intent to use the token as money, which must be charged, proven, and found, as other essential facts in criminal cases.

§ 96. **Other Statutes Relating to the Coinage.**—Section 165 takes the place of the old Section 5459, as amended by the Act shown at page 579 of the Second Supplement. This section punishes the fraudulent mutilation or lightening of the coinage. There seems to be nothing in the old law or in the new law that inhibits the bona fide use of a coin. If, however, there be a mutilation, for the purpose of defrauding some person, the statute is so broad as to include every possible method. It was said in United States vs. Lissner, 12 Federal, 840, that where one punched a hole with a sharp instrument through a coin, leaving all the silver in the coin, though crowding it into different shape, he committed no offense.

Section 166 relates to the debasement of the coinage by officers of the mint, and is a practical re-enactment of old Section 150. Section 169 relates to counterfeiting, etc., of the dies for coins of the United States, and incorporates all the features of the Act shown in First Supplement, page 889.

Section 170 denounced the counterfeiting of dies for foreign coins, and is based upon the Act shown in the First Supplement, page 890.

Section 171 is an incorporation of the Act shown in First Supplement, page 890, and the Act of the Third of March, 1903, page 1223 of the 32 St. Large, and treats of the making, importing, or having in possession, tokens, prints, etc., similar to United States or foreign coins.

§ 97. **Counterfeit Obligations, etc., to be Forfeited.**—By the terms of Section 172, which reads as follows:

"All counterfeits of any obligation or other security of the United States or of any foreign government, and all material or apparatus fitted or intended to be used, or that shall have been used, in the making of any such counterfeit obligation or other

security or coins hereinbefore mentioned, that shall be found in the possession of any person without authority from the Secretary of the Treasury or other proper officer to have the same, shall be taken possession of by any authorized agent of the Treasury Department, and forfeited to the United States, and disposed of in any manner the Secretary of the Treasury may direct. Whoever having the custody or control of any such counterfeits, material, or apparatus, shall fail or refuse to surrender possession thereof upon request by any such authorized agent of the Treasury Department, shall be fined not more than one hundred dollars, or imprisoned not more than one year, or both,''

any counterfeit obligation, security, coin, or other material, is to be forfeited. This section is an enlargement of the Act shown in the First Supplement, page 890, in that it adds a penalty. Whoever, having custody of the material, refuses to surrender, upon request, is liable to one hundred dollars fine, or imprisonment for not more than one year, or both.

§ 98. **Search Warrant.**—In aid of the above statute, and particularly for the suppression of all sorts of counterfeiting, we have Section 173 of the New Code, in the following words:

''The several judges of courts established under the laws of the United States and United States commissioners may, upon proper oath or affirmation, within their respective jurisdictions, issue a search warrant authorizing any marshal of the United States, or any other person specially mentioned in such warrant, to enter any house, store, building, boat, or other place named in such warrant, in which there shall appear probable cause for believing that the manufacture of counterfeit money, or the concealment of counterfeit money, or the manufacture or concealment of counterfeit obligations or coins of the United States or of any foreign government, or the manufacture or concealment of dies, hubs, molds, plates, or other things fitted or intended to be used for the manufacture of counterfeit money, coins, or obligations of the United States or of any foreign government, or of any bank doing business under the authority of the United States, or of any State or Territory thereof, or any bank doing business under the authority of any foreign government, or of any political division of any foreign government, is being carried on or practiced, and there search for any such counterfeit money, coins, dies, hubs, molds, plates, and other things, and for any such obligations, and if any such be found, to seize and secure the same, and to make return thereof to the proper authority;

and all such counterfeit money, coins, dies, hubs, molds, plates, and other things, and all such counterfeit obligations so seized shall be forfeited to the United States."

The only difference between the new section and the old section as shown in First Supplement, page 890, is the leaving out of the provision that a search warrant may be served or acted upon only in the day-time. Under the new law, officers may act under the search warrant, when issued as therein provided, at any time, unless, perchance, the Constitutional prohibition against unreasonable searches and seizures may be read into the statute, and it doubtless is.

CHAPTER V.

OFFENSES AGAINST PUBLIC JUSTICE.

§ 99. **Perjury.**—Section 125 of the New Code, which contains 5392 of the old statutes, without changing the same, reads as follows:

"Whoever, having taken an oath before a competent tribunal,

officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars, and imprisoned not more than five years."

Common law perjury was practically the same as this statutory offense. Perjury, at Common Law, was the wilful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry.

§ 100. **Form of Oath Immaterial.**—An oath, as understood in prosecutions under this statute, is one's solemn asseveration, uttered in an appeal to the Supreme Being, under the sanction of his religion, that a thing stated or to be stated by him is true, made to a civil officer authorized to administer or receive it. It must, therefore, be a lawful one; that is, it must be legally administered, by an officer duly authorized, but the form is immaterial, provided the witness professes it to be binding on him. When a witness comes to be sworn, it is to be assumed that he has settled with himself in what way he shall be sworn, and he should make it known to the Court, and should be sworn with uplifted hand, or by any other unusual mode, though not conscientiously opposed to swearing on the Gospel, and depose falsely, he subjects himself to prosecution for perjury. See Clark, Bishop, and Wharton on Perjury. In United States vs. Mallard, 40 Federal, 151, the Court held that the affiant, being unable to write, the Commissioner reduced his statement to writing, ending with the jurat, "Sworn to before me," and said to him, "If you swear to this statement, put your mark here." The affiant put his mark. This was held to be an oath. In United States vs. Baer, 6 Federal, 42, the evidence of a notary public showed that he had used a form substantially as that required by the local state statute, in swearing a witness, and the Court held that the oath was sufficient to sustain a verdict of guilty of perjury.

§ 101. **Competent Tribunal, Officers, Etc.**—Having been satisfied that the person took an oath in some form recognized as re-

ligiously binding, the next question under the statute is whether such an oath was taken before a competent tribunal, officer, or person, in a case in which a law of the United States authorized an oath to be administered. Under the Common Law, the false testimony must be in a judicial proceeding, or in the course of justice; but the statute under consideration includes much more than the Court-house testimony and oath. It does not, however, include every affidavit or declaration. In United States vs. Babcock, 4 McLean, 113, it was held that an oath administered to a witness by the Clerk of the Circuit Court, as to the distance from the Court to his home, taken by the witness to support his claim for mileage, was not taken under any law of the United States, and, therefore, a prosecution for perjury could not be sustained. In United States vs. Maid, 116 Federal, 650, the Court held that an affidavit of the non-mineral character of the land, made in support of a homestead entry, although a regulation of the land office required such an affidavit to be made in certain states, since it was not required by Revised Statutes 2290, which prescribes the contents of a homestead affidavit, would not sustain a prosecution for perjury.

In United States vs. Howard, 37 Federal, the facts showed that the defendant entered a homestead claim, and on application to commute his entry to a cash entry, he made affidavit that he had actually moved on the land in December, etc., taking his oath before a Judge of Probate. The statute did not authorize a Judge of Probate to administer such an oath; and the Court, upon demurrer, held the indictment to be fatally defective, upon the proposition that the defendant had not taken his oath before some competent tribunal, officer, or person. In United States vs. Manion, 44 Federal, page 800, the Court held that perjury cannot be assigned upon affidavit made before a notary public, by a person in support of his claim to a preference right to purchase coal land under certain sections of the Revised Statutes, because notaries public are not authorized by any law of the United States to administer oaths to affidavits required by the rules and regulations of the general land office, the regulations showing that persons desiring to make affidavits for coal lands must do so before a Register or Receiver of the Land office. Judge Paul, in

United States vs. Law, 50 Federal, 915, held that Section 778 of the Revised Statutes, which authorized notaries public to administer oaths in all cases in which Justices of the Peace had power to administer them, gave no power to administer an oath in an investigation by the Post-office Department, as to the alleged loss of a registered letter, for there was no statute which gave Justices such power, and, therefore, no indictment for perjury could be based upon false statements in an affidavit made before a notary public in such an investigation. Before the Act of February 26, 1881, a notary public had no authority to administer oaths to officers of national banks for the verification of their reports to the Comptroller, and false statements in such reports, where verification was had before a notary public, would not have sustained prosecution for perjury. United States vs. Curtis, 107 U. S., 671. An oath taken before a Commissioner of the Circuit Court in taking bail, where the laws of the State do not authorize the State officers mentioned in the statute to administer oaths for similar purposes, will not sustain a prosecution for perjury. United States vs. Garcelon, 82 Federal, 611. Under the authority of United States vs. Lamson, 165 Federal, page 80, an affidavit under Section 6 of the Oleomargarine Act, which requires wholesale dealers to keep such books and render such returns as the Commissioner of Internal Revenue may, by regulation, require, under prescribed penalties for its violation, and the regulation thereunder made requiring an oath to the returns, does not have the force of law in such sense that a false oath to a return subjects the maker to prosecution for perjury, and an indictment so laid was quashed by Judge Brown.

§ 102. In the following cases, perjury has been successfully laid:

False oath by a director of a national bank, before a notary public. United States vs. Neal, 14 Federal, 767.

Affidavit of an applicant for an entry to land, made before the Clerk of the County Court, United States vs. Hearing, 26 Federal, 744.

False oath under the Timber Culture Act, which authorized the oath to be administered in the District where the land is situated.

United States vs. Madison, 21 Federal, 628; United States vs. Shinn, 14 Federal, 447.

False swearing in an affidavit made before a Justice of the Peace, in conformity to a regulation of the Secretary of the Treasury. United States vs. Bailey, 9 Peters, 238.

Also where oath is administered by state officer authorized by the usage of the Treasury Department, when Congress required an oath to be made. United States vs. Winchester, 2 McLean, 135.

An affidavit made before a Justice of the Peace, to support a pension claim. United States vs. Boggs, 31 Federal, 337.

An affidavit made before a notary public, in support of an application for pension. Noah vs. United States, 128 Federal, 270; also Williamson vs. United States, U. S. Supreme Court, October Term, 1907.

Officer of the General Land Office of the United States, hearing a contest with respect to a homestead entry, in accordance with the rules promulgated by the Interior Department, constitutes a competent tribunal. Caha vs. United States, 152 U. S., 211.

A verification of a cashier of a national bank, of a report of the condition of the bank. United States vs. Bartow, 10 Federal, 873.

Judge Speer, in United States vs. Hardison, 135 Federal, 419, held that where a defendant swore falsely as to his qualifications to become a surety on a distiller's bond, before a Deputy Internal Revenue Collector, he was properly charged with perjury, even though the oath thereto was taken before a United States Commissioner.

In United States vs. Patterson, 172 Federal, 241, Judge Woolverton held that a wilful false statement in an oath to an application for patent, made as required by Section 4892 of the Revised Statutes, that the applicant verily believes himself to be the original, first, and sole inventor of the device for which the patent is sought, is of a material matter, and constitutes perjury.

In United States vs. Voltz, 14 Blatchf., page 15, the Court held that the qualification of a surety to a bail bond is a case

within the meaning of the perjury section, and upon which perjury can be based.

In Brace vs. United States, 149 Federal, 871, a land affidavit is sufficient, as the foundation for a perjury prosecution.

Naturalization affidavits, in Schmidt vs. U. S.., 133 F., 257, and U. S. vs. Dupont, 176 F., 823.

§ 103. **Materiality and Wilfulness.**—The indictment must aver unmistakably the materiality of the oath, and the wilfulness of the falsification. U. S. vs. Ammerman, 176 F., 636. A false statement, declaration, or testimony, upon a collateral issue, will not sustain perjury, and neither will mistake or innocent falseness make one guilty of the offense.

It is sufficient to charge generally that the false testimony was in respect to a matter material to the issue, without setting out the facts from which such materiality appears. If, however, the facts are also stated, and it clearly appears that the testimony was not material, a formal allegation of materiality will not save the indictment. United States vs. Pettus, 84 Federel, 791. So, also, where in an indictment for perjury it is apparent from the averments that the evidence which is charged to be false was material, it is not essential to state the legal conclusion by alleging that the evidence was material. The Court being apprised of the facts, may draw the conclusion without the allegation. So, also, where the averments as to the materiality of what is alleged to have been sworn falsely are defective, the indictment is, nevertheless, good, if such materiality sufficiently appears on its face. 30 Cyc., 1435.

§ 104. **Sufficiency of Indictment.**—As before noticed, great particularity was required at Common Law; and while proceedings of the Federal Courts are assimilated to the Common Law forms, all Federal crimes are statutory, and the Common Law rules in passing upon the sufficiency of a perjury indictment in the Federal Court would necessitate the same strictness with reference to its proper alleging as did the Common Law, but Congress provided a saving statute in Section 5396 of the old statutes, which is still the law, and reads as follows:

"In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance

of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed."

The ordinary rules of criminal pleading, and the above statute being clearly in mind, all that is necessary under the Federal statute is to draw the bill in such plain and intelligible terms, and with such particularity as to apprise the accused with reasonable certainty of the offense for which he is sought to be punished, and state the substance of the controversy upon which the false oath was taken, specify the Court or officer by whom it was administered, aver or show that such Court or officer had authority to administer an oath, allege the falsity of the oath, and assign perjury thereon. Noah vs. U. S., 128 Fed., 270; U. S. vs. Cuddy, 39 Fed., 696; U. S. vs. Walsh, 22 Fed., 622; Markham vs. U. S., 160 U. S., 319, 40 Law Ed., 441, 30 Cyc., 1425. This section demands that the oath must have been wilful, and an allegation that it was corruptly taken is not sufficient. The indictment must allege that the oath was wilfully taken. United States vs. Edwards, 43 Fed., 67; U. S. vs. Lake, 129 Federal, 499; United States vs. Hearing, 26 Federal, 744.

Wilfullness and a corrupt intent being essential elements of the crime of perjury, evidence to prove such issues goes to the very substance of the offense, and is, therefore, admissible. All of the record, including the judgment of the case in which the perjury is alleged to have been committed, is, therefore, admissible upon the question of motive. If perjury were committed by one in his own defense in the trial of a criminal case, the indictment and judgment would be admissible, not for the purpose of showing that the defendant had been convicted of an offense, but for the purpose of showing his motive to testify untruly in the original case; but it is thought that the Court should limit the consideration of the judgment by proper instructions,

to the consideration of motive alone, or inducement, as some authorities put it. A judgment so introduced and so restricted by the Court, is material and competent. In United States vs. Berkhardt, 31 Federal, 141, the trial Court set aside a judgment of conviction of perjury, because he had admitted the judgment in the original case for all purposes, and without limiting it. Wharton, Criminal Evidence, Section 602-a. The same rights that exist in favor of the prosecution to show the corrupt motive and wilfulness are equally pertinent for the defense, and it is at all times admissible and competent for him to show the lack of corrupt motive, or to rebut the existence of such a motive.

§ 105. **Proof.**—Perjury must be proven by two witnesses, or by one witness and corroborating circumstances, and the jury should be informed, in some part of the instructions, that before they can convict, the fact that the oath was false must be shown to their satisfaction in such way; and it is thought in this connection that the instructions must also somewhere inform the jury what is meant by "corroborated." State vs. Hunter, 181 Missouri, 316; 80 S. W., 915; People vs. Wells, 103 Calif., 631; U. S. vs. Hall, 44 Federal, 864.

§ 106. **Subornation of Perjury.**—Section 126 of the New Code reads as follows:

"Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section prescribed,"

which are the substantial words of old Section 5393. An indictment is sufficient which alleges that the witness knew the testimony to be false and that the defendant, knowing it was perjury, procured her to commit it. Babcock vs. United States, 34 Federal, 873; United States vs. Thompson, 31 Federal, 331. In United States vs. Dennee, 3 Woods, (U. S.) 39, the Court held that an indictment must allege that the defendant knew that the testimony which he instigated the witness to give was false, and the defendant knew that the witness knew that the testimony she was instigated to give was false. The same particularity and accurateness is required in an indictment under this section, and the same general law relates thereto, as under that for perjury. The following cases may be interesting:

U. S. vs. Evans, 19 Fed., 912.

U. S. vs. Howard, 132 Fed., 325.

U. S. vs. Cobban, 134 Fed., 290.

U. S. vs. Brace, 144 Fed., 869.

U. S. vs. Boren, 144 Fed., 801; 30 Cye., at page 1440, gives the following elements of an indictment for subornation, with supporting authorities, which it is thought is the law:

"An indictment for subornation of perjury must state all the essential elements constituting the crime of perjury, as well as of subornation of perjury. It must set forth the nature of the proceeding in which the alleged perjury was committed; the court or officer in which, or before whom, the false oath was taken; that the witness was duly sworn; that the testimony was material, and false; that defendant knowingly and wilfully procured another to swear falsely; that the party did knowingly swear falsely; that defendant knew that the testimony of the witness would be false; and that he knew that the witness knew said testimony was false."

A charge of subornation of perjury may be joined with a charge of perjury in the same indictment, and the perjurer and the suborner may both be included in it. Commonwealth vs. Devine, 155 Mass., 224; 29 N. E., 515.

§ 107. **Stealing or Altering Process; Procuring False Bail, Etc.**— Old Section 5394 is practically re-enacted in Section 127 of the New Code, except that under the old statute the Court was not authorized to impose both penalties of fine and imprisonment. The new section reads as follows:

"Whoever shall feloniously steal, take away, alter, falsify, or otherwise avoid any record, writ, process, or other proceeding, in any court of the United States, by means whereof any judgment is reversed, made void, or does not take effect; or whoever shall acknowledge, or procure to be acknowledged, in any such court, any recognizance, bail, or judgment, in the name of any other person not privy or consenting to the same, shall be fined not more than five thousand dollars, or imprisoned not more than seven years, or both; but this provision shall not extend to the acknowledgment of any judgment by an attorney, duly admitted, for any person against whom such judgment is had or given."

Most of the annotators cite United States vs. Crecilius, 34

Federal, page 30; Barber vs. United States, 35 Federal, 886, and 5 Attorney General's Opinion, 523.

The two first cases contain practically no assistance, by decision or argument, for the construction of the statute. In one of them the word "alter" is treated at some inconsiderate length. Anderson's Dictionary of Law defines the word alter to mean "to make a thing different from what it was." The definition in the Century Dictionary is practically the same, and is in the following words: "to become different in some respect; to vary; to change."

The statute, of course, does not make an innocent, thoughtless, or mistaken alteration or falsification an offense. The charge must include an unlawful and felonious alteration or falsification.

The statute also includes the acknowledgment of any recognizance or bail or judgment by one in the name of another without authority.

§ 108. **Obstructing Process, or Assaulting an Officer, Etc.**—In the New Code Section 140 takes the place of Section 5398 in the 1878 statutes. The new section, which reads as follows:

"Whoever shall knowingly and wilfully obstruct, resist, or oppose any officer of the United States, or other person duly authorized, in serving, or attempting to serve or execute, any mesne process or warrant, or any rule or order, or any other legal or judicial writ or process of any court of the United States, or United States Commissioner, or shall assault, beat, or wound any officer or other person duly authorized, knowing him to be such officer, or other person so duly authorized, in serving or executing any such writ, rule, order, process, warrant, or other legal or judicial writ or process, shall be fined not more than three hundred dollars, and imprisoned not more than one year,"

contains some interpolated phrases that seem to strengthen and broaden the old statute. In other words, under the new statute, the words "or other person duly authorized" would protect any person who happened to be a messenger conveying any Court process, though such person would not be an officer of the United States within the meaning of the decisions, which requires a person to have been nominated and commissioned by the Executive

Department. So also, the words "or any other legal or judicial writ or process" are placed in the new statute; and to meet that line of decisions which has held in contempt proceedings that a United States Commissioner does not hold any United States Court, and is, therefore, not a Court, or Judge, the statute specially includes the words, "or United States Commissioner."

The new statute also includes the words "knowing him to be such officer or other person so duly authorized," which is but an enactment of what the best authorities had already determined was necessary before one could be convicted for an alleged violation of the Section. Necessarily, one who, by mistake or without knowledge, obstructed process or an officer, should not be prosecuted.

In United States vs. Terry, 41 Federal, 771, Judge Ross held that the Section related to an oral order of a Court, to remove from a Court room a prisoner who was disturbing the proceedings of a Court. In that case, it was conceded in argument, and is recognized by the Court in his opinion, that at the time the defendant resisted the marshal who attempted to eject her from the court room under the order of the Judge, that such order was oral, and had not been entered of record. The distinction is drawn in the following words:

"Undoubtedly, in judicial proceedings, an 'order' as distinguished from a 'judgment' is often defined as one reduced to writing and entered in the records of the Court, and such is the purport of many of the cases referred to by counsel for the defendant, but this is by no means saying that such only is an order. There must, in the nature of things, be an order of a Court made before it is, or can be, written out in the records of the Court by the Clerk. When written out, the writing becomes a record of the order, and is evidence of it. Orders are almost daily given to the Marshal concerning matters to be performed in the presence of the Court, and they are as constantly executed before being written out. Indeed, many of them are never reduced to writing at all. Yet, there can be no doubt of their validity. The language of the statute in question is broad enough to include all valid oral orders. The natural ordinary meaning of the word includes written, as well as unwritten orders, and there is no reason in the policy of the law or in the nature of things, for excluding unwritten orders. Indeed, the contrary is true. There is just as much reason and necessity for making it an of-

fense to resist the execution of a lawful unwritten order, brought distinctly and authoritatively to the notice of the offending party, as for making it an offense to resist the execution of one in writing.'' United States vs. Terry, 41 Federal, 773.

The essential elements of a charge under this section are three: first, the issuance of a legal process, warrant, writ, rule, or order, by a Court of the United States or a United States Commissioner; second, that such legal process, warrant, writ, rule, or order, after the same was issued, was in the hands of some officer of the United States, or other person duly authorized, for service; and, third, that such legal process, warrant, writ, rule, or order was knowingly and wilfully obstructed or interfered with. United States vs. Tinklepaugh, 3 Blatchf., 425. If the Tinklepaugh case seems in a measure to conflict with the Terry case, reason and public justice would seem to demand that the Terry case be the ranking authority.

It must be borne in mind that it is not at all necessary that actual force be used in obstructing. Passive force, such as the congregation of a large number of individuals, knowingly and determinedly, in the way of the officer who is attempting to serve the writ or process, would be within the decisions, and within reason, an obstruction which would come within the statute. Such was the construction used by the Court in charging a grand jury in 2 Curtis, 637; 30 Fed. Cases, No. 18250. Obstruction must, therefore, under the authorities, include not only resistance but all impediments or opposition or obstacles, as outlined in the case of the United States vs. McDonald, 8 Biss., 439; 26 Federal Cases, No. 15667. The lexicographers, in treating the word ''obstruct,'' determine it to mean ''to impede or retard action; to hinder; to render passage difficult or impossible; to pile up against.'' The ordinary meaning of the word, therefore, has been accepted in its lawful interpretation, when used in the statute under discussion. The officer is not obliged to risk his life, or expose himself to personal violence. Threats by a person in possession is a violation, as has been determined in United States vs. Lowry, 2 Wash., 169; 26 Federal Cases No. 15636; U. S. vs. Smith, 1 Dill., 212; 27 Federal Cases No. 16333. If one in possession of property opposes and obstructs the execution of a

writ of possession by refusing to yield possession, and by threats of violence, he has committed an offense against this statute. United States vs. Lowry, 2 Wash., 169; 26 Fed. Cases, No. 15636.

Under this statute, a state jailer who holds Federal prisoners by commitments from United States Courts under the statute of a State, is protected, and a forcible release of a prisoner in his hands would be an offense against this statute, as well as the statute for rescuing a prisoner, which is new Section 143 and old Section 5401. See in this connection, Matthews vs. United States 32 Court of Claims, 123. By following the cases of Blake vs. United States, 71 Federal, 286; United States vs. Mullin, 71 Federal, 682; and United States vs. Cover, 46 Fed., 284, in construing an indictment under this section, there can be no difficulty at arriving at its lawful essentials and ingredients. The allegation of knowledge can be included generally, it is thought, in the words knowingly and wilfully in the first part of the bill, for they will, therefore, be construed to apply to each of the necessary averments of substance, though it may be considered the best pleading, and surely pleading that leaves no room for doubt, if the allegation of knowledge is repeated in the body of the bill, with reference to the process and the person handling the same. In other words, in addition to the general words knowingly and wilfully at the first part of the indictment, let the pleading show that the person charged knew that the person attempting to serve the writ or order was an authorized person, and really had a writ or order from a competent tribunal or Court, as the case may be. In the case of United States vs. McDonald, 8 Biss., page 439, the Court held that the custodian of property for the Marshal was an officer within the meaning of the old Section. In United States vs. Martin, 17 Federal, 150, the Court held under a prosecution for a violation of the old section that a Deputy Marshal was an officer of the United States, within the meaning of the section, as is also the keeper of a State jail, and process issued by a Commissioner of the Circuit Court, under Section 1014 of the Revised Statutes, in causing the arrest or imprisonment of a person, was entitled to the protection of the provisions of the section.

The discussion of the Judge in the 13 Federal, United States

vs. Huff, at page 639, of the words "disobedience" and "resistance" under a prosecution for violations of Sections 5359 and 5360, will be found to be in line with the views heretofore expressed with reference to there being no distinction between the definitions of the words as found in the dictionaries and as found in the decisions of the Courts.

Of course, there is no offense when one resists unauthorized arrest. A reasoning under a case of this sort will be found in the case of the United States vs. Mundell, 1 Hughes, 415; 27 Federal Cases, No. 15834.

Blackstone, in his division of crime, made five heads: first, offenses against God and religion; second, offenses against the law of nations; third, offenses against the king and Government; fourth, offenses against the commonwealth, as against public justice, public peace, public trade, public health, public economy; fifth, offenses against individuals,—that is, against their persons, their habitations, and their property.

Of course, such division is arbitrary, but serves to furnish a plan for the student and the legislator. The offense we are considering comes under the fourth head, and at Common Law included many things, such as resisting arrest or process, obstructing officers, rescue, escapes, preventing attendance, briberies, perjuries, and contempts, etc. Mr. Bishop says that "no government is perfect, and some are simply terrible, but the worst is immeasurably better than none." To interfere, therefore, with the performance of an official function, is a most serious concern, since the public good requires a due performance of all official functions, and any person who interferes therewith is an enemy to the Government.

§ 109. **Destroying or Stealing, Etc., Public Records.**—Section 128 of the New Code, which changes materially, in both wording and punishment, old Section 5403, reads as follows:

"Whoever shall wilfully and unlawfully conceal, remove, mutilate, obliterate, or destroy, or attempt to conceal, remove, mutilate, obliterate, or destroy, or, with intent to conceal, remove, mutilate, obliterate, destroy, or steal, shall take and carry away any record, proceeding, map, book, paper, document, or other thing filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or

public officer of the United States, shall be fined not more than two thousand dollars, or imprisoned not more than three years, or both."

The very wording of the statute itself incorporates the idea that there must be the specific intent to destroy or steal, or do the things denounced by the statute. Wherever the word "wilful" is used, or wherever the context of the statute clearly indicates that it should be read into the body of the act, such specific intent is absolutely necessary, before the offense can be committed. In United States vs. De Groat, 30 Federal, 764, the facts showed that the Government, for want of space, had stored a vast quantity of old Internal Revenue records in an out-house, from which they were stolen by the defendants, and sold as waste paper to junk dealers. The Court, in instructing a verdict of not guilty, told the jury in substance that the Act was for the specific purpose of the protection of records, and did not carry punishment for mere theft of Government property, and the case not showing any intent on the part of the defendants to destroy records, but only to steal something that belonged to another, would not support an indictment under old Section 5403.

It must be borne in mind, however, that the old Common Law definition of record and document is not to be used in circumscribing and limiting the purpose of the statute under discussion. It was manifestly intended to protect all sorts of Court and public office records, including all papers that are filed, whether such papers be accurately or inaccurately drawn. To this purpose and construction is the case of McInerney vs. United States, 143 Federal, 729, by the Circuit Court of Appeals for the First Circuit. In that case, the Court held in substance that the rule that a criminal or penal statute must be strictly construed does not mean that its language must be given the narrowest interpretation, but contemplates a reasonable construction, in aid of the purposes of the Act, and Courts should adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature; and, therefore, the statute under consideration, which makes it a criminal offense to steal or destroy any record, paper, or proceeding of a Court of justice, or any paper

or document or record filed or deposited in any public office or with any judicial or public officer, will not be construed so as to limit the meaning of the word "record" and "document" to the technical Common Law record of Courts as unrolled, or to technical documents, but will be used in the ordinary and common sense, and include all and every part, not only of such technical records or documents, but of any paper filed, which becomes a part of the records of the Court or office, and that a prosecution for stealing or destroying a record of a Court cannot be defeated by showing that the record was technically imperfect or incorrectly kept. The following cases may be interesting upon one or the other phases of the statute: People vs. Bussey, 82 Mich., 49; State vs. Bloor, 20 Mont., 574; People vs. Peck, 138 N. Y., 386; *ex parte* Tongue, 29 Oregon, 48; Georgia vs. Jennings, 50 S. C., 156.

§ 110. **Destroying Records by Officer in Charge.**—Old Section 5408 is practically re-enacted in Section 129, which reads as follows:

"Whoever, having the custody of any record, proceeding, map, book, document, paper, or other thing specified in the preceding section, shall wilfully and unlawfully conceal, remove, mutilate, obliterate, falsify, or destroy any such record, proceeding, map, book, document, paper, or thing, shall be fined not more than two thousand dollars, or imprisoned not more than three years, or both; and shall moreover forfeit his office and be forever afterward disqualified from holding any office under the Government of the United States."

The substance of this section, as well as the substance of Section 128, were in the original Act of February 26, 1853, 10 St. at Large, 170, and are companion statutes. It is necessary, in prosecutions under Section 129, that the party have lawful custody of the record or other document or paper, as the case may be, before the penalty under this statute can be inflicted. In Martin vs. United States, 168 Federal, 198, the Circuit Court of Appeals of the Eighth Circuit held that a Clerk in the office of one who had charge of certain Government records could not be prosecuted under this section, because he was not lawfully "in custody." The meat of that decision is that "custody" means keeping, and implies responsibility for the protection and pre-

servation of the person or thing in custody; and a document in a public office in the general custody of a Commissioner, and in the particular custody of his Chief Clerk, under whom five or six subordinate clerks are employed, who have access to it, in order to discharge their duties, is not in the custody of one of the latter. There is this difference, however, in the old and new sections: the old section contained the word "fraudulently," while the new section contains the word "wilfully." Under the old section, an intent to injure or alter the rights or interests of another, or an effect to so injure or alter some of them, was essential to a fraud, and in the absence of such intent, attempt, and effect, an act could not be done fraudulently under that section. Martin vs. United States, 168 Federal, 198. Under the instant section, however, fraudulent intent is not an ingredient. This section, like the preceding, denounces the acts therein specified when they are wilfully done; that is, when they are committed with the specific intent, as defined in McInerney vs. United States, 143 Federal, 729, cited and discussed *supra*.

Under the authority of Martin vs. United States, an indictment drawn in the language of the statute would be insufficient.

§ 111. **Forging Signature of Judge, Etc.**—Section 130 of the New Code re-enacts Section 5419 of the old Statutes, and reads as follows:

"Whoever shall forge the signature of any judge, register, or other officer of any court of the United States, or of any Territory thereof, or shall forge or counterfeit the seal of any such court, or shall knowingly concur in using any such forged or counterfeit signature or seal, for the purpose of authenticating any proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court subscribed or attached thereto, knowing such seal to be false or counterfeit, shall be fined not more than five thousand dollars, and imprisoned not more than five years."

An indictment under the latter portion of this section, which relates to the use of any false signature or counterfeit seal, would be fatally defective, unless it alleged that the act was knowingly done.

Certificate of Bankruptcy, register subject of. See *ex parte* Parks, 93 U. S., 18.

§ 112. **Intimidation or Corruption of Witness or Grand or Petit Juror or Officer.**—Section 135 of the New Code contains all of the elements of the old Statutes 5399 and 5404, changing the punishment of both, and incorporating new words and a somewhat broader meaning, and reads as follows:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States, or before any United States Commissioner, or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States Commissioner or officer acting as such by threats or force, or by any threatening letter or threatening communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

The offenses covered by this section are not new. They are Common Law crimes. The word "corrupt," as used in each portion of the statute, is defined by Bishop to mean an evil purpose, and is not restricted to the form of evil. No particular definition of the sort of corruption or threats or intimidation or force can be given. The length and breadth of the same must depend upon the facts of the particular case, as coming, within the judgment of a jury and Court, within the purview of the statute, and which would, if left unpunished, result in a perversion or trammeling of our courts, witnesses, officers, or litigants. When such would appear to be the natural result of something done or undone, then the statute would seem to apply. In the case of Wilder et all vs. United States, 143 Federal, 433, a form of indictment is given that was approved by the Circuit Court of Appeals for the Fourth Circuit, and a state of facts which showed that the defendant corruptly endeavored to induce other persons to have knowledge of facts in a civil case which would be material to a party to conceal or deny their knowledge, so as to prevent such party from obtaining knowledge or procuring evidence of such facts, was a violation of the old Section 5399, which is, in a large measure, the first part of the new Section. In that case, certain parties to a civil action arranged and agreed to testify with ref-

erence to certain corner trees that were supposed to be the starting point and one of the boundary lines of the tract of land in controversy.

The words "due administration of justice" import a free and fair opportunity to every litigant in a pending case in a Federal Court to learn what he may learn, if not impeded or obstructed, concerning material facts, and to exercise his option as to introducing testimony of such facts, and a violation of this law may consist in preventing a litigant from learning facts which he might otherwise learn, and in thus preventing him from deciding for himself whether or not to make use of such facts.

Pettibone vs. United States.—The ranking authority under these statutes is probably the case of Pettibone vs. United States, 148 U. S., 197, 37 Law Ed., 419. The case gives excerpts from the indictment. The following propositions are announced in the case, which must be recognized and adhered to in drafting indictments:

1. There must be a specific allegation of an intent to obstruct the administration of justice in the Federal Court.

2. There must be an allegation that the defendant knew of the proceedings that he was interfering with. The indictment must, therefore, contain the words knowingly and wilfully. The general doctrine of the penal law that ignorance of the law constitutes no defense to an indictment for their violation, is a rule that has no application here. Knowledge of the court proceedings and of the relation thereto of the party intimidated or otherwise improperly approached is necessary. Among the cases cited by the Court in the Pettibone case is United States vs. Bittinger, (Mo.), 15 Am. Law Reg. N. S., 49, 24 Federal Cases No. 14,598, in which it was held that a person is a witness, under Section 5399, who is designated as such, either by the issue of a subpoena or by the endorsement of his name on the complaint, but that before anyone could be said to have endeavored to corruptly influence a witness under that Section, he must have known that the witness had been properly designated as such. Under this authority, the designation of a witness by the District Attorney, as the including of the name of the witness in the complaint, or in the grand jury docket, or by issuing a subpoena

therefor, would be, it seems, sufficient. In United States vs. Kee, 39 Federal, 603, the Court instructed the jury that the defendant would be guilty of violating 5399, when he beats one summoned as a witness before a United States Commissioner, for the purpose of intimidating or influencing him in giving his testimony, but if the defendant did not know that the one was a witness before the United States Commissioner, and beats him, on account of insulting language, the beating having no relation to the character of the party as a witness, he would not be guilty of a violation of the section. In United States vs. Keen, 5 Mason, 453, it was held that it was no defense to an indictment for forcibly obstructing or impeding an officer of the customs in the discharge of his duty that the object of the party was personal chastisement, and not to obstruct or impede the officer in the discharge of his duty, if he knew the officer to be so engaged. It is the official character that creates the offense, and the *scienter* is necessary.

In Savin's Petitioner, 131 U. S., 267; *ex parte* McLeod, 120 Federal, 130; *in re* Brule, 71 Federal, 943, the position is taken that the mode of punishment prescribed by these old sections was not exclusive, if the offense was committed under such circumstances as to bring it within Section 725, which authorizes the Court to punish for contempts. In Sharon vs. Hill, 24 Federal, 726, it was held that the carrying of weapons into a court room, while court was in session, and threatening the life of the lawyer and counsel engaged in conducting the litigation was an offense under this statute, as was also the assaulting of a commissioner in United States vs. McLeod, 119 Federal, 416.

Under the authority of United States vs. Thomas, 47 Federal, 807, and United States vs. McLeod, 119 Federal, 416, which is supported by the intent and purpose of the statute, there must be a pending cause. In the Thomas case, Thomas was a witness on behalf of the United States before a United States Commissioner. The cause was dismissed. Two months afterwards Thomas was assaulted and beaten by a gang of men at his house in the night time. The men were indicted under Section 5399. The position was taken by the defendant, and sustained by the Court, that as Thomas was not, at the time of the beating, a wit-

ness in any Court of the United States, or in any cause pending therein, the defendant could not be prosecuted under that section. In this connection, also may be cited *ex parte* Robinson, 19 Wallace, 505; *in re* Nagle, 135 U. S., 63; U. S. vs. Memphis Railroad Company, 6 Federal, 237; U. S. vs. Kilpatrick, 16 Federal, 765; U. S. vs. Polite, 35 Federal, 58; *in re* Nagle, 39 Federal, 833; U. S. vs. Armstrong, 59 Federal, 568. In *in re* Brule, 71 Federal, 943, District Judge Hawley held upon a contempt proceeding, that the bribing of a person who is known to be a material witness in a pending cause to hide himself and remain away from the Court, thereby preventing his testifying in such case, is punishable by indictment under Section 5399.

§ 113. **Conspiring to Intimidate Party, Witness, or Jury.**—Section 136 of the New Code, which supersedes old Section 5406, reads as follows:

"If two or more persons conspire to deter by force, intimidation, or threat, any party or witness in any court of the United States, or in any examination before a United States Commissioner or officer acting as such commissioner, from attending such court or examination, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property, on account of any verdict, presentment or indictment lawfully assented to by him, or on account of his being or having been such juror, each of such persons shall be fined not more than five thousand dollars, or imprisoned not more than six years, or both."

The old section contained a minimum punishment of six months.

The most interesting change in the new section is the addition of the words, "or in any examination before a United States Commissioner, or officer acting as such commissioner." The Supreme Court of the United States, in the case of Todd vs. United States, 158 United States, page 278, Book 39 Law Ed., 982, held that a preliminary examination before a Commissioner is not a proceeding "in any court of the United States" within the meaning of the old Section 5406. In that case the Court observed that it doubtless was within the power of Congress to legislate so as to fully protect every witness called upon by the laws of the

United States to give testimony in any case and under any circumstance, but that the wording of 5406 limited such protection to those who had dealing with a "court" of the United States. Under the new section, as above quoted, Congress has seen fit to legislate as suggested by the Supreme Court, and the present statute, therefore, punishes all conspiracies to deter by either force, intimidation, or threat, any party or any witness in any court of the United States, or in any examination before a United States Commissioner, or officer acting as such commissioner.

This legislation was made necessary because of the decision in the Todd case, and because of that line of decisions therein cited, which clearly distinguished United States Commissioners and Circuit Court Commissioners from Judges and United States Courts.

The form of indictment given in the Todd case is thought to contain all of the elements that are necessary in charging an offense under the new statute, with the possible exception that the bill could be made stronger, and undoubtedly good, if it contained an allegation of knowledge.

§ 114. **Attempt to Influence Jury.**—New Section 137, in the following words:

"Whoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any letter or any communication in print or writing, in relation to such issue or matter, shall be fined not more than one thousand dollars, or imprisoned not more than six months, or both,"

replaces old Section 5405.

There have been few, if any, adjudications under this section, as disclosed by the annotators and court reports. It is almost universal in its broadness, and would seem to cover practically any communication. In United States vs. Kilpatrick, 16 Federal, 765, is a distinguished Court opinion covering communications by officers and others to grand jurors, and, in general, the conduct of such body.

This statute, in connection with Sections 135 and 132, are in-

tended directly and primarily for the preservation of the purity of the juror in the performance of his official duty.

§ 115. **Allowing Prisoner to Escape.**—Section 138 of the New Code is in the exact words of Section 5409 of the old statutes, and reads as follows:

"Whenever any marshal, deputy marshal, ministerial officer, or other person has in his custody any prisoner by virtue of process issued under the laws of the United States by any court, judge, or commissioner, and such marshal, deputy marshal, ministerial officer, or other person voluntarily suffers such prisoner to escape, he shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both."

This statute, of course, applies to a State Deputy Sheriff or Jailer who has control, under legal authority and process, of a Federal prisoner. By Section 139, the above statute applies not only to domestic prisoners, but any prisoner in custody, charged with an offense against a foreign government with which the United States has a treaty of extradition, and also to prisoners held in custody for removal to the Philippine Islands. It is practically the same as old Statute 5410.

§ 116. **Rescuing, Etc., Prisoner; Concealing, Etc., Prisoner for Whom Warrant Has Issued.**—Section 141 of the New Code, in the following words:

"Whoever shall rescue or attempt to rescue from the custody of any officer or person lawfully assisting him, any person arrested upon a warrant or other process issued under the provisions of any law of the United States, or shall, directly or indirectly, aid, abet, or assist any person so arrested to escape from the custody of such officer or other person, or shall harbor or conceal any person for whose arrest a warrant or process has been so issued, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined not more than one thousand dollars, or imprisoned not more than six months, or both,"

is a substitute for old Sections 5401 and 5516. The new statute, it will be noted, creates several offenses: that of rescuing or attempting to rescue; that of directly or indirectly aiding, abetting, or assisting any person to escape; that of harboring or concealing any person for whose arrest a warrant has been issued.

A successful prosecution could not be had under either of the provisions of this statute, unless the person attempted to be rescued was in the possession of an officer lawfully, and it is thought that the indictment must contain an allegation of knowledge. The latter section of the statute, which relates to concealing, requires that before one can offend he must have knowledge that process has been issued for the prisoner.

§ 117. **Rescue at Execution; Rescue of Prisoner, and Rescue of Body of Executed Offender.**—The above three offenses are covered by Sections 142, 143, and 144 of the New Code, and were originally old Sections 5400, 5401, and 5402 of the 1878 Statutes. These new statutes, in their order, read as follows:

"Sec. 142. Whoever, by force, shall set at liberty or rescue any person found guilty in any court of the United States of any capital crime, while going to execution or during execution, shall be fined not more than twenty-five thousand dollars and imprisoned not more than one year."

"Sec. 143. Whoever, by force, shall set at liberty or rescue any person who, before conviction, stands committed for any capital crime; or whoever, by force, shall set at liberty or rescue any person committed for or convicted of any offense other than capital, shall be fined not more than five hundred dollars and imprisoned not more than one year."

"Sec. 144. Whoever, by force, shall rescue or attempt to rescue from the custody of any marshal or his officers, the dead body of an executed offender, while it is being conveyed to a place of dissection as provided by section three hundred and thirty-one hereof, or by force shall rescue or attempt to rescue such body from the place where it has been deposited for dissection in pursuance of that section, shall be fined not more than one hundred dollars, or imprisoned not more than one year, or both."

§ 118. **Extortion by Internal Revenue Informers.**—Section 145 of the New Code is a substantial re-enactment of old Section 5484, and reads as follows:

"Sec. 145. Whoever shall, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demand or receive any money or other valuable thing, shall be fined not more than two thousand dollars, or imprisoned not more than one year, or both."

§ 119. **Misprision of Felony.**—Section 146 of the New Code re-enacts old Section 5390, in the following words:

"Sec. 146. Whoever, having knowledge of the actual commission of the crime of murder or other felony cognizable by the courts of the United States, conceals and does not as soon as may be disclosed and make known the same to some one of the judges or other persons in civil or military authority under the United States, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both."

This section is a companion to Section 145, above quoted, and the two together are thought to guarantee publicity for violators, and immunity of such violators from those who would prey upon them. Prosecutions under either of these are not disclosed by prision to be crimnial neglect, either to prevent the commission of crime, or to bring to justice the offender after its commission. annotations. Bishop in his new Criminal Law, defines mis- Misprision of misdemeanor is unknown to the language of the law, but misprision of treason was held to be a Common Law treason. We will later see that by Federal statute, misprision of treason is denounced in old Section 5333 and new Section 3.

§ 120. **Bribery.**—In four sections, the New Code covers the offenses denounced by Sections 5449 and 5499 of the old Statutes, and then creates new offenses.

§ 121. **Bribery of a Judge or Judicial Officer.**—Section 131 of the New Code amplifies and enlarges old Section 5449, and reads as follows:

"Whoever, directly or indirectly, shall give or offer, or cause to be given or offered, any money, property, or value of any kind, or any promise of agreement therefor, or any other bribe, to any judge, judicial officer, or other person authorized by any law of the United States to hear or determine any question, matter, cause, proceeding, or controversy, with intent to influence his action, vote, opinion, or decision thereon, or because of any such action, vote, opinion, or decision, shall be fined not more than twenty thousand dollars, or imprisoned not more than fifteen years, or both; and shall forever be disqualified to hold any office of honor, trust, or profit under the United States."

§ 122. **Judge or Judicial Officer Accepting Bribe, Etc.**—Section 132 of the New Code practically re-enacts old Section 5499, and reads as follows:

"Sec. 132. Whoever, being a judge of the United States, shall in any wise accept or receive any sum of money, or other bribe, present, or reward, or any promise, contract, obligation, gift, or other security for the payment of money, or for the delivery or conveyance of anything of value, with the intent to be influenced thereby in any opinion, judgment, or decree, in any suit, controversy, matter, or cause depending before him, or because of any such opinion, ruling, decision, judgment, or decree, shall be fined not more than twenty thousand dollars, or imprisoned not more than fifteen years, or both; and shall be forever disqualified to hold any office of honor, trust, or profit under the United States."

This section relates only to the acceptance of a bribe by a judge, but the following section covers practically every person authorized by any law of the United States to hear or determine any question.

§ 123. **Juror, Referee, Master, U. S. Commsisoner, or Judicial Officer, Etc., Accepting Bribe.**—Section 133 of the New Code, in the following words:

"Sec. 133. Whoever, being a juror, referee, arbitrator, appraiser, assessor, auditor, master, receiver, United States Commissioner, or other person authorized by any law of the United States to hear or determine any question, matter, cause, controversy, or proceeding, shall ask, receive, or agree to receive, any money, property, or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, action, judgment, or decision, shall be influenced thereby, or because of any such vote, opinion, action, judgment, or decision, shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both."

creates offenses that were unknown to the old statute.

§ 124. **Witness Accepting Bribe.**—Section 134 of the New Code, which reads as follows:

"Sec. 134. Whoever, being, or about to be, a witness upon a trial, hearing, or other proceeding, before any court, or any officer authorized by the laws of the United States to hear evidence or take testimony, shall receive, or agree or offer to receive, a bribe, upon any agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial, hearing, or other proceeding, or because of such testimony, or such absence, shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both,"

is likewise an entirely new statute, without any parallel in the Statutes of 1878.

§ 125. **Members of Congress Accepting Bribes, Etc.**—In the next Chapter, under the head of Offenses Relating to Official Duties, will be found a discussion and citation of the statutes of the New Code that inhibit members of Congress and other United States officers from accepting bribes, such statutes and treatment, however, being in a different Chapter, for the reason that they do not relate directly to offenses against public justice.

CHAPTER VI.

OFFENSES RELATING TO OFFICIAL DUTIES.

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163. Immunity from Official Proscription, Etc.: New Code, 120.
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165. Penalty for Violating the Provisions of the Four Preceding Sections, New Code, 122.
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167. Government Officer, Etc., Giving Out Advance Information Respecting Crop Reports: New Code, 123.
168. Government Officer, Etc., Knowingly Compiling or Issuing False Statistics Respecting Crops: New Code, 124.
169. Counterfeiting Weather Forecasts; Interfering with Signals, Etc.: 33 St. L., 864.

§ 126. **Extortion.**—At the Common Law, extortion was one of the forms of malfeasance in office. Mr. Bishop, in his second volume of Criminal Law, at page 225, says that those who assume official position place themselves thereby in circumstances to exert a certain power, which brings with it corresponding obligations, cognizable by the Criminal Law, and among wrongful official acts, extortion is particularly reprehensible. Hence it is, that the law separates it from the rest under a name of its own. Anderson, in his Dictionary of Law, defines extortion to be "that abuse of public justice which consists in an officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it

is due, obtaining money or other valuable thing by compulsion or force of motives applied to will." Wharton, in his second volume of Criminal Law, paragraph 1574, defines extortion as any oppression by color of right. Bishop, in his second volume of Criminal Law, page 225, defines it as the "corrupt demanding or receiving by a person in office of a fee for services which should be rendered gratuitously; or, where compensation is permissible, of a larger fee than the law justifies, or a fee not yet due." Corruption, as used in these definitions, and as applied to the offense of extortion, implies an evil mind; hence it is not committed when the fee comes voluntarily, in return for real benefits conferred by extra exertions put forth. Second Bishop's Criminal Law, page 226; State vs. Stotts, 5 Black., 460; Rex. vs. Baines, 6 Mod., 192; Williams vs. S., 2 Sneed, 160; Evans vs. Trenton, 4 Zab., 764.

§ 127. **Federal Offense.**—The general statute against extortion was old Section 5481, which limited extortion to an "officer" of the United States. Under the authorities of United States vs. Schlierholz, in 137 Federal, 616, and United States vs. same, in 133 Federal, 333, and the cases therein cited, it appeared that the various bureaus of the Executive and Judicial Departments of the Government were administering their respective affairs through so many agents and clerks and employees, who, in turn, could and did practice extortion and such sort of malfeasance, but who are not really "officers" within the meaning of the Act and the decisions and authorities above referred to, that Congress passed the Act of June 28, 1906, amending Section 5481, which is now practically re-enacted in Section 85 of the New Code, which is in the following words:

"Sec. 85. Every officer, clerk, agent, or employee of the United States, and every person representing himself to be or assuming to act as such officer, clerk, agent, or employee, who, under color of his office, clerkship, agency, or employment, or under color of his pretended or assumed office, clerkship, agency, or employment, is guilty of extortion, and every person who shall attempt any act which if performed would make him guilty of extortion, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both."

The above statute includes not only every officer of the United

States, but every clerk, agent, employee, and every other person.

The Supreme Court of the United States, in Williams vs. United States, 168 U. S., 382, 42 Law Ed., 512, held that a Chinese Inspector could be guilty of extortion under the old Section. Other cases of more or less interest are United States vs. Germane, 99 U. S., 508; U. S. vs. Waitz, 3 Sawy., 28 Fed. Cases No. 16,631.

In United States vs. Harned, 43 Federal, 376, a District Judge, in passing upon a motion to dismiss the prosecution, held that the word "extortion" implies that the money paid was extorted on the part of the one who received it, and was paid unwillingly by the party paying the same, and that, therefore, where there was a voluntary payment by the witness, knowing at the time that it was in excess of the amount that was required to be paid, and that the same was willingly paid, and not demanded, would not support a prosecution, and therefore the motion to dismiss was granted.

Bearing in mind the definitions above quoted, and that there must be an allegation of corruptness, as above defined, it is not believed that the Harned case states the rule correctly. The purpose of the statute is to prevent the receipt by an officer of money in excess of that to which he is legally entitled, and if he asks for more, with knowledge and corrupt purpose, the asking, it is thought, would be the demand comprehended in the definitions, and the payment thereof would be sufficiently unwilling under the law to constitute the offense of extortion. It is not here argued that an innocent overcharge or an overpayment or an overdemand, or a taking of property or money without the corrupt thought and intent, would constitute the offense; but when an officer, knowing he is entitled to a certain sum, deliberately and corruptly makes his bill or demand for a larger sum, public policy would demand that he suffer prosecution under this statute.

The case of United States vs. Moore, in the 18 Federal, page 686, is a prosecution under old Section 5485, for demanding or receiving a greater sum than ten dollars in a pension case, and its reasoning may be of interest in studying the instant statute. Under the Revenue Acts, considered elsewhere, will be found a

statute relating to extortion by revenue officers or agents. Under the old law, this inhibition was contained in Section 3169. The case of United States vs. Deaver, 14 Federal, 595, in passing upon this particular statute, defines extortion to be the taking or obtaining of anything from another by a public officer, by means of illegal compulsion or oppressive exaction, and holds that an officer who collects a sum of money as special taxes from a person as wholesale and retail dealer in spirits, when no such taxes have been regularly assessed against him, is guilty of oppression, although such party has been guilty of selling spirits at wholesale and retail, without a license, as required by law, and the fact that he reported such taxes to the Collector of the District as received, and the Collector of the District, in his settlement with the Revenue Department was required to pay the sum collected after the manner of its collection was fully known to the Department, will not render legal the acts of the defendant, knowingly and wilfully done without authority of law.

That same case, in considering further the offense, decided in substance, that the principle and policy of the Common Law that a ministerial officer who had arrested a person, and who takes from such person money, or other reward, under a pretense or promise of getting the offender discharged, is guilty of a criminal offense, and under the Section 3169 is extended to officers of the Revenue, and any such officer who accepts or attempts to collect, directly or indirectly, as payment or gift or otherwise, any sum of money or other thing of value, for a compromise of a violation of the Revenue laws, is guilty of a misdemeanor.

§ 128. **Receipting for Larger Sums than are Paid.**—Section 5483 of the old Statutes, is changed by Section 86 of the New Code, which reads as follows:

"Sec. 86. Whoever, being an officer, clerk, agent, employee, or other person charged with the payment of any appropriation made by Congress, shall pay to any clerk or other employee of the United States a sum less than that provided by law, and require such employee to receipt or give a voucher for an amount greater than that actually paid to and received by him, is guilty of embezzlement, and shall be fined in double the amount so withheld from any employee of the Government, and imprisoned not more than two years."

The old statute was limited by the word "officer," just as was old Section 5481. New Section 86, however, includes not only "officer," but clerk, agent, or employee, or other person, and in such broadness includes, it is thought, every paying officer of the Federal Government. In United States vs. Mayers, 81 Federal, page 159, which was a decision under the old statute, a postmaster was held to be an "officer" within the meaning of that statute, and subject to indictment for having received a receipt for a larger amount than that which he actually paid a letter carrier employed in his office. That decision also contains a copy of the indictment in that case, which was held to be sufficient.

§ 129. **Species of Embezzlement.**—Sections 5488, 5489, 5490, 5491, 5492, 5493, 5494, 5495, 5496, and 5497 of the 1878 Revised Statutes, denominate certain acts with reference to handdlers of the public money, such as disbursing officers and depositories, to be statutory embezzlements, the specific elements of which are respectively therein included. These statutes are practically re-enacted under the following sections of the New Code.

§ 130. **Disbursing Officer Unlawfully Converting, Etc., Public Money.**—Section 87 of the New Code reads as follows:

"Sec. 87. Whoever, being a disbursing officer of the United States, or a person acting as such, shall in any manner convert to his own use, or loan with or without interest, or deposit in any place or in any manner, except as authorized by law, any public money intrusted to him; or shall, for any purpose not prescribed by law, withdraw from the Treasurer, or any assistant treasurer, or any authorized depository, or transfer, or apply, any portion of the public money intrusted to him, shall be deemed guilty of an embezzlement of the money so converted, loaned, deposited, withdrawn, transferred, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both."

§ 131. **Failure of Treasurer to Safely Keep Public Moneys.**—Section 88 of the New Code is in the following words:

"Sec. 88. If the Treasurer of the United States, or any assistant treasurer, or any public depository, fails safely to keep all moneys deposited by any disbursing officer or disbursing agent, as well as all moneys deposited by any receiver, collector, or other person having money of the United States, he shall be

deemed guilty of embezzlement of the moneys not so safely kept, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years."

§ 132. **Custodians of Public Money Failing to Safely Keep, Etc.**—New Section 89 reads as follows:

"Sec. 89. Every officer or other person charged by any Act of Congress with the safe-keeping of the public moneys, who shall loan, use, or convert to his own use, or shall deposit in any bank or exchange for other funds, except as specially allowed by law, any portion of the public moneys intrusted to him for safe-keeping, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years."

§ 133. **Failure of Officer to Render Accounts, Etc.**—New Section 90 reads as follows:

"Sec. 90. Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement, and shall be fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years."

§ 134. **Failure to Deposit, as Required.**—Section 91 of the New Code reads as follows:

"Sec. 91. Whoever, having money of the United States in his possession or under his control, shall fail to deposit it with the Treasurer, or some assistant treasurer, or some public depository of the United States, when required so to do by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officers of the Treasury, shall be deemed guilty of embezzlement thereof, and shall be fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years."

It has been determined, in the case of United States vs. Dimmick, reported in 112 Federal, 350, and affirmed in Dimmick vs. United States, 121 Federal, 638, that to constitute the offense of failing to deposit, as required, in these sections, it is not necessarythat a person having such moneys in his possession should have been "required" to deposit the same by a specific order directed to him which he failed to obey, but such requirement may be made by a general rule or regulation of the Treasury Depart-

ment, requiring such moneys to be deposited at stated times, and a wilful failure to comply with such rule is within the statute.

So also, it seems that a similar general rule made by the Postmaster General, or any other executive officer, concerning the deposit of moneys by subordinates in that particular branch of the Government, would likewise be all that was necessary to meet the requirement of the statute under the word "required."

§ 135. **Provisions of the Five Preceding Sections—How Applied.**—New Section 92 reads as follows:

"Sec. 92. The provisions of the five preceding sections shall be construed to apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such person be indicted as receivers or depositaries of the same."

§ 136. **Record Evidence of Embezzlement.**—New Section 93 is in the following words:

"Sec. 93. Upon the trial of any indictment against any person for embezzling public money under any provision of the six preceding sections, it shall be sufficient evidence, *prima facie*, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury, as required in civil cases, under the provisions for the settlement of accounts between the United States and receivers of public money."

§ 137. **Prima Facie Evidence.**—New Section 94 is in the following words:

"Sec. 94. The refusal of any person, whether in or out of office, charged with the safe-keeping, transfer, or disbursement of the public money to pay any draft, order, or warrant drawn upon him by the proper accounting officer of the Treasury, for any public money in his hands belonging to the United States, no matter in what capacity the same may have been received, or may be held, or to transfer or disburse any such money, promptly, upon the legal requirement of any authorized officer, shall be deemed, upon the trial of any indictment against such person for embezzlement, *prima facie* evidence of such embezzlement."

§ 138. **Evidence of Conversion.**—Section 95 of the New Code is in the following words:

"If any officer charged with the disbursement of the public moneys accepts, receives, or transmits to the Treasury Department to be allowed in his favor any receipt or voucher from a creditor of the United States without having paid to such creditor

in such funds as the officer received for disbursement, or in such funds as he may be authorized by law to take in exchange, the full amount specified in such receipt or voucher, every such act is an act of conversion by such officer to his own use of the amount specified in such receipt or voucher."

The above three sections are general statutes that apply to and regulate the method of proof, and create new rules of evidence that apply to Sections 87, 88, 89, 90, and 91, above quoted.

§ 139. **Banker, Etc., Receiving Deposit from Disbursing Officer.** —Section 96 of the New Code is in the following words:

"Sec. 96. Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both."

See Cook County National Bank vs. United States, 107 U. S., 445, 27 Law Ed., page 537, which discusses, in a general way, the priority right of the United States as against insolvents. See also 15 Opinion of Attorney General, 288.

Under the authority of United States vs. Green et al, 146 Federal, 778, old Section 5497, all the terms of which are included in the statute under discussion, extended the crime of embezzlement of public money to every person who used, transferred, converted, appropriated, or applied any portion of the same for any purpose not prescribed by law.

§ 140. **Embezzlement by Internal Revenue Officers, Etc.**—Section 97 of the New Code is in the following words:

"Sec. 97. Any officer connected with, or employed in, the Internal Revenue Service of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or other property of the United States, and any officer of the United States, or any assistant of such officer,

who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both."

This section contains a part of what was originally in Section 5497 of the old Statutes, as does Section 96, above considered. By the specific terms of the section, an embezzlement may be properly laid thereunder, even though the money or property so embezzled is not the money or property of the United States, provided that such money or property came into the possession or control of the United States officer by reason of his office, or under color thereof, or under claim of authority; as, for instance, one paying to a Deputy Collector a partial payment or installment payment on a license not yet issued, or giving to a rural route carrier money to purchase a money-order, which remains the property of the intended purchaser. All these, and many other offenses, would be punishable under this statute.

§ 141. **Officer Contractng Beyond Specific Appropriation.**—Section 98 of the New Code, which practically re-enacts old Section 5503, and the substance of the amendment thereto, is in the following words:

"Sec. 98. Whoever, being an officer of the United States, shall knowingly contract for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than the specific sum appropriated for such purpose, shall be fined not more than two thousand dollars and imprisoned not more than two years."

§ 142. **Officer of United States Court Failing to Deposit Moneys, Etc.**—Section 99 of the New Code, which substantially re-enacts old Section 5504, is in the following words:

"Sec. 99. Whoever, being a clerk or other officer of a court of the United States, shall fail forthwith to deposit any money belonging in the registry of the court, or hereafter paid into court or received by the officers thereof, with the Treasurer, assistant treasurer, or a designated depositary of the United States, in the

name and to the credit of such court, or shall retain or convert to his own use or to the use of another any such money, is guilty of embezzlement, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both; but nothing herein shall be held to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court."

Some civil cases that merely mention old Section 5504 are the following: Henry vs. Sowles, 28 Federal, 481; United States vs. Bixby, 10 Bis., 238.

§ 143. **Receiving Loan or Deposit from Officer of Court.**—Section 100 of the New Code, which takes the place of the old Statute 5505, reads as follows:

"Sec. 100. Whoever shall knowingly receive from a clerk or other officer of a court of the United States, as a deposit, loan, or otherwise, any money belonging in the registry of such court, is guilty of embezzlement, and shall be punished as prescribed in the preceding section."

§ 144. **Failure to Make Returns or Reports.**—Section 101 of the New Code, which re-enacts old Section 1780, is in the following words:

"Sec. 101. Every officer who neglects or refuses to make any return or report which he is required to make at stated times by any Act of Congress or regulation of the Department of the Treasury, other than his accounts, within the time prescribed by such act or regulation, shall be fined not more than one thousand dollars."

§ 145. **Aiding in Trading in Obscene Literature, Etc.**—Old Section 1785, which is to be regulated by the decisions under the old Section 3893 and its amendments, which have heretofore been treated under postal crimes and offenses, is replaced by Section 102 of the New Code, in the following words:

"Sec. 102. Whoever, being an officer, agent, or employee of the Government of the United States shall knowingly aid or abet any person engaged in violating any provision of law prohibiting importing, advertising, dealing in, exhibiting, or sending or receiving by mail, obscene or indecent publications or representations, or means for preventing conception or producing abortion, or other article of indecent or immoral use or tendency, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both."

§ 146. **Collecting and Disbursing Officers Forbidden to Trade in Public Funds.**—Old Sections 1788 and 1789 are re-enacted into new Section 103 in the following words:

"Sec. 103. Whoever, being an officer of the United States concerned in the collection or the disbursement of the revenues thereof, shall carry on any trade or business in the funds or debts of the United States, or of any State, or any public property of either, shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both, and be removed from office, and thereafter be incapable of holding any office under the United States."

§ 147. **Judges, Clerks, Deputies, Marshals, and Attorneys, and their Deputies Forbidden to Purchase Witness Fees, Etc.**—The statute contained in the 29 Statute at Large, 595, is re-enacted into new Section 104, in the following words:

"Sec. 104. Whoever, being a judge, clerk, or deputy clerk of any court of the United States, or of any Territory thereof, or a United States district attorney, assistant attorney, marshal, deputy marshal, commissioner, or other person holding any office, or employment, or position of trust or profit under the Government of the United States, shall, either directly or indirectly, purchase at less than the full face value thereof, any claim against the United States for the fee, mileage, or expenses of any witness, juror, deputy marshal, or any other officer of the court whatsoever, shall be fined not more than one thousand dollars."

§ 148. **Falsely Certifying, Etc., as to Record of Deeds.**—Section 105 of the New Code, creates a new offense, in the following words:

"Sec. 105. Whoever, being an officer or other person authorized by any law of the United States to record a conveyance of real property, or any other instrument which by law may be recorded, shall knowingly certify falsely that such conveyance or instrument has or has not been recorded, shall be fined not more than one thousand dollars, or imprisoned not more than seven years, or both."

§ 149. **Other False Certificates.**—Section 106 of the New Code creates a new offense in the following words:

"Sec. 106. Whoever, being a public officer or other person authorized by any law of the United States to make or give a certificate or other writing, shall knowingly make and deliver as true such a certificate or writing, containing any statement which

he knows to be false, in a case where the punishment thereof is not elsewhere expressly provided by law, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both."

§ 150. **Inspector of Steamboats Receiving Illegal Fees.**—Section 5482 of the old Statutes is re-enacted in Section 107 of the new Statutes in the following words:

"Every inspector of steamboats who, upon any pretense, receives any fee or reward for his services, except what is allowed to him by law, shall forfeit his office, and be fined not more than five hundred dollars, or imprisoned not more than six months, or both."

§ 151. **Pension Agent Taking Fee, Etc.**—Section 108, which displaces old Section 5487, reads as follows:

"Every pension agent, or other person employed or appointed by him, who takes, receives, or demands any fee or reward from any pensioner for any service in connection with the payment of his pension, shall be fined not more than five hundred dollars."

In the cases of United States vs. Kessel, 62 Federal, page 57, and United States vs. Van Leuven, 2 Federal, 62, successful prosecutions were laid by the Government against members of the Board of Examining Surgeons for receiving and asking outside compensation and gratuity for services rendered and to be rendered, respecting certain certificates from the Board of Surgeons. An indictment in the first case, which charged that the defendant, a member of a Board of Surgeons, did unlawfully ask "a gratuity, the nature of which is unknown," with intent to have his official action influenced, was held to be bad, in that it failed to sufficiently inform the defendant of what he was to meet. These two decisions held that a member of a Board of Examining Surgeons, appointed by the Commissioner of Pensions, though not an officer of the United States, was a person acting for, or in behalf of, the United States, and in an official capacity, and under authority of an office of the Government, and distinguished the case of the United States vs. Germaine, 99 U. S., 508.

§ 152. **Officer not to Be Interested in Claims Against United States.**—Section 109 of the New Code is substantially in the words of the old Statute 5498, and reads as follows:

"Sec. 109. Whoever, being an officer of the United States, or

a person holding any place of trust or profit, or discharging any official function under, or in connection with, any Executive Department of the Government of the United States, or under the Senate or House of Representatives of the United States, shall act as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, shall aid or assist in the prosecution or support of any such claim, or receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted in the prosecution of such claim, shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both."

To this statute, as well as most of the others that we are considering in this Chapter, the thought is applicable that a political office is merely a trust, which is to be conferred upon whatever conditions the Government chooses to impose. If the conditions are unacceptable to the office-holder, he is under no obligation to take the office, and he has no Constitutional or other right to require the conditions of the trusts he accepts to be subsequently altered or removed. In United States vs. Curtis, 12 Federal, 824, the Court, in expressing this thought, said:

"No citizen is required to hold a public office, and if he is unwilling to do so, upon such conditions as are prescribed by that Department of the Government which creates the office, fixes its tenure and incidents, it is his duty to resign."

The Curtis case was an indictment, in 1882, against a Federal employee for soliciting and receiving money from other Federal employees, to be used by the Republican State Committee. The indictment was found under Section 6 of the Act of August 15, 1876, First Supplement, 245, 19 Statute-at-Large, 169. The defendant was convicted, and thereafter sought, by writ of habeas corpus from the Supreme Court of the United States, his discharge; but the Supreme Court, through Chief Justice Waite, in 106 U. S., 371, *ex parte* Curtis; Lawyers' Co-Operative Edition, Book 27, page 232, refused to discharge the petitioner, and in effect, therefore, confirmed the conviction.

§ 153. **Member of Congress, Etc., Soliciting or Accepting Bribe.** —Sections 1781, 5500, and 5502 have contributed to new Section 110, which is in the following words:

"Sec. 110. Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment, and either before or after he has qualified, and during his continuance in office, directly or indirectly, ask, accept, receive, or agree to receive, any money, property, or other valuable consideration, or any promise, contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value to him, or to any person with his consent, connivance, or concurrence, for his attention to, or services, or with the intent to have his action, vote, or decision influenced on any question, matter, cause, or proceeding, which may at any time be pending in either House of Congress or before any committee thereof, or which by law or under the Constitution may be brought before him in his official capacity, or in his place as such member, delegate, or resident commissioner, shall be fined not more than three times the amount asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place, and thereafter be forever disqualified from holding any office of honor, trust, or profit, under the Government of the United States."

§ 154. **Offering, Etc., Member of Congress Bribe.**—New Section 111 contains the meat of old Section 5450, and is in the following words:

"Sec. 111. Whoever shall promise, offer, or give, or cause to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any Member of either House of Congress, or Delegate to Congress, or Resident Commissioner, after his election or appointment, and either before or after he has qualified, and during his continuance in office, or to any person with his consent, connivance, or concurrence, with intent to influence his action, vote, or decision, on any question, matter, cause, or proceeding which may at any time be pending in either House of Congress, or before any committee thereof, or which by law or under the Constitution may be brought before him in his official capacity or in his place as such member, delegate, or resident commissioner, shall be fined not more than three times the amount of money or value of the thing so promised, offered, given, made, or tendered, and imprisoned not more than three years."

§ 155. **Member of Congress Taking Consideration for Procuring Contracts, Offices, Etc.; Offering Member Consideration, Etc.**—New

Section 110, quoted above, together with new Section 112, which is in the following words:

"Sec. 112. Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment, and either before or after he has qualified and during his continuance in office, or being an officer or agent of the United States, shall directly or indirectly take, receive, or agree to receive, from any person, any money, property, or other valuable consideration whatever, for procuring or aiding to procure any contract, appointive office, or place to any person whomsoever; or whoever, directly or indirectly shall offer, or agree to give, or shall give, or bestow, any money, property, or other valuable consideration whatever, for the procuring, or aiding to procure, any such contract, appointive office, or place, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, be disqualified from holding any office of honor, profit, or trust under the Government of the United States. Any such contract or agreement may, at the option of the President, be declared void."

enlarge upon the provisions of old Statute 1781.

Upon the question of policy, the Curtis case, cited *supra,* may be considered as an authority under this section. In United States vs. Driggs, 125 Federal, 520, Congressman Driggs was indicted for assisting a contractor by the name of Miller in making a contract with the Government for certain automatic cash registers, for a consideration of twelve thousand dollars. In the case of United States vs. Dietrich, 126 Federal, 676, which grew out of an indictment against Senator Dietrich, of Nebraska, for an alleged agreement to procure, or aid in the securing of, a post-office, for one Fisher, the Court held, of course, that it was necessary to allege in the indictment the election, qualification, and oath of Dietrich as such Senator, and for the facts to show that the offense was committed while he was such officer; and there being an interim before his actual qualification to such office, during which time he made the contract for the disposition of the post-office, if he made it at all, the Court determined that no offense was committed. In that opinion, the Court said:

"The defendant was not admitted to a seat in the Senate, and did not enter upon the discharge of the duties of that office, until December 2, 1901, not until that date did the Senate consider or act upon his election, credentials, and qualifications. Until then,

it was not known, and could not have been, in the absence of an earlier session of the Senate, whether his election, credentials, and qualifications, would be deemed by the Senate, the sole and exclusive judge, to be such as to entitle him to membership in that body. Immediately following the favorable action of the Senate upon his election, credentials, and qualifications, the defendant took the oath of office as a Senator, which was an assumption of the duties of that office; but until then he had not accepted the office, and was not obligated to its acceptance. Until then, it was optional with him to accept or decline; and if, on December 2, 1901, he had exercised that office by declining instead of accepting, he would not have been a Senator at all, under the election of March 28, 1901."

It is quite true that the Common Law made it an offense for one not to accept an office to which he was elected, but no such jurisdiction is recognized by the Federal Courts. If it be true, therefore, that Dietrich agreed to sell the office between the date of his election, in March, and the date of his qualification, in December, he committed no offense under the Statute under discussion. The case of United States vs. Burton, reported in 131 Federal, 552, grew out of an alleged practice by Senator Burton before the Post-office Department of the United States, with reference to a certain fraud order that the Postmaster General had issued. The conviction that resulted upon that case was finally reversed, Burton vs. United States, 196 U. S., 283, but upon a retrial another conviction was affirmed, United States vs. Burton, 202 U. S., 344; 50 Law Ed., 1057. The Court held, in the last writ of error, that a fraud order inquiry pending before the Post-office Department is a proceeding in which the United States, although having no direct money or pecuniary interest in the result, is directly or indirectly interested within the meaning of Section 1782, making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any Department, in relation to any proceeding in which the United States is so interested.

The Court also in that case said that the agreement to receive, and the receipt of, the forbidden compensation are made two separate and distinct offenses under Section 1782.

In the case of McGregor vs. United States, 134 U. S., 188, the Circuit Court of Appeals for the Fourth Circuit affirmed a con-

viction of the defendants, who were clerks in the Post-office Department, under Sections 1781 and 1782, for conspiring with a dealer in leather goods for the sale of mail pouches to the Federal Government.

This case discusses the introduction of evidence before a grand jury, the joinder of various counts, and the sufficiency in general of a bill alleging the elements of such an offense. The Court refused to revise the judgment of the grand jury, stating that,

"It is doubtless true that grand juries frequently consider testimony that would be held inadmissible by a trial court, for such juries are not usually well informed concerning the rules of evidence, nor the rights and privileges of the parties whose alleged offenses they are examining into.....In cases like this, where the record discloses that many witnesses were examined, and much documentary evidence considered by the grand jury, it is quite apparent that it would be subversive of our criminal procedure and destructive of the rules formulated to promote the due administration of justice, to establish a practice under which indictments might be quashed, because of a consideration by the grand jury of the improper testimony given by one witness among many, or the reading by such jury of a statement irregularly submitted to it, which may likely have had but little influence in the conclusion reached by the jury."

In other words, the Court said later on, that even though evidence might have been improperly considered by the grand jury, that the Court would not say that the jury did not, nevertheless, have before it sufficient of legal and pertinent testimony to warrant the returning of the indictment, and cites cases in support.

In United States vs. Booth, 148 Federal, 112, will be found a complete copy of an indictment under Section 1782, which was approved by the Court. In that case, a Receiver of the Land Department of the United States was held to commit an offense against the statute under discussion, when he gave advance information respecting the lands, for which advance information he received compensation, and the Court held that the United States has a direct interest, within the meaning of the section, in all public lands, and in the right of entry or purchase thereof, through proceedings to be had at any of its land offices. Under the reasoning of this last case, any compensation whatever is con-

strued to be a violation of the statute. It will be remembered, however, that the distinction drawn in the Dietrich case, with reference to election and qualification, can never arise under new Sections 112 and 113, for the reason that those sections expressly provide either before or after qualification.

§ 156. **Member of Congress Taking Compensation in Matters to Which the United States Is a Party.**—New Section 113, which is closely akin to 112, just discussed, and which re-enacts the salient features of old Section 1782, and under which the citations and suggestions made with reference to 112 are also applicable, is in the following words:

"Sec. 113. Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever, for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States."

§ 157. **Member of Congress Not to be Interested in Contract.**—Sections 109, 110, 111, 112, and 113, provide, in various ways, for the conservation of official fidelity. To these, has been added new Section 114, which takes the place of old Section 3739, and which is in the following words:

"Sec. 114. Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States by any officer or person authorized to make contracts on its behalf, shall be fined not

more than three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced by the United States, in consideration of any such contract or agreement, it shall forthwith be repaid; and in case of failure or refusal to pay the same when demanded by the proper officer of the Department under whose authority such contract or agreement shall have been made or entered into, suit shall at once be brought against the person so failing or refusing and his sureties, for the recovery of the money so advanced."

The case of the United States vs. Dietrich, 126 Federal, 671, cited *supra* under 112 and 113, may be read with interest by those seeking light upon the instant statute; also Second Attorney's General Opinion, 697, 15 Attorney's General Opinion, 280. This statute, it will be noticed, is directed against Members of Congress being interested in contracts with the Government, whatever such interest may be, whether direct or indirect, and whether before qualification or after qualification, which meets, as heretofore observed, the objections that were raised by the Court in the Dietrich case, to a successful prosecution.

§ 158. **Officer Making Contract with Member of Congress.**—Old Section 3742 becomes new Section 115, which is in the following words:

"Sec. 115. Whoever, being an officer of the United States, shall on behalf of the United States, directly or indirectly make or enter into any contract, bargain, or agreement, in writing or otherwise, with any Member of or Delegate to Congress, or any Resident Commissioner, after his election or appointment as such member, delegate, or resident commissioner, and either before or after he has qualified, and during his continuance in office, shall be fined not more than three thousand dollars."

This section, as the other sections of the New Code bearing upon this phase of official wrong, is so worded as to punish the offender, whether before or after his qualification to office.

§ 159. **Contracts to Which the Two Preceding Sections Do Not Apply.**—By Section 116 of the New Code, which was Section 3740 of the Old Code, the two preceding sections,—that is, Sections 114 and 115,—do not apply to certain contracts, as is shown by the following words:

"Sec. 116. Nothing contained in the two preceding sections

shall extend, or be construed to extend, to any contract of agreement made or entered into, or accepted, by any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company; nor to the purchase or sale of bills of exchange or other property by any Member of or Delegate to Congress, or Resident Commissioner, where the same are ready for delivery, and payment therefor is made at the time of making or entering into the contract or agreement."

§ 160. **United States Officer Accepting Bribe.**—In the discussion of Section 110, *supra*, cases were cited and suggestions were made concerning old Sections 5501 and 5502. These two sections are broadly re-enacted in new Section 117, which is in the following words:

"Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses, shall ask, accept, or receive any security for the payment of money, or for the delivery or conveyance of anything of value with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years, and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States."

The cases of the United States vs. Kissel, 62 Federal, 57, and United States vs. Van Lauven, 62 Federal, 62, heretofore discussed under Section 110, are authorities under this section. The statute is so broad that it covers not only one who is an officer of the United States, but any person acting for or on behalf of the United States in any official capacity.

The case of United States vs. Boyer, 85 Federal, 425, correctly, it seems, announces a doctrine that would be equally applicable to the new Section: that is, that though one be a United States officer, if he be attempting to perform a function which under

the laws and limitations of the United States, he is not entitled to perform, even though he may think that he has such duty, and even though the person offer him a gratuity not to perform such duty may think that he has a right to perform it, yet he would not be guilty under the section, for the reason that he was acting outside of his authority. In the Boyer case, an Inspector for the Agriculture Department of the United States was indicted for receiving money from the packing house to which he was assigned, as an Inspector of the Bureau of Animal Industry. The point was raised that Congress did not have the power, under the Constitution, to send an inspector into a packing house located within a State, and impose upon him the duties set out in the indictment. The Court held that the facts set out in the indictment did not constitute an offense against the United States, for the reason that it was intended to induce him not to do a thing which no valid law of Congress imposed upon him to do.

In the case of United States vs. Ingham, 97 Federal, 935, which was a prosecution under Section 5451 of the old Statutes, which is closely akin to the one under discussion, the Court held that the statute applied to any person acting for or on behalf of the United States, whether such person was an officer or not; and, therefore, applied the section to a Secret Service operative employed by the Secretary of the Treasury, holding that the bribery or attempted bribery of such a person to collude in or allow a fraud on the United States, was an offense within the terms of the statute.

In King vs. United States, 112 Federal, is a state of facts which showed an offense under Section 5501 of the old Statutes, in the receiving of a large sum of money by a Captain in the United States Quartermaster's Department, for the acceptance and rejection of material to be used in the construction of a public building, such payment having been made him by the Contractor. The Circuit Court of Appeals for the Fifth Circuit sustains a conviction under such facts, but reverses the case upon another question. In the opinion is a copy of the indictment.

An indictment under these sections should charge that the

bribe was given with the intent to influence the official action of the person. An indictment should also clearly specify the official capacity of the person who has accepted the bribe, or to whom an attempt has been made to give a bribe. It was said, however, in the King case, that after verdict, a general allegation which seems to show capacity of supervision over a particular Governmental function would be sufficient.

In the case of Sharp against the United States, 138 Federal, 878, the Circuit Court of Appeals for the Eighth Circuit, while reversing the case upon another question, held that an indictment against a United States Indian Agent for bribery, which alleged that he, having charge of the execution and completion of certain leases for certain contracts of land in a specified Indian reservation, commonly known as the Ponca Pasture, etc., feloniously and corruptly accepted and received the sum of fifteen hundred dollars from one A., for the purpose of influencing his action on the completion of such leases, was sufficient to charge the offense under 5501. The case also directly holds that an Indian Agent, in the execution and completion of leases of Government lands, was charged with such an official trust that his receiving a bribe to influence his official action rendered him subject to punishment under the above section.

The case of United States vs. Haas, 163 Federal. 908, was an indictment under the old Conspiracy Statute, for a violation of the old bribery section, which was 5451, and is interesting in this connection, because in that case the Court held that a person employed by the United States as an Assistant Statistician in the Department of Agriculture, in the performance of the duties with which he is charged by the rules of the Department, acts for the United States in an official function within the meaning of Revised Statutes No. 5451, making it a criminal offense to bribe any such person, to induce him to do or to omit to do any act in violation of his lawful duty.

§ 161. **Political Contributions Not to be Solicited by Certain Officers.**—Section 118 of the New Code reads as follows:

"Sec. 118. No Senator or Representative in, or Delegate or Resident Commissioner to Congress, or Senator, Representative, Delegate, or Resident Commissioner-elect, or officer or employee

of either House of Congress, and no executive, judicial, military or naval officer of the United States, and no clerk or employee of any Department, branch, or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any Department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States."

§ 162. **Political Contributions Not to be Received in Public Offices.**—Section 119 of the New Code reads as follows:

"Sec. 119. No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in the preceding section, or in any navy-yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever."

§ 163. **Immunity from Official Proscription, Etc.**—Section 120 is in the following words:

"Sec. 120. No officer or employee of the United States mentioned in section one hundred and eighteen, shall discharge, or promote, or degrade, or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose."

§ 164. **Giving Money, Etc., to Officials for Political Purposes Prohibited.**—Section 121 of the New Code is as follows:

"Sec. 121. No officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate to Congress, or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever."

§ 165. **Penalty for Violating the Provisions of the Four Preceding Sections.**—Section 122 is in the following words:

"Sec. 122. Whoever shall violate any provision of the four preceding sections shall be fined not more than five thousand dollars, or imprisoned not more than three years, or both."

The above sections are taken from the First Volume of the Supplements, 396, and were what was originally known as the Civil Service Act. The case of the United States vs. Thayer, in 154 Federal, 508, originated on that portion of the original law which is now Section 119, above quoted, and was a prosecution based upon the sending of letters by mail to the Federal employees, soliciting political contributions for use by the Republican State Committee, such letters to be delivered to such Federal employee in the Federal building at Dallas, Texas. The lower Court held that the sending of such a letter addressed to an Internal Revenue employee at his office in the Federal Building, by a defendant who was neither an officer nor an employee of the United States, did not constitute an offense within the Act. The Government sued out a writ of error under the new statute, authorizing the United States to go direct to the Supreme Court of the United States under certain conditions, and the Supreme Court of the United States reversed the judgment of the lower Court, and held that,

"solicitation by letter, intended to be received and read by an Internal Revenue employee in the Post-office Building, and which was so received and read in such building, is embraced by the provision of the Civil Service Act now under discussion, that no person shall in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in such Act, solicit 'in any manner whatever' or receive any contribution of money or any other thing of value, for any political purpose whatever."

In the course of the opinion, the Court says:

"The solicitation was made at sometime, somewhere. The time determines the place; it was not completed when the letter was dropped into the post. If the letter had miscarried or been burned, the defendant would not have accomplished the solicitation. The Court below was misled by cases in which, upon an indictment for obtaining money by false pretenses, the crime was held to have been committed at the place where drafts were put into the post by a defrauding person, but these stand on the analogy of the acceptance by mail of an offer, and throw no light. .....Therefore, we repeat, until after the letter had entered the building, the offense was not completed, but when it had been read. The case was not affected by the nature of the intended means by which it was put into the hands of the person ad-

dressed. Neither can the case be affected by speculation as to what the position would have been if the receiver had put the letter in his pocket and had read it later, at home. Offenses usually depend for their completion upon events that are not wholly within the offender's control, and that may turn out in different ways."

In the case of United States vs. Smith, 163 Federal, 926, District Judge Jones held that the personal delivery to a postmaster, in his office, of a sealed letter containing a request for a contribution for a political campaign constitutes a criminal offense under the Act under discussion.

§ 167. **Government Officer, Etc., Giving Out Advance Information Respecting Crop Reports.**—The New Code, at Section 123, contains an entirely new statute, which is the fruit of stock exchanges and the alternate rage of the American bull and bear, and is in the following words:

"Whoever, being an officer or employee of the United States or a person acting for or on behalf of the United States in any capacity under or by virtue of the authority of any Department or office thereof, and while holding such office, employment, or position shall, by virtue of the office, employment, or position held by him, become possessed of any information which might exert an influence upon or affect the market value of any product of the soil grown within the United States, which information is by law or by the rules of the Department or office required to be withheld from publication until a fixed time, and shall wilfully impart, directly or indirectly, such information, or any part thereof, to any person not entitled under the law or the rules of the Department or office to receive the same; or shall, before such information is made public through regular official channels, directly or indirectly speculate in any such product respecting which he has thus become possessed of such information, by buying or selling the same in any quantity, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both: *Provided*, That no person shall be deemed guilty of a violation of any such rule, unless prior to such alleged violation he shall have had actual knowledge thereof."

§ 168. **Government Officer, Etc., Knowingly Compiling or Issuing False Statistics Respecting Crops.**—Section 124 of the New Code is likewise pioneer legislation, and is in the following words:

"Whoever, being an officer or employee of the United States,

and whose duties require the compilation or report of statistics or information relative to the products of the soil, shall knowingly compile for issuance, or issue, any false statistics or information as a report of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

§ 169. **Counterfeiting Weather Forecasts, Interfering with Signals, Etc.**—In the 33 Statute at Large, page 864, there was annexed to the Agricultural Department Appropriation Act the following statute, with reference to the protection and reliability of weather reports and forecasts, including signals issued by and under the control of the Agricultural Department:

"Any person who shall knowingly issue or publish any counterfeit weather forecasts or warnings of weather conditions, falsely representing such forecasts or warnings to have been issued or published by the Weather Bureau or other branch of the Government Service, or shall molest or interfere with any weather or storm flag or weather map or bulletin displayed or issued by the United States Weather Bureau, shall be deemed guilty of a misdemeanor, and on conviction thereof, for each offense, be fined in a sum not exceeding five hundred dollars, or imprisoned not to exceed ninety days, or be both fined and imprisoned, in the discretion of the Court."

CHAPTER VII.

OFFENSES AGAINST THE OPERATIONS OF THE GOVERNMENT.

197. Boxing, Etc., Timber on Public Lands for Turpentine: 34 St. L., 208—51.
198. Setting Fire to Timber on Public Lands: II Sup., 562, II Sup., 1163—52.
199. Failing to Extinguish Fires: New Code, 53.
200. Breaking Fence or Gate Enclosing Reservation Lands, or Driving or Permitting Live Stock to Enter Upon: New Code, 56.
201. Injuring or Removing Posts or Monuments: New Code, 57.
202. Interrupting Service: 2412—58.
203. Agreement to Prevent Bids at Sale of Lands: 2373—59.
204. Injuries to United States Telegraph, Etc., Lines: I Sup., 46—60.
205. Counterfeiting Weather Forecasts: II Sup., 233, and II Sup., 406, and II Sup., 459—61.
206. Interfering with Employees of Bureau of Animal Industry: 33 St. L., 1265—62.
207. Forgery of Certificate of Entry: 5417—63.
208. Concealment or Destruction of Invoices, Etc.: 5443—63.
209. Resisting Revenue Officers; Rescuing or Destroying Seized Property, Etc.: 5447—65.
210. Falsely Assuming to Be Revenue Officer: 5448—66.
211. Offering Presents to Revenue Officers: 5452—67.
212. Admitting Merchandise to Entry for Less Than Legal Duty: 5444—68.
213. Securing Entry of Merchandise by False Samples: 5445—69.
214. False Certification by Consular Officers: 5442—70.
215. Taking Seized Property from Custody of Revenue Officer: 5446—71.
216. Forging, Etc., Certificate of Citizenship: 34 St. L., 602—74.
217. Engraving, Etc., Plate for Printing or Photographing, Etc., Certificate of Citizenship: 34 St. L., 602—75.
218. False Personification, Etc., in Procuring Naturalization: 5424—76.
219. Using False Certificate of Citizenship, or Denying Citizenship, Etc.: 5425—77.
220. Using False Certificate, Etc., as Evidence of Right to Vote: 5426—78.
221. Falsely Claiming Citizenship: 5428—79.
222. Taking False Oath in Naturalization: 5395—80.
223. Provisions Applicable to All Courts of Naturalization: 5429—81.
224. Corporations, Etc., Not to Contribute Money for Political Elections: 34 St. L., 83.

§ 170. In the new Criminal Code, which went into effect January 1, 1910, there are fifty-eight sections, from 27 to 58 inclusive, which treat of various offenses under the above general head, many of which sections will not be considered herein, other

than to copy them, and refer to the old Section of the Revised Statutes of like nature, for the reason that such offenses are scarcely ever committed.

§ 171. **Forgery of Letters Patent.**—The Act of March 3, 1825, which became Section 5416 of the Revised Statutes, and which the Court, in the case of United States vs. Irwin, 5 McLean, 178, determined had repealed the fourteenth section of the Act of April 30, 1790, which provided for the death penalty for certain forgeries, is now Section 27 of the New Code, in the following words:

"Whoever shall falsely make, forge, counterfeit, or alter any letters patent granted or purporting to have been granted by the President of the United States; or whoever shall pass, utter, or publish or attempt to pass, utter, or publish as genuine, any such forged, counterfeited or falsely altered letters patent, knowing the same to be forged, counterfeited, or falsely altered, shall be fined not more than five thousand dollars and imprisoned not more than ten years."

§ 172. **Forging Bond, Bid, Public Record, Etc.**—Section 28 of the New Code, which is in the following words:

"Sec. 28. Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist, in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be fined not more than one thousand dollars, or imprisoned not more than ten years, or both,"

takes the place of Sections 5418 and 5479 of the Revised Stat-

utes, which largely duplicate each other. Many cases of interest arose under the two old statutes, and since the new section comprehends the elements of those two statutes, the decisions thereunder may be considered authority in construing and determining the elements of an offense under the new section.

In United States vs. Hall, 131 U. S., page 50, the Supreme Court held that a notary public has no general authority to administer oaths in reference to United States matters, unless there be a special statute with reference to such matter. This decision was approved in United States vs. Reilly, 131 U. S., 59, 33 Law Ed., 75. In United States vs. Manion, 44 Federal, 800, it is held that no Federal law authorizes notaries to take affidavits required by Land Department rules.

In United States vs. Todd, 25 Federal, page 815, it was determined, as we have already seen with reference to prosecutions under the New Code, that a prosecution under Sections 5418 and 5479 could not be begun by information, since the punishment was infamous.

The elements necessary to be alleged and proven to make an offense under the section are plainly set forth in the case of United States vs. Houghton, 14 Federal, 544. That was a prosecution against a collector of a port for forging a pay-roll for transmission to his superior at Washington, as a result of which he would secure the money. The Court, in that case, held that the indictment must allege, and the proof show, that the pay-roll was false, forged, and counterfeited; that the same was transmitted to the proper officer of the Government by the defendant; and that the false character of the writing was known by the defendant at the time of the sending; and that it was sent with intent to defraud the United States.

Legal knowledge, as herein understood, and as understood in all criminal prosecutions, is, that every man is presumed to know everything that he can learn upon inquiry, when he has facts in his possession which suggest the inquiry. This sort of knowledge must be affirmatively shown by the Government, except in the case of confession. It is generally impossible to make it out by direct evidence, and can only be inferred from overt acts. Wharton, in discussing the subject, says that if the

knowledge cannot be implied from the facts and circumstances which, together with it, constitute the offense, the other acts of the defendant from which it can be implied to the satisfaction of the jury must be proved at the trial.

It will be borne in mind that the statute denounces the offense of forgery, and not the offense of perjury, as was made clear by the opinion in the case of United States vs. Wentworth, 11 Federal, 52.

It is absolutely necessary that the indictment allege that the acts were committed for the purpose of defrauding the United States, and that the persons so committing the offense had such intent; and if the facts completely show upon their face that the result would not have been a fraud upon the United States, or that the United States could not have been defrauded, then and in that event, no offense is plead.

In the case of United States vs. Barnhart, 33 Federal, 459, which grew out of a forged affidavit with reference to the selection of certain Government lands, the Court held that even though the affidavit was false and forged, no offense was committed, for the reason that the affidavit could not be legally used before the Land Office or before the Secretary of the Interior, for the reason that those officers had theretofore superseded such affidavits; hence, such affidavits could not be legally used to defraud the United States.

In United States vs. Gowdy, 37 Federal, 333, the Court held that a false affidavit in support of a pension would support a prosecution hereunder, because the same was in support of a claim against the Government, which would have resulted in defrauding the Government.

In United States vs. Bunting, 82 Federal, 883, an applicant for a Government clerkship filed a sworn application in the form required for an examination by the Civil Service Commission, and was afterwards notified by postal card to appear for examination at a time stated. By previous arrangement, another person, impersonating the applicant, presented himself for examination, and filled out a paper known as the declaration sheet, which contained questions concerning the applicant, and signed the applicant's name thereto. The Court held that Section

5418 covered such a case, and sustained the indictment, and observed that the acts were an attempt to prejudice the rights of the United States in the administration of the Civil Service Statutes, and had the defendant been successful, he would have obtained a privilege which would have placed him in a favored class, and have entitled him to an advantage over others in the appointment to office, which privilege was a valuable one, and would have been in prejudice of the Government.

In the case of Staton vs. United States, 88 Federal, 253, the Circuit Court of Appeals for the Eighth Circuit, in passing upon a case wherein the defendant had been convicted while a postmaster for making out his quarterly accounts and forging the name of the Justice of the Peace thereto, and thus pretending to show that he had taken his oath to the correctness of his accounts before the Justice of the Peace, and upon the trial of which the defendant had contended that, as a matter of fact, his accounts were just and true, and had thereupon requested the trial court to instruct the jury that if, as a matter of fact, his accounts were true and just, that then and in that event the United States could not have been defrauded, said:

"Inasmuch as the trial Court, in its charge, altogether ignored the intent with which the acts complained of had been committed, and instructed the jury that the accused was guilty of the crime of forgery if he signed the name of the Justice to his reports, ...it is manifest that there was error."

The Court further said that the accused was entitled to have the jury determine the intent involved, because it was a necessary ingredient of the offense charged in the indictment, as to whether he had been actuated with an intent to defraud the United States.

So, also, in the case of the United States vs. Ah Won, 97 Federal, 494, it was held that the making of a blank form of a certificate of residence, such as when filed are issued by the United States to Chinese and entitle them to remain in the country, is not within Section 5418, making it a crime to counterfeit any writing for the purpose of defrauding the United States.

In United States vs. McKinley, 127 Federal, 166, the Court held that the forgery of homestead applications and affidavits

with intent to thereby obtain title to public lands of the United States, constitutes an offense under Section 5418, although the land was described as in Township 24 South of Range East, without naming the meridian, where, in fact, all the townships in the state are numbered from the same meridian, and the description was, therefore, sufficient to identify the lands to the officers acting on the papers, and such papers were capable of effecting the intended fraud.

In the case of Neff vs. United States, 165 Federal, 273, the Circuit Court of Appeals for the Eighth Circuit, held that when a false instrument or affidavit is so palpably and absolutely invalid that it cannot defraud or inflict loss or injury under any circumstances, it may not form the basis of a charge of forging it or of uttering it, or of transmitting it, to the officer, to defraud the United States; but if, under any contingency, it may have the effect to deceive and defraud, it is sufficient to found a conviction of such an offense upon. This decision arose in a case where the defendant had forwarded to the officers of the Land Department affidavits that were forged and false, which were erroneously received by the Land Office, but which, if acted upon, would have caused the issuance by the United States of a patent to the land, which purchase could not have been successfully attacked collaterally if the land had passed into the hands of an innocent purchaser, and the United States would thereby have been dafrauded.

§ 173. **Forging Deeds, Powers of Attorney, Etc.**—Section 29 of the new Code, in the following words:

"Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money, or whoever shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, with intent to defraud the United States, knowing the same to

be false, altered, forged, or counterfeited; or whoever shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the Government of the United States, any deed, power of attorney, order, certificate, receipt, contract, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be fined not more than one thousand dollars and imprisoned not more than ten years."

takes the place of old Section 5421, and contains all of the elements of the old Section, and adds thereto the word "contract," and changes the punishment, fixing a maximum fine and imprisonment.

Considered abstractly, the Section comprises three offenses: first, the making of any forged or counterfeited deed or other writing as therein enumerated for the purpose of obtaining any sum of money from the United States or any of its officers; second, the uttering of any such forged or counterfeited paper, with the intent to defraud the United States, knowing it to have been so forged; third, the transmitting or presenting to any office or officer of the Government any such writing, with knowledge that it is false, or forged, with the intent to defraud the United States. An indictment, therefore, under either of the three parts, must contain the elements as above set out, and must specially plead the intent and knowledge where requisite. So, likewise, a bill that includes in one count allegations that set up acts covering the entire statute, would be bad for duplicity.

In the case of United States vs. Fout, 123 Federal, 625, District Judge Adams divided the statute as above indicated. In the case of United States vs. Swan, 131 Federal, page 140, the same judge, in passing upon this statute, held that the forgery of an affidavit by a pensioner, to be used in contesting his deserted wife's claims for one-half of his pension, as authorized by the Act of March third, 1899, was not an offense within old Section 5421, which provided that any person who falsely forges any writing for the purpose of obtaining or receiving, or enabling any other person, directly or indirectly, to receive from the United States, any sum of money, shall be imprisoned, etc., was not

an offense thereunder. The decision is based upon the ground that the purpose of Swan seemed to be to make use of the forged writing to prevent his wife from obtaining half of the pension, which had already been allowed to him. He was, therefore, making no claim against the United States for himself. His right to a pension had already been established, and he, therefore, did not have the necessary intent under the statute to obtain or receive from the United States, etc., any sum of money.

Carrying out this distinction, the cases of United States vs. Barney, 5 Blatchf., 294, and United States vs. Myler, 27 Federal Case No. 15849, can be read with profit, since they hold that the first and second parts of the old section, and, therefore, of course, of the new statute, are confined to instruments designed to obtain money from the United States, and a count alleging the forgery and uttering of a certain false and fraudulent bond on the exportation of distilled liquors charges no offense under the section. To the same effect is the case of United States vs. Reese, 4 Sawyer, 629, which held in substance that an indictment for uttering and presenting as true to the Board of Land Commissioners, a false writing purporting to be a grant of certain described lands from the Mexican Government, with intent to defraud the United States, knowing the same to be false, was subject to demurrer on the ground that the section applied only to instruments altered or forged for the purpose of obtaining moneys from the United States or their officers or agents. To the same effect is Staton vs. United States, 88 Federal, 253, where it was held that an indictment which alleged the signing of the name of a Justice of the Peace to an affidavit, with the intent to defraud the United States, charged no offense under the section.

In United States vs. Wilson, 28 Federal Case No. 16732, it was held that the words "other writing" did not embrace a forged endorsement of a genuine instrument, as the forgery to a bank check drawn by a Pension Agent upon a depository of the United States.

In the case of the United States vs. Rohmstormm, 5 Blatchf., 222, it was held that a claim against the Government under this section need not be in favor of the party presenting the false writing or instrument or paper in support thereof.

In United States vs. Glasener, 81 Federal, 566, the Court held that false statements in the certificate of a notary public did not come within the provisions of the section; to the direct contrary of which holding is the case of the United States vs. Hartman, 65 Federal, 490, the courts being of equal dignity. In that case, the Court held that the statement in a certificate of something that was not true, if taken with the intent and knowledge required by the statute, would authorize prosecution thereunder, and subject the offender to punishment. To the same effect, is the decision in the case of United States vs. Moore, 60 Federal, 738.

In the cases of United States vs. Wilcox, 4 Blatchf., 385, and United States vs. Bickford, 4 Blatchf., 337, it was held that where a writing did not state all the facts, if made with the intent to defraud denounced by the statute, it would constitute an offense under this section.

It must be remembered, as a general proposition, that the false statements so made must be material, just as materiality is meant in a prosecution for perjury. Every false oath is not perjury. United States vs. Corbin, 11 Federal, 238.

In the case of United States vs. Moore, 60 Federal, 738, District Judge Cox, in passing upon a demurrer to an indictment under this section, says that,

"the authorities are unanimous in holding that the first paragraph of this Section 5421 is a forgery, and not a perjury, statute. It punishes one who falsely makes an affidavit, and not one who makes a false affidavit. The words of the statute are *ejusdem generis,* and are the words usually adopted to describe the crime of forgery. False making may almost be said to be synonymous with forging. United States vs. Statts, 8 Howard, 41; U. S. vs. Barney, 5 Blatchf., 294; U. S. vs. Wentworth, 11 Federal, 52; U. S. vs. Reese, 4 Sawyer, 629; U. S. vs. Cameron, 4 Dakota, 141, 13 N. W., 561; State vs. Wilson, 28 Minnesota, 52, 9 N. W., 28; Mann vs. People, 15 Hun., 155; State vs. Young, 46 N. H., 266; Commonwealth vs. Baldwin, 11 Gray, 197; Barb. Criminal Law, 97; Wharton Criminal Law, 653. It is clear, then, if the indictment merely charges the defendants with making an affidavit which contains a false statement of fact, that the offense cannot be punished under the paragraph quoted. For reasons stated hereafter, it is thought that the indictment is defective under any construction of the statute; but assuming now that it contains a full and clear statement of the acts of omission and com-

mission attending the fabrication of the affidavit and jurat, it amounts only to an averment that the notarial certificate is false. The names signed to the affidavit and jurat are all genuine. No part of the affidavit has been altered, forged, or counterfeited. In short, the certificate contains a number of false statements. It is a false certificate, but not a forged certificate. No authority has been cited or found by the Court, holding that a notary who signs a certificate containing untruthful statements, is guilty under a forgery statute. The statute must be construed strictly, and until such authority is presented, I shall hold that the paragraph quoted does not cover such an offense."

Of course, the indictment must allege that the forged or altered paper was transmitted to the officer of the Government in support of, or in relation to, a pending claim. In other words, it must appear that there was an account or claim against the United States. United States vs. Kessel, 62 Federal, 59. See also U. S. vs. Albert, 45 Federal, 552; United States vs. Kuentsler, 74 Federal, 220; United States vs. Hansee, 79 Federal, 303; De Lemos vs. United States, 91 Federal, 497.

In De Lemos vs. United States, 91 Federal, 499, the case arose by reason of the forgery of an endorsement to a genuine Government draft, and the Circuit Court of Appeals for the Fifth Circuit held that an indictment, to be good under 5421, on such a state of facts, should lay the charge on the endorsement, and not on the draft, because it was the endorsement that was forged, and not the draft.

§ 174. **Having Forged Papers in Possession.**—Section 30 of the New Code is in the following words:

"Sec. 30. Whoever, knowingly and with intent to defraud the United States, shall have in his possession any false, altered, forged, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of enabling another to obtain from the United States, or from any officer or agent thereof, any sum of money, shall be fined not more than five hundred dollars, or imprisoned not more than five years, or both."

The new section fixes a maximum punishment, and contains the word "contract." The old statute 5422 left the punishment to the discretion of the Court. These are the only two differences between the old and the new.

§ 175. **False Acknowledgements.**—Section 31 of the New Code reads as follows:

"Sec. 31. Whoever, being an officer authorized to administer oaths or to take and certify acknowledgments, shall knowingly make any false acknowledgement, certificate, or statement concerning the appearance before him or the taking of an oath or affirmation by any person with respect to any proposal, contract, bond, undertaking, or other matter, submitted to, made with, or taken on behalf of, the United States, and concerning which an oath or affirmation is required by law or regulation made in pursuance of law, or with respect to the financial standing of any principal, surety, or other party to any such proposal, contract, bond, undertaking, or other instrument, shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both."

This is an entirely new section. In the 1909 Supplement of the Federal Statutes annotated, it is said in speaking of this section, that,

"This section is new. As originally drafted, it was designed to reach officers making false acknowledgements in contracts, etc., with the Post-office Department, that department having strongly recommended such a section, in order to put a stop to abuses which frequently occurred with respect to mail and other contracts. The Committee on Revision of Laws approved the recommendation, and broadened the section so as to punish false acknowledgements with respect to *any* contract made with or on behalf of the Government."

This statute would seem to answer the cases cited under Section 29, which held that a false certificate of a notary was not punishable.

§ 176. **Falsely Pretending to be a United States Officer.**—Section 32 of the New Code, in the following words:

"Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both,"

contains a general statute, which was originally a special statute against one falsely representing himself to be a Revenue Officer, as set out in old Section 5448. This section was amended in the 23 Statute at Large, page 11, Chapter 26, First Supplement 425, and passes into the New Code as shown above.

In the case of the United States vs. Ballard, 118 Federal, 757, District Judge Phillips, in passing upon an indictment drawn under the above mentioned amendment, held that this statute covered the obtaining of some valuable thing by means of the fraudulent standing or credit secured by holding one's self out as such an officer, and that a month's lodging is a valuable thing within the meaning of the law.

The opinion sets out the indictment that was being passed upon, which charges that the defendant pretended to be a Deputy United States Marshal, and in such pretended character, did demand and obtain from Julia Eggeling a thing of value, to wit, lodging of the value of twenty dollars. A second count therein pleads the same fact in a different manner. While the indictment is in general terms, the Court, in passing thereon, upon objection, held that the offense was statutory, and a bill sufficiently describes the same, which follows the language of the statute and describes in addition thereto the act that was done to constitute the offense.

Judge Adams, in United States vs. Taylor, 108 Federal, held that the section created two offenses, the first of which included as an essential element, the use of such assumed position to extort money or property by wrongfully asserting a pretended claim of the United States, and the second comprehending the extortion of money not under the guise of asserting a claim due the United States, but including the holding out of the offender as an officer for the purpose of giving him such credit as will entitle him to successfully demand money from another for his private use, with intent to defraud, and, therefore, an indictment charging that the defendant feloniously, with the intent to defraud H., did falsely assume and pretend to be an officer acting under the authority of the United States Treasury Department, and did then and there feloniously, and with intent to defraud said H., take upon himself to act as such officer, and as a part of

the same sentence including the charge, "and did then and there in such assumed and pretended character as such officer, demand and receive the sum of ten dollars," was demurrable for duplicity. Judge Simonton, in charging the jury under this statute, told them that it was necessary to find that the defendant assumed to be the officer mentioned in the indictment; that such assumption was false; that he made such false assumption with the intent to defraud; and that he carried out such intent. That was in the case of United States vs. Curtain, 43 Federal, 433, which was an indictment growing out of one pretending to be a Post-office Inspector, and in such pretended capacity, visited a postmaster, and charged him with an illegal sale of stamps, which illegal sale the postmaster admitted; whereupon, the imposter received one hundred fifty dollars from the postmaster, giving him a receipt in full for the stamps illegally used, and signing it as Post-office Inspector. The same judge, in United States vs. Bradford, 53 Federal, 542, charged the jury to find the defendant not guilty upon the following state of facts: A Postal Clerk was in his postal car, assorting his mail, and he discovered Bradford concealed in a corner of the car. He sprang and seized him by the collar. The defendant at once said, "I am Bradford, and in the service." The Postal Clerk denied that he was in the service, and Bradford then said, "I have been discharged, but am trying to steal a ride to Florence." The facts not showing that Bradford claimed at the time to be an employee of the United States, he was not guilty of a violation of this section.

In United States vs. Farnham, 127 Federal, 478, District Judge McPherson set aside a conviction, and discharged the defendant, in a case under this statute, which showed the following facts: The defendant, while stopping at the prosecutor's hotel as a guest, falsely represented himself to the prosecutor as a Secret Service operative in the employ of the Government, and exhibited to the prosecutor a metal badge, inscribed, "Secret Service, U. S." Ten months thereafter, the defendant returned, and represented himself as a traveling salesman, spending several days at the hotel. Prosecutor believed defendant to be a Free Mason, and took special care of him during sickness on that account, after which the defendant presented a check which he

alleged had been signed by his employer in payment of his salary, and obtained seventy dollars thereon from prosecutor. The check was drawn on a bank which did not exist; was returned unpaid, and the prosecutor declared that he cashed the check because he continued to believe that the defendant was a Secret Service operative.

In discharging the defendant, the Court held that the facts were not sufficient to sustain a conviction for pretending to be an employee of the United States, and as such, knowingly and feloniously obtaining from another a sum of money, etc.

§ 177. **False Personation of Holder of Public Stocks.**—Section 33 of the New Code, which re-enacts old Section 5435, is in the following words:

"Sec. 33. Whoever shall falsely personate any true and lawful holder of any share or sum in the public stocks or debt of the United States, or any person entitled to any annuity, dividend, pension, prize money, wages, or other debt due from the United States, and, under color of such false personation, shall transfer or endeavor to transfer such public stock or any part thereof, or shall receive or endeavor to receive the money of such true and lawful holder thereof, or the money of any person really entitled to receive such annuity, dividend, pension, prize money, wages, or other debt, shall be fined not more than five thousand dollars, and imprisoned not more than ten years."

§ 178. **False Demand or Fraudulent Power of Attorney.**—Old Section 5436 is displaced by the New Code in Section 34, as follows:

"Sec. 34. Whoever shall knowingly or fraudulently demand or endeavor to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, prize money, wages, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power of attorney, authority, or instrument, shall be fined not more than five thousand dollars, and imprisoned not more than ten years."

§ 179. **Making or Presenting False Claims.**—Section 5438 of the old statutes is replaced by Section 35 of the New Code, in the following words:

"Sec. 35. Whoever shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any

person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department, or officer thereof, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining, or aiding to obtain the payment or approval of such claim, shall make or use, or cause to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; or whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or wilfully to conceal such money or other property, shall deliver or cause to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. And whoever shall knowingly purchase or receive in pledge for any obligation or indebtednes from any soldier, officer, sailor, or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier, sailor, officer, or other person under a clothing allowance or otherwise, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall be fined not more than five hundred dollars, and imprisoned not more than two years."

This section contains several offenses, and sets out two different punishments. It is necessary, in alleging an offense under the first portion of the section that there be an averment that the false claim, etc., was made for the purpose of being presented; in other words, a false claim that was not made for such a purpose is not inhibited by the statute. In prosecutions under this portion of the statute, it is not necessary to set out the name of

the officer or person to whom the claim was presented, if such person be sufficiently designated by his position, as First Auditor of the Treasury. So, also, different items of the account may all be included in one count of the indictment. United States vs. Ambrose, 2 Federal, 764.

In United States vs. Coggin, 3 Federal, 492, the Court held that old Section 5438 includes a false claim presented by a person as a pensioner, demanding money as a pensioner. In that case, the defendant, by fraud, secured a pension certificate from the Government, and thereby had his name entered on the pension roll. This certificate he presented to the Pension Agent, and obtained money from the United States. The indictment alleged that the grounds upon which the application was sustained before the Commissioner of Pensions and his name entered upon the list of pensioners, were all false, fictitious, and fraudulent, and that in fact he was not injured at the battle at Corinth in any way, and was not entitled to a pension. The Court held that the facts alleged were sufficient to constitute an offense under that section.

In the case of United States vs. Hull, 14 Federal, 324, it was held by a District Court, that the section was not limited in its operation to false claims presented by the accused on his own behalf, but applied as well to such claims presented by an attorney, agent, officer, or other person presenting or aiding in the collection of a false claim, knowing it to be false. Of course, the allegation of "knowledge" is absolutely necessary, as is also the proof. An indictment under this section that the defendant "presented and caused to be presented," is not bad for duplicity, because the statute employs the disjunctive "or" instead of "and." In United States vs. Franklin, 174 Federal, 161, the same question was passed upon, and the Court held that an indictment was not bad for duplicity because it charges that the accused "made and presented." In the Franklin case the indictment, which set out the claim showing it to be an itemized account, and averred that certain sums charged therein "should have been" certain smaller sums, sufficiently shows wherein the claim is false and fraudulent. In that case it was alleged that the fraudulent claim was against the War Department of the United States, and described the officer to whom the claim was

presented as a Brigadier-General in the Army, and Superintendent of the Military Academy at West Point, and alleged that he was an officer authorized to approve such claim. Held, that such allegation was sufficient to show authority. Affirmed by U. S. Supreme Court, March 14, 1910.

The case of United States vs. Ingraham, 49 Federal, 155, was an indictment for presenting for payment and approval to the Third Auditor of the Treasury Department of the United States of America, a certain claim against the Government of the United States, and also in the second count for using a false affidavit in support thereof. An objection of uncertainty, charging no offense and duplicity, was overruled by the trial court, and the same questions were presented to the Supreme Court in the same case, reported in 155 U. S., page 436; 39 Law Ed., page 213, and the conviction was affirmed, the Court holding that it was not error, of course, to join distinct offenses of the same class in one indictment in separate counts, and that a paper presented to the Third Auditor of the Treasury of the United States, in support of a claim against the Government, purporting to be an affidavit certified to by a Justice of the Peace, is admissible in evidence without formal proof that he had been duly commissioned and qualified as a Justice of the Peace, and that the person indicted for presenting for payment a false and fictitious claim to the Auditor of the Treasury, and using a false affidavit in support thereof, if he knew it to be false, is not the less guilty because the person purporting to be a Justice of the Peace before whom the affidavit was sworn to, had not been commissioned as such, and was not entitled to administer an oath.

In the case of United States vs. Michael, 153 Federal, 609, Judge Maxey instructed the jury that the receiving in pledge by a civilian from a soldier, of clothing issued to the latter, during the term of his enlistment, does not constitute a penal offense within Revised Statutes 5438, providing that every person who purchases or receives in pledge from a soldier any arms, equipment, ammunition, clothing, military stores, or other public property, such soldier not having the lawful right to pledge or sell the same, shall be imprisoned, etc., since the clothing, on being issued to the soldier, becomes his individual property, and

ceases to belong to the United States. In conflict with this opinion, seems to be the case of United States vs. Koplik, 155 Federal, 919, in which Judge Chatfield holds that it is not a defense to a prosecution under such statute, 5438, for receiving property in pledge from a soldier while in the service, that such property consisted of clothing which he had paid for out of his clothes allowance, or which had been charged against it. The policy of the statute seems to be best served by Judge Chatfield's decision. In United States vs. Hart, 146 Federal, 202, a decision of District Judge Bethea seems in a measure to support Judge Chatfield's construction of the statute. It is there said:

"On motion to take from the jury, the question arose as to whether certain articles of clothing, namely, caps, gloves, shoes, and goods which had been issued to soldiers in the service of the United States, and by them sold and pledged to the defendant, are public property under Section 5438 of the Revised Statutes. Clothing is issued to soldiers of the United States for use by them in the capacity of soldiers. The Government determines the character, quality, and kind of clothing to be issued to the soldiers; and when the clothing is issued, although it is charged against the soldiers on their clothing account, they receive but a qualified interest therein."

The Seventeenth Article of War punishes the soldier by Court Martial if he loses or spoils his clothing or accoutrements, and Section 3748 authorizes the Government to seize such property wherever found. This would indicate that the title to clothing issued to soldiers remains in the United States.

The case of United States vs. Smith, 156 Federal, 859, while it is a prosecution under the same portion of the statute, does not raise or discuss the conflict noted in the above two cases. Judge Hanford, in the Smith case, in charging the jury, says:

"You will observe that the provisions of this statute, 5438, apply to persons who knowingly purchase or receive in pledge any of the kinds of property described here from a soldier, officer, or sailor in the service of the United States. The elements of the crime are guilty knowledge, and the actual purchase of and receiving in pledge the kind of property named, and receiving it from a person in the military service of the United States. All those things are necessary to be proven, in order to make out a criminal case. The guilty knowledge that is a necessary element of the crime is not knowledge that the act is unlawful. The law

does not permit ignorance of the provisions of the law to avail as a defense in any case, but the knowledge must be knowledge of the facts.—knowledge that the property offered for sale or pledge is the military stores or property of the United States,—that is, arms, clothing, or property that is provided by the United States for use in the military service, and knowledge that the person offering to sell or to pledge it is a person in the military service at the time."

It must be borne in mind that Sections 3748 and 1242 of the old statutes in short make the possession of such property of the United States by a person not in the service of the United States, *prima facie* evidence that it had been sold or pledged.

Other cases bearing upon the statute in its entirety, are the following: United States vs. Daubner, 17 Federal, 793; U. S. vs. Russell, 19 Federal, 591; U. S. vs. Griswold, 24 Federal, 361; U. S. vs. Frisbie, 28 Federal, 808; U. S. vs. Rhodes, 30 Federal, 431; U. S. vs. Griswold, 30 Federal, 604, also same Volume, 762; U. S. vs. Reichurt, 32 Federal, 142; U. S. vs. Jones, 32 Federal, 482; U. S. vs. Route, 33 Federal, 246; U. S. vs. Gowdy, 37 Federal, 332; U. S. vs. Wallace, 40 Federal, 144; U. S. vs. Newton, 48 Federal, 218; U. S. vs. Strobach, 48 Federal, 902; U. S. vs. Adler, 49 Federal, 733; U. S. vs. Van Leuven, 62 Federal, 62; U. S. vs. Hartman, 65 Federal, 490; Rhodes vs. U. S., 79 Federal, 740; Dimmick vs. U. S., 116 Federal, 825; U. S. vs. Lair, 118 Federal, 98; Pooler vs. U. S., 127 Federal, 509; Franklin vs. U. S., U. S. Sup. Ct., Oct., 1909, term.

In Bridgeman vs. United States, 140 Federal, 577, the Circuit Court of Appeals for the Ninth Circuit held that inasmuch as the statutory provisions and rules and regulations of the Indian Department required accounts and vouchers for claims and disbursements connected with Indian affairs to be transmitted to the Commissioner of Indian Affairs, that a transmission to such commissioner by an agent of the Department, of a false voucher, etc., was an offense under 5438. This case also authorizes the use of the words "making and presenting," as was considered to be correct in the cases cited above. Two of the counts in that indictment are set out in the decision and approved by the Court, as is also the full charge of the trial judge.

§ 180. **Embezzling Arms, Stores, Etc.**—As a companion to the

section treated above, appears Section 36 in the New Code, which displaces old Section 5439, and is in the following words:

"Sec. 36. Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in the preceding section."

As somewhat enlightening upon the question as to what steps one should take in order to be in the military service of the United States, may be read the case of Johnson vs. Sayre, 158 U. S., 109. In that particular case, the Court held that a postmaster's clerk in the navy, appointed by the Secretary of the Navy with the approval of the President, is in the naval service of the United States; but in the reasoning of the opinion will be found a number of authorities and reasons that apply to other conditions.

Section 36 above quoted occupies the same position to Section 35 as old Section 5439 did to old Section 5438, and, therefore, the observation of District Judge Swing, in the case of United States vs. Murphy, 9 Federal, page 26, is applicable and pertinent. In that case the indictment was drawn under Section 5439. It contained two counts, charging that the defendant had applied to his own use an overcoat, which had been issued to an inmate of the National Military Home at Dayton, to be used by him for the military service of the United States. A demurrer to the bill raised the question whether clothing so issued to inmates of that institution was within the prohibition of that section. The Court said:

"The preceding section (5438) prohibits the purchase of clothing, etc., from any soldier or other person called into or employed in the military service of the United States, such soldier or person not having the lawful right to sell the same. This section (5439), then, prohibits any person from knowingly applying to his own use any clothing or other property of the United States, furnished or to be furnished for the military service. Under Section 5438, the clothing must be purchased from a person 'in the military service'; under Section 5439, it must be clothing or other property of the United States 'furnished or to be used for the military service.' The indictment, it is true, charges in one count that the overcoat in question was 'furnished for the military service,' and in the other that it was 'to be used for the military

service'; but in each it appears it had been issued to an inmate of the home. It is claimed in argument on behalf of the Government that these military homes are a part of the military establishment, and clothing issued to the inmates is furnished and used for the military service. It is clear that the inmates of these homes are not in the military service. It is not claimed that Section 5438 applies to the purchase of clothing from them; nor do I think that the clothing issued to them is used in the military service of the United States. Congress could probably prohibit the purchase of clothing from these inmates, and punish any one applying it to other purposes than for which it is issued; but the law in force does not apply to it, and a demurrer must be sustained."

§ 181. **Conspiracies to Commit Offenses Against the United States; All Defendants Liable for Acts of One.**—One of the most useful and comprehensive statutes in the old revision was Section 5440, which is re-enacted in the New Code in Section 37, in the following terms:

"Sec. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The old and the new sections are practically identical with the single exception that there is no minimum punishment under the latter. Indictments under this statute must comprehend in allegation, not only whatever averments are necessary under it, but also the necessary allegations and ingredients of the offense or statute for which the conspiracy was formed. An indictment that fails to set out the elements of the offense conspired to be committed is bad. A conspiracy as commonly understood, is a corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end. The word "corrupt," as used, means unlawful. The intendment of this definition is that to conspire to do an unlawful act; or to conspire to accomplish a result which may in itself be lawful, but to do it in an unlawful manner; or an unlawful agreement to accomplish an unlawful result, are conspiracies. The unlawful

combination may be expressly proven, or it may be provable from concerted action in itself unlawful. If one join the conspiracy at any time after the formation of the conspiracy, he becomes a conspirator, and the acts of the others become his, by adoption.

That there is, or may be, a difference between the punishment prescribed in this section, and that prescribed in the statute that the conspiracy was formed to violate, is immaterial. Congress has the power, says the Supreme Court of the United States, in Clune vs. United States, 159 U. S., 590, to enact a statute making a conspiracy to do an act punishable more severely than the doing of the act itself. The power exists to separate the offenses, and to affix distinct and independent penalties to each.

As above indicated, there need be no proof of the express agreement. The full measure of the law is met if the facts and circumstances indicate with the requisite lawful certainty the existence of a preconcerted plan. Reilley vs. United States, 106 Federal, 896; U. S. vs. Cassidy, 67 Federal, 698; U. S. vs. Barret, 65 Federal, 62; U. S. vs. Wilson, 60 Federal, 890; U. S. vs. Newton, 52 Federal, 275; U. S. vs. Sacia, 2 Federal, 754. So, under the same authorities, it need only be shown that one or more of the overt acts charged in the indictment have been committed, and that they were done in furtherance of the conspiracy. Federal Statutes Annotated, Volume 2, page 250.

Text-books and courts unite in the proposition that where there is a *prima facie* showing of conspiracy, all of the acts done, and all of the declarations made in pursuance of the originally concerted plan, and with reference to the common object, by any one of the conspirators, are admissible against all. The rule, however, ceases after the conspiracy, has been ended; for, upon the completion of the conspiracy, acts and declarations of co-conspirators are evidence only against the one so acting or declaring. Logan vs. U. S., 144 U. S., 263.

In Taylor vs. U. S., 89 Federal, 954, the Court of Civil Appeals for the Ninth Circuit, in a conspiracy prosecution against certain defendants for entering into a conspiracy to counterfeit and utter counterfeit coins of the United States, the Court determined that the evidence showing that one of the defendants resided with another of the conspirators for six weeks, during which time the

coins were made, and that he wrote the letter ordering the machine with which they were made, and that after the arrest he wrote one of the defendants offering to assist in procuring bail, was entirely sufficient to authorize the admission against him of the statements of his co-conspirators. In that case, it was also determined that the order of proof rests in the sound discretion of the Court; in other words, the Court was not bound to exclude evidence of declarations until the prosecution should first have shown the connection of the defendant with the offense. 1 Greenleaf, Section 111; 6 Am. and Eng. Enc. of Law, Second Ed., 689; State vs. Winner, 17 Kansas, 298.

§ 182. **Sufficiency of Description.**—In Cling vs. United States, 118 Federal, 538, the Circuit Court of Appeals for the Fourth Circuit held that the offense intended to be committed as the result of the conspiracy need not be described as fully as would be required in an indictment in which such matter was charged as a substantive crime. To the same effect is United States vs. Stevens, 44 Federal, 132. In United States vs. Stamatopoulos, 164 Federal, 524, Judge Chatfield, in passing upon a demurrer, said:

"The indictment sets forth a conspiracy to defraud the United States, and it is unnecessary to allege either the consummation of the fraud, or to include an allegation that the fraud could have been accomplished unless detected. It is sufficient to show that the conspiracy so to do the act charged constituted a fraud upon the United States."

§ 183. **Venue.**—The venue for the prosecution may be laid in the District in which the overt act was committed, and it does not matter where the conspiracy was formed or the unlawful agreement entered into; and where the offense has been commenced in one district and consummated in another, the venue may be laid and the trial may be had in either district.

Sufficient to Warrant Conviction.—If the indictment alleges, in proper terms, the formation of the conspiracy for either one of the inhibited purposes mentioned in the statute, and then sets out the offense for which the conspiracy was formed with sufficient certainty to apprise the defendant thereof, and then the proof shows that the conspiracy existed as charged in the indictment,

and that if such conspiracy existed, the overt act charged was committed in furtherance of such conspiracy, and that the defendant was one of the conspirators, a case will have been made out, both by allegation and proof. United States vs. Cassidy, 67 Federal, 698; United States vs. Newton, 52 Federal, 275.

§ 184. **Illustrative Cases.**—While the courts have held, as above cited, that a good conspiracy charge will be one which alleges the accomplishment of the fraud or fails to allege its accomplishment, so, also, they have held that a conspiracy may be charged, though the indictment charges the accomplishment. In Scott vs. United States, 165 Federal, 172, the Circuit Court of Appeals for the Fifth Circuit held that an indictment will lie for conspiracy to remove distilled spirits on which the tax had not been paid, in violation of Section 3296, although it is charged that the purpose of the conspiracy was accomplished.

In United States vs. Stevens, 44 Federal, 132, it was held that a conspiracy may be entered into even when the overt act constituting the criminal offense can only be done by one of the parties to the conspiracy; as where a census enumerator and another conspired to make false certificates or fictitious returns. The same sort of an offense was approved in the Ching case by a Circuit Court of Appeals, 118 Federal, 538. So, also, a conspiracy may be laid against a person not connected with the bank for conspiring with the cashier to commit one of the offenses described in Section 5209. U. S. vs. Martin, 4 Cliff. (U. S.), 156. And in United States vs. Boyer, 4 Dill., 407, the Court held that a conspiracy could be charged against persons conspiring with a bankrupt to commit an offense thereunder, even if it could be held that only the bankrupt could commit the offense there charged with having agreed to violate. See also U. S. vs. Swett, 2 Hask., 310, 28 Fed. Cases No. 16427.

In Johnson vs. United States, 158 Federal, 69, the Circuit Court of Appeals for the Fifth Circuit, it seems to the writer, held contrary to the above views. In that case, the bankrupt, his trustee, and one other, were indicted for conspiring to conceal from the Trustee, one of the indicted parties, assets of the bankrupt. There were convictions. Upon appeal, the Court held that an indictment will not lie under 5440, for a conspiracy to effect

the concealment by a bankrupt, of property, from his trustee, where the trustee is himself charged as one of the conspirators and the averments of the indictment show that there was in fact no concealment of property from him, and no purpose that there should be such concealment. In considering that case, the Court cited the case where Lord Audley was convicted of rape upon his wife; being present, aiding and abetting one of his minions to perpetrate this monstrous crime, and for which this devil-crazed nobleman was hung; but differentiated that case from the one they were discussing, and said:

"The defect in the indictment is not that it charges a conspiracy by three persons to commit an offense which only one of the three could commit. That may not be a defect. The fatal defect is that it charges Johnson, one of the alleged conspirators, with participation in, and knowledge of, a transaction which could only be an offense against the law when it was concealed from him."

In United States vs. Melfi, 118 Federal, 899, there was a prosecution against conspirators to secure, illegally, naturalization papers, but the Court held against the indictment, not because such a conspiracy would not be unlawful, but because the indictment failed to allege sufficient ingredients of the statute for the breaking of which the conspiracy was formed.

In United States vs. Clark, 164 Federal, page 75, the Court upheld a prosecution against an agent of a railroad company and others for conspiring to issue interstate freight passes in the name of the railroad to those not entitled thereto, under the provisions of the Hepburn Act, June 29, 1906.

In United States vs. Lonabaugh, 158 Federal, 314, a prosecution was sustained upon a conspiracy to induce the Land Department of the United States, by fraudulent means, to dispose of public lands in a way not authorized by the statute, and this even though the Government received payment for the lands, and suffered no pecuniary loss.

In United States vs. Haas et al, 163 Federal, 908, an indictment was sustained which charged a confederated effort to deprive the national government of the right and privilege of proper service in the Department of Agriculture, by corrupting an employee of

such department, and inducing him to secretly furnish advance information of crop conditions, contrary to the rules of the department, and to issue false reports to the public as to such conditions. The main offense in that case was laid under the bribery statute, 5451, and the Court held that an Assistant Statistician in the Department of Agriculture, in the performance of the duties with which he was charged by the rules of that department, acted for the United States in an official function. This case was practically affirmed, and the case of United States vs. Haas, 167 Federal, 211, overruled, by the Supreme Court of the United States in Haas vs. Henkle, February 21, 1910. The Supreme Court, in passing directly upon the indictment, uses this language:

"These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States; but as it is averred that the acquiring of the information and its intelligent computation, with deductions, comparisons, and explanations, involved great expense, it is clear that practices of this kind would deprive these reports of most of their value to the public, and degrade the Department in general estimation, and that there would be a real financial loss. But it is not essential that such a conspiracy should contemplate a financial loss, or that one should result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any Department of the Government. Assuming, as we have, for it has not been challenged, that this statistical side of the Department of Agriculture is the exercise of a function within the purview of the Constitution, it must follow that any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports, as fair, impartial, and reasonably accurate, would be to defraud the United States, by depriving it of its lawful right and duty of promulgating or diffusing information so officially acquired in the way and at the time required by law or Departmental regulation. That it is not essential to charge or prove an actual financial or property loss to make a case under the statute, has been more than once ruled. Hyde vs. Shine, 199 U. S., 62; U. S. vs. Keitel, 211 U. S., 370; Curley vs. U. S., 130 Fed., 1; McGregor vs. U. S., 134 Fed., 195."

In United States vs. Hirsch, 100 U. S., 33, the Supreme Court held that a conspiracy to defraud the United States out of duties on imported merchandise is not a crime arising under the

revenue laws, and is, therefore, barred by the three years statute of limitations.

For other cases arising under the old section, see

United States vs. Dietrich, 126 Federal, 664.

Gantt vs. U. S., 108 Federal, page 61;

U. S. vs. Bradford, 148 Fed., 413;

U. S. vs. Mitchell, 141 Fed., 666;

Wright vs. United States, 108 Fed., 805 (This case approves a general form of indictment); Lehman vs. U. S., 127 Federal, 41; Conrad vs. U. S., 127 Fed., 798 (That was a conspiracy to violate Section 3995, or in other words, a conspiracy to knowingly and wilfully delay the United States mail); Wan Din vs. United States, 135 Fed., 704, (The Court sets out the elements of the conspiracy); United States vs. Curley, 122 Fed., 738; affirmed in 130 Fed., page 2 (This was a conspiracy to violate the Civil Service Examination Act); U. S. vs. Richards, 149 Fed., 443. In Crawford vs. U. S., an opinion rendered by the Supreme Court of the United States, on February 1, 1909, sets forth the elements of a conspiracy under this section. In *in re* Miller, 114 Federal, 963, there was a prosecution for conspiracy to return one to peonage. See United States vs. Green, 115 Federal, 343, for conspiring to conceal assets in violation of the Bankrupt Act; United States vs. Goodsay, 164 Federal, 157; United States vs. Biggs, 157 Federal, 264; United States vs. Brace, 149 Fed., 874. The case of Bradford vs. United States, 129 Federal, page 49, was a prosecution for conspiring to execute straw bail. In the case of United States vs. Stevenson, decided by the Supreme Court of the United States in November, 1909, a conviction for a conspiracy to violate the Immigration Act was sustained.

In Williamson vs. U. S., 207 U. S., 425, 52 Law Ed., page 207, the Supreme Court reversed and remanded a conviction of a Congressman for conspiring to suborn perjury, in proceedings to purchase public land, but held among other things, that an indictment alleging a conspiracy to suborn perjury need not, with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and of perjury, and that the precise persons to be suborned, or the time and place of such suborning need not be agreed upon in the minds of the

conspirators, in order to constitute the crime of conspiracy to suborn perjury in proceedings for the purchase of public land. U. S. vs. Railey, 173 Federal, 159; Richards vs. U. S., 175 Fed., 911; U. S. vs. Kane, 23 Fed., 748; U. S. vs. Milner, 36 Fed., 890. In United States vs. Keitel, 211 U. S., 370, the Supreme Court held that a charge of conspiracy to defraud the United States can be predicated on acts made criminal after the enactment of the statute. This case was reversed, on some other minor points, United States vs. Keitel, 157 Fed., 396. In United States vs. Biggs, 211 U. S., which was a writ of error by the United States from the sustaining of a demurrer to an indictment brought for a conspiracy to defraud the United States of public lands, reported in United States vs. Biggs, 157 Fed., 264, the Supreme Court affirmed the decision of the lower Court, and held that an indictment for conspiracy to defraud the United States by improperly obtaining title to public lands, will not lie under 5440, where the only acts charged were permissible under the land laws. In other words, the acts charged in the indictment appeared to be lawful under the laws relating to such lands. United States vs. Briton, 108 U. S., 192; Mackin vs. U. S., 117 U. S., 348; U. S. vs. Hess, 124 U. S., 483; *in re* Coy, 312 Fed., 794; 127 U. S., 731; U. S. vs. Perrin, 131 U. S., 55; U. S. vs. Barber, 140 U. S., 177; Pettibone vs. U. S., 148 U. S., 197; *ex parte* Lennon, 150 U. S., 393; Dill vs. U. S., 152 U. S., 539; Bannon vs. U. S., 156 U. S., 464; Stokes vs. U. S., 157 U. S., 187; France vs. U. S., 164 U. S., 696. In the case of Crawford vs. U. S., 212 U. S., page 183, the Supreme Court sustained the sufficiency of the indictment, but reversed the case on other points. The prosecution grew out of a conspiracy between the defendant and a Government official, by which the Government would be defrauded by means of a contract between the Postal Device and Lock Company, a corporation, and the Post-office Department of the United States, by which the company was to furnish certain satchels to the Department for the use of the letter carriers in the free delivery system of the United States. U. S. vs. Bridgeman, 140 Federal, 577; U. S. vs. Marx, 122 Fed., 964; U. S. vs. McKinley, 126 Fed., 242; U. S. vs. Wilson, 60 Fed., 890; U. S. vs. Debs, 63 Fed., 436; Huntington vs. U. S., 175 Fed., 950.

§ 185. **Bribery of United States Officer.**—Section 5451 of the old statutes is re-enacted into Section 39 of the New Code in the following words:

"Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any Committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit, or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years."

One must be a Federal official or some other person performing an official function, and he must be offered some gratuity or thing of value to assist in the defrauding of the United States in some manner, or to fail to perform his lawful duty, before he can be guilty of the crime alleged in the foregoing section. For instance, in the case of the United States vs. Gibson, 47 Federal, 833, the Court quashed an indictment under this section, which set out in substance that the defendant had offered a bribe to an internal revenue officer to set fire to a distillery within the limits of a State. He very properly held that this was the offering of a bribe to perform an act which was not in any sense within the official function of the revenue officer, and, therefore, not an offense under the section. The crime of arson, of course, unless committed upon some Government reservation, is not cognizable in the United States Courts, and is not a United States offense. So, also, in the case of United States vs. Boyer, it was determined

that an Inspector of the Agriculture Department of the United States, charged with the enforcement of unconstitutional regulations, and offered a bribe not to perform such regulations, the offering of such a bribe was not an offense under 5451, for the reason that the Inspector, in the failure to perform an unconstitutional duty, would not in any sense, defraud the United States, nor fail to perform an act which it was his lawful duty to perform. In United States vs. Kessel, 62 Federal, 57, and United States vs. Van Leuven, 62 Federal, 62, District Judge Shiras, in passing upon old section 5501, determined that a member of a Board of Examining Surgeons is a person acting in behalf of the United States in an official capacity, and, therefore, subject to an indictment for receiving a bribe. The same reasoning adopted by the judge in those two cases will apply to offenses under Section 5451.

The case of United States vs. Ingham, 97 Federal, 935, was a prosecution based upon an attempt to bribe a Secret Service operative employed by the Secretary of the Treasury; and in passing directly upon the question as to whether or not such operative was an officer of the United States within the necessary meaning of 5451, the Court held that he was not such an officer, but that the prosecution would lie under the phrase in the statute, "official function," and held that official function, as spoken of in the statute is not necessarily a function belonging to an office held by a person acting on behalf of the United States. It may also be a function belonging to an office held by his superior which function has been committed to the subordinate, whether he be also an officer or a mere employee for the purpose of executing the function.

In the case of United States vs. Green, 136 Federal, 618, the doctrine was announced that the giving of a check as a bribe will not necessarily be an offense under the statute, unless there be sufficient allegations in the indictment to show that the check was good, and that the bank upon which it was drawn was a going concern, and that the same would be honored, and other allegations to show that as a matter of fact the check was valuable. A bank check not thus defined in the bill of indictment is not an obligation for the payment of money, within the legal meaning

of such term, as used in the section, and the tendering by a person of his personal check, drawn on a bank, and payable to an officer of the United States to such officer, with intent thereby to affect his official action, does not constitute the crime of bribery, since the check made and delivered for such illegal purpose is void and not within any of the classes of instruments enumerated in the statute. In the case of Vernon vs. U. S., 146 Fed., 121, the Circuit Court of Appeals for the Eighth Circuit sets out a count of an indictment under this section. That was a prosecution for an alleged attempt to bribe an agent of the Treasury Department, charged with the location of public buildings. The evidence, however, was held to be insufficient by the Court of Appeals.

The Supreme Court, in the case of Palliser vs. United States, 136 U. S., 268; 34 Law Ed., 514, held that a letter written and sent from New York to a postmaster in Connecticut, asking him to put postage stamps on circulars and send them out at the rate of fifty to one hundred daily, and promising him that if he would do so, the writer of the letter would remit to him the price of stamps, was a tender of a contract for the payment of money to induce him to sell postage stamps for credit in violation of his lawful duty, and contrary to Section 5451; and such an offer for an unlawful sale of postage stamps on credit is not the less within the statute because the postmaster's commission on the sale would be no greater than upon a lawful sale for cash.

§ 186. **Unlawfully Taking or Using Papers Relating to Claims.**—Section 40 reads as follows:

"Sec. 40. Whoever shall take and carry away, without authority from the United States, from the place where it has been filed, lodged, or deposited, or where it may for the time being actually be kept by authority of the United States, any certificate, affidavit, deposition, written statement of facts, power of attorney, receipt, voucher, assignment, or other document, record, file, or paper, prepared, fitted, or intended to be used or presented in order to procure the payment of money from or by the United States, or any officer or agent thereof, or the allowance or payment of the whole or any part of any claim, account, or demand against the United States, whether the same has or has not already been so used or presented, and whether such claim, account, or demand, or any part thereof, has or has not already been allowed or paid; or whoever shall present, use, or attempt to use,

any such document, record, file, or paper so taken and carried away, in order to procure the payment of any money from or by the United States, or any officer or agent thereof, or the allowance or payment of the whole or any part of any claim, account, or demand against the United States, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both."

§ 187. **Persons Interested Not to Act as Agents of the Government.**—Section 1783 of the old statutes becomes Section 41 of the New Code in the following words:

"Sec. 41. No officer or agent of any corporation, joint stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than two thousand dollars and imprisoned not more than two years."

Old Section 1783 applied only to officers of "banking or other commercial" corporations, but in the new statute these words have been omitted, so that the section, as it now stands, is applicable to the officers of any corporation. It has likewise been made more comprehensive, in that it now covers officers and agents of any "joint stock company or association."

§ 188. **Enticing Desertions from the Military or Naval Service.**—Section 42 of the New Code re-enacts the substantial provisions of Sections 1553 and 5455 of the Old Code in the following words:

"Sec. 42. Whoever shall entice or procure, or attempt or endeavor to entice or procure, any soldier in the military service, or any seaman or other person in the naval service of the United States, or who has been recruited for such service, to desert therefrom, or shall aid any such soldier, seaman, or other person in deserting or in attempting to desert from such service; or whoever shall harbor, conceal, protect, or assist any such soldier, seaman, or other person who may have deserted from such service, knowing him to have deserted therefrom, or shall refuse to give up and deliver such soldier, seaman, or other person on the demand of any officer authorized to receive him, shall be imprisoned not more than three years and fined not more than two thousand dollars."

The only substantial addition is the word "seaman," which the

old statutes did not include. In the case of Kurtz vs. Moffitt, 115 U. S., 487, the Supreme Court held that a deserter from the United States army could not be arrested by a police officer or private citizen without warrant or authority from the United States.

§ 189. **Enticing Away Workman.**—Section 43 of the New Code re-enacts the provisions of Sections 1668 of the old statutes, adding thereto the word "artificer" instead of the word "armorer," and is in the following words:

"Sec. 43. Whoever shall procure or entice any artificer or workman retained or employed in any arsenal or armory, to depart from the same during the continuance of his engagement, or to avoid or break his contract with the United States; or whoever, after due notice of the engagement of such workman or artificer, during the continuance of such engagement, shall retain, hire, or in anywise employ, harbor, or conceal such artificer or workman, shall be fined not more than fifty dollars, or imprisoned not more than three months, or both."

§ 190. **Injuries to Fortifications, Harbor Defenses, Etc.**—Section 44 of the New Code re-enacts the meat of the Act of July 7, 1898; Second Supplement, 885, and simplifies the original Act by omitting the words "wantonly or maliciously" before "trespass," since authorities are a unit that the word "wilful" will include any wanton or malicious act, and is in the following words:

"Sec. 44. Whoever shall willfully trespass upon, injure, or destroy any of the works or property or material of any submarine mine or torpedo, or fortification or harbor-defense system owned or constructed or in process of construction by the United States, or shall willfully interfere with the operation or use of any such submarine mine, torpedo, fortification, or harbor-defense system, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

§ 191. **Unlawfully Entering Upon Military Reservation, Fort, Etc.**—Section 45 of the New Code is an entirely new Act, and is in the following words:

"Sec. 45. Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall re-enter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to re-enter by any officer or person in command or charge thereof,

shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both."

§ 192. **Robbery or Larceny of Personal Property of the United States.**—Old Section 5456 is re-enacted into new Section 46, in the following words:

"Sec. 46. Whoever shall rob another of any kind or description of personal property belonging to the United States, or shall feloniously take and carry away the same, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both."

In the case of Jolly vs. United States, 170 Federal, 402; 42 Law Ed., 185, the Supreme Court held that there are two distinct offenses mentioned in the statute: one is the offense of robbery, and the other is the crime of feloniously taking and carrying away any kind or description of personal property belonging to the United States. This is a distinct and separate offense from that of robbery. "If the statute required the taking to be forcible in all cases, the language providing against the felonious taking and carrying away of the personal property of the United States would be surplusage, the forcible taking being already implied and included in the use of the word 'rob'; but in addition to robbery, the offense of feloniously (not forcibly) taking the personal property of the United States, is created."

Postage stamps which have not been issued or sold, and are in the possession of the Government, are personal property belonging to the United States within the meaning of this section, which makes it a crime to feloniously take and carry away such property.

Under the authority of United States vs. Jones, 69 Federal, 973, a count under this statute may be joined with a count under another statute for a separate offense, when the offense is the same transaction. In that case, Judge Hawley held that it was immaterial that one might be classed as larceny and the other as embezzlement, or that the punishment was different. That case also gives a form of indictment.

§ 193. **Embezzling, Stealing, Etc., Public Property.**—New Section 47 re-enacts a part of the Act of March 3, 1875; First Supplement, page 88, in the following words:

"Sec. 47. Whoever shall embezzle, steal, or purloin any mon-

ey, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

In drafting indictments for the various offenses created by this section, to wit, the offenses of embezzlement, larceny, and purloining, it is believed that it will be necessary to set out the elements of these particular offenses as understood in the Common Law, for the reason that the statute itself does not specify just what acts shall constitute the offense therein denominated. The cases of Moore vs. United States, 160 U. S., 268; 40 Law Ed., 422, and Faust vs. United States, 163 U. S., 452; 41 Law Ed., page 224, will be instructive in determining the principles that must be adhered to in setting out offenses under this statute. For the crime of embezzlement, of course, the indictment must allege that the sum alleged to have been embezzled came into the possession of the defendant in the capacity in which he was an employee of the United States; that is, as assistant, clerk, or employee in whatever department of the Government he served. Want of consent of the postmaster to embezzlement of money-order funds by his assistant is not necessary to to make the latter liable for the crime, under the authority of Faust vs. United States, cited *supra*.

It was held in Dimmick vs. United States, 135 Federal, 257, that an indictment which charged the defendant with stealing money "belonging to" the United States sufficiently averred the ownership of the property stolen.

Of course, it is necessary to allege specific intent before the offenses here denominated shall be properly plead. As was well said in United States vs. De Groat, 30 Federal, 764, the Federal Criminal Jurisprudence is entirely destitute of any substratum of a Common Law of crimes and misdemeanors upon which to draw for supplying elements of the offense, and the Courts look only at the statute, using the Common Law, if necessary, to furnish a definition of the terms used, but never any ingredient of the offense. That case will be recalled as an indictment for having stolen papers which were public records, but the facts showed that they were stolen from a barn where they were stored, under

the belief that they were old papers, and without knowledge of the fact that they were public records, and the Court ordered a verdict of not guilty.

§ 194. **Receivers, Etc., of Stolen Public Property.**—Section 48 of the New Code enacts the substantial features of the Act of March 3, 1875; First Supplement, 88, and is in the following words:

"Sec. 48. Whoever shall receive, conceal, or aid in concealing or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen or purloined by any other person, knowing the same to have been so embezzled, stolen ,or purloined, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender."

This statute leaves out that provision of the old statute which made the judgment of conviction of the principal conclusive evidence in the porsecution against such receiver. That provision was declared to be unconstitutional by the Supreme Court in the case of Kirby vs. United States, 174 U. S., 47; Book 43 Law Ed., page 890. In that case, the Supreme Court held that the provision that the judgment of conviction against the principal felons shall be evidence in the prosecution against the receiver of the property of the United States alleged to have been embezzled, stolen, or purloined, is in violation of the clause of the United States Constitution that in criminal prosecutions the accused shall be confronted with the witnesses against him.

Allegations of Ownership.—Under the authority of the Kirby case, cited above, it is sufficient if an indictment for receiving stolen property of the United States alleges its ownership when it was feloniously received by the accused, by alleging that the property was that of the United States when stolen, and was stolen two days previously to its being received by the defendant, and that he received it knowing that it had been stolen. It was further held in that case that the indictment need not state from whom the accused received it or need not state that the name of such person is unknown to the grand jurors.

An indictment under this section would be entirely insufficient that did not allege knowledge on the part of the receiver, and the words "unlawfully, knowingly, and wilfully" should be used.

§ 195. **Timber Depredations on Public Lands.**—The Act of August 4, 1892, 27 Statute at Large, 348, Second Supplement, 65, extended the Act of June 3, 1878, 20 Statute at Large, 90, First Supplement, 168, to include all the public land States, and these Acts are substantially re-enacted into new Section 49, in the following words:

"Sec. 49. Whoever shall cut, or cause or procure to be cut, or shall wantonly destroy, or cause to be wantonly destroyed, any timber growing on the public lands of the United States; or whoever shall remove, or cause to be removed, any timber from said public lands, with intent to export or to dispose of the same; or whoever, being the owner, master, or consignee of any vessel, or the owner, director, or agent of any railroad, shall knowingly transport any timber so cut or removed from said lands, or lumber manufactured therefrom, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both. Nothing in this section shall prevent any miner or agriculturalist from clearing his land in the ordinary working of his mining claim, or in the preparation of his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States. And nothing in this section shall interfere with or take away any right or privilege under any existing law of the United States to cut or remove timber from any public lands."

Some of the cases decided by the courts under some of the timber statutes of the Old Code will be of assistance in determining some of the elements of this new section. For instance, in United States vs. Stores, 14 Federal, 824, it was determined that the term "timber," as used in Section 2461 of the Revised Statutes, applies not alone to large trees fit for house or ship-building, but includes trees of any size, of a character or sort that may be used in any kind of manufacture, or the construction of any article; and it was also there determined that the using of trees for fire-wood or burning into charcoal was no justification for the cutting.

In United States vs. Garretson, 42 Federal, 22, the District Judge held, on demurrer, that the general public domain is

open to private entry, and lands cannot be said to be reserved for such entry. The lands reserved are thus severed from the mass of public lands, and appropriated for Government purposes.

In a prosecution under Old Section 5388, as amended by the Act of June 4, 1888, which forbade the cutting or wanton destruction of timber upon military or Indian Reservation, the Court, in the case of the United States vs. Konkapot, 43 Federal, 64, held that that statute did not apply to one who removed and used for building purposes timber which had been cut on an Indian Reservation by another person without his aid or encouragement. Of course, the present section not only covers the cutting and causing or procuring to be cut, or wanton destruction, but also removal of any timber from such public lands.

Intent.—Prosecutions under this section should include the allegation of knowledge and wilfulness, and a depredation by mistake, it is thought, would not be an offense; that is, for one who got upon the public domain thinking that he was upon his own property. When, however, he has knowledge that it is Government lands, on the authority of Taylor vs. United States, 113 Federal, which was an opinion by the Circuit Court of Appeals for the Eighth Circuit, he would not be protected by a general custom in that particular locality, which was known to the General Land Office, of entering on land and cutting the timber therefrom before the patent was obtained; nor would the defendant be protected for unlawfully cutting timber on public land by the fact that he acted in accordance with a general custom, nor by the fact that prior to the time he unlawfully cut timber he endeavored to ascertain whether the land was surveyed, and had also notified a Special Agent of the Government that he was cutting the timber, and was not warned off for three weeks. None of these facts, says the Court, in that case, are evidence of an honest intent. It was also determined in that case that an occupant of a mineral claim, who has applied for a patent before the purchase price is paid, and before he receives a certificate, has no right to cut the timber on such claim with the intent to export or remove the same, and a license from him to so cut the timber gives no protection to the licensee as against the Government.

Indictment.—In Morgan vs. United States, 148 Federal, 189,

the Circuit Court of Appeals for the Eighth Circuit, held that in a prosecution for cutting timber from the public domain, the defendant was not prejudiced by the fact that the indictment charged that he cut the timber with intent unlawfully to export and with intent to dispose of the same, and that a conviction could not be set aside because of such duplicity, since Section 1025 provided that no indictment shall be deemed insufficient, or the proceedings under it affected, by any defect in matter of form, which does not tend to prejudice the defendant.

§ 196. **Timber, Etc., Depredations on Indian and Other Reservations.**—Section 5388 of the old statutes, and the Acts of March 3, 1875, First Supplement, 91, and the Fourth of June, 1888, 4 Supplement, 588, are included in substance in new Section 50, which reads as follows:

"Sec. 50. Whoever shall unlawfully cut, or aid in unlawfully cutting, or shall wantonly injure or destroy, or procure to be wantonly injured or destroyed, any tree, growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian Reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both."

In the case of United States vs. Pine River Logging and Improvement Company, 89 Federal, 907, the Circuit Court of Appeals for the Eighth Circuit announced the doctrine that the title to the timber growing or standing on Indian Reservations is in the United States, and in the absence of legislative authority, Indians have no right to cut or dispose of it; and where an Indian made a contract with a purchaser to cut and deliver to such purchaser a certain quantity of timber, "more or less, or about," to be taken from the dead timber on a reservation, which contract to sell was permitted by an Act of Congress empowering the President, in his discretion, to authorize certain sales, such contract would be limited to the amount stated, and the fact that the purchaser had paid for a large quantity, delivered and received, in excess of that stated in the contract, did not give him title thereto, and it was no defense to a suit for its recovery by the Government.

In that suit it was also determined that a Government agent could not legalize a trespass committed by the cutting of living trees in violation of the statute, by agreeing, after they were cut and had thus become dead timber, that they might pass under a contract, and such an agreement would not estop the Government from recovering the value of such trees.

§ 197. **Boxing, Etc., Timber on Public Lands for Turpentine, Etc.** —The Act of June 4, 1906, 34 Statute at Large, 208, is practically re-enacted into new Section 51:

"Sec. 51. Whoever shall cut, chip, chop, or box any tree upon any lands belonging to the United States, or upon any lands covered by or embraced in any unperfected settlement, application, filing, entry, selection, or location, made under any law of the United States, for the purpose of obtaining from such tree any pitch, turpentine, or other substance, or shall knowingly encourage, cause, procure, or aid in the cutting, chipping, chopping, or boxing of any such tree, or shall buy, trade for, or in any manner acquire any pitch, turpentine, or other substance, or any article or commodity made from any such pitch, turpentine, or other substance, when he has knowledge that the same has been so unlawfully obtained from such trees, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both."

This statute became necessary by reason of the depredations which the Courts held were not violations of any existing statutes. In United States vs. Garretson, 42 Federal, 22, the Court held that Section 5388 of the old Statutes, making the wanton destruction of timber on lands reserved for public uses a crime, did not cover turpentine boxing or wanton destruction of timber on lands open for pre-emption, homestead, and cash entries. So also, to the same effect was the case of Bryant vs. United States, 105 U. S., 941, where the Circuit Court of Appeals for the Fifth Circuit held that old Section 2461, which prohibited the cutting or removing of oak trees or other timber from the public lands of the United States, with intent to export, dispose of, use, or employ, the trees or timber for any purpose except for the use of the navy, was not violated by boxing pine trees on public lands for the purpose of the manufacture of turpentine, since the same was not a cutting of trees within the meaning of the statute. The present statute, however, inhibits the cutting, chipping, chopping,

or boxing for the purposes therein denounced. An indictment, of course, should contain the words "unlawful, wilful, and knowing."

§ 198. **Setting Fire to Timber on Public Lands.**—New Section 52, which incorporates the salient features of the Act of the 24th of February, 1897; Second Supplement, 562, and the Act of May 5th, 1900, Second Supplement, 1163, is in the following words:

"Sec. 52. Whoever shall wilfully set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall leave or suffer fire to burn unattended near any timber or other inflammable material, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both."

§ 199. **Failing to Extinguish Fires.**—Section 53 of the New Code is made from a part of the Acts of which 52 was constructed, and reads as follows:

"Sec. 53. Whoever shall wilfully set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall leave or suffer fire to burn unattended near any timber, or other inflammable material, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both."

The fines arising from Sections 52 and 53 are to be paid into the Public School Fund of the county in which the lands where the offense was committed are situated, and this is provided by Section 54 of the New Code.

§ 200. **Breaking Fence or Gate Enclosing Reserve Lands, or Driving or Permitting Live Stock to Enter Upon.**—Section 56 of the New Code reads as follows:

"Sec. 56. Whoever shall knowingly and unlawfully break, open, or destroy any gate, fence, hedge, or wall inclosing any lands of the United States which, in pursuance of any law, have been reserved or purchased by the United States for any public use; or whoever shall drive any cattle, horses, hogs, or other live stock upon any such lands, for the purpose of destroying the grass or trees on said lands, or where they may destroy the said grass or trees; or whoever shall knowingly permit his cattle, horses, hogs, or other live stock, to enter through any such inclosure upon any such lands of the United States, where such cattle, horses, hogs, or other live stock may or can destroy the grass or trees or other property of the United States on the said lands,

shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both; *Provided,* That nothing in this section shall be construed to apply to unreserved public lands."

§ 201. **Injuring or Removing Posts or Monuments.**—Section 57 the New Code is as follows:

"Sec. 57. Whoever shall wilfully destroy, deface, change, or remove to another place any section corner, quarter-section corner, or meander post, on any Government line of survey, or shall wilfully cut down any witness trees or any tree blazed to mark the line of a Government survey, or shall wilfully deface, change, or remove any monument or bench mark of any Government survey, shall be fined not more than two hundred and fifty dollars, or imprisoned not more than six months, or both."

§ 202. **Interrupting Service.**—Section 58 of the New Code reads in the following words, and takes the place of old Section 2412:

"Sec. 58. Whoever in any manner, by threats or force, shall interrupt, hinder, or prevent the surveying of the public lands, or of any private land claim which has been or may be confirmed by the United States, by the persons authorized to survey the same, in conformity with the instructions of the Commissioner of the General Land Office, shall be fined not more than three thousand dollars and imprisoned not more than three years."

§ 203. **Agreement to Prevent Bids at Sale of Lands.**—Old Section 2373 becomes New Section 59, which is in the following words:

"Sec. 59. Whoever, before or at the time of the public sale of any of the lands of the United States, shall bargain, contract, or agree, or attempt to bargain, contract, or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof; or whoever by intimidation, combination, or unfair management shall hinder or prevent, or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both."

§ 204. **Injuries to United States Telegraph, Etc., Lines.**—The Act of the twenty-third of June, 1874, 18 Statute at Large, 250, First Supplement, 46, did not include telephone and cable lines and systems, but Section 60 of the New Code, in the following words, does:

"Sec. 60. Whoever shall wilfully or maliciously injure or

destroy any of the works, property, or material of any telegraph, telephone, or cable line, or system, operated or controlled by the United States, whether constructed, or in process of construction, or shall wilfully or maliciously interfere in any way with the working or use of any such line, or system, or shall wilfully or maliciously obstruct, hinder, or delay the transmission of any communication over any such line, or system, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both."

§ 205. **Counterfeiting Weather Forecasts.**—All of the salient features of the Act of August eighth, 1894, 28 Statute at Large, 274; Second Supplement, 233; the Act of March 2, 1895, 28 Statute at Large, 737; Second Supplement, 406; and the Act of April twenty-fifth, 1896, 29 Statute at Large, 108, Second Supplement, 459, are re-enacted in the new Section 61, which reads as follows:

"Sec. 61. Whoever shall knowingly issue or publish any counterfeit weather forecaste or warning of weather conditions falsely representing such forecaste or warning to have been issued or published by the Weather Bureau, United States Signal Service, or other branch of the Government service, shall be fined not more than five hundred dollars, or imprisoned not more than ninety days, or both."

§ 206. **Interfering with Employees of Bureau of Animal Industry.**—The Act of March third, 1905, 33 Statute at Large, 1265, is re-enacted, with few unimportant changes, in Section 62 in the following words:

"Sec. 62. Whoever shall forcibly assault, resist, oppose, prevent, impede, or interfere with any officer or employee of the Bureau of Animal Industry of the Department of Agriculture in the execution of his duties, or on account of the execution of his duties, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both; and whoever shall use any deadly or dangerous weapon in resisting any officer or employee of the Bureau of Animal Industry of the Department of Agriculture in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties or on account of the performance of his duties, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

§ 207. **Forgery of Certificate of Entry.**—Section 63 of the New

Code re-enacts the substantial provisions of old Section 5417, in the following words:

"Sec. 63. Whoever shall forge, counterfeit, or falsely alter any certificate of entry made or required to be made in pursuance of law by any officer of the customs, or shall use any such forged, counterfeited, or falsely altered certificate, knowing the same to be forged, counterfeited, or falsely altered, shall be fined not more than ten thousand dollars and imprisoned not more than three years."

§ 208. **Concealment or Destruction of Invoices, Etc.**—Old Section 5443 is re-enacted into Section 64 in the following words:

"Sec. 64. Whoever shall wilfully conceal or destroy any invoice, book, or paper, relating to any merchandise liable to duty, which has been or may be imported into the United States from any foreign port or country, after an inspection thereof has been demanded by the collector of any collection district, or shall at any time conceal or destroy any such invoice, book, or paper for the purpose of suppressing any evidence of fraud therein contained, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both."

§ 209. **Resisting Revenue Officers; Rescuing or Destroying Seized Property, Etc.**—The provisions of old Section 5447 become in substance Section 65 of the New Code, in the following words:

"Sec. 65. Whoever shall forcibly assault, resist, oppose, prevent, impede, or interfere with any officer of the customs or of the internal revenue, or his deputy, or any person assisting him in the execution of his duties, or any person authorized to make searches and seizures, in the execution of his duty, or shall rescue, attempt to rescue, or cause to be rescued, any property which has been seized by any person so authorized; or whoever before, at, or after such seizure, in order to prevent the seizure or securing of any goods, wares, or merchandise by any person so authorized, shall stave, break, throw overboard, destroy, or remove the same, shall be fined not more than two thousand dollars, or imprisoned not more than one year, or both; and whoever shall use any deadly or dangerous weapon in resisting any person authorized to make searches or seizures, in the execution of his duty, with intent to commit a bodily injury upon him, or to deter or prevent him from discharging his duty, shall be imprisoned not more than ten years."

§ 210. **Falsely Assuming to be Revenue Officer.**—There is little difference between Section 5448 of the old Statutes and new Section 66, which is as follows:

"Sec. 66. Whoever shall falsely represent himself to be a revenue officer, and, in such assumed character, demand or receive any money or other article of value from any person for any duty or tax due to the United States, or for any violation or pretended violation of any revenue law of the United States, shall be fined not more than five hundred dollars and imprisoned not more than two years."

This statute is in addition to Section 32 of the New Code, which has been heretofore noticed, and which was old Section 5448. Section 32 makes it an offense for any person to pretend to be *any* United States officer, while Section 66 makes it an offense to assume to be a revenue officer, when in such assumed character a demand is made for, or any money or other article of value is received from any person for any duty or tax due the United States, or for any violation or pretended violation of any of the revenue laws of the United States. In other words, a bare assumption or pretention that one is a United States revenue officer, without demanding or receiving any money or article of value, as set out in the statute, would not be an offense under this section, nor would it be an offense under Section 32.

Indictment.—An indictment should charge the unlawful, felonious, and false representation of the defendant to be a revenue officer of the United States, and that in such assumed character he did demand and receive certain money or valuable thing, as the case may be, as a duty or tax, or in settlement of some violation or pretended violation of the Government revenue laws.

In United States vs. Browne, 119 Federal, 482, District Judge Thomas held good, on demurrer, an indictment which jointly indicted two defendants under old Section 5448, the first count of which charged that the defendants unlawfully and feloniously falsely represented themselves to be revenue officers of the United States, and in such assumed character did demand and receive certain money, to wit, two hundred dollars, of and from one A. Isaacs, for a pretended violation by the said Isaacs of a revenue law of the United States; that is to say, of Section 8 of an Act of Congress concerning internal revenue taxation, approved June 13, 1898, as amended in the respect of knowingly and wilfully buying washed revenue stamps, etc. The second count was like the first, except that it charged that the defendants had in pos-

session washed and restored revenue stamps, knowingly, and without lawful excuse. The third count charged that the defendants, with intent to defraud one Isaacs, unlawfully and feloniously, did falsely assume and pretend to be officers and employees acting under the authority of the United States, to wit, revenue officers and employees, and in such pretended character did fraudulently demand and obtain from him, the said Isaacs, a sum of money, to wit, two hundred dollars. This third count, it will be noticed, is laid under what is now new Section 32. The defendants' counsel contended that the averments of the indictment were not sufficiently defined, particularly as to the designation of the sort of revenue officer meant. The Court held that the words of the indictment were technically sufficient to charge an offense under the statute.

The case of the United States vs. Farnham, 127 Federal, 478, was discussed in considering Section 32 *supra*, but it is not out of place to cite it here again to support the theory that there must not be a remoteness between the pretended character, and the demand or receipt of the money or thing of value. In the Farnham case, the defendant pretended to be a secret-service operative, wearing a badge, etc. Ten months afterwards he returned to the same hotel, representing himself to be a traveling salesman, and secured the cashing of a worthless check. At the time of the cashing of the worthless check, he did not make any further representation of his Government employment, and the Court held that the facts were insufficient to sustain a conviction for pretending to be an employee of the United States, and as such knowingly and feloniously obtaining from another a sum of money, etc.

§ 211. **Offering Presents to Revenue Officers.**—Section 67 of the New Code, which re-enacts the substantial provisions of old Statute 5452, is as follows:

"Sec. 67. Whoever, being engaged in the importation into the United States of any goods, wares, or merchandise, or being interested as principal, clerk, or agent in the entry of any goods, wares, or merchandise, shall at any time make, or offer to make, to any officer of the revenue, any gratuity or present of money or other thing of value, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both."

The offense herein denounced is a species of bribery, and without using the ugly word "bribery," is for the purpose of covering such gratuities and gifts as might otherwise be received by the public official, even though such official would not think of accepting a bribe. The statute is limited in that it only applies to such gratuities or presents as are made by importers to any officer in the Federal revenue service. Smuggling of merchandise from foreign countries into the United States would doubtless be facilitated to a more or less extent by gifts or gratuities from such smugglers to revenue inspectors and officers. The purpose, therefore, of the statute, seems to be to prevent such friendships between importers and revenue officials as would facilitate importations of goods into this country without the payment of legal duties.

§ 212. **Admitting Merchandise to Entry for Less than Legal Duty.**—Old Section 5444 becomes New Section 68, which reads as follows:

"Sec. 68. Whoever, being an officer of the revenue, shall, by any means whatever, knowingly admit or aid in admitting to entry, any goods, wares, or merchandise, upon payment of less than the amount of duty legally due thereon, shall be removed from office and fined not more than five thousand dollars, or imprisoned not more than two years, or both."

District Judge Chatfield, in the case of United States vs. Mescall, 164 Federal, 584, which was an indictment under old Section 5444, held that that section did not refer merely to the act of filing at the customs-house the document known as an entry, but comprises the transaction of entering the goods into the body of the commerce of the country; that is, the whole process of passing the goods from the customs-house, which cannot be deemed completed until liquidation has been had. He further held that the words in the statute, "aid in the illegal admission of imports," includes aid given both before and after the fact, and where a custom officer aids one who has made wrongful entry, by concealing the falsity of the entry, or by supporting it by false official returns, he is within the prohibition or the section.

Indictment.—In the above case, the Court held that an indictment which charged that certain goods had been imported into

the United States, and entered by the importer with the collector of the port under an entry number, that such goods were subject to a specific duty, and that the defendant, who was an officer of the customs service, as a part of his official duties, was to weigh the goods included in this particular importation, and to return to the collector a true statement of the result of that weighing from which statement the amount of duty to be collected was to be liquidated and paid, and that in fact the defendant returned a false statement of weight, upon which false weight duty was paid, (the amount of this payment being too little, in proportion to the amount by which the false weight was less than the actual weight), and that the defendant, by so doing, unlawfully admitted, or aided in admitting, to entry, goods specified upon payment of less than the amount of duty legally due thereon, was not subject to demurrer for failing to describe an offense under this statute. See also United States vs. Browne, 126 Federal, 766, and United States vs. Legg, 105 Federal, 933. See United States vs. Mescall, by the same judge, for other points, 164 Federal, 587.

§ 213. **Securing Entry of Merchandise by False Samples, Etc.**— Section 69 in the New Code is the same as Section 5445 of the old Statutes, and is as follows:

"Sec. 69. Whoever, by any means whatever, shall knowingly effect, or aid in effecting, any entry of goods, wares, or merchandise, at less than the true weight or measure thereof, or upon a false classification thereof as to quality or value, or by the payment of less than the amount of duty legally due thereon, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both."

The allegations and proof under this section should show knowledge on the part of the defendant of the improper weight or measure or classification of the goods or articles imported; and while in United States vs. Rosenthal, 126 Federal, 766, District Judge Thomas held that an indictment under 5445 which charged that the defendant, on a day named, "with intent.....that the United States should be wrongfully deprived of a portion of the lawful duties due" on certain imported goods which were specifically dutiable according to weight, effected an entry thereof at less than their true weight, and by payment of less than their

legal duty, sufficiently charged that the entry was knowingly effected; yet, it is believed that the correct practice is to use the word knowingly in the indictment when the statute makes knowledge a constituent of the offense.

With the above qualification, the indictment as epitomized by Judge Thomas in that case, may be relied upon as good under this statute, such epitome comprehending that the defendants, on the day named, and with intent to defraud the United States of duty on goods specifically dutiable according to weight, effected an entry thereof, which was an entry for ware-houseing the goods, and by payment of less than the legal duty. They effected said entry, (1) by making it in accordance with false statements as to weight in the invoice, which invoice had by their direction been made, consulated, and forwarded by their agent in Japan; (2) by corruptly procuring said invoice to be wrongfully approved, passed, and reported, by Browne, the examiner, to the collector. In other words, the offense described in the statute is knowingly effecting an entry of goods, (a) at less than their true weight or measure; (b) upon a false classification; or (c) by payment of less than legal duty.

§ 214. **False Certification by Consular Officers.**—Old Statute 5442 has been changed by the omission of the words "commercial agent or vice-commercial agent," substituting therefor, "or other person employed in the Consular Service of the United States," in new Section 70, which is in the following words:

"Sec. 70. Whoever, being a consul, or vice-consul, or other person employed in the consular service of the United States, shall knowingly certify falsely to any invoice, or other paper, to which his certificate is by law authorized or required, shall be fined not more than ten thousand dollars and imprisoned not more than three years."

This is the only difference between the new and the old law.

Query.—An United States Consul or other person in the Consular Service who committed the offense denounced by the statute while he was in some foreign country would be beyond the jurisdiction of the Federal Government, because of venue. The incorporation of the word "knowingly" in the section also requires it in the proof and indictment.

§ 215. **Taking Seized Property from Custody of Revenue Officer.**—There is practically no difference between the wording of old Section 5446 and new Section 71, which reads as follows:

"Sec. 71. Whoever shall dispossess or rescue, or attempt to dispossess or rescue, any property taken or detained by any officer or other person under the authority of any revenue law of the United States, or shall aid or assist therein, shall be fined not more than three hundred dollars and imprisoned not more than one year."

While this statute does not contain the word "knowingly," there is no doubt but that an indictment should allege that the person charged knew that the property rescued or taken from the revenue officer was in fact in possession of such officer as a revenue officer of the United States.

§ 216. **Forging, Etc., Certificate of Citizenship.**—The Act of June 29, 1906, 34 Statute at Large, 602, known as the Naturalization Law, contained at Section 16 a provision for the prosecution of falsely making, forging, etc., certificates, when such certificate was for the use of the person so falsely making or for the use of someone else. In other words, to constitute an offense under the statute, the certificate must have been so falsely made, etc., to be used, and such allegation is necessary in the bill, and must be made in the proof. The section, as it passes into the New Code, becomes Section 74, which reads as follows:

"Sec. 74. Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or shall knowingly aid or assist in falsely making, forging, or counterfeiting any certificate of citizenship, with intent to use the same, or with the intent that the same may be used by some other person, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both."

§ 217. **Engraving, Etc., Plate for Printing or Photographing, Concealing, or Bringing Into the United States, Etc., Certificate of Citizenship.**—From the same law, and being Section 17 thereof, comes Section 75 of the New Code, which reads as follows:

"Sec. 75. Whoever shall engrave, or cause or procure to be engraved, or assist in engraving, any plate in the likeness of any plate designed for the printing of a certificate of citizenship; or whoever shall sell any such plate, or shall bring into the United States from any foreign place any such plate, except under the

direction of the Secretary of Commerce and Labor, or other proper officer; or whoever shall have in his control, custody, or possession any metallic plate engraved after the similitude of any plate from which any such certificate has been printed, with intent to use or to suffer such plate to be used in forging or counterfeiting any such certificate or any part thereof; or whoever shall print, photograph, or in any manner cause to be printed, photographed, made, or executed, any print or impression in the likeness of any such certificate, or any part thereof; or whoever shall sell any such certificate, or shall bring the same into the United States from any foreign place, except by direction of some proper officer of the United States; or whoever shall have in his possession a distinctive paper which has been adopted by the proper officer of the United States for the printing of such certificate, with intent unlawfully to use the same, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both."

§ 218. **False Personation, Etc., In Procuring Naturalization.**—Section 5424 of the old statutes was construed in the cases of United States vs. York, 131 Federal, 323, and United States vs. Raisch, 144 Federal, 486, by reason of its peculiar wording, as follows:

"It will be observed that after the word 'or' and before the words 'who tries,' etc., are omitted the words 'every person,' with which the section opens. The same omission occurs in the third auxiliary clause of the section; hence 'who,' as so used, and wherever used in the section, refers to the initial 'every person.' But such words 'every person' are modified by the words 'applying to be admitted a citizen, or appearing as a witness for any such person'; hence, as the section literally reads, a person uttering a certificate can only be punished in case he was a 'person applying to be admitted a citizen, or appearing as a witness for any such person'." United States vs. York, 131 Fed., 327.

To the same effect is United States vs. Raisch, by Judge DeHaven, who limits the application of the old section to the person applying to be admitted a citizen, or appearing as a witness for any such person. To meet such construction, and to remedy what was evidently a mistake, we have Section 76 of the New Code, in the following words:

"Sec. 76. Whoever, when applying to be admitted a citizen, or when appearing as a witness for any such person, shall knowingly personate any person other than himself, or shall falsely appear in the name of a deceased person, or in an assumed or fic-

titious name; or whoever shall falsely make, forge, or counterfeit any oath, notice, affidavit, certificate, record, signature, or other instrument, paper, or proceeding required or authorized by any law relating to or providing for the naturalization of aliens; or whoever shall utter, sell, dispose of, or shall use as true or genuine, for any unlawful purpose, any false, forged, antedated, or counterfeit oath, notice, certificate, order, record, signature, instrument, paper, or proceeding above specified; or whoever shall sell or dispose of to any person other than the person for whom it was originally issued any certificate of citizenship or certificate showing any person to be admitted a citizen, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.''

This section clearly applies generally to every person, whether he be applying to be admitted a citizen, or whether he be appearing as a witness for any such person. The use of the word ''whoever'' before each of the clauses in the section which denounce various phases of the offense, meet clearly the limitations found in the old statute, and render the new section general in its application.

§ 219. **Using False Certificate of Citizenship, or Denying Citizenship, Etc.**—Section 5425 of the old statute was enlarged by the Act of June twenty-ninth, 1906, 34 Statute at Large, 602, which now passes into the New Code as Section 77, in the following words:

''Sec. 77. Whoever shall use or attempt to use, or shall aid, assist, or participate in the use of any certificate of citizenship, knowing the same to be forged, counterfeit, or antedated, or knowing the same to have been procured by fraud or otherwise unlawfully obtained; or whoever, without lawful excuse, shall knowingly possess any false, forged, antedated, or counterfeit certificate of citizenship purporting to have been issued under any law of the United States relating to naturalization, knowing such certificate to be false, forged, antedated, or counterfeit, with the intent unlawfully to use the same; or whoever shall obtain, accept, or receive any certificate of citizenship, knowing the same to have been procured by fraud or by the use or means of any false name or statement given or made with the intent to procure, or to aid in procuring, the issuance of such certificate, or knowing the same to have been fraudulently altered or antedated; or whoever, without lawful excuse, shall have in his possession any blank certificate of citizenship provided by the Bureau of Immigration and

Naturalization with the intent unlawfully to use the same; or whoever, after having been admitted to be a citizen, shall, on oath or by affidavit, knowingly deny that he has been so admitted, with the intent to evade or avoid any duty or liability imposed or required by law, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

The rule announced in United States vs. Melfi, 118 Federal, 902, which was a prosecution for conspiracy to commit an offense against the United States by causing a violation of Section 5425, is applicable to the drafting of indictments under the new section, and it will, therefore, be observed that one of the essential ingredients of the offense is that the person who should obtain, accept, or receive a certificate of citizenship, who should do so with knowledge on his part that it had been procured by means of false statements made with intent to procure or aid in procuring the issue of such certificate.

Running throughout these naturalization laws, is the use of the word "knowingly," and the pleader must not assume that such word was used by Congress unintentionally. It is absolutely necessary to show knowledge, both in allegation and in proof.

§ 220. **Using False Certificate, Etc., as Evidence of Right to Vote.**—Section 78 of the New Code displaces old Section 5426, and is in the following words:

"Sec. 78. Whoever shall in any manner use, for the purpose of registering as a voter, or as evidence of a right to vote, or otherwise unlawfully, any order, certificate of citizenship, or certificate, judgment, or exemplification, showing any person to be admitted to be a citizen, whether heretofore or hereafter issued or made, knowing that such order, certificate, judgment, or exemplification has been unlawfully issued or made; or whoever shall unlawfully use, or attempt to use, any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or the name of a deceased person, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

Bearing in mind the observation that has been so often repeated as to the use of the word "knowledge" or "knowingly" in these naturalization statutes, it is well to call attention to the case of United States vs. Lehman, 39 Federal, 768, where Judge Thayer held that an indictment for a violation of such statute,

which describes the fraud without describing the facts constituting the fraud, is bad, though the allegation be made that such acts are unknown to the grand jury. In the matter of Coleman, 15 Blatchf., 406, it was held that knowledge that the certificate was unlawfully issued or made was necessary to constitute an offense under the section. There can be no conviction when it appears that the defendant complied fully with all the conditions imposed on him as prerequisite to his admission and that the unlawfulness, if any, was in the want of form in the record of the Court. So, in United States vs. Burley, 14 Blatchf., U. S., 91, where the defendant was indicted under this section and the proof showed that the defendant had registered as a voter upon the protection of the certificate, which certificate had been issued when the applicant was not in Court, and without any oath taken by him, the certificate being regular upon its face, the mere fact that the defendant knew that the certificate had been issued without his presence in Court, and without any oath being taken by him, was not sufficient to warrant a conviction.

§ 221. **Falsely Claiming Citizenship.**—Section 5428 of the old statutes, becomes Section 79 of the New Code in the following words:

"Sec. 79. Whoever shall knowingly use any certificate of naturalization heretofore or which hereafter may be granted by any court, which has been or may be procured through fraud or by false evidence, or which has been or may hereafter be issued by the clerk or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; or whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both."

The word "duly" in the section, on the authority of Judge Chatfield in United States vs. Hamilton, 157 Federal, 569, applies to a regular compliance with requirements, rather than to the truth of the facts involved in the admission, and where the person charged was granted a certificate of citizenship by an order of Court, both of which are regular in form, and have not been vacated, it is impossible to charge unlawful use, based solely

upon a further allegation of knowledge that the certificate had not been duly made.

In Green vs. United States, 150 Federal, 560, the Circuit Court of Appeals for the Ninth Circuit held that an alien who knowingly makes a false affidavit that he has been duly naturalized as a citizen of the United States, before a Registration Officer for the purpose of procuring himself to be registered as a voter at an approaching election in a State, commits an offense under this section. That Court also held that it is not necessary that the false certificate be actually used for an unlawful purpose to constitute the offense denounced by the statute.

§ 222. **Taking False Oath in Naturalization.**—Section 80 of the New Code re-enacts old Section 5395 in the following words:

"Sec. 80. Whoever, in any proceeding under or by virtue of any law relating to the naturalization of aliens, shall knowingly swear falsely in any case where an oath is made or affidavit taken, shall be fined not more than one thousand dollars and imprisoned not more than five years."

In United States vs. Moore, 144 Federal, 962, the Circuit Court of Appeals passes upon a form of an indictment under this section, and says that in prosecutions for perjury and in prosecutions akin thereto, it is a fundamental rule that an indictment must show that the tribunal before which the offense is alleged to have occurred had jurisdiction over the issue to which it related. It is also a fundamental rule that it is not sufficient to allege in general terms that the tribunal named had jurisdiction over the issue alleged to have been involved, because such an allegation includes matters of law, as well as fact; while it is the duty and right of the court before which an indictment is pending to be so far advised of the facts that it can determine for itself whether the issue was of such a character as to give the tribunal named jurisdiction thereof, and such as to render the alleged offense material thereto.

In the case of Schmidt vs. United States, 133 Federal, 257, the Circuit Court of Appeals for the Ninth Circuit held that on the trial of a defendant for perjury committed in a naturalization proceeding, his signature to affidavits filed in the proceeding is admissible to prove the fact that he was a witness therein, al-

though such affidavits, when signed, were in blank. So, too, in that case the Court held that a defective final order was admissible as evidence of the facts therein stated. The Supreme Court, in Holgren vs. United States, October Term, 1909, affirms same case, 156 Fed., 439, the principal question being whether, under this section, a conviction can be had in a Federal Court for a false oath thereunder in a State Court. Held, that it could.

§ 223. **Provisions Applicable to All Courts of Naturalization.**—Section 5429 of the old statutes is re-enacted into Section 81 of the New Code, and some new words are added for the purpose of showing that the penal provisions above treated are applicable to proceedings had or taken in any Court, and reads as follows:

"Sec. 81. The provisions of the five sections last preceding shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceedings for naturalization may be commenced or attempted to be commenced, and whether such court was vested by law with jurisdiction in naturalization proceedings or not."

See Holgren vs. United States, 156 Federal, 439, affirmed by Supreme Court, October Term, 1909.

§ 224. **Corporations, Etc., Not to Contribute Money for Political Elections, Etc.**—The Act of January 26, 1907, 34 Statute at Large, becomes Section 83 of the New Code, in the following words:

"Sec. 83. It shall be unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for, or any election by any state legislature of a United States Senator. Every corporation which shall make any contribution in violation of the foregoing provisions shall be fined not more than five thousand dollars; and every officer or director of any corporation who shall consent to any contribution by the corporation in violation of the foregoing provisions shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

CHAPTER VIII.

OFFENSES AGAINST THE EXISTENCE OF THE GOVERNMENT.

§ 225. **Treason.**—At the time of the formation of this Republic, treasons were numerous in England. They were divided into high and petit. By the old Common Law, there were several forms of petit treason, which later, by English statute, were reduced to three. These were: the killing by a servant of his master; the killing of a husband by the wife; and the killing of a prelate by an ecclesiastic owing him obedience. All these petit treasons were abolished, however, in 1828, and there remains now but one sort, and that is high treason. So, when the word "treason" is used, it means high treason. Under the United States laws, there are no Common Law crimes, and treason, as defined in the Constitution of the United States, consists only in levying war against them, or in adhering to their enemies, giving them aid and comfort. The meaning of the words "levying war," and the other words, "adhering to their enemies, giving them aid and comfort," is to be found in the Common Law doctrine of an aider at the fact, as applicable to the levying of war in treason. The meaning of war, as defined by Bishop, is an attempt, by force, either to subjugate or to overthrow the Government against which it is levied. Ordinarily, where the overthrow is not contemplated,

a treaty acknowledging rights previously denied is expected. If a body of men, mistakenly deeming a particular statute to violate fundamental or constitutional right, combine to oppose by force its execution, and commit therein an overt act, they are undoubtedly guilty of treason, provided, it is their determination also to resist by violence every attempt to bring them to justice and to continue this course until the Government is compelled to yield to them. Bishop's New Criminal Law, Second Volume, page 703. The same writer, in answering the question, What is levying war? says that in legal reason a levying of war consists of two elements, neither of which can be dispensed with: the one is the intent existing as of fact in the mind of the accused person, either to overthrow the Government, or to compel it, through fear, to yield something to which it would not voluntarily assent; the other is some overt act in the nature of war or preparation therefor, or threatening it, as an array of persons assembled for war, or some war-like violence, or some other step menacing war. Yet, we must admit that it is legally possible for one man alone to levy war upon his Government, and be guilty of treason. Second Bishop's Criminal Law, 704.

§ 226. **The statute.**—In line with the Constitutional definition of treason was old Statute 5331, which is re-enacted into Section 1 of the New Code, which reads as follows:

"Sec. 1. Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason."

In 1 Story, U. S., 614, 30 Federal Case, 18275, the following charge was given to a grand jury:

"It is not every act of treason by levying war that is treason against the United States. It may be, and often is, aimed altogether against the sovereignty of a particular state. Thus, for example, if the object of an assembly of persons met with force is to overthrow the Government or Constitution of a State, or to prevent the due exercise of its sovereign powers, or to resist the exercises of any one or more of its general laws, but without any intention whatsoever to intermeddle with the relations of that State with the national Government, or to displace the national laws or sovereignty therein:—every overt act done with force toward the execution of such a treasonable purpose is treason

against the State, and against the State only. But treason may be begun against a State and may be mixed up or merged in treason against the United States. Thus, if the treasonable purpose be to overthrow the Government of the State and forcibly to withdraw it from the Union, and thereby to prevent the exercise of the national sovereignty within the limits of the State, that would be treason against the United States."

In United States vs. Wiltberger, 5 Wheat., U. S., 76, treason was defined as a breach of allegiance, and can be committed by him only who owes allegiance, either perpetual or temporary. In the case of United States vs. Greiner, 26 Federal Case No. 15262, it was held that every step taken by anyone of an armed body of men mustered into military array for a treasonable purpose, by marching or otherwise, in part execution of that purpose, is an overt act of treason in levying war. See also U. S. vs. Vilato, 2 Dall., 370; the Insurgents, 2 Dall., 385; *ex parte* Bohnan et al, 4 Cranch, 75; U. S. vs. Burr, 4 Cranch, 469; Carlyle vs. U. S., 16 Wallace, 147; U. S. vs. Burr, 1 Burr's Trial, 14, 16; Second Burr's Trial, 402, page 25, Federal Case, 2, 52, 55, and 210; U. S. vs. Cathcart, 1 Bond, 556; 25 Federal Case, 344; U. S. vs. Greathouse, 26 Federal Case, 818; U. S. vs. Hodges, 26 Federal Cases, 332; U. S. vs. Hoxie, 26 Federal Case, 397; U. S. vs. Mitchell, 2 Dall., 26, Federal Case, 1277; U. S. vs. Vigol, 28 Federal Case, 376; U. S. vs. Pryor, 27 Federal Case, 628; Charges to Grand Jury, 2 Curt., 630, 30 Federal Case, 1024, 4 Blatchf., 518; 30 Federal Case, 1032; 5 Blatchf., 549; 30 Federal Case, 1034; 1 Bond, 609, 30 Federal Case, 1036; 30 Federal Case, 1039; 30 Federal Case, 1042; 30 Federal Case, 1046; 30 Federal Case, 1047; 30 Federal Case, 1049. One of the most interesting cases, in its treatment of the evidence necessary to establish the offense, will be found in United States vs. Burr, 25 Federal Case, No. 14693.

§ 227. **Punishment.**—The punishment for treason is the same under Section 2 of the new Code as it was under the old Statute 5332, the new section reading as follows:

"Sec. 2. Whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five years and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and per-

sonal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States."

In Davis case, Chase, U. S., page 1, 7 Federal Case No. 3621-a, it was held that treason under this section is bailable.

It was held in Wallace vs. Van Riswick, 92 U. S., 202, 23 Law Ed., 473, that after an adjudicated forfeiture and sale of an enemy's land, under the Confiscation Act of Congress of July 7, 1862, and the general resolution of even date therewith, that there was not left in him any interest which he could convey by deed.

In Windsor vs. McVeigh, 93 U. S., 274, 23 Law Ed., page 914, the Supreme Court held that the jurisdiction acquired by the seizure of the property in a proceeding *in rem* for its condemnation, is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been offered to its owner and parties interested to appear and be heard upon the charges for which the forfeiture is claimed. To that end, some notification of the proceedings, beyond that arising from the seizure prescribing the time within which the appearance must be made, is essential.

§ 228. **Misprision of Treason.**—Section 3 of the New Code, which takes the place of the old Statute 5333, is in the following words:

"Sec. 3. Whoever, owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals, and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular State, is guilty of misprision of treason and shall be imprisoned not more than seven years and fined not more than one thousand dollars."

Cases of more or less interest, bearing upon the statute, are United States vs. Wiltberger, 5 Wheat., 97; Confiscation cases, 1 Woods, 221, 6 Federal Case, 270; U. S. vs. Tract of Land, 1 Woods, 475; 28 Federal Case, 203.

Misprision, whether of felony or of treason, is defined by the text-book writers as criminal negligence either to prevent it from being committed, or to bring to justice the offender after its com-

mission. The statute under consideration seems to be limited by its terms, not to a prevention of the offense of treason, but to the disclosure of the knowledge of the commission as soon as may be.

§ 229. **Inciting or Engaging in Rebellion or Insurrection.**—Section 5334 of the old Statutes becomes Section 4 of the New Code, in the following words:

"Sec. 4. Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be imprisoned not more than ten years, or fined not more than ten thousand dollars, or both; and shall, moreover, be incapable of holding any office under the United States."

§ 230. **Criminal Correspondence with Foreign Governments.**—Section 5335 of the old statutes becomes Section 5 of the New Code, which reads as follows:

"Sec. 5. Every citizen of the United States, whether actually resident or abiding within the same, or in any place subject to the jurisdiction thereof, or in any foreign country, without the permission or authority of the Government, directly or indirectly, commences or carries on any verbal or written correspondence or intercourse with any foreign government or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States; and every person, being a citizen of or resident within the United States or in any place subject to the jurisdiction thereof, and not duly authorized, counsels, advises, or assists in any such correspondence with such intent, shall be fined not more than five thousand dollars and imprisoned not more than three years; but nothing in this section shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects."

§ 231. **Seditious Conspiracy.**—Section 5336 of the old statutes becomes Section 6 of the New Code, and is as follows:

"Sec. 6. If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent,

hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than five thousand dollars, or imprisoned not more than six years, or both."

§ 232. **Recruiting Soldiers or Sailors to Serve Against the United States.**—Section 5337 of the 1878 statutes becomes Section 7 of the New Code, and is as follows:

"Sec. 7. Whoever recruits soldiers or sailors within the United States, or in any place subject to the jurisdiction thereof, to engage in armed hostility against the same, or opens within the United States, or in any place subject to the jurisdiction thereof, a recruiting station for the enlistment of such soldiers or sailors to serve in any manner in armed hostility against the United States, shall be fined not more than one thousand dollars and imprisoned not more than five years."

§ 233. **Enlistment to Serve Against the United States.**—Section 8 of the New Code displaces Section 5338 of the old statutes, and is as follows:

"Sec. 8. Every person enlisted or engaged within the United States or in any place subject to the jurisdiction thereof, with intent to serve in armed hostility against the United States, shall be fined one hundred dollars and imprisoned not more than three years."

CHAPTER IX.

OFFENSES AGAINST NEUTRALITY.

§ 234. The word "neutrality," as used with reference to governments and international law, has no different meaning than that given to it in the ordinary course of affairs. The Century Dictionary defines it as "the state of being neutral, or of being unengaged in a dispute or contest between others; the taking of no part on either side; in international law, the attitude and condition of a nation or state, which does not take part, directly or indirectly, in a war between other states, but maintains relations of amity with all the contending parties." The 29 Volume of the "Cyc.", at page 675, citing the Three Friends, 166 U. S., page 1, 41 Law Ed., page 897, deduces that neutrality, strictly speaking, consists in abstinence from any participation in a public, private, or civil war, and impartiality of conduct toward both parties. That authority, continuing, says:

"The nation which, while preserving its natural liberty and its independence, remains at peace while other nations are at war, and which continues to maintain with the two beligerent nations the friendly relations of commerce, or only of sociality, or of hu-

manity, existing before the out-break of hostilities, may call itself neutral. This quality imposes upon it the obligations which may be sumed up in two principles, and which embrace all the others: abstaining from all acts of hostility, direct or indirect: and perfect impartiality between the two nations at war, respecting all matters affecting the war."

From these definitions, one readily discovers that neutrality, in a measure, interferes with the liberty and independence of the nation preserving that status.

The United States was one of the earliest countries to preserve by law its netrality with reference to conflicts between other governments and nationalities. While there are international punishments for a failure to observe the full measure of neutrality, the most effective preventive is the penal code, which creates offenses under this head, and affixes punishments therefor; and in construing such statutes, the same rules are to be applied and observed as govern the construction of other penal statutes.

§ 235. **Accepting Foreign Commission.**—Section 9 of the New Code re-enacts old Section 5281, and is in the following language:

"Sec. 9. Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, shall be fined not more than two thousand dollars and imprisoned not more than three years."

The wording of the statute bears the construction that the mere aeceptanee of a commission of the sort therein described would not create the offense. It is necessary that some overt act be committed under the commission, such as raising men for the enterprise, collecting provisions, munitions of war, or any other act which shows an exercise of the authority which the commission is supposed to confer. 29 Cyc., 678; *in re* Charge to Grand Jury, 30 Federal Case No. 18265, 2 McLean, 1.

§ 236. **Enlisting in Foreign Service.**—Old Section 5282 becomes Section 10 of the New Code, in the following words:

"Whoever, within the territory or jurisdiction of the United States, enlists, or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered

in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, shall be fined not more than one thousand dollars, and imprisoned not more than three years."

The Courts have held, in construing this section, United States vs. Obrien et al, 75 Federal, 900, that persons are not only prohibited from enlisting in this country as a soldier of any foreign power, but they are also prohibited from hiring or retaining any other person to enlist or to go abroad for the purpose of enlisting. The Court also observes in that case, which seems to have been followed, that the statute does not prohibit persons within our jurisdiction, whether citizens or not, going as individuals to foreign states, and there enlisting in their armies, and that individuals may go abroad to enlist in any number and in any way they see fit; by regular line of steamers, by chartering a vessel, or in any other manner, either separately, or associated, provided always, that they do not go as a military expedition, or set on foot or begin within our jurisdiction a military expedition or enterprise, to be carried on for this country, or provide or prepare the means therefor.

If, however, a military expedition or enterprise has in fact been prepared in this country, and carried by sea to a foreign shore, then all persons who planned for it, or prepared for it here, or knowingly took part in the transportation of it, are guilty under the statute. U. S. vs. Obrien, 75 Federal, page 900.

§ 237. **Arming Vessels Against People at Peace with the United States.**—Old Section 5238 becomes new Section 11, and is as follows:

"Sec. 11. Whoever, within the territory or jurisdiction of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or whoever issues or delivers a commission within the territory or jurisdiction of the United States for any vessel, to the intent that she may be

so employed, shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer and the other half to the use of the United States."

The statute contains two methods of punishment, it will be noticed: one against the person, and one against the property; that is, the imprisonment of the offender and the forfeiture of his vessel. The Supreme Court of the United States, in Wiborg et al vs. United States, 163 U. S., page 632, 41 Law Ed., page 289, in passing upon a case that originated in Pennsylvania, under Section 5286, hereinafter noted, the facts of which showed in substance, that the "Horsa," a Danish steamer engaged in the fruit business at Philadelphia, cleared from Philadelphia for Jamaica, having only a small cargo; that thereafter, near Barnegat, off the Jersey coast, she was loaded with a cargo of men and rifles, swords, machettes, cartridges, and other munitions of war, which cargo was subsequently delivered to Cuba, where there was an insurrection of the Cubans against the Spaniards, said in substance, a military expedition or enterprise is entered upon when men with knowledge of the enterprise combine and organize in this country, and are carried with arms and ammunition under their control, by a tug, thirty or forty miles out to sea, to a steamer, on which they embark and drill, and by which they are taken to Cuba, where they disembark to effect an armed landing on the coast, with intent to make war against a government with which the United States is at peace; and in determining whether the combination was lawful or not, the declarations of those engaged in it, explanatory of acts done in furtherance of its object, are competent evidence after the combination has been proved.

Another interesting authority under this section, as well as other sections under this chapter, is the Lauradra, 85 Federal, 760, which was a case that originated upon a similar state of facts to the Wiborg case, and was the loading of a fruit vessel off the American coast, near Barnegat, with men and munitions, for engagement in the Cuban revolution. In that case, the Court observed that while it was not the purpose of our neutrality laws

in any manner to check or interfere with the commercial activity of citizens of the United States, or of others residing therein, and interested in commercial transactions, nor to render unlawful mere commercial ventures in contraband of war, they were designed to prohibit acts and preparations on the soil or waters of the United States not originating with a due regard for commercial interest, but of a nature distinctly hostile in a material sense to a friendly power engaged in hostilities, and calculated or tending to involve this country in war, whether an incidental or direct commercial profit does or does not result therefrom.

District Judge Bradford, in considering the above-mentioned case, held that it was necessary, for the forfeiture of the vessel under 5283, that the furnishing, fitting out, or arming of her for the prohibited should be completed within the limits of the United States. It was also determined that it was sufficient, if by pre-arrangement within the limits of the United States, the vessel having been procured there, the furnishing, fitting out, or arming was to be effected or completed after she had gone beyond the limits of the United States; and further, that the intent that a vessel furnished, fitted out, or armed to cruise or commit hostilities against the subjects or property of a foreign prince with whom the United States is at peace, shall be formed within the limits of the United States, and shall be of a fixed and unconditional nature. If such intent originates on the high seas, beyond the limits of the United States, though on an American vessel, which then, for the first time, is intended to commit such hostilities, no forfeiture accrues under the section.

§ 238. **Forfeiture Without Conviction.**—On the authority of the United States against the Three Friends, 166 U. S., page 1, Lawyers' Edition, Book 41, page 915, it may be stated as the law that a civil suit *in rem* for the condemnation of the vessel is not a criminal prosecution, and the success of such suit does not depend upon the conviction of a person or persons doing the acts denounced in the statute. The two proceedings are wholly independent, and pursued in different courts. In deed, forfeiture might be decreed, if the proof showed the prohibited acts were committed, though lacking as to the identity of the person by whom they were committed. In deciding the Three Friends case,

and giving expression to the opinion as above quoted in substance, the Supreme Court cited the "Palmyra," 25 U. S., 12 Wheat., 1; 6 Law Ed., 531; "Ambrose Light," 25 Federal, 408; the "Meteor," 17 Federal Cases, 178. The Supreme Court also held in the Three Friends case, cited *supra*, that the release on bond of a vessel charged with liability to forfeiture under this section, before answer or hearing, and against the objection of the United States, when such release might result in a hostile expedition against a friendly power, should not be allowed; and if such an order of release is improvidently made, the vessel should be recalled.

§ 239. **Augmenting Force of Foreign Vessel of War.**—Revised Statutes 5285 becomes Section 12 of the New Code, in the following words:

"Sec. 12. Whoever, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be fined not more than one thousand dollars and imprisoned not more than one year."

This statute, in substance, makes it an offense for any person to increase or augment, within the territory of the United States, any war vessel belonging to a foreign power. Such equipment, within the meaning of the statute, must be intended solely for the purpose of war. See Alerta vs. Moran, 9 Cranch, 359; U. S. vs. Grassin, 3 Washington, 65; 26 Federal Cases, 10.

§ 240. **Military Expeditions Against People at Peace with the United States.**—Old Section 5286 becomes Section 13, as follows:

"Sec. 13. Whoever, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on

from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be fined not more than three thousand dollars and imprisoned not more than three years."

In the language of Judge Bradford, as cited in United States vs. Murphy, 84 Federal, 609, the broad purpose of Section 5286 of the United States Revised Statutes is to prevent complications between this Government and foreign powers. It is not the intent of that section in any manner to check or interfere with the commercial activities of citizens of the United States, or of others residing within the United States and interested in commercial transactions; but to prevent the use of the soil or waters of the United States as a base from which military expeditions or military enterprises shall be carried on against foreign powers with which the United States is at peace. And under the authority of that case, the providing of the means of transportation of a military enterprise to be carried on from the United States against the Spanish rule in Cuba, was, within the meaning of that section, a preparing of the means for such military enterprise, to be so carried on; and if done with knowledge on the part of the person so providing the means of transportation, of the character and purpose of such enterprise, the same is denounced by the statute.

In Wibord vs. United States, 163 U. S., 632, the Supreme Court held that a hostile expedition dispatched from the ports of the United States, is within the words "carried on from thence."

Under the authority of Hart vs. United States, 84 Federal, 799, the question as to whether the men and munitions of war, for which the accused furnished transportation, constituted a "military expedition" in the meaning of the statute, or the men were traveling as individuals, without organization or concert of action, and the arms and munitions were carried as articles of legitimate commerce, and whether the accused had guilty knowledge of the facts constituting the military expedition (if it were such), are all questions for the jury, under proper instructions.

The words in the statute, "begins, or sets on foot," are construed to mean, in charge to grand jury, 1838 Second McLain, U. S., 1; 30 Federal Case No. 18265, the making of preparations which showed an intent to set such an expedition on foot; as, for

instance, the contribution of money, clothing for troops, provisions, arms, or any other contribution which shall tend to forward the expedition or to add to the comfort or maintenance of those who are engaged in it.

District Judge Brown, in United States vs. Nunez et al, 82 Federal, 599, uses the following language:

"What constitutes a military expedition? What are some of the features that mark a military enterprise or expedition as different from a peaceable transportation of passengers, arms, ammunition, or goods. The essential features of military operations are evident enough. They are concert of action, unity of action by a body organized and acting together, acting by means of weapons of some kind, acting under command, leadership: these are the three most essential elements of military action."

The Court held in United States vs. O'Sullivan, 27 Federal Cases No. 15975, that it is not essential to the case that the expedition should start, much less that it should have been accomplished. To "begin" is not to finish; to "set on foot" is not to accomplish; to provide a powder, is not to put to it the match or the percussion. It is not necessary that the vessel should actually sail, nor is it necessary that war should exist between the nation on which the descent is to be made with another nation.

District Judge Brawley, in United States vs. Hughes, 70 Federal, 972, held upon preliminary examination that testimony which showed that the steamship of which the defendant was captain, after leaving the port of New York and passing outside of Sandy Hook, stopped two or three miles from shore; that two tugs approached and put on board thirty-five men with several boxes and three boats; that the boxes were opened and guns and arms were taken out; that during the voyage the men so taken on board were constantly drilled; that the men spoke Spanish, and some of them said they were going to Cuba to fight; that when the steamer approached the coast of Cuba at night, the lights were extinguished and that the men disembarked there, taking their arms with them, using their own three boats and one lent by the steamer, was sufficient to raise probable cause to believe that the captain had violated the statute.

The necessary ingredients of the offense denounced by this

statute are plainly set out in charges to the grand jury, 5 McLean, 306, 30 Federal Case, 18267.

Other cases bearing upon different phases, and illustrating the construction of the statute with reference to such phases by the Court, are the following: U. S. vs. Pirates, 5 Wheat., 184; U. S. vs. Hallock, 154 U. S., 537; Duvall vs. U. S., 154 U. S., 548; the "Chapman," 4 Saw., 501; the "Carondelet," 37 Federal, 799; City of Mexico, 32 Federal, 105; U. S. vs. the "Resolute," 40 Federal, 543; U. S. vs. the "Robert" and "Minnie," 47 Federal, 84; U. S. vs. Trumbull, 48 Federal, 99; the "Itata," 46 Federal, 646; U. S. vs. Ybanez, 53 Federal, 536; Hendricks vs. Gonzales, 67 Federal, 351; U. S. vs. Pena, 69 Federal, 983; U. S. vs. O'Brien, 75 Federal, 900. The Supreme Court, in United States vs. Quincey, 6 Peters, 445, gives the substance of the form of an indictment. This was a case for the fitting out of a foreign vessel in an American port.

§ 241. **Enforcement of Foregoing Provisions.**—Section 5287 of the 1878 Statutes becomes Section 14 of the New Code, in the following words:

"Sec. 14. The district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of capture made within the waters of the United States, or within a marine league of the coasts or shores thereof. In every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot, contrary to the provisions and prohibitions of this chapter; and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, it shall be lawful for the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to enforce the execution of the prohibitions and penalties of this chapter, and the restoring

of such prizes in the cases in which restoration shall be adjudged; and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territory or jurisdiction of the United States against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace."

In Gelston vs. Hoyt, 3 Wheat., 246, the Supreme Court, delivering its opinion through Mr. Justice Storey, held that a plea, to justify a seizure and detention under this statute as it was originally, which is the soul of the present statute, must aver that the naval or military force of the United States was employed for that purpose, and that the seizor belonged to the force so employed. The Court also held that the Act was not to be resorted to, except in cases where a seizure or detention could not be enforced by the ordinary civil power. See also Stoughton vs. Dimick, 3 Blatchf., 356. The Attorney General, in 17 Opinions of Attorneys General, 242, held that the authority given by this section may be exercised when there is an organized armed body of men who intend to invade the territory of a people with whom the United States are at peace, when the object of such invasion is plunder.

§ 242. **Compelling Foreign Vessels to Depart.**—Old Section 5288 becomes new Section 15, which is as follows:

"Sec. 15. It shall be lawful for the President, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign vessel to depart the United States in all cases in which, by the laws of nations or the treaties of the United States, she ought not to remain within the United States."

§ 243. **Armed Vessels to Give Bond on Clearance.**—Section 5289 of the old statutes is re-enacted into Section 16 of the New Code, as follows:

"Sec. 16. The owners or consignees of every armed vessel sailing out of the ports of, or under the jurisdiction of, the United States, belonging wholly or in part to citizens thereof, shall, before clearing out the same, give bond to the United States, with sufficient sureties, in double the amount of the value of the vessel and cargo on board, including her armament, conditioned that the vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property of any for-

eign prince or state, or of any colony, district, or people with whom the United States are at peace."

The Supreme Court, in United States vs. Quincey, 6 Peters, 445, 8 Law Ed., 458, held that the statute did not prohibit armed vessels belonging to citizens of the United States from sailing out of our ports. It only requires the owners to give security that such vessels shall not be employed by them to commit hostilities against foreign powers at peace with the United States.

§ 244. **Detention by Collector of Customs.**—Section 5290 of the old statutes becomes Section 17 of the New Code, and is as follows:

"Sec. 17. The several collectors of the customs shall detain any vessel manifestly built for warlike purposes, and about to depart the United States, or any place subject to the jurisdiction thereof, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances, render it probable that such vessel is intended to be employed by the owners to cruise or commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, until the decision of the President is had thereon, or until the owner gives such bond and security as is required of the owners of armed vessels by the preceding section."

In United States vs. Quincey, 6 Peters, 445, Law Ed., 8, 458, the Supreme Court held that Collectors are not authorized to detain vessels, although manifestly built for warlike purposes, and about to depart from the United States, unless circumstances shall render it probable that such vessels are intended to be employed by the owners to commit hostilities against some foreign power at peace with the United States. All the latitude, therefore, necessary for commercial purposes, is given to our citizens and they are restrained only from such acts as are calculated to involve the country in war.

In Hendricks vs. Gonzales, 67 Federal, 351, the Circuit Court of Appeals for the Second Circuit used this language:

"It is not an infraction of the international obligation, to permit an armed vessel to sail, or munitions of war to be sent, from a neutral country to a belligerent port for sale as articles of commerce; and neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerents, articles which

are contraband of war. It is the right of the other belligerent power to seize and capture such property in transit; but the right of the neutral state to sell and transport, and of the hostile power to seize, are conflicting rights, and neither can impute misconduct to the other. The penalty which affects contraband merchandise is not extended to the vessel which carries it, unless ship and cargo belong to the same owner, or the owner of the ship is privy to the contraband carriage; and ordinarily the punishment of the ship is satisfied by visiting upon her the loss of time and freight and expenses which she incurs in consequence of her complicity. On the other hand, it is the duty of every Government to prevent the fitting out, arming, or equipping of vessels which it has reasonable ground to believe are intended to engage in naval warfare with a power with which it is at peace."

§ 245. **Construction of this Chapter.**—Section 5291 of the old Revised Statutes becomes Section 18 of the New Code, in the following words:

"Sec. 18. The provisions of this chapter shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people who is transiently within the United States and enlists or enters himself on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people who is transiently within the United States to enlist or enter himself to serve such foreign prince, state, colony, district or people on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people. Nor shall they be construed to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States."

CHAPTER X.

OFFENSES AGAINST THE ELECTIVE FRANCHISE AND CIVIL RIGHTS OF CITIZENS.

§ 246. Our system of government, being dual in its nature, brings to the native or naturalized individual who maintains his citizenship in this country, two protections, each of which is, however, distinct from the other, and jealous of its particular territory and jurisdiction. The State has certain duties which it must fulfill toward its citizens, to the complete and satisfactory meeting of which the Federal Government stands as sponsor and guarantor. On the other hand, the Federal Government must exercise its superior power with extreme care, lest it encroach upon the rights and sovereignties of the respective States. There are also some Federal citizenship rights, but they are few in comparison to State citizenship rights. While the Federal Government has au-

thority, under the Federal Constitution, and particularly under Amendments Six, Thirteen, and Fourteen to that instrument, to enforce certain private rights for the individual at the hands of the State, the vast majority of individual rights are to be enforced by the State Governments.

Among the rights and privileges which have been recognized by the Courts as being secured to the citizens of the United States by the Constitution, are the right to petition Congress for a redress of grievances; the right to vote for Presidential Electors or Members of Congress; and the right of every judicial and executive officer, or every person engaged in the service or kept in the custody of the United States in the course of the administration of justice, to be protected from lawless violence. There is a peace of the United States. These Federal rights have been announced by the Supreme Court in their order as above stated, in the following cases: United States vs. Cruikshank, 92 U. S., 542, 23 Law Ed., 588; *ex parte* Yarbrough, 110 U. S., 651, 28 Law Ed., 274; *in re* Neagle, 135 U. S., 1, 34 Law Ed., 55; U. S. vs. Logan, 12 Supreme Court, 617, 36 Law Ed., 429.

These Supreme Court discovered rights have been somewhat added to by later cases, that will be noticed in the discussion under old Section 5508, which becomes new Section 19.

Difficult, indeed, it is to invariably trace the line between the authorities and limitations of the two sovereignties; and this difficulty is somewhat increased by the desire to see that a wronged individual secures his rights, regardless of setting precedent or the overriding of limitations that must, for the perpetuity of our republic, be observed.

§ 247. **Conspiracy to Injure, Etc., Citizens in the Exercise of Civil Rights.**—Section 5508 of the 1878 Revised Statutes becomes Section 19 of the New Code, in the following words:

"Sec. 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so se-

cured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Bearing in mind the two sorts of rights that each individual citizen in this country is supposed to enjoy, namely, those original rights which he has as a citizen of the United States and those which he has as a citizen of the State in which he resides, it will be at once understood that the foregoing section can only relate to and protect such rights as are guaranteed to the citizen of the United States; that is, to the rights pertaining to citizens as citizens of the United States. The easiest way for us to find the line as blazed by the Courts, is to review some of the decisions.

In United States vs. Eberhart, 127 Federal, 254, District Judge Newman held that an indictment which charged the defendants with conspiring, etc., to intimidate B., a citizen of the United States, in the free exercise of his privilege to contract and being contracted with, his right of personal security and personal liberty, and the overt act charged was the seizing of B., the placing of handcuffs on him and compelling him, by force and against his will, to enter into a pretended contract to work for a long period of time, stated no Federal offense; because the citizen's right to personal liberty and security was within the primary jurisdiction of the State.

In McKenna vs. United States, 127 Federal, page 88, the Circuit Court of Appeals for the Sixth Circuit held that an indictment under this section, which charged that the defendants conspired to injure, etc., certain male citizens of Kentucky in the free exercise and enjoyment of a right and privilege secured to them, was bad, as indefinite, in that it failed to state what particular right and privilege it meant. The opinion, in discussing the demurrer, leaves us under the impression that the prosecution would have sustained, (it being for a conspiracy to prevent certain persons from voting), had the indictment been sufficient.

The Circuit Court of Appeals for the Eighth Circuit, in Haynes vs. United States, 101 Federal, page 819, held in substance, that an indictment against certain persons for conspiring

to prevent a citizen of the United States from the free exercise and enjoyment of a certain right and privilege secured to him by the laws of the United States, (that is to say, the right to then and there peaceably enter upon, prospect for minerals, initiate, locate, establish, and perfect a mining claim upon the public lands of the United States under the public land of the United States, etc.), was good, and that a prosecution therefor could be sustained under this section.

In Davis vs. United States, 107 Federal, 753, the Circuit Court of Appeals for the Sixth Circuit affirmed a conviction had upon an indictment charging a conspiracy under this section to prevent the arrest of certain parties who were sought by the United States Deputy Marshals for alleged violations of the Federal Revenue Laws, the overt act charged therein being the murder of one of the Federal officials.

In Karem vs. United States, 121 Federal, 250, the Circuit Court of Appeals for the Fifth Circuit, in a prosecution under this section, held that the power of Congress to legislate on the subject of voting at purely State elections, is entirely dependent upon the Fifteenth Constitutional Amendment, and is limited by such amendment to the enactment of appropriate legislation to prevent the right of a citizen of the United States to vote, from being denied or abridged by a State, on account of race, color, or condition; and since the amendment is in terms addressed to action by the United States or a State, appropriate legislation for its enforcement must also be addressed to State action, and not to the action of individuals. In that case, the Court held, in substance, that a penal act of Congress cannot be sustained, as an exercise of the power given by a Constitutional provision, to enact appropriate legislation for its enforcement, where the Act is broader in its terms than the Constitutional provision, and the language used covers wrongful acts without, as well as within, the same. In that particular case, the defendant had been convicted under an indictment framed under this section, which charged in substance that he and others had conspired, etc., to intimidate certain persons of color, who were citizens of the United States and of the State of Kentucky, qualified voters, etc., from exercising a right

and privilege secured to them by the Constitution and laws of the United States, to wit, the right and privilege to vote at the election (setting out the election, etc.), such election being for State and municipal officers of Kentucky only. The defendants were convicted. The contention of the Government before the Circuit Court of Appeals was, that Sections 2004 and 5508 of the old Statutes, guaranteed the individual the right to vote at a State election, and that the Federal Government protected him in his right, even against the acts of individuals. The Fifteenth Amendment to the Constitution reads as follows:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have the power to enforce this Article by appropriate legislation."

The Courts had already decided that this Constitutional Amendment did not confer the right of suffrage upon anyone, United States vs. Reeves, 92 U. S., 214, 23 Law Ed., 563; United States vs. Cruikshank, 92 U. S., 542, 23 Law Ed., 588. The right to vote is conferred by the State laws. The Amendment, therefore, merely guaranteed that no State should interfere with the right to vote, by legislation based upon a distinction as to race, color, or previous condition of servitude. "State action, therefore, and not individual action," said the Court, "is the subject of this Article. The right to vote is purely State elections being, as we have seen, a right granted by, and dependent upon, the law of the State, is, therefore, a right which can only be denied or abridged by the State. The Amendment is, therefore, in terms addressed to State action.....With the exception of the first clause of the first section of the Fourteenth Amendment, that section is, like the Fifteenth Amendment, addressed broadly to the State. The other clauses of that Section, reading as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person, within its jurisdiction, the equal protection of the laws,"

have been authoritatively construed as addressed to State action

in some form, and not to mere individual conduct. The Slaughter house case, 10 Wallace, 36, 21 Law Ed., 394; *ex parte* Virginia, 100 U. S., 339, 25 Law Ed., 676, the Cruikshank case, cited *supra;* United States vs. Harris, 106 U. S., 629, 27 Law Ed., 290; Virginia vs. Rives, 100 U. S., 313, 25 Law Ed., 667; Civil Rights case, 109 U. S., 3, 37 Law Ed., 835; Chicago, etc. Railroad vs. Chicago, 166 U. S., 226, 41 Law Ed., 979." Of course, if the individual acts as an instrument or agency of the State, and presumes to act by the authority of the State, then this section would be operative. Same authorities. And the Court reversed the conviction, and sustained the demurrer.

§ 248. **Right to Labor.**—District Judge Trieber, in United States vs. Morris, 125 Federal, 322, in overruling a demurrer to an indictment, found under this section, which charged a conspiracy, etc., to prevent negro citizens from exercising the right to lease and cultivate land, because they were negroes, etc., held that Congress has the power, under the Thirteenth Constitutional Amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the depredation of those rights is solely because of race or color. In his opinion, Judge Trieber follows the distinction made by Justice Bradley in the Civil Rights Cases, 109 U. S., 3, 27 Law Ed., 835, in considering the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. By the wording of the Fourteenth and Fifteenth Amendments, encroachments by State authority alone are mentioned; but the Thirteenth Amendment includes everybody within the jurisdiction of the national Government. That Amendment provides that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. The abolition of slavery, said Mr. Justice Field in the Slaughter-house case, and involuntary servitude, was intended to make everyone born in this country a free man; and as such, to give him the right to pursue the ordinary avocations of life, without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. All the right to lease land, said Judge Trieber, and to accept employment as a

laborer for hire, are fundamental rights, inherent in every free citizen, and a conspiracy to prevent the negro from exercising these rights, because he is a negro, is a conspiracy to deprive him of the privilege secured by the Constitution and laws of the United States, within the meaning of Section 5508.

The Circuit Court of Appeals for the Eighth Circuit, in Smith vs. United States, 157 Federal, 721, affirmed a judgment of conviction had upon an indictment found under the section now being considered, for conspiring, etc., to effect, by arresting, imprisoning, guarding, and compelling by threats and intimidation, a certain negro to work against his will. This prosecution was also predicated upon the Thirteenth Constitutional Amendment. The evidence in this case showed that one of the defendants went to Memphis, Tennessee, and there hired fifteen or more negroes to go with him to his place in Missouri, to work in a mill, promising liberal wages. On their arrival in the night, they were met at the station by another of the defendants with hacks and taken to a farm twelve miles distant, where they were searched for weapons, and then placed in a cabin under the guard of others, armed with repeating rifles and revolvers. They were kept under such guards night and day, and worked on the farm in clearing and ditching, few, if any, receiving the promised wage. All of the defendants were convicted.

§ 249. **Other Illustrations.**—In United States vs. Davis, 103 Federal, 458, Judge Hammond overruled a motion for new trial, and assessed the full penalty of the statute against a defendant who was indicted for violating this section, the specific conspiracy being to injure and intimidate, etc., a United States Marshal and his posse, and to deprive them of their Constitutional right to arrest him on legal process; as a result of which consipracy the Deputy Marshal was killed.

The Supreme Court of the United States, in United States vs. Mason, 213 U. S., page 115, passed technically upon a similar prosecution against certain parties who conspired to intimidate, and finally killed, an agent of the Department of Justice of the United States; upon the trial of whom the defense was raised that they had been acquitted in the State Court for murdering the identical person; and the Supreme Court of the United States,

in that case, says that inasmuch as the State Court had acquitted for murder of the identical person alleged as the overt act for the Federal crime, there could be no Federal offense. In other words, "the language of Section 5509 is entirely satisfied, and the ends of justice met, if the statute is construed as not embracing, nor intended to embrace, any felony or misdemeanor against the State, of which, prior to the trial in the Federal Court of the Federal offense charged, the defendants had been lawfully acquitted of the alleged State offense, by a State Court having full jurisdiction in the premises. This interpretation recognizes the power of the State, by its own tribunals, to try offenses against its laws, and to acquit or punish the alleged offender, as the facts may justify. This construction," continued that Court, "will not prevent the trial of the defendants upon the charge of conspiracy, and their punishment, if guilty, according to 5508; namely, by a fine of not exceeding five thousand dollars and imprisonment not more than ten years. The only result of the views we have expressed is that in the trial of this case in the Federal Court, 5509 cannot be applied, because it has been judicially ascertained and determined by a tribunal of competent jurisdiction—the only one that could finally determine the question—that the defendants did not murder Walker. The Federal Court may, therefore, proceed as indicated in 5508, without reference to 5509."

Morris Case, Hodges Case, Riggins Case, and Powell Case.—We have discussed above Judge Trieber's opinion in 125 Federal, 322. The Supreme Court of the United States, in Hodges vs. United States, 27 Supreme Court, 6; 51 Law Ed., page 65; 203 U. S., page 1, which was a case from the Eastern District of Arkansas, where the defendants were convicted under this section for conspiring, etc., to compel negro citizens, by force and intimidation, to desist from performing their contracts of employment, reversed and dismissed the prosecution; the reasoning of the Court being in direct conflict with the reasoning of Judge Trieber in the Morris case, cited *supra*. The opinion of the Court, by Judge Brewer, suggests that prior to the post-bellum Amendments to the Constitution, the national Government had no jurisdiction over a wrong like that charged in this indictment. The Fourteenth and Fifteenth Amendments do not justify the legislation, (that

is, Section 5508), for they, as have been repeatedly held, are restrictions upon State action. Unless, therefore, said the Court, the Thirteenth Amendment vests in the nation the jurisdiction claimed, the remedy must be sought through State action, and in State tribunals, subject to the supervision of this Court, by writ of error, in proper cases. The things denounced by the Thirteenth Amendment are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation. It is the denunciation of the condition, and not a declaration in favor of a particular people. It reaches every race and every individual; and if in any respect it commits one race to the nation, it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo Saxon, are as much within its compass as slavery or involuntary servitude of the African. It is no answer to say that one of the *indicia* of the existence of slavery is the existence of the disability to make or perform contracts. The Court continues:

"At the close of the Civil War, when the problem of the emancipated slaves was before the nation, it might have left them in a condition of aliens; or established them as wards of the Government, like the Indian tribes, and thus retained jurisdiction for the nation over them; or it might, as it did, give them citizenship. It chose the latter. By the Fourteenth Amendment, it made citizens of all born within the limits of the United States, and subject to its jurisdiction. By the Fifteenth, it prohibited any State from denying the right of suffrage, on account of color, race, or previous condition of servitude; and by the Thirteenth, it forbade slavery or involuntary servitude anywhere within the limits of the land.....Congress gave them citizenship, doubtless believing that thereby, in the long-run, their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes. For these reasons, we think that the United States Court had no jurisdiction of the wrong charged in the indictment."

District Judge Jones, in United States vs. Powell, 151 Federal, 648, follows the Hodges case, and sustained a demurrer to an

indictment which charged the defendant, with one Riggins, *ex parte* Riggins, 134 Federal, 404; Riggins vs. United States. 199 U. S., 546, 50 Law Ed., 303, with conspiring to injure, etc., a negro citizen in the enjoyment of certain rights, to wit, by depriving him of the right of trial, etc., by taking him from the sheriff, who had him in custody, and mobbing him. Judge Jones, in the Riggins case, 134 Federal, 404, decided the question on demurrer differently from the way he decided in the Powell case; but between the time of the rendition of the Riggins opinion and the rendition of the Powell opinion, the Supreme Court had spoken in the Hodges case, cited *supra.*

Voting.—In United States vs. Lackey, District Judge Evans overruled demurrers to an indictment which was brought under this section for conspiring to intimidate and prevent negro citizens from exercising the right to vote; and he placed his decision upon the guarantee of the Fifteenth Amendment.

Right to Inform of Violations of the Law.—It is the right and privilege of one, in return for the protection enjoyed under the Constitution and laws of the United States, to aid in the execution of the laws, by giving information to the proper authorities of violations of those laws. Conspiracy to injure one who had given information about violations of the Revenue Laws, is an offense under this Section. 1 Federal Stat., 803; Motes vs. United States, 178 U. S., 458; *in re* Quarrels, 158 U. S., 532. A conspiracy to intimidate a citizen of African descent in the exercise of his right to vote for a Member of Congress and in the execution of that conspiracy, beating and maltreating him, is an offense under Section 5520. First Federal Statutes Annotated, 803; *ex parte* Yarbrough, 110 U. S., 651; U. S. vs. Butler, 1 Hughes, 457.

Right of One in Custody to Protection.—The leading case upon this question is the case of Logan vs. United States, 144 U. S., 263, where it was decided that a person in the custody of a United States Marshal, has the right to be protected against unlawful interference; and the conspiracy to deprive him of such right is an offense under this section.

Other Cases.—Cases not cited in the above discussion, but which bear upon various phases of the statute under consideration are

the following: Strauder vs. West Virginia, 100 U. S., 303; *ex parte* Virginia, 100 U. S., 339; *ex parte* Siebold, 100 U. S., 371; *ex parte* Clark, 100 U. S., 399; Neal vs. Delaware, 103 U. S., 370; United States vs. Harris, 106 U. S., 629; Civil Rights cases, 109 U. S. 17; Baldwin vs. Frank, 120 U. S., 678; *in re* Coy, 127 U. S. 731; *in re* Neagel, 135 U. S., 1; *in re* Lancaster, 137 U. S., 393; Brown vs. United States, 150 U. S., 93; *in re* Quarrels, 158 U. S., 532; Rakes vs. U. S., 212 U. S., 55; Le Grand vs. U. S., 12 Federal, 577; *in re* Baldwin, 27 Federal, 187; U. S., vs. Lancaster, 44 Federal, 885; U. S. vs. Sanges, 48 Federal, 78; U. S. vs. Patrick, 53 Federal, 356; also 54 Federal, 338.

It may, therefore, be stated with comparative satisfaction and confidence in the ability to demonstrate its correctness from the above decisions, that the Federal Government has no jurisdiction to prosecute under these statutes for offenses which interfere with the privileges and immunities of citizens of the several States. The difficulty seems to be to determine just what are such privileges and immunities. "They are," in the language of Mr. Justice Washington, which is approved in the Slaughter-house Cases, cited *supra*, "such privileges and immunities as are fundamental; which belong of right to the citizens of all free Governments, and which have, at all times, been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the Government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole." On the other hand, the Federal Government, under the above statutes, will protect the person in the right to vote for any Federal official; will protect a person in his right to give information of the violation of Federal laws; will protect the Federal Government, and all of its agencies, persons, and entire officialdom; will protect the person of any prisoner that may be in the hands of its officers; and will protect its officers in the execution of any and all of their functions; and will, in the

enforcement of the Thirteenth Amendment, punish all sorts of peonage and enforced labor.

Any mob, however, or aggregation of private individuals that act independently of a State or Government that attacks the negro race or other races, commit no Federal offense. Such offenders are to be punished by the laws of the State.

§ 250. **Other Crimes Committed While Violating the Preceding Section.**—Section 5509 of the old 1878 Statutes reads as follows:

"Sec. 5509. If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed."

The section does not embrace any felony or misdemeanor against a State, of which, prior to the trial in the Federal Court of the Federal offense, the defendants had been lawfully acquittel by a State Court having full jurisdiction. As the Federal Court accepted the judgment of a State Court, construing the meaning and scope of the State enactment, whether civil or criminal, it should also accept the judgment of a State Court based on a verdict of acquittal of a crime against the State. United States vs. Mason, 213 U. S., 115.

§ 251. **Depriving Persons of Civil Rights Under Color of State Law.**—Section 5510 of the old statutes becomes Section 20 of the New Code, which is in the following words:

"Sec. 20. Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

The Court, in charging the jury in United States vs. Buntin, 10 Federal, 730, which was a prosecution under this section, said, "He, the child, must have been excluded under some color of law, statute, ordinance, regulation, or custom of the State, and on account of his color." See also Civil Rights Cases, 109 U. S., 16.

§ 252. **Conspiracy to Prevent Person from Holding Office or Officer from Performing His Duty Under United States, Etc.**—Section 5518 of the old Statutes becomes Section 21 of the New Code, as follows:

"Sec. 21. If two or more persons in any State, Territory, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, Territory, District, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined not more than five thousand dollars, or imprisoned not more than six years, or both."

§ 253. **Unlawful Presence of Troops at Elections.**—Section 22 of the New Code takes the place of old Section 5528, and is in the following words:

"Sec. 22. Every officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, who orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held in any State, unless such force be necessary to repel armed enemies of the United States, shall be fined not more than five thousand dollars and imprisoned not more than five years."

§ 254. **Intimidation of Voters by Officers, Etc., of Army and Navy.**—Section 23 of the New Code displaces old Section 5529, and is in the following words:

"Sec. 23. Every officer or other person in the military or naval service of the United States who, by force, threat, intimidation, order, advice, or otherwise, prevents, or attempts to prevent, any qualified voter of any State from freely exercising the right of suffrage at any general or special election in such State shall be fined not more than five thousand dollars and imprisoned not more than five years."

§ 255. **Officers of Army or Navy Prescribing Qualifications of Voters.**—Section 24 of the New Code takes the place of old Statute 5530, and is as follows:

"Sec. 24. Every officer of the Army or Navy who prescribes

or fixes, or attempts to prescribe or fix, whether by proclamation, order, or otherwise, the qualifications of voters at any election in any State shall be punished as provided in the preceding section."

§ 256. **Officers, Etc., of Army or Navy Interfering with Officers of Election, Etc.**—Section 25 of the New Code takes the place of Section 5531, and is as follows:

"Sec. 25. Every officer or other person in the military or naval service of the United States who, by force, threat, intimidation, order, or otherwise, compels, or attempts to compel, any officer holding an election in any State to receive a vote from a person not legally qualified to vote, or who imposes, or attempts to impose, any regulations for conducting any general or special election in a State different from those prescribed by law, or who interferes in any manner with any officer of an election in the discharge of his duty, shall be punished as provided in section twenty-three."

§ 257. **Persons Disqualified from Holding Office; When Soldiers, Etc., May Vote.**—Old Section 5532 becomes Section 26 of the New Code, as follows:

"Sec. 26. Every person convicted of any offense defined in the four preceding sections shall, in addition to the punishment therein prescribed, be disqualified from holding any office of honor, profit, or trust under the United States; but nothing therein shall be construed to prevent any officer, soldier, sailor, or marine from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote."

CHAPTER XI.

OFFENSES AGAINST FOREIGN AND INTERSTATE COMMERCE.

In Chapter IX. of the 1910 Code, there are fourteen sections which are created offenses by reason of the power of the general Government to supervise interstate and international commerce.

§ 258. **Dynamite, Etc., Not to be Carried on Vessels or Vehicles Carrying Passengers for Hire.**—Sections 4278 and 5353 of the old Statutes are shorn of their cumbersomeness and broadened by new Section 232, in the following words:

"Sec. 232. It shall be unlawful to transport, carry, or convey, any dynamite, gunpowder, or other explosive, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, and a place in any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier, which vessel or vehicle is carrying passengers for hire: *Provided*, That it shall be lawful to transport on any such vessel or vehicle small arms ammunition in any quantity, and such fuses, torpedoes, rockets, or other signal devices, as may be essential to promote safety in operation, and properly packed and marked samples of explosives for laboratory examination, not exceeding a net weight of one-half pound each, and not exceeding twenty samples at one time in a single vessel or vehicle; but such samples shall not be carried in any part of a vessel or vehicle which is intended for the transportation of passengers for hire: *Provided further*, That nothing in this section shall be construed to prevent the transportation of military or naval forces with their accompanying munitions of war on passenger equipment vessels or vehicles."

The punishment for the violation of this section is determined in Section 235, wherein Congress provides, that, "Whoever shall knowingly violate or cause to be violated.....any provision of this section.....shall be fined not more than two thousand dollars, or imprisoned not more than eighteen months, or both."

§ 259. **Interstate Commerce Commission to Make Regulations for Transportation of Explosives.**—Old Sections 4279 and 5355 are amplified and added to, and become Section 233 in the New Code, authorizing the Interstate Commerce Commission to formulate regulations, in the following words:

"Sec. 233. The Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. Said commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions. Such regulations shall be in accord with the best known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in

proper condition to transport. Such regulations, as well as all changes or modifications thereof, shall take effect ninety days after their formulation and publication by said commission and shall be in effect until reversed, set aside, or modified."

§ 260. **Liquid Nitroglycerine, Etc., Not to be Carried on Certain Vessels and Vehicles.**—The Act of May 30, 1908, 35 Statute at Large, 555, becomes Section 234 of the New Code, as follows:

"Sec. 234. It shall be unlawful to transport, carry, or convey, liquid nitroglycerine, fulminate in bulk in dry condition, or other like explosive, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, and a place in any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier in the transportation of passengers or articles of commerce by land or water."

This section seems to prohibit the transportation by any method, by any common carrier that carries passengers or articles of commerce. It will be noted, however, that this section (234) and Section 233, above quoted, and Section 235, hereinafter set out, seem to have been repealed by the schedule in Section 341; and these three sections do not seem to have been in the bill, as reported to Congress by the Committee on Revision, but because of uncertainty, they are quoted.

§ 261. **Marking of Packages of Explosives; Deceptive Marking.**—Section 235 of the New Code reads as follows:

"Sec. 235. Every package containing explosives or other dangerous articles when presented to a common carrier for shipment shall have plainly marked on the outside thereof the contents thereof; and it shall be unlawful for any person to deliver, or cause to be delivered to any common carrier engaged in interstate or foreign commerce by land or water, for interstate or foreign transportation, or to carry upon any vessel or vehicle engaged in interstate or foreign transportation, any explosive, or other dangerous article, under any false or deceptive marking, description, invoice, shipping order, or other declaration, or without informing the agent of such carrier of the true character thereof, at or before the time such delivery or carriage is made. Whoever shall knowingly violate, or cause to be violated, any provision of this section, or of the three sections last preceding, or any regulation

made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than two thousand dollars, or imprisoned not more than eighteen months, or both."

It will be borne in mind that this section, as well as 234 and 233, are probably repealed by Section 341 of the New Code as presented by the Committee on Revision.

§ 262. **Death or Bodily Injury Caused by Such Transportation.** —Section 5354 of the old statutes becomes, with some changes, Section 236 of the New Code, as follows:

"Sec. 236. When the death or bodily injury of any person is caused by the explosion of any article named in the four sections last preceding, while the same is being placed upon any vessel or vehicle to be transported in violation thereof, or while the same is being so transported, or while the same is being removed from such vessel or vehicle, the person knowingly placing, or aiding or permitting the placing, of such articles upon any such vessel or vehicle, to be so transported, shall be imprisoned not more than ten years."

The imprisonment in the old statute was for any period not less than two years.

§ 263. **Importation and Transportation of Lottery Tickets, Etc.** —The defects and limitations in the Act of March second, 1895, 28 Statute at Large, 963, Second Supplement, 435, are remedied by Section 237 of the New Code, which is as follows:

"Sec. 237. Whoever shall bring or cause to be brought into the United States or any place subject to the jurisdiction thereof, from any foreign country, for the purpose of disposing of the same, any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar schame, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier for carriage, or shall carry, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof,, or from any place in or subject to the jurisdiction of the United States through a foreign country to any place in or subject to the jurisdiction thereof, or from any place in or sub-

ject to the jurisdiction of the United States to a foreign country, any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon, the event of any such lottery, gift enterprise, or similar scheme, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme, or shall knowingly take or receive, or cause to be taken or received, any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall, for the first offense, be fined not more than one thousand dollars, or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than two years."

This statute meets the criticisms leveled at the former statute by Circuit Judge Jenkins, in the 95 Federal, 453, Champion vs. Ames, and by Judge McDowell, in 125 Federal, 616, United States vs. Whelpley, wherein each held that the old statute did not prevent or punish the sending of lottery tickets from a State to a Territory, etc., or from a Territory to a State; the language being "from one State to another." This new statute covers the entire ground, and protects Territories, Provisional Governments, foreign countries, States, and non-contiguous territory subject to the jurisdiction of the United States. This limitation has been held to be Constitutional, in France vs. United States, 164 U. S., 676; Champion vs. Ames, 188 U. S., 321; and Francis vs. United States, 188 U. S., 375.

In France vs. United States, 164 U. S., 676, 41 Law Ed., 595, the Supreme Court held that a paper that contains nothing but figures which relate to a drawing already completed, is not a paper certificate or instrument purporting to be, or representing, a ticket, chance, share, or interest, in a lottery, which the Act of Congress of 1895, Chapter 191, makes it unlawful to bring into the United States, or deposit in the mails, or carry from one State to another. Such statute refers only to a paper, which depends upon a lottery, the drawing of which has not yet taken place.

In Champion vs. Ames, 188 U. S., 321, 47 Law Ed., 496, the Supreme Court held that the carriage of lottery tickets from one State to another, by an express company, engaged in carrying freight and packages from State to State, is interstate commerce,

which Congress, under its power to regulate, may prohibit by making it an offense against the United States to cause such tickets to be so carried.

In Francis vs. United States, 188 U. S., 375, 47 Law Ed., 510, the Supreme Court held that policy slips, written by a customer to indicate his choice of numbers, and delivered by him to an agent of the policy game, to be forwarded by him to headquarters in another State, are not within this Act. Gathering the facts from the opinion, they show, in substance, that the policy game, the lottery in question, had its headquarters in Ohio, and agencies in different States. A person wishing to take a chance went to one of these agencies (in this case, in Kentucky), selected three or more numbers, wrote them on a slip, and handed the slip to the agent (in this case, to the defendant Hoff), paying the price of the chance at the same time, and keeping a duplicate, which was the purchaser's voucher for his selection. The slip was then taken by the defendant Edgar, to be carried to the principal office, which was, it will be remembered, in Ohio; where afterwards, in the regular course, there was a drawing by the defendant Francis. Thus, the carriage from Kentucky to Ohio, or from one State to another, relied upon as the object of the conspiracy, and as the overt act in pursuance of the conspiracy, was the carriage by Edgar of slips delivered to Hoff by the person wishing to take a chance, as above described. It will thus be noticed that the slips were at home, as between the purchaser and the lottery, when put into Hoff's hands in Kentucky. They had reached their final destination in point of law, and their later movements were internal circulation within the sphere of the lottery company's possession; and the Supreme Court said:

"Therefore, the question is suggested whether the carriage of a paper of any sort by its owner, or the owner's servant, properly so-called, with no view of a later change of possession, can be commerce, even when the carriage is in the aid of some business or traffic. The case is different from one where, the carriage being done by an independent carrier, it is commerce merely by reason of the business of carriage."

This question, however, the Supreme Court did not see fit to answer, for the case went off upon another ground, to wit, upon

the ground that the papers did not represent a ticket or interest in a lottery.

"We assume, for purposes of decision, that the papers kept by the purchasers were tickets, or did represent an interest in a lottery; but these papers did not leave Kentucky."

§ 264. **Interstate Shipment of Intoxicating Liquors; Delivery to be Made Only to Bona Fide Consignee.**—Brand new legislation is Section 238 of the New Code, which reads as follows:

"Sec. 238. Any officer, agent, or employee of any railroad company, express company, or other common carrier, who shall knowingly deliver or cause to be delivered to any person other than the person to whom it has been consigned, unless upon the written order in each instance of the bona fide consignee, or to any fictitious person, or to any person under a fictitious name, any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind which has been shipped from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both."

This section, it will be noticed, contains three divisions: first, the liquor must be delivered to the one to whom consigned; second, the liquor must not be delivered to any fictitious person; third, the liquor must not be delivered to any person under a fictitious name. Of course, if the liquor be consigned to a *bona fide* consignee, such consignee may give a written order to another person to receive the liquor.

§ 265. **Common Carrier, Etc., Not to Collect Purchase Price of Interstate Shipment of Intoxicating Liquors.**—All railroads and express companies, common carriers, or other persons engaged in interstate commerce, cannot, in any way, aid in the transaction of the so-called C. O. D. liquor business, since the passage of Section 239 of the New Code, which is new legislation, in the following words:

"Sec. 239. Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or

other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars."

It will be noted that no part of the purchase price shall be collected by the carrier from the consignee before delivery, at the time of delivery, or after delivery; nor can such collection be made from any other person. It will also be noted that the carrier cannot, in any manner, act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling, or completing the sale. In other words, the carrier must engage only in the transportation and delivery of the same.

§ 266. **Packages Containing Intoxicating Liquors Shipped in Interstate Commerce to be Marked as Such.**—Other new legislation upon the subject of interstate carriage of intoxicating liquors is Section 240, which reads as follows:

"Sec. 240. Whoever shall knowingly ship or cause to be shipped, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, any package of or package containing any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than five thousand dollars; and such liquor shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law

for the seizure and forfeiture of property imported into the United States contrary to law."

While Sections 238 and 239 fix penalties for certain transgressions by the carrier, Section 240 creates a new offense for the shipper, and does not relate, in any sense, to the carrier. Under other internal revenue decisions, the marking and branding of this Section will be construed to mean upon the outside of the package, so as to be plainly seen at all times. Such mark or label must show the name of the consignee, the nature of the contents of the package, and the quantity of the contents.

§ 267. **Importation of Certain Wild Animals, Birds, and Reptiles Forbidden.**—The Act of May twenty-fifth, 1900, 31 Statute at Large, 188, Second Supplement, 1174, becomes Section 241 of the New Code, as follows:

"Sec. 241. The importation into the United States, or any Territory or District thereof, of the mongoose, the so-called "flying foxes" or fruit bats, the English sparrow, the starling, and such other birds and animals, as the Secretary of Agriculture may from time to time declare to be injurious to the interests of agriculture or horticulture, is hereby prohibited; and all such birds or animals shall, upon arrival at any port of the United States, be destroyed or returned at the expense of the owner. No person shall import into the United States or into any Territory or District thereof, any foreign wild animal or bird, except under special permit from the Secretary of Agriculture: *Provided*, that nothing in this section shall restrict the importation of natural history specimens for museums or scientific collections, or of certain cage birds, such as domesticated canaries, parrots, or such other birds as the Secretary of Agriculture may designate. The Secretary of the Treasury is hereby authorized to make regulations for carrying into effect the provisions of this section."

§ 268. **Transportation of Prohibited Animals.**—Taken from the same Act, will be found the substance of Section 242 of the New Code, which is in the following words:

"Sec. 242. It shall be unlawful for any person to deliver to any common carrier for transportation, or for any common carrier to transport from any State, Territory, or District of the United States to any other State, Territory, or District thereof, any foreign animals or birds, the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed or shipped

in violation of the laws of the State, Territory, or District in which the same were killed, or from which they were shipped: *Provided,* That nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured, and the export of which is not prohibited by law in the State, Territory, or District in which the same are captured or killed: *Provided further,* That nothing herein shall prevent the importation, transportation, or sale of birds or birds plumage manufactured from the feathers of barnyard fowls."

The section, as it now exists, meets the objections, and remedies the defects, noted in United States vs. Thompson, 147 Federal, 637, wherein District Judge Amidon discovered and held that the references to Section 1 of the original act was a clerical error, such section having no relation to the subject matter, because Section 3 was manifestly intended. Forms for indictment under the section as it now exists will be found after noticing the criticisms of the Courts thereon, at page 637 of the 147 Federal, U. S. vs. Thompson, and page 423 of the 115 Federal, United States vs. Smith. In the last case, the Court held that it was essential, to constitute the offense under the provisions of the section, that the prohibited game should either have been shipped, or delivered to the carrier for shipment, and an indictment which charged the defendant with intent to ship it by interstate commerce, or having concealed the same in unmarked packages for the purpose of such shipment, in evasion or violation of the Act, without alleging delivery to a carrier, was insufficient.

§ 269. **Marking of Packages.**—Section 243 of the New Code was taken from the same Act of May twenty-fifth, 1900, and is as follows:

"Sec. 243. All packages containing the dead bodies, or the plumage, or parts thereof, of game animals, or game or other wild birds, when shipped in interstate or foreign commerce, shall be plainly and clearly marked, so that the name and address of the shipper, and the nature of the contents may be readily ascertained on an inspection of the outside of such package."

§ 270. **Penalty for Violation of Preceding Sections.**—Section 244 of the New Code reads as follows:

"Sec. 244. For each evasion or violation of any provision of

the three sections last preceding, the shipper shall be fined not more than two hundred dollars; the consignee knowingly receiving such articles so shipped and transported in violation of said sections shall be fined not more than two hundred dollars; and the carrier knowingly carrying or transporting the same in violation of said sections shall be fined not more than two hundred dollars."

§ 271. **Depositing Obscene Books, Etc., with Comomn Carrier.**—Section 245 of the New Code is in the following words:

"Sec. 245. Whoever shall bring or cause to be brought into the United States or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States through a foreign country to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use, or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of how, or of whom, or by what means, any of the hereinbefore mentioned articles, matters, or things may be obtained or made; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

This section, it will be noticed, relates not to the use of the Post-office establishment in the transmission of things therein denounced, but to the use of a person or common carrier, or express company.

The meat of the statute is substantially the same as Section 211 of the New Code, which relates to obscene matter, etc., as being non-mailable, and which is denounced in Section 211 of the New Code, heretofore treated.

CHAPTER XII.

THE SLAVE TRADE AND PEONAGE.

§ 272. Closely akin to the offenses against the elective franchise and civil rights of citizens heretofore treated in Chapter X., are some of the offenses to be treated in this chapter; both of which arise by reason of legislation under the authority of the Thirteenth and Fourteenth Amendments to the Constitution.

§ 273. **Confining or Detaining Slaves on Board Vessel.**—Section 5375 of the 1878 Statutes, is practically re-enacted in the New Code, as Section 246, with the exception that the word "person" is substituted for the words "negro or mulatto;" and such new section is as follows:

"Sec. 246. Whoever, being of the crew or ship's company of any foreign vessel engaged in the slave trade, or being of the crew or ship's company of any vessel owned wholly or in part, or navigated for or in behalf of any citizen of the United States, forcibly confines or detains on board such vessel any person as a slave, or, on board such vessel, offers or attempts to sell as a slave any such person, or on the high seas, or anywhere on tide water, transfers or delivers to any other vessel any such person with intent to make such person a slave, or lands or delivers on shore from on board such vessel any person with intent to make sale of, or having previously sold such person as a slave, is a pirate, and shall be imprisoned for life."

In prosecutions under this section, it must be alleged and shown that the defendant was one of the ship's company, and that he received or detained on board one or more persons with intent to make slaves of them, or aided and abetted others in doing so; and, of course, that he was a citizen of the United States. United States vs. Darnaud, 3 Wallace, Jr., 143. In United States vs. Westervelt, 5 Blatchf., 30, the Court said that there are four descriptions of the offense to be found in this section: first, a seizing the negroes, now "persons;" second, forcibly bringing and carying them on board; third, decoying them; fourth, receiving them on board of the vessel.

It is the intent to make a slave that constitutes the essentials of the offense. Neither the seizing, nor forcibly bringing or carrying, or receiving, a person on board, is any offense without such intent. United States vs. Battiste, Second Sumn., 240; United States vs. Libby, 1 W. & M., 221; United States vs. Corrie, Brun. Col. Cases, 686, 25 Federal Case No. 14869. In the Westervelt case, cited *supra*, the landing and seizing of negroes, and the forcibly bringing and carrying them on board comprehended the use of force, and, therefore, the decoying of them and the receiving them on board, do not constitute force.

It is entirely immaterial, under the Westervelt case, under U.

S. vs. Brown, 24 Federal Case No. 14656, as to the ownership of the vessel, if the defendant is an American citizen.

§ 274. **Seizing Slaves on Foreign Shore.**—Old Section 5376 becomes Section 247 of the New Code, in the following words:

"Sec. 247. Whoever, being of the crew or ship's company of any foreign vessel engaged in the slave trade, or being of the crew or ship's company of any vessel owned in whole or part, or navigated for, or on behalf of, any citizen of the United States, lands from such vessel, and on any foreign shore, seizes any person with intent to make such person a slave, or decoys, or forcibly brings, or carries or receives such person on board such vessel, with like intent, is a pirate, and shall be imprisoned for life."

The substitution of the word "person" for the words "negro or mulatto" is made in the new law. In the case of the United States vs. Corrie, 25 Federal Cases, 658, the Court held that even though a person was on board the vessel who owned the negroes or mulattoes, he could not be convicted or punished under this statute, unless he was of the crew or ship's company.

§ 275. **Bringing Slaves Into the United States.**—Old Section 5377 becomes Section 248 of the New Code, without substantial change, except that the words "negro, mulatto, or person of color" become simply the word "person":

"Sec. 248. Whoever brings within the jurisdiction of the United States, in any manner whatsoever, any person from any foreign kingdom or country, or from sea, or holds, sells, or otherwise disposes of, any person so brought in, as a slave, or to be held to service or labor, shall be fined not more than ten thousand dollars, one half to the use of the United States and the other half to the use of the party who prosecutes the indictment to effect; and, moreover, shall be imprisoned not more than seven years."

§ 276. **Equipping Vessels for Slave Trade.**—Section 5378 of the old statutes becomes Section 249 of the New Code, with the change of the words "negro, mulatto, or person of color" to the word "person":

"Sec. 249. Whoever builds, fits out, equips, loads, or otherwise prepares, or sends away, either as master, factor, or owner, any vessel, in any port or place within the jurisdiction of the United States, or causes such vessel to sail from any port or place whatsoever, within such jurisdiction, for the purpose of procuring any person from any foreign kingdom or country to

be transported to any port or place whatsoever, to be held, sold, or otherwise disposed of as a slave, or held to service or labor, shall be fined not more than five thousand dollars, one-half to the use of the United States and the other half to the use of the person prosecuting the indictment to effect; and shall, moreover, be imprisoned not more than seven years."

§ 277. **Transporting Persons to Be Held as Slaves.**—Section 5379 of the Old Code becomes Section 250 of the New Code in the following words:

"Section 250. Whoever, within the jurisdiction of the United States, takes on board, receives, or transports from any foreign kingdom of country, or from sea, any person in any vessel, for the purpose or holding, selling, or otherwise disposing of such person as a slave, or to be held to service or labor, shall be punished as prescribed in the section last preceding."

The change in this section is made by the substitution of the word "person" for the words "negro, mulatto, or person of color."

§ 278. **Hovering on Coast With Slaves on Board.**—Section 5380 of the old statutes becomes Section 251 of the New Code in the following words:

"Sec. 251. Whoever, being the captain, master, or commander of any vessel found in any river, port, bay, harbor, or on the high seas, within the jurisdiction of the United States, or hovering on the coast thereof, having on board any person, for the purpose of selling such person as a slave, or with intent to land such person for any such purpose, shall be fined not more than ten thousand dollars and imprisoned not more than four years."

The change from the old to the new is the substitution of the word "person" for the words "negro, mulatto, or person of color."

§ 279. **Serving in Vessels Engaged in Slave Trade.**—Sections 5381 and 5382 of the Old Code relate to slave trade, and their salient points are comprehended in new Section 252 in the following words:

"Sec. 252. Whoever, being a citizen of the United States, or other person residing therein, voluntarily serves on board of any vessel employed or made use of in the transportation of slaves from any foreign country or place to another, shall be fined not more than two thousand dollars and imprisoned not more than two years."

§ 280. **Receiving or Carrying Away Any Person to Be Sold or Held as a Slave.**—Section 5524 of the old statutes becomes Section 253 of the New Code, in the following words:

"Sec. 253. Whoever, being the master or owner or person having charge of any vessel, receives on board any other person, with the knowledge or intent that such person is to be carried from any place subject to the jurisdiction of the United States to any other place, to be held or sold as a slave, or carries away from any place subject to the jurisdiction of the United States any such person, with the intent that he may be so held or sold as a slave, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

§ 281. **Equipping, Etc., Vessels for Slave Trade.**—Section 5551 of the old statutes becomes Section 254 of the New Code, as follows:

"Sec. 254. No person shall, for himself or for another, as master, factor, or owner, build, fit, equip, load, or otherwise prepare any vessel in any port or place within the jurisdiction of the United States, or cause any vessel to sail from any port or place within the jurisdiction of the United States for the purpose of procuring any person from any foreign kingdom, place, or country to be transported to any port or place whatsoever, to be held, sold, or otherwise disposed of, as a slave, or to be held to service or labor; and every vessel so built, fitted out, equipped, laden, or otherwise prepared, with her tackle, apparel, furniture, and lading, shall be forfeited; one moiety to the use of the United States and the other to the use of the person who sues for the forfeiture and prosecutes the same to effect."

A consideration of this section will be found in charge to the grand jury, 30 Federal Case No. 18268, and 30 Federal Case 18269-a.

In the case of *in re* Sah Quah, 31 Federal, 327, Judge Dawson held that this legislation was founded upon the Thirteenth Amendment to the Constitution, and that a custom which prevailed among the uncivilized tribes of Indians in Alaska, whereby slaves were bought and sold and held in servitude against their will, even though such Indians were not citizens of the United States, they were dependent subjects, and that such custom and servitude was contrary to this legislation, and contrary to the Thirteenth Amendment to the Constitution, and that a

person so held in slavery would be released by the Court upon writ of *habeas corpus*.

§ 282. **Penalty on Persons Building, Equipping, Etc.**—Section 5552 of the old Revised Statutes becomes Section 255 in the New Code, as follows:

"Sec. 255. Whoever so builds, fits out, equips, loads, or otherwise prepares or sends away any vessel, knowing or intending that the same shall be employed in such trade or business, contrary to the provisions of the section last preceding, or in any way aids or abets therein, shall, besides the forfeiture of the vessel, pay the sum of two thousand dollars; one moiety thereof to the use of the United States and the other moiety thereof to the use of the person who sues for and prosecutes the same to effect."

§ 283. **Forfeiture of Vessel Transporting Slaves.**—Section 5553 of the old statutes becomes Section 256 of the New Code, as follows:

"Sec. 256. Every vessel employed in carrying on the slave trade or on which is received or transported any person from any foreign kingdom or country, or from sea, for the purpose of holding, selling, or otherwise disposing of such person as a slave, or of holding such person to service or labor, shall, together with her tackle, apparel, furniture, and the goods and effects which may be found on board, or which may have been imported thereon in the same voyage, be forfeited; one moiety to the use of the United States and the other to the use of the person who sues for and prosecutes the forfeiture to effect."

In United States vs. Schooner, 2 Paine, 25 Federal Cases, No. 14755; the "Mary Ann," 16 Federal Cases No. 9194; and the Charge to the Grand Jury, 30 Federal Cases, No. 18268, will be found a consideration of this section. The 5 Opinion of the Attorneys General, page 724, also contains an opinion upon seizure for engaging in the slave trade.

The change in this section consists in the substitution of the word "person" for the words "negro, mulatto, or person of color."

§ 284. **Receiving Persons on Board to be Sold as Slaves.**—Old Section 5554 becomes new Section 257 in these words:

"Sec. 257. Whoever, being a citizen of the United States, takes on board, receives, or transports any person for the purpose of selling such person as a slave shall, in addition to the forfeiture of the vessel, pay for each person so received on board or

transported the sum of two hundred dollars, to be recovered in any court of the United States; the one moiety thereof to the use of the United States and the other moiety to the use of the person who sues for and prosecutes the same to effect."

The change in this section consists in the substitution of the word "person" for the words "negro, mulatto, or person of color."

§ 285. **Vessel Found Hovering on Coast.**—Old Section 5555 becomes new Section 258, as follows:

"Sec. 258. Every vessel which is found in any river, port, bay, or harbor, or on the high seas, within the jurisdiction of the United States, or hovering on the coasts thereof and having on board any person, with intent to sell such person as a slave, or with intent to land the same for that purpose, either in the United States, or elsewhere, shall, together with her tackle, apparel, furniture, and the goods or effects on board of her, be forfeited to the United States."

The change in this section consists in the substitution of the word "person" for the words "negro, mulatto, or person of color."

§ 286. **Forfeiture of Interest in Vessels Transporting Slaves.**—Section 259 of the New Code takes the place of Section 5556 of the old Statutes, and is as follows:

"Sec. 259. It shall be unlawful for any citizen of the United States, or other person residing therein, or under the jurisdiction thereof, directly or indirectly to hold or have any right or property in any vessel employed or made use of in the transportation or carrying of slaves from one foreign country or place to another, and any such right or property shall be forfeited, and may be libeled and condemned for the use of the person suing for the same. Whoever shall violate the prohibition of this section shall also forfeit and pay a sum of money equal to double the value of his right or property in such vessel; and shall also forfeit a sum of money equal to double the value of the interest he had in the slaves which at any time may be transported or carried in such vessels."

§ 287. **Seizure of Vessels Engaged in the Slave Trade.**—Section 5557 of the old statutes becomes Section 260 of the New Code, as follows:

"Sec. 260. The President is authorized, when he deems it expedient, to man and employ any of the armed vessels of the United States to cruise wherever he may judge attempts are mak-

ing to carry on the slave trade, by citizens or residents of the United States, in contravention of laws prohibitory of the same; and, in such case, he shall instruct the commanders of such armed vessels to seize, take, and bring into any port of the United States, to be proceeded against according to law, all American vessels, wheresoever found, which may have on board, or which may be intended for the purpose of taking on board, or of transporting, or may have transported any person, in violation of the provisions of any Act of Congress prohibiting the traffic in slaves."

§ 288. **Proceeds of Condemned Vessels; How Distributed.**—Section 5558 of the old statutes is so modified in Section 261 of the New Code, in conformity with the abolition of prize money by Congress, as to require the proceeds of all forfeitures to be paid into the Treasury of the United States, and is in the following words:

"Sec. 261. The proceeds of all vessels, their tackle, apparel, and furniture, and the goods and effects on board of them, which are so seized, prosecuted, and condemned, shall be paid into the Treasury of the United States."

§ 289. **Disposal of Persons Found on Board Seized Vessel.**—Section 5559 of the Old Code becomes Section 262 of the New Code, by the mere change of the words "negro, mulatto, or person of color," to the word "person," and is in the following words:

"Sec. 262. The officers of the vessel making such seizure shall safely keep every person found on board of any vessel so seized, taken, or brought into port for condemnation, and shall deliver every such person to the marshal of the district into which he may be brought, if into a port of the United States, or if elsewhere, to such person as may be lawfully appointed by the President, in the manner directed by law, transmitting to the President, as soon as may be after such delivery, a descriptive list of such persons, in order that he may give directions for the disposal of them."

§ 290. **Apprehension of Officers and Crew.**—Section 5560 of the Old Code becomes Section 263 of the New Code in the following words:

"Sec. 263. The commanders of such commissioned vessels shall cause to be apprehended and taken into custody every person found on board of such offending vessel so seized and taken, being of the officers or crew thereof, and him convey, as soon as conveniently may be, to the civil authority of the United States, to be proceeded against in due course of law."

§ 291. **Removal of Persons Delivered from Seized Vessels.**—Section 5571 of the 1878 Statutes, by substituting the word "persons" for the words "negroes, mulattoes, or persons of color," becomes Section 264 of the New Code, as follows:

"Sec. 264. The President is authorized to make such regulations and arrangements as he may deem expedient for the safe keeping, support, and removal beyond the limits of the United States of all such persons as may be so delivered and brought within its jurisdiction."

§292. **To What Port Captured Vessels Sent.**—Section 5563 of the Old Code, by the addition of the words "or District," becomes Section 265 of the New Code, as follows:

"Sec. 265. It shall be the duty of the commander of any armed vessel of the United States, whenever he makes any capture under the preceding provisions, to bring the vessel and her cargo, for adjudication, into some port of the State, Territory, or District to which such vessel so captured may belong, if he can ascertain the same; if not, then into any convenient port of the United States."

§ 293. **When Owners of Foreign Vessels Shall Give Bond.**—By substituting the words "clearing from any port within the jurisdiction of the United States," for the words "clearing out for any of the coasts or kingdoms of Africa," Section 5564 of the old statutes becomes Section 266 of the New Code, as follows:

"Sec. 266. Every owner, master, or factor of any foreign vessel clearing from any port within the jurisdiction of the United States, and suspected to be intended for the slave trade and the suspicion being declared to the officer of the customs by any citizen, on oath, and such information being to the satisfaction of the officer, shall first give bond, with sufficient sureties, to the Treasurer of the United States that none of the natives of any foreign country or place shall be taken on board such vessel to be transported or sold as slaves in any other foreign port or place whatever, within nine months thereafter."

§ 294. **Instructions to Commanders of Armed Vessels.**—By changing the words "negroes, mulattoes, and persons of color" to the word "persons," and the words "coast of Africa" for the words "country from which they were taken," Section 5567 of the old statutes becomes Section 267 of the New Code, as follows:

"Sec. 267. The President is authorized to issue instructions to the commanders of armed vessels of the United States, directing them, whenever it is practicable, and under such rules and

regulations as he may prescribe, to proceed directly to the country from which they were taken, and there hand over to the agent of the United States all such persons, delivered from on board vessels seized in the prosecution of the slave trade; and they shall afterward bring the captured vessels and persons engaged in prosecuting such trade to the United States for trial and adjudication."

§ 295. **Kidnaping.**—Section 5525 of the Old Code becomes Section 268 of the New Code, in the following words:

"Sec. 268. Whoever kidnaps or carries away any other person, with the intent that such other person to be sold into involuntary servitude, or held as a slave; or who entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he may be made or held as a slave, or sent out of the country to be so made or held; or who in any way knowingly aids in causing any other person to be held, sold, or carried away to be held or sold as a slave, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

§ 296. **Holding or Returning to Peonage.**—The most interesting and practicable section in this Chapter is Section 269 of the New Code, which takes the place of old Section 5526, and is in the following words:

"Sec. 269. Whoever holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

Judge Newman, in United States vs. Eberhart, 127 Federal, 252, held that this statute had no application to any State or Territory, except the Territory of New Mexico. By implication, this was overruled by United States vs. McClellan, in 127 Federal, 971, by Judge Speer, and was directly overruled by the Supreme Court of the United States in Clyatt vs. United States, 197 U. S., 207, 49 Law Ed., 726; the Supreme Court saying, in substance, that the prohibition against peonage in any State or Territory of the United States, contained in Sections 1990 and 5526 of the Old Code, was authorized by the provisions of the United States Constitution, the Thirteenth Amendment forbidding slavery or involuntary servitude within the United States, or any place sub-

ject to their jurisdiction, and granting to Congress the power to enforce the prohibition by appropriate legislation.

The statute, it will be noted, comprehends several different forms of peonage, to wit, holding, arresting, returning, or causing to be held, arrested, or returned. In the Clyatt case, the Supreme Court reversed the judgment of conviction, because there was no evidence that the peons had been previously held in peonage, and the indictment charged that there was a return to peonage. Of course, if the indictment had charged holding in peonage, without returning to peonage, the evidence would doubtless have been sufficient, and the case would have been affirmed. The Supreme Court, in the Clyatt case, says:

"That which is contemplated by the statute is compulsory service, to secure the payment of a debt. Is this legislation within the power of Congress? It may be conceded, as a general proposition, that the ordinary relations of individual to individual are subject to the control of the States, and are not entrusted to the general Government; but the Thirteenth Amendment, adopted as an outcome of the Civil War, reads,

" 'Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or in any place subject to their jurisdiction.

" 'Sec. 2. Congress shall have the power to enforce this Article by appropriate legislation.'

This Amendment denounces a status or condition, irrespective of the manner or authority by which it is created. The prohibitions of the Fourteenth and Fifteenth Amendments are largely upon the acts of the States; but the Thirteenth Amendment names no party or authority, but simply forbids slavery and involuntary servitude, grants to Congress the power to enforce this prohibition by appropriate legislation."

In the peonage cases, 123 Federal, 671, District Judge Jones defined "the condition of peonage" to be to hold or return a person to enforced servitude, wherein the servitor is restrained of his liberty, and compelled to labor in liquidation of some debt or obligation, either real or pretended, against his will.

In the peonage cases just cited, and in the peonage cases by Judge Trieber, 136 Federal, 707, it was held, in substance, that it was entirely immaterial that the contract of employment was voluntarily made by the laborer; and it was entirely immaterial

whether it was made for the present or pre-existing consideration. In other words, when the person desires to abandon the service, from that moment on the holding of such a person is the holding of him within the meaning of the statute, to a condition of peonage. So, likewise, District Judge Jones held that to falsely pretend to another that he was accused of crime, and to pretent to prevent his conviction if he will pay a sum of money, etc., all come within the statute.

In *in re* peonage charge, 138 Federal, 636§, and United States vs. Cole, 153 Federal, 801, peonage was defined to be the status or condition of compulsory service, in the payment of an alleged indebtedness by the peon to his master. The same definition is practically adopted in United States vs. McClellan, 127 Federal, 971.

§ 297. **Obstructing Execution of Above.**—Section 5527 of the Old Code becomes Section 270 of the New Code, as follows:

"Sec. 270. Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of the section last preceding, shall be liable to the penalties therein prescribed."

§ 298. **Bringing Kidnaped Persons Into the United States.**—By broadening the Act of June 23, 1874, 18 Statute at Large, 251, 1 Supplement, 46, to extend so as to apply to any place subject to the jurisdiction of the United States, such Act becomes Section 271 of the New Code, as follows:

"Sec. 271. Whoever shall knowingly and wilfully bring into the United States or any place subject to the jurisdiction thereof, any person inveigled or forcibly kidnaped in any other country, with intent to hold such person so inveigled or kidnaped in confinement or to any involuntary servitude; or whoever shall knowingly and wilfully sell, or cause to be sold, into any condition of involuntary servitude, any other person for any term whatever; or whoever shall knowingly and wilfully hold to involuntary servitude any person so brought or sold, shall be fined not more than five thousand dollars and imprisoned not more than five years."

CHAPTER XIII.

OFFENSES WITHIN THE ADMIRALTY, MARITIME, AND TERRITORIAL JURISDICTION OF THE UNITED STATES.

Note.—The first numbers indicate the old Sections; then follows a dash, and after the dash the numbers indicate the Sections in the new Code.

§ 299. Generally, Federal Territory.
300. Places Defined: New Code, 272.
301. Murder: 5339—273.
302. Murder Verdict: 29 Stat. L., 487.
303. Manslaughter: 5341—274.
304. Punishment for Murder and Manslaughter: 5339 and 5343—275.
305. Assault with Intent to Commit Murder, Rape, Robbery, Etc.: 5346—276.
306. Attempt to Commit Murder or Manslaughter: 5342—277.
307. Rape: 5343—278.
308. Having Carnal Knowledge of Female Under Sixteen: New Code, 279.
309. Seduction of Female Passenger on Vessel: 5349—280.
310. Payment of Fine to Female Seduced; Evidence Required; Limitations on Indictment: 5350 and 5351—281.
311. Punishment for Loss of Life by Misconduct of Officers, Owners, Charterers, Etc., of Vessels: 5344—282.
312. Maiming: 5348—283.
313. Robbery: 5370—284.
314. Arson of Dwelling House: 5385—285.
315. Arson of Arsenal, Etc.; Other Buildings, Etc.: 5386—286.
316. Larceny: 5356—287.
317. Receiving, Etc., Stolen Goods: 5357—288.
318. Laws of State Adopted for Punishing Wrongful Acts, Etc.: 5391—289.

§ 299. The New Code, in Section 272, sets forth certain specific national territory, within and upon which the commsision of the acts mentioned in this chapter become exclusive Federal offenses. The offenses upon which Congress has legislated under the head

of admiralty, maritime, and territorial jurisdiction of the Federal Government are murder, manslaughter, intent to murder, rape, robbery, certain carnal knowledge of the female, loss of life by misconduct of the officers of a vessel, maiming, arson, larceny, receiving stolen goods, and a general statute, which creates a Federal offense of every State offense not herein mentioned, when the same is committed within the limits spoken of.

§ 300. **The Places Defined.**—Section 272 of the New Code, which makes unnecessary a repetition of the place in defining each separate offense, reads as follows:

"Sec. 272. The crimes and offenses defined in this chapter shall be punished as herein prescribed:

"First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof.

"Second. When committed upon any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, namely: Lake Superior, Lake Michigan, Lake Huron, Lake Saint Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of said lakes, or upon the River Saint Lawrence where the same constitutes the International boundary line.

"Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard, or other needful building.

"Fourth. On any island, rock, or key, containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States."

While this section is new, some of its parts are to be found in old Statute 5339, old Statute 5570, and Article I., Section 8, of the Constitution. The first division of the Section, it will be noted, gives the jurisdiction to offenses upon certain waters. The second division gives jurisdiction to offenses upon vessels when on

cetrain waters. The third division gives jurisdiction over offenses that are committed upon lands over which the Government has acquired exclusive jurisdiction, by purchase or otherwise; but it must be understood that this division does not mean that there is any jurisdiction in the Federal Government, unless there be cession thereof under the Federal and State laws. Thus, the renting of a building in which the Federal Post-office is conducted would give no jurisdiction to the Federal Government for an assault committed within that building by one private citizen upon another private citizen. The jurisdiction of the Government to punish one who assaulted the postmaster in the performance of his official duties, rests upon an entirely different statute, and is not grounded upon the section now being noticed. District Judge Whitson, in United States vs. Tully, 140 Federal, 899, held in substance, that the jurisdiction of a Federal Court to try a person for a criminal offense on the ground that it was committed within a fort or military reservation, such fort or reservation must have been established by law, as contemplated by Article I., Section 8, of the Constitution, either by purchase, with the consent of the Legislature of the State, or by reservation of public lands therefor by compact with the State at the time of its admission, and exclusive jurisdiction over the same must have been reserved to the United States, either by express words or necessary implication. Judge Maxey, in 111 Federal, 630, United States vs. Lewis, held in substance, that whether a homicide committed within the boundaries of a State constitutes an offense against the laws of the United States, of which a Federal Court has jurisdiction, depends on two questions: first, whether there has been such a cession by the State to the United States of the territory upon which the act alleged to constitute the crime was committed, as to render such territory a place or district of country under the exclusive jurisdiction of the United States, which is a question of law for the Court; and, second, if such cession was made, whether the act was committed within the territory so ceded, which is a question of fact to be submitted to the jury. In United States vs. Carter, 84 Federal, 622, the Court held that a defendant was properly indicted in the Federal jurisdiction for a murder committed on board the United States

battle-ship "Indiana," then moored at Cob Dock, being within territory which had not been purchased by the United States, but over which exclusive jurisdiction had been ceded to the United States by the New York Legislature. In United States vs. Hewecker, 79 Federal, page 59, the Court held that where a seaman an on American schooner was indicted for having shot, in the harbor of Havana, one Miller, who died therefrom in the hospital three days afterwards, at Havana, on January 21, 1892, and the indictment was not found until March 10, 1896; the defendant, in the meantime, having been imprisoned in Havana, upon conviction for an assault, and on the expiration of his sentence delivered to the United States authorities, that the defendant was not a fugitive from justice, under Section 1045, so as to be excepted from the exemption of indictment after three years, and that the death, having taken place on land within a foreign jurisdiction, the case was not one of wilful murder at Common Law, under the Federal authorities; and that the United States statute, Section 5339, though making the offense punishable with death, neither declares it to be murder, nor does it limit that offense to all cases within a year and a day, which at Common Law was an essential element of the offense of murder; and, therefore, that the case was not one of wilful murder, and the indictment was barred by the three-year limitation.

A cession by a State to the United States of "exclusive jurisdiction" over certain land, providing that the State shall retain concurrent jurisdiction with the United States, so far that the process, civil or criminal, issued under the authority of the State may be executed by the State officers upon any person amenable to the same, within the limits of the land so ceded, confers on the United States exclusive jurisdiction within the meaning of Revised Statutes 5339, United States vs. Meagher, 37 Federal, 875. Of course, the burden is on the Government to show that the crime was committed on land which was under the exclusive jurisdiction of the United States.

In Cook vs. United States, 138 U. S., page 185, 34 Law Edition, 906, it was held that a public land strip lying between Texas and New Mexico and Colorado and Kansas, over which jurisdiction had been vested in the United States after the commission of the

offense of murder thereon, was properly within the control of the Federal Courts, and the offense punishable therein.

The fourth division relates to offenses upon certain islands, rocks, or keys, which contain deposits of guano, the beginning of which recognition was old Statute 5570, and is the extending of sovereignty by the political power of the Government. In other words, by the law of nations, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest.

In the case of United States vs. Rogers, 150 U. S., 249, 37 Law Ed., page 1071, the Supreme Court held that the term "high seas," as used in old Section 5346, is applicable to the open unenclosed waters of the Great Lakes, between which the Detroit River is a connecting stream; and that Court, in the same case, also held that a vessel is deemed part of the territory of the country to which she belongs, and that the Courts of the United States have jurisdiction, under United States Revised Statutes 5346, to try a person for assault with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State, and within the territorial limits of the Dominion of Canada. This decision seems to overrule the case of United States vs. Rogers, in the 46 Federal, page 1, and the case of *ex parte* Byers, 32 Federal, 404, where the Court denied a like jurisdiction.

It is determined, in United States vs. Peterson, 64 Federal, 145, that the District Court of the Eastern District of Wisconsin has no jurisdiction of an indictment for an assault committed on a vessel on Lake Huron, within the boundary of the jurisdiction of the Eastern District of Michigan. In other words, the indictment should have been prosecuted in Michigan, instead of Wisconsin, and Judge Seaman reviews the Byers case and the Rogers case, cited *supra*.

In Jones vs. United States, 137 U. S. 202, 34 Law Ed., 691, the Supreme Court maintains the constitutionality of jurisdiction by discovery, and incidentally Section 5570 of the Old Code, and, therefore, the fourth division of the present section. The Court held in that case, that,

"All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the Government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings."

And for this purpose of judicially knowing, the judges may refresh their memory and inform their conscience from such sources as they may deem most trustworthy.

Under the authority of the United States vs. Battle, 154 Federal, 540, which was an indictment for murder, alleged to have been committed on a plot of ground in the city of Macon, Georgia, which had been conveyed to the United States for the erection of a post-office and Federal Court building, over which territory the State had surrendered jurisdiction, reserving the right to serve process and apprehend offenders there, that it is not necessary in the indictment to plead the act of the General Assembly or Legislature, because that is the general law, which it is presumed not only the Court, but the defendant, knew; nor is it necessary to plead the title of the Government in the indictment. The allegation that the crime was maliciously, unlawfully, and feloniously done, with the other ingredients of the offense, is sufficient. This case was affirmed in Battle vs. United States, 209 U. S., page 36, 52 Law Ed., page 671.

§ 301. **Murder.**—The old Statute 5339 gave no definition of the crime of murder, and thus the Courts were driven to the Common Law for such definition. Now Section 273, however, defines murder, and somewhat enlarges the Common Law definition, and appropriates many of the terms of the statutes of a large majority of the various states, and such section reads as follows:

"Sec. 273. Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree."

The Common Law definition of murder was,

"Murder is where a person of sound memory and discretion, unlawfully and feloniously kills any human being in the peace of the sovereign, with malice prepense, or aforethought, express or implied."

Mr. Bishop, in Volume II., of his New Criminal Law, treats of this and other definitions of murder, setting forth the definitions used by Lord Coke, as follows:

"Murder is when a man of sound memory and of the age of discretion, unlawfully killeth, within any county of the realm, any reasonable creature in *rerum natura* under the King's peace, with malice aforethought, either expressed by the party, or implied by law, so as the party wounded or hurt, etc., die of the wound or hurt, etc., within a year and a day after the same,"

and Lord Mansfield, namley:

"Murder is where a man of sound sense, unlawfully killeth another of malice aforethought, either express or implied,"

and continues by saying that a complete definition is impossible, but that it must include an understanding of the term "malice aforethought," which term means an intent to take life without excuse.

Judge Maxey, in United States vs. Lewis, 111 Federal, 630, said:

"Malice, when attempted to be defined, has been necessarily given a more comprehensive meaning than enmity or illwill or revenge, and has been extended so as to include all those states of mind under which the killing of a person takes place without any cause which will in law justify or excuse or extenuate the homicide. Mc Coy vs. State, 25 Texas, 39. Malice, as applied to the offense of murder, need not denote spite or malevolence, hatred or illwill, to the person killed, nor that the slayer killed his victim in cold blood, as with settled design and premeditation. Such a killing would, it is true, be murder; but malice, as essential to the crime of murder, has a more extended meaning. A killing flowing from an evil design in general may be of malice, and constitute murder; as, a killing resulting from the dictates of a wicked, depraved, and malignant spirit—a heart regardless of social duty and fatally bent upon mischief—may be of malice, necessarily implied by law from the fact of the killing, without lawful excuse, and sufficient to constitute the crime of murder, although the person killing may have had no spite or illwill against the deceased. Malice, as thus described, is either express or implied. Express malice is where one with a sedate and deliberate mind, and formed design, doth kill an-

other, which formed design is evidenced by external circumstances, discovering that inward intention; as, lying in wait, antecedent menaces, former grudges, and concerted schemes to do bodily harm. It rarely, if ever, occurs that express malice is proved upon the trial of a case. The existence or non-existence of malice is a matter to be determined by the jury, from a consideration of all the facts in evidence. The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing, the jury infers malice or its absence. Malice, in connection with the crime of killing, is but another name for a certain condition of a man's heart or mind; and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of the killing, is to infer it from the surrounding facts, and that inference is one of fact for the jury. 'Jordan vs. State, 10 Texas, 492; 3 Russell on Crime, sixth edition, pages 1 and 2; Stevenson vs. United States, 162 U. S., 320, 40 Law Ed., 983; Wallace vs. United States, 162 U. S., 476, 40 Law Ed., 1043.' The malice which distinguishes the crime of murder must be aforethought. It implies premeditation—a prior intent to do the act. It may have existed but for a moment—an inappreciably brief period of time, or longer. No limit has been, or can be, fixed as to its duration. If it in fact exist for any period, however brief, the killing would be murder; but in malice so wanting, the homicide could not be of a higher grade than manslaughter.''

In Battle vs. United States, 209 U. S., 36, 52 Law Ed., 670, the Supreme Court affirmed the refusal of the trial court to give requested instructions upon the law of justifiable homicide and involuntary homicide, when, according to the testimony of the accused, the death was due to an accident, and according to all the other evidence, the death was intentional and unjustified.

In considering the cases that are hereafter cited, it will be borne in mind that the original Federal Statute, under which the cases arose, contained no provision for murder in the second degree; in other words, the two degrees of homicide were murder and manslaughter.

By the Common Law, both time and place were required to be alleged. It is necessary that it should appear that the death transpired within a year and a day after the stroke, and the place of the death equally with that of the stroke, had to be stated to show jurisdiction in the Court. The controlling ele-

ment which distinguishes the guilt of the assailant from a common assault was the death, within a year and a day, and also within the same jurisdiction. Ball vs. United States, 140 U. S., 136, 35 Law Ed., 384. So far as the present statute is concerned, there are no differences upon this point between it and the old Statute, upon which the Ball decision was rendered and the Common Law rules with reference to these matters must, therefore, be observed under the new statute, in both pleading and proving the offense. In the case of United States vs. Guiteau, reported in 1 Mackey, 498, the Supreme Court of the District of Columbia affirmed a conviction, even though the shot was fired in the District of Columbia and President Garfield died in Maryland, such affirmance being based upon the absorption of the latest English statute by Maryland, in 1801, which, to correct the original technicality of the Common Law, permitted prosecution in either the realm of the stroke or the realm of the death. Section 731 of the Federal statutes, which allows the prosecution of an offense against the United States in either the county in which it was begun or in the county in which it was completed, was held by the Supreme Court in the Ball case, even if applicable to the crime of murder, not to apply if the stroke were given in one district and the death ensued in some other country than the United States. In St. Clair vs. United States, 154 U. S., 134, 38 Law Ed., 936, the Court sustained a description in an indictment with reference to the locality of the offense, when it showed that it was committed on board of an American vessel on the high seas, within the jurisdiction of the Court and the admiralty and maritime jurisdiction of the United States, and not within the jurisdiction of any particular State.

§ 302. **Verdict.**—Under the Federal practice, the Court may sentence the defendant to a manslaughter punishment and enter a judgment for manslaughter, upon a verdict of guilty of murder, because the conviction of the higher offense includes the lower. United States vs. Linnier, 125 Federal, 83.

The 29 Statute at Large, 487, Act of January 25, 1897, provides that in all cases where the accused is found guilty of murder or of rape, the jury may qualify their verdict by adding thereto, "without capital punishment"; and whenever the jury

shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life. This Act was reviewed and applied as being permissible in the case of Winston vs. United States, 172 Federal, 304, 43 Law Ed., 456; and this though the statute provides a punishment of death, Section 275 of the New Code.

§ 303. **Manslaughter.**—The old manslaughter statute, Section 5341, is so changed by new Section 274 as to include the practical elements of the Common Law definition of manslaughter and the statutes of many of the States, and reads as follows:

"Sec. 274. Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

"First. Voluntary—upon a sudden quarrel or heat of passion.

"Second. Involuntary—in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

At Common Law, voluntary manslaughter was the unlawful and intentional killing of another without malice on sudden quarrel or in heat of passion. Bishop, in his New Criminal Law, second volume, page 425, cites several definitions, and notes Hawkins' definition, which was this: homicide against the life of another, amounting to felony, is either with or without malice. That which is without malice is called manslaughter, or sometimes chance-medley; by which we understand such killing as happens either on a sudden quarrel or in the commission of an unlawful act, without any deliberate intention of committing any mischief at all. Mr. Bishop proposes a new definition, as follows:

"Manslaughter is any such dangerous act or omission, feloniously done or suffered contrary to one's legal duty, as results in the death of a human being, within a year and a day."

But whatever may have been the original Common Law definition, the statute now under discussion fixes and defines just what shall be manslaughter in the Federal jurisdiction. An interesting expression of the Supreme Court, in Anderson vs. United States, 170 U. S., 510, 42 Law Ed., 1126, will be of value here:

"The law, in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion or in hot blood, produced by adequate cause, and before a

reasonable time has elapsed for the blood to cool, as an offense of a less heinous character than murder; but if there be sufficient time for the passion to subside, and shaken reason to resume her sway, no such distinction can be entertained; and if the circumstances showed a killing with deliberate mind and formed design, with comprehension of the act and determniation to perform it, the elements of self-defense being wanting, the act is murder. Nor is the presumption of malice negatived by previous provocation, having no casual connection with the murderous act, or separated from it by such an interval of time as gives reasonable opportunity for the excess of fury to moderate."

In other words, in manslaughter, malice is presumed to be absent or wanting, and the act is imputed to the infirmity of human nature, and the punishment is, therefore, proportionately lenient.

The Circuit Court of Appeals for the Fifth Circuit, in the case of Roberts vs. United States, 126 Federal, 897, speaking through Chief Justice Pardee, affirmed a manslaughter charge by District Judge Meek, and his definition thereof, which was as follows:

"In the definition of manslaughter contained in the statute, the killing must be done unlawfully and wilfully. The term 'unlawfully,' as here used, means without legal excuse. The term 'wilfully' here means done wrongfully, with evil intent. It means any act which a person of reasonable knowledge and ability must know to be contrary to duty."

The statute, it will be noted, rehabilitates voluntary and involuntary manslaughter, being the same divisions originally recognized by the Common Law.

§ 304. **Punishment for Murder and Manslaughter.**—Section 275 of the New Code, which displaces old Sections 5339 and 5343, is as follows:

"Sec. 275. Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree shall be imprisoned not less than ten years and may be imprisoned for life. Every person guilty of voluntary manslaughter shall be imprisoned not more than ten years. Every person guilty of involuntary manslaughter shall be imprisoned not more than three years, or fined not exceeding one thousand dollars, or both."

§ 305. **Assault with Intent to Commit Murder, Rape, Robbery, Etc.**—A part of the provisions of old Statute 5346 are included

in new Section 276, which is very broad, and which is in the following words:

"Sec. 276. Whoever shall assault another with intent to commit murder, or rape, shall be imprisoned not more than twenty years. Whoever, shall assault another with intent to commit any felony, except murder, or rape, shall be fined not more than three thousand dollars, or imprisoned not more than ten years, or both. Whoever, with intent to do bodily harm, and without just cause or excuse, shall assault another with a dangerous weapon, instrument, or other thing, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. Whoever shall unlawfully strike, beat, or wound another, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both. Whoever shall unlawfully assault another, shall be fined not more than three hundred dollars, or imprisoned not more than three months, or both.

In United States vs. Barnaby, 51 Federal, 20, the defendant was charged in the indictment with an assault with intent to commit murder, and the Court held that the indictment was insufficient, where it merely charged that the defendant made an assault with a knife upon a person named, with intent him to kill, wilfully and feloniously, and of his malice aforethought. without disclosing the character of the knife, or averring that he struck him with it, or inflicted any wound having a tendency to produce death.

§ 306. **Attempt to Commit Murder or Manslaughter.**—Section 5342 of the old statutes is replaced by Section 277 of the New Code, in the following words:

"Sec. 277. Whoever shall attempt to commit murder or manslaughter, except as provided in the preceding section, shall be fined not more than one thousand dollars and imprisoned not more than three years."

§ 307. **Rape.**—Section 5343 of the old statutes becomes Section 278 of the New Code, in the following words:

"Sec. 278. Whoever shall commit the crime of rape shall suffer death."

Under the Common Law, rape is the having of carnal knowledge, by a man of a woman, forcibly and against her will. A corrected definition, given by Mr. Bishop, is,

"Rape is the having of unlawful carnal knowledge, by a man of a woman, forcibly, where she does not consent."

The difference between the use of the words, "where she does not consent" and the words, "against her will," is treated by Lord Campbell in the following manner:

"The question is, What is the real definition of rape,—whether it is the ravishing of a woman against her will, or without her consent? If the former is the correct definition, the crime is not, in this case, proved; if the latter, it is proved. Camplin's case seems to me really to settle what the proper definition is, and the decision in that case rests upon the authority of an Act of Parliament. The statute of Westminster 2, C. 34, defines the crime to be where a man do ravish a woman, married, maid, or other, where she did not consent, neither before nor after. We are bound by that definition, and it was adopted in Camplin's case, acted upon in Ryan's case, and subsequently in a case before my Brother Willes. It would be monstrous to say that if a drunken woman, returning from market, lay down and fall asleep by the roadside, and a man, by force, had connection with her whilst she was in a state of insensibility, and incapable of giving consent, he would not be guilty of rape."

The concluding illustration of the great Chief Justice was held not to be rape, in P. vs. Quin, 50 Barb., 128, but was held to be rape in C. vs. Burk, 105 Mass., 376.

§ 308. **Having Carnal Knowledge of Female Under Sixteen.**—Section 279 of the New Code reads as follows:

"Sec. 279. Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years."

§ 309. **Seduction of Female Passenger on Vessel.**—The substance of Section 5349 becomes new Section 280, which reads as follows:

"Sec. 280. Every master, officer, seaman, or other person employed on board of any American vessel who, during the voyage, under promise of marriage, or by threats, or the exercise of authority, or solicitation, or the making of gifts or presents, seduces and has illicit connection with any female passenger, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both; but subsequent intermarriage of the parties may be pleaded in bar of conviction."

§ 310. **Payment of Fine to Female Seduced; Evidence Required; Limitation on Indictment.**—Old Sections 5350 and 5351 become new Section 281 of the New Code, as follows:

"Sec. 281. When a person is convicted of a violation of the section last preceding, the court may, in its discretion, direct that the amount of the fine, when paid, be paid for the use of the female seduced, or her child, if she have any; but no conviction shall be had on the testimony of the female seduced, without other evidence, nor unless the indictment is found within one year after the arrival of the vessel on which the offense was committed at the port of its destination."

§ 311. **Punishment for Loss of Life by Misconduct of Officers, Owners, Charterers, Etc., of Vessels.**—Old Section 5344 is greatly broadened by new Section 282, which is as follows:

"Sec. 282. Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both. *Provided,* That when the owner or charterer of any steamboat or vessel shall be a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and wilfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both."

The term "vessel" was construed to include every description of water-craft, or other artificial contrivance used or capable of being used as a means of transportation on water, in the case of United States vs. Holmes, 104 Federal, 884. In that same case, it was also held that the offense named in the statute was complete when the misconduct, negligence, or inattention in the navigation of a vessel by one of the persons named resulted in the loss of human life, and that the indictment thereunder need not charge a criminal intent.

In United States vs. Van Schaick, 134 Federal, 592, which was affirmed in Van Schaick vs. United States, 159 Federal, 847, it was held that even though the statute could not reach a corporation owner of a vessel, yet such fact did not affect the right of the Gov-

ernment to prosecute individuals under said section, who aid and abet the corporation in the commission of the crime; and the owner of a steamship who fails to comply with the statute requiring it to be equipped with life preservers and proper fire appliances, either by supplying none, or by supplying those that are unsuitable, inefficient, and useless, is guilty of a violation of this section, provided such violation results in the death of a person.

§ 312. **Maiming.**—Old Statute 5348 becomes the substance of Section 283 of the New Code, as follows:

"Sec. 283. Whoever, with intent to maim or disfigure, shall cut, bite, or slit, the nose, ear, or lip, or cut out or disable the tongue, or put out or destroy an eye, or cut off or disable a limb or any member of another person; or whoever, with like intent, shall throw or pour upon another person, any scalding hot water, vitriol, or other corrosive acid, or caustic substance whatever, shall be fined not more than one thousand dollars, or imprisoned not more than seven years, or both."

§ 313. **Robbery.**—Section 5370 of the old statutes becomes Section 284 in the New Code, in the following words:

"Sec. 284. Whoever, by force and violence, or by putting in fear, shall feloniously take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years."

§ 314. **Arson of Dwelling House.**—Section 285 of the New Code adds the new element of destruction by explosives, and reduces the maximum penalty, and is substituted for Section 5385 of the old statutes, and is in the following words:

"Sec. 285. Whoever shall wilfully and maliciously set fire to, burn, or attempt to burn, or by means of a dangerous explosive destroy or attempt to destroy, any dwelling house, or any store, barn, stable, or other building, parcel of a dwelling house, shall be imprisoned not more than twenty years."

§ 315. **Arson of Arsenal, Etc.; Other Buildings, Etc.**—Section 286 of the New Code includes many things not enumerated in old Statute 5386, and is in the following words:

"Sec. 286. Whoever shall maliciously set fire to, burn, or attempt to burn, or by any means destroy or injure, or attempt to destroy or injure, any arsenal, armory, magazine, rope-walk, ship-house, warehouse, blockhouse, or barrack, or any store-house, barn, or stable, not parcel of a dwelling house, or any other

building not mentioned in the section last preceding, or any vessel built, building, or undergoing repair, or any light-house, or beacon, or any machinery, timber, cables, rigging, or other materials or appliances for building, repairing, or fitting out vessels, or any pile of wood, boards, or other lumber, or any military, naval, or victualing stores, arms, or other munitions of war, shall be fined not more than five thousand dollars and imprisoned not more than twenty years."

The technical quashing of an indictment in United States vs. Cardish, 143 Federal, 640, growing out of the necessity of the Common Law definition of the word "arson" controlling in the Federal prosecution, would not be possible under this new section, for the reason that the destruction by fire, as enumerated in the new section, is not limited to the technical meaning of the word "arson" at Common Law.

§ 316. **Larceny.**—Section 287 of the New Code, which takes the place of old Section 5356, is patterned after the legislation of the various States which recognize two different punishments, to be graded by the value of the articles stolen.

"Sec. 287. Whoever shall take and carry away, with intent to steal or purloin, any personal property of another, shall be punished as follows: If the property taken is of a value exceeding fifty dollars, or is taken from the person of another, by a fine of not more than ten thousand dollars, or imprisonment for not more than ten years, or both; in all other cases, by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or both. If the property stolen consists of any evidence of debt, or other written instrument, the amount of money due thereon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, shall be deemed to be the value of the property stolen."

§ 317. **Receiving, Etc., Stolen Goods.**—Section 5357 of the Old Code is broadened by new Section 288, so as to include the receiving of money which has been embezzled, and by authorizing the trial of the receiver of such money before the trial of the principal offender; the section reading as follows:

"Sec. 288. Whoever shall buy, receive, or conceal, any money, goods, bank notes, or other thing which may be the subject of larceny, which has been feloniously taken, stolen, or embezzled, from any other person, knowing the same to have been so taken,

stolen, or embezzled, shall be fined not more than one thousand dollars and imprisoned not more than three years; and such person may be tried before or after the conviction of the principal offender."

In Bise vs. United States, 144 Federal, 374, the Court held that in a prosecution under old section, it was not essential to allege in the indictment that the property was received without the consent of the owner, or with intent to deprive him of its use and benefit; the criminal intent and evil purpose of the receiver being sufficiently alleged where his act is characterized as unlawful and felonious.

§ 318. **Laws of State Adopted for Punishing Wrongful Acts, Etc.**—Re-written, broadened, and amplified, old Section 5391 becomes new Section 289, in the following words:

"Sec. 289. Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing, or hereafter reserved or acquired, described in section two hundred and seventy-two of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial, or District law shall, for the purpose of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District."

This is one of the most useful Federal sections. Under it, petty misdemeanors and other offenses not enumerated in the Federal Code, U. S. vs. Barnaby, 51 Federal, page 20, the punishment of which, however, is essential, are made in this comprehensive manner Federal offenses. In Franklin vs. United States, decided by the Supreme Court on March 14, 1910, that Court re-affirmed the case of United States vs. Paul, 6 Peters, 141, over the objection made to the constitutionality of the section under discussion, resting such objection upon the contention that the statute would authorize State governments to change penalties for Federal offenses, and said:

"In United States vs. Paul, 6 Peters, 141, coming here on certificate of division, it was held by this Court, speaking by Chief Justice Marshall, that the effect of this Section (5391) was lim-

ited to the laws of the several States in force at the time of its enactment, and it followed by this Act, Congress adopted for the government of the designated places under the exclusive jurisdiction and control of the United States, the criminal laws then existing in the several States, within which such places were not displaced by specific laws enacted by Congress. Section 2 of the Act of July seventh, 1898, was to the same effect, and, moreover, by express language, Congress adopted such punishment as 'the laws of the State in which such place is situated *now* provide for the like offense.' There is plainly no delegation to the State of authority in any way to change the criminal laws applicable to the places over which the United States has jurisdiction.''

In *in re* Kelly, 71 Federal, 545, the Court held that a cession to the general Government to certain lands for a soldiers' home, in the Act giving the consent of the State to purchase of such land, does not confer exclusive jurisdiction, and that upon such lands so ceded for the purpose of a home for disabled soldiers, the criminal laws of the United States, which apply only to places within their exclusive jurisdiction, are not operative. See also United States vs. Barnaby, 51 Federal, 20.

CHAPTER XIV.

PIRACY AND OTHER OFFENSES UPON THE HIGH SEAS.

§ 319. Piracy is an offense against the international law, and as such, the authorities define it to be any forcible depredation on the high seas, perpetrated in general hostility to mankind, for the gain or other private ends of the doers. First Kent's Commentary, page 183, defines it as follows:

"Piracy is robbery or a forcible depredation on the high seas, without lawful authority, and done *animo furandi* and in the

spirit and intention of universal hostility. It is the same offense at sea with robbery on land; and all the writers on the law of nations and on the maritime law of Europe agree in this definition of piracy.''

Lord Coke said that a pirate is a rover and a robber upon the sea.

The statutes of the United States make piracy a Federal offense. The original punishment was by death. The Act of January fifteenth, 1897, 29 Statute at Large, 487, substituted life imprisonment.

§ 320. **Piracy.**—Section 290 of the New Code takes the place of Section 5368 of the Old Code, which had been amended as before mentioned, and Section 290 reads as follows:

''Sec. 290. Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.''

Some cases of the Common Law doctrine, applied either in the construction of the statutes or otherwise, are the ''Marinna Flora,'' 11 Wheat., 1; U. S. vs. Gilbert, 2 Sumn., 19; U. S. vs. Tully, 1 Gallis, 247; the ''Antelope,'' 10 Wheat., 66; U. S. vs. Jones, 3 Wash., C. C., 209; United States vs. Pirates, 5 Wheat., 184; U. S. vs. Palmer, 3 Wheat., 610; U. S. vs. Smith, 5 Wheat., 153; U. S. vs. Klintock, 5 Wheat., 144.

In the case of Ambrose Light, 25 Federal, 408, Judge Brown said:

''Accordingly, the definitions of piracy, aside from statutory piracy, fall naturally into two classes, according as the offense is viewed more especially as it affects the rights of nations, or is amenable to criminal punishment under the municipal law. The Common Law jurists and our standard authorities on Criminal Law, define piracy as robbery on the high seas; or such acts of violence or felonious taking on the high seas as upon land would constitute the crime of robbery.....The majority of authorities on international law, however, define it substantially as Wheaton defines it, namely: as, 'the offense of depredating on the high seas without being authorized by any sovereign State, or with commissions from different sovereigns at war with each other.' ''

The reading of our statute sends us for a definition of the of-

fense to this last authority, and it may be accepted as the correct definition.

§ 321. **Maltreatment of Crew by Officers of Vessel.**—Old Section 5347, by eliminating the word "American" before the word "vessel," and adding the words "of the United States" after the word "vessel," becomes new Section 291, as follows:

"Sec. 291. Whoever, being the master or officer of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, beats, wounds, or without justifiable cause, imprisons any of the crew of such vessel, or withholds from them suitable food and nourishment, or inflicts upon them any cruel and unusual punishment, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. Nothing herein contained shall be construed to repeal or modify section forty-six hundred and eleven of the Revised Statutes."

Originally, this Act included the words "malice, hatred, or revenge"; and while these words were in the statute, many decisions were rendered upon a state of facts showing, or failing to show, such condition of mind, but which decisions would not be at all helpful under the statute in its present shape.

Under the authority of the United States vs. Trice, 30 Federal, 490, anyone who, by authority, exercises the function of control over the actions of the crew, or any part of it, by giving direction to their work, is an officer within the meaning of the Revised Statutes of the United States, and is liable to the penalty, if he beat or wound one of the crew. Thus, upon a state of facts which showed that one of the roust-abouts belonging to the crew of a boat was set over the rest as captain of the watch, with power to direct their work and demand obedience to his orders, and while so acting, beat and wounded one of the crew so under his command, he was an officer within the meaning of the statute, and amenable to its penalty.

Since the abolition of corporal punishment by the old Section 4611 in the 1878 Statutes, a punishment by flogging is without "justifiable cause." United States vs. Cutler, 1 Curt., 501, 25 Federal Case No. 14910. In line with the Trice case, cited *supra,* is United States vs. Taylor, 2 Sumn., 584, 28 Federal Case No. 16442. It is needless to say in this connection that this statute

protects the crew of a United States vessel, it does not matter upon what waters she be sailing, and where the offense denounced by the statute is committed on board such a vessel, it is an offense against the United States, though the vessel be in a harbor or river or a foreign country. United States vs. Bennett, 3 Hughes, 466, 24 Federal Cases, 14574; Roberts vs. Skoelfield, 20 Federal Cases No. 11,917. Under the authority of United States vs. Reed, 86 Federal, 308, the captian of a vessel is bound to exercise the same care to discover that his vessel is properly provisioned when he undertakes a new voyage, after having had difficulty or trouble at sea, that he is bound to observe in the original provisioning of his vessel at the outset of the voyage. Sections 4568 and 4612 of the old statutes provide what constitutes short allowance of food, etc., as meant by the statute under discussion. This section comprises four different offenses: beating or wounding; imprisoning; deprivation of suitable food and nourishment; the infliction of any cruel and unusual punishment.

§ 322. **Extradition for This Offense.**—It was decided by the Supreme Court, in United States vs. Ranschur, that one who had committed an offense against this statute, and who was apprehended in a foreign country and extradited upon the charge of murder, could not be tried in this country under an indictment found under this section, even though the identical acts relied upon to prove the charge of the indictment were the same acts as those charged to have been relied upon for the charge of murder. The Treaty, the Acts of Congress, and the proceedings by which he was extradited, clothe him with the right to exemption from trial for any other offense until he has had opportunity to return to the country from which he was taken, for the purpose of trial for the offense specified in the demand for his surrender. The the country which surrendered him.

§ 323. **Inciting Revolt or Mutiny on Ship Board.**—Section 5359 of the old statutes becomes Section 292 of the New Code, without substantial change, except that the words "of the United States" have been added after the word "vessel"; the section now reading as follows:

"Sec. 292. Whoever, being of the crew of a vessel of the

United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, endeavors to make a revolt or mutiny on board such vessel, or combines, conspires, or confederates with any other person on board to make such revolt or mutiny, or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust, or assembles with others in a tumultuous and mutinous manner, or makes a riot on board thereof, or unlawfully confines the master or other commanding officer thereof, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

The jurisdictional question suggested in the statute is that only the acts therein mentioned become acts punishable in United States Courts when the vessel is a United States vessel; and when that is the case, the acts are punishable in the United States, whether the vessel be on the high seas, in foreign port, or harbor, or upon waters within the admiralty and maritime jurisdiction of this government. The word "crew" in the statute must necessarily include the mate and all other inferior officers, as well as the crew proper. In fact, it includes the entire force of the vessel, with the exception of the master. This was the holding in the United States vs. Huff, 13 Federal, page 630. That case also makes the distinction between mere passive disobedience and active resistance. In other words, the statute would not include a case of simple passive disobedience of the master's orders on the part of one of the crew, not participated in by others. So, also, that case includes within the meaning of the statute an unlawful confinement of the master, even though such confinement was not physical, but merely a confinement by intimidation, or threats of bodily injury from the free use of every part of the vessel in the performance of his functions as master.

In the case of United States vs. Crawford, 25 Federal Cases No. 14890, it was held that the vessel must be proved to be an American vessel, but that such proof can be made by parole. So, also, it was ruled in United States vs. Seagrist, 27 Federal Case 16245, and 27 Federal Case No. 16037. A vessel engaged in the whaling business, which has not taken out an American license or enrollment, is not protected by this statute, and an in-

dictment will not hold under this section against her crew for revolt. United States vs. Rogers, 27 Federal Case No. 16189. See also United States vs. Jenkins, 26 Federal Case No. 15437-a. For other cases illustrating the statute, see United States vs. Sharp, 27 Federal Case 16264; United States vs. Doughty, 25 Federal Case 14987; United States vs. Kelley, 11 Wheat., 417; United States vs. Smith, 27 Federal Case No. 16344; United States vs. Forbes, 25 Federal Case No. 15129; U. S. vs. Lynch, 26 Federal Case No. 15648; United States vs. Thompson, 28 Federal Case No. 16492. As defense to an indictment under this section, the Courts have permitted the crew to show that the vessel was unseaworthy, and that, therefore, they resisted its sailing, United States vs. Ashton, 24 Federal Case No. 14470; also, where they have refused to perform their duty on account of a proposed deviation in the original line of voyage, United States vs. Matthews, 26 Federal Case No. 15742.

§ 324. **Revolt and Mutiny on Ship Board.**—By adding the words "of the United States" after the word "vessel," old Section 5360 becomes new Section 293 in the following words:

"Sec. 293. Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt and mutiny, and shall be fined not more than two thousand dollars and imprisoned not more than ten years."

Under the authority of United States vs. Haines, 26 Federal Case No. 15275, and United States vs. Forbes, 25 Federal Case No. 15129, as cited in Volume 6 Federal Statutes, page 929, a revolt is an open rebellion or mutiny of the crew against the authority of the Master in the command, navigation, or control of the ship. If the crew, in a mutiny, were to displace him from the actual command of the ship, and appoint another in his stead, that would clearly be a revolt. It would be an actual usurpation of his authority on board of the ship and an ouster of him from

the possession and control of it. As determined in United States vs. Almeida, 24 Federal Case No. 14433, the unlawful acts which now fall within the definition of a maritime revolt are distributed by the language of the Section into four categories or classes: first, simple resistance to the exercise of the captain's authority; second, the deposition of the captain from his command; third, the transfer of the captain's power to a third person; and, fourth, the usurpation of the captain's power by the accused party. See also United States vs. Haines and United States vs. Forbes, cited *supra*. Other cases are United States vs. Borden, 24 Federal Case, 1202; United States vs. Givings, 25 Federal Case, 1331; United States vs. Haskell, 26 Federal Case, 207; United States vs. Peterson, 27 Federal Case, 515.

§ 325. **Seaman Laying Violent Hands on His Commander.**—By changing the penalty in old Section 5369 from death to imprisonment for life, that section becomes Section 294 of the New Code, as follows:

"Sec. 294. Whoever, being a seaman, lays violent hands upon his commander, thereby to hinder and prevent his fighting in defense of his vessel or the goods intrusted to him, is a pirate, and shall be imprisoned for life."

§ 326. **Abandonment of Mariners in Foreign Ports.**—Section 5363 of the old statutes, taking into consideration Section 310 of the New Code, which defines what the words "vessel of the United States" means, is practically the same as Section 295 of the New Code, in the following words:

"Sec. 295. Whoever, being master or commander of a vessel of the United States, while aboard, maliciously and without justifiable cause forces any officer or mariner of such vessel on shore, in order to leave behind him in any foreign port or place, or refuses to bring home again all such officers and mariners of such vessel whom he carried out with him, as are in a condition to return and willing to return, when he is ready to proceed on his homeward voyage, shall be fined not more tan five hundred dollars, or imprisoned not more than six months, or both."

See United States vs. Ruggles, 5 Mass., 192; United States vs. Coffin, 1 Sumn., 394; United States vs. Netcher, 1 Storey, 307; United States vs. Riddle, 4 Wash., 644; Nieto vs. Clark, 18 Federal Case, 236.

In Chinese Laborers Case, 13 Federal Reporter, 291, the Court held that the immigration laws of the United States, which prohibited the importation of Chinese laborers, did not apply to bringing a Chinese laborer already on board the vessel when touching at a foreign port or place. In other words, while on board an American vessel, a Chinese laborer is within the jurisdiction of the United States, and does not lose, by his employment, the right of residence here previously acquired under the treaty with China. His status as an American citizen is not changed by the fact of his employment on an American vessel, and that he is permitted by the captain to land for a few hours in a foreign port.

§ 327. **Conspiracy to Cast Away Vessel.**—Old Section 5364 becomes, without any material change, Section 296 of the New Code, in the following words:

"Sec. 296. Whoever, on the high seas, or within the United States, wilfully and corruptly conspires, combines, and confederates with any other person, such other person being either within or without the United States, to cast away or otherwise destroy any vessel, with intent to injure any person that may have underwritten or may thereafter underwrite any policy of insurance thereon or on goods on board thereof, or with intent to injure any person that has lent or advanced, or may lend or advance, any money on such vessel on bottomry or respondentia; or whoever, within the United States, builds, or fits out, or aids in building or fitting out, any vessel with intent that the same be cast away or destroyed, with the intent hereinbefore mentioned, shall be fined not more than ten thousand dollars and imprisoned not more than ten years."

The constitutionality of this section has been determined in United States vs. Cole, 5 McLean, 513; 25 Federal Cases No. 14832; and in that same case it was also determined that the section related to the internal, as well as the foreign commerce of the United States. In that same case, it was also held that an actual injury was not necessary; as, for instance, any combination or conspiracy to bring about the destruction of the vessel or any portion of its cargo, ripened the offense of the statute.

In United States vs. Hand, 6 McLean, 274; 26 Federal Cases No. 15296, the Court speaks of the specific intent necessary under the statute, which must be both alleged and proven.

§ 328. **Plundering Vessel, Etc., in Distress.**—By increasing the punishment from ten years to life imprisonment, old Section 5358 becomes new Section 297, in the following words:

"Sec. 297. Whoever plunders, steals, or destroys any money, goods, merchandise, or other effects, from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, shall be fined not more than five thousand dollars and imprisoned not more than ten years; and whoever wilfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; or whoever holds out or shows any false light, or extinguishes any true light, with intent to bring any vessel sailing upon the sea into danger, or distress, or shipwreck, shall be imprisoned not less than ten years and may be imprisoned for life."

Under United States vs. Coombs, 12 Peters, 72, it is entirely immaterial whether the goods be upon the vessel or not, or whether the goods be above high water mark. It is entirely sufficient if it be property belonging to any ship or vessel. This same case determined the constitutionality of this section, and held that it was within the power of Congress, under the commerce clause of the Constitution.

In United States vs. Stone, 8 Federal, 232, Judge Hammond overruled a motion for a new trial, which was requested by certain men who were convicted for plundering the wreck of the City of Vicksburg, out of which fifty-one indictments were found; and in that opinion, he held that Section 5358 was comprehensive, and afforded an extraordinary protection to property within the admiralty and maritime jurisdiction of the United States, by creating and punishing a substantive and distinct offense for all acts of spoliation upon the property belonging to a vessel wrecked or in distress; that it was not alone the crime of larceny that the statute punishes, but any act of depredation, whether it be of the character that would be piracy if committed on the high seas, robbery or other foreible taking, theft, trespass, malicious mischief, or any fraudulent and criminal breach of trust, if committed on land, of property solely under the protection of Common or statutory law of the State; and that no specific intent was necessary under the statute to constitute the

offense. In other words, any intent, except that of restoring the goods to the vessel or the owner, was the unlawful intent comprehended under the statute; and whether conceived at the time of the taking, or subsequently thereto, if carried out, made the offense complete.

United States vs. Sanche was the upholding of a conspiracy indictment under Section 5440, for a violation of 5358. Other cases bearing upon different features of this section are United States vs. Kessler, 26 Federal Cases, 766; United States vs. Pitman, 27 Federal Case, 540; United States vs. Smiley, 27 Federal Cases, 1132.

§ 329. **Attacking Vessel with Intent to Plunder.**—Because of Section 272 of the New Code, heretofore noted, Section 298 of the New Code, which is a re-enactment of Section 5361 of the old statutes, does not enumerate the waters upon which the offense may be committed, and Section 298 is in the following words:

"Sec. 298. Whoever, upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, by surprise or by open force, maliciously attacks or sets upon any vessel belonging to another, with an intent unlawfully to plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof, shall be fined not more than five thousand dollars and imprisoned not more than ten years."

United States vs. Stone, 8 Federal, 232, cited *supra.*

§ 330. **Breaking and Entering Vessel, Etc.**—By changing old Section 5362 so as to limit it to offenses that are committed out of the jurisdiction of any particular State, such section becomes Section 299 of the New Code, in the following words:

"Sec. 299. Whoever, upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, breaks or enters any vessel, with intent to commit any felony, or maliciously cuts, spoils, or destroys any cordage, cable, buoys, buoy rope, head fast, or other fast, fixed to the anchor or moorings belonging to any vessel, shall be fined not more than one thousand dollars and imprisoned not more than five years."

§ 331. **Owner Destroying Vessel at Sea.**—Old Section 5365 denounced the acts only when committed upon the high seas. New Section 300 so broadens the offense as to include all the waters

within the admiralty and maritime jurisdiction of the United States, and reads as follows:

"Sec. 300. Whoever, upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, wilfully and corruptly casts away or otherwise destroys any vessel, of which he is owner, in whole or in part, with intent to prejudice any person that may underwrite any policy of insurance thereon, or any merchant that may have goods thereon, or any other owner of such vessel, shall be imprisoned for life or for any term of years."

§ 332. **Other Persons Destroying or Attempting to Destroy Vessel at Sea.**—Section 301 of the New Code takes the place of old Sections 5366 and 5367, by incorporating both the act and the attempt to perform the act of destruction, and is in the following words:

"Sec. 301. Whoever, not being an owner, upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, wilfully and corruptly casts away or otherwise destroys any vessel of the United States to which he belongs, or, wilfully, with intent to destroy the same, sets fire to any such vessel, or otherwise attempts the destruction thereof, shall be imprisoned not more than ten years."

The Act, it will be noted, covers the offense not only upon the high seas, as did the original statutes, but upon any other waters within the admiralty and maritime jurisdiction of the United States. In United States vs. Vanranst, 28 Federal Case, No. 16608, the Court held that the offense was complete under this section if the mate destroyed the vessel, even though he had no interest therein, and even though the plan for its destruction was laid before the sailing by the owner himself. See also United States vs. Jacobson, 26 Federal Cases No. 16461. See also United States vs. Wilson, 28 Federal Case, 718; U. S. vs. McAvoy, 26 Federal Case, 1044.

§ 333. **Robbery on Shore by Crew of Piratical Vessel.**—Section 5371 becomes Section 302 of the New Code as follows:

"Sec. 302. Whoever, being engaged in any piratical cruise, or enterprise, or being of the crew of any piratical vessel, lands from such vessel, and on shore commits robbery, is a pirate, and shall be imprisoned for life."

In the construction of the general terms "piratical cruise," of

this section, the pleader will look to the definition of piracy, as heretofore given.

§ 334. **Arming Vessel to Cruise Against the Citizens of the United States.**—Section 303 of the New Code takes the place of old Section 5284, and is as follows:

"Sec. 303. Whoever, being a citizen of the United States, without the limits thereof, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly aids or is concerned in furnishing, fitting out, or arming, any private vessel of war, or privateer, with intent that such vessel shall be employed to cruise or commit hostilities upon the citizens of the United States, or their property, or whoever takes the command of or enters on board of any such vessel, for such intent, or who purchases any interest in any such vessel with a view to share in the profits thereof, shall be fined not more than ten thousand dollars and imprisoned not more than ten years. The trial for such offense, if committed without the limits of the United States, shall be in the district in which the offender shall be apprehended or first brought."

See United States vs. Howard, 3 Wash., 340; 26 Federal Case, 390.

§ 335. **Piracy Under Color of a Foreign Commission.**—Section 5373 of the old Statutes becomes Section 304 of the New Code, as follows:

"Sec. 304. Whoever, being a citizen of the United States, commits any murder or robbery, or any act of hostility against the United States, or against any citizen thereof, on the high seas, under color of any commission from any foreign prince, or state, or on pretense of authority from any person, is, notwithstanding the pretense of such authority, a pirate, and shall be imprisoned for life."

See United States vs. Palmer, 3 Wheat., 610; United States vs. Baker, 5 Blatchf., 6; 24 Federal Cases, 962; United States vs. Hutchings, 26 Federal Case, 440; United States vs. Terrel, 1 Federal Case, 999.

§ 336. **Piracy by Subjects or Citizens of a Foreign State.**—Section 305 of the New Code displaces Section 5374 of the old statutes, and is as follows:

"Sec. 305. Whoever, being a citizen or subject of any foreign state, is found and taken on the sea making war upon the United States, or cruising against the vessels and property there-

of, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which the offender is a citizen or subject, when by such treaty such acts are declared to be piracy, is guilty of piracy, and shall be imprisoned for life."

§ 337. **Running Away with or Yielding up Vessel of Cargo.**—Old Section 5383 becomes new Section 306 in the following words:

"Sec. 306. Whoever, being a captain or other officer or mariner of a vessel upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, piratically or feloniously runs away with such vessel, or with any goods or merchandise thereof, to the value of fifty dollars, or who yields up such vesel voluntarily to any pirate, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both."

In United States vs. Tully, 28 Federal Case, 16545, the intent must be alleged and proven, as in other criminal cases requiring such proof and allegation; but the piratical and felonious running away with a vessel does not mean that personal force and violence must have been used. See also United States vs. Howard, 26 Federal Case, 15404; United States vs. Kessler, 26 Federal Case, 15528.

§ 338. **Confederating, Etc., with Pirates.**—New Section 307 takes the place of old Section 5384, and is in the following words:

"Sec. 307. Whoever attempts or endeavors to corrupt any commander, master, officer, or mariner to yield up or to run away with any vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to or confederate with pirates, or in any wise to trade with any pirate, knowing him to be such, or furnishes such pirate with any ammunition, stores, or provisions of any kind, or fits out any vessel knowingly and, with a design to trade with, supply, or correspond with any pirate or robber upon the seas; or whoever consults, combines, confederates, or corresponds with any pirate or robber upon the seas, knowing him to be guilty of any piracy or robbery; or whoever, being a seaman, confines the master of any vessel, shall be fined not more than one thousand dollars and imprisoned not more than three years."

See U. S. vs. Howard, 26 Federal Cases, 390.

§ 339. **Sale of Arms and Intoxicants Forbidden in Pacific Islands.**—The Act of February 14, 1902, 32 Statute at Large, 33, becomes Section 308 of the New Code, in the following words:

"Sec. 308. Whoever, being subject to the authority of the United States, shall give, sell, or otherwise supply any arms, ammunition, explosive substance, intoxicating liquor, or opium to any aboriginal native of any of the Pacific Islands lying within the twentieth parallel of north latitude and the fortieth parallel of south latitude, and the one hundred and twentieth meridian of longitude west and the one hundred and twentieth meridian of longitude east of Greenwich, not being in the possession or under the protection of any civilized power, shall be fined not more than fifty dollars or imprisoned not more than three months, or both. In addition to such punishment, all articles of a similar nature to those in respect to which an offense has been committed, found in the possession of the offender, may be declared forfeited. If it shall appear to the court that such opium, wine, or spirits have been given bona-fide for medical purposes, it shall be lawful for the court to dismiss the charge."

§ 340. **Offenses Under Preceding Section Deemed on High Seas.**—Another part of the Act of February 14, 1902, becomes Section 309 of the New Code, as follows:

"Sec. 309. All offenses against the provisions of the section last preceding, committed on any of said islands, or on the waters, rocks, or keys adjacent thereto, shall be deemed committed on the high seas on board a merchant ship or vessel belonging to the United States, and the courts of the United States shall have jurisdiction accordingly."

§ 341. **Vessels of the United States Defined.**—Section 310 of the New Code reads as follows:

"Sec. 310. The words "vessel of the United States," wherever they occur in this chapter, shall be construed to mean a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof."

CHAPTER XV.

CERTAIN OFFENSES IN THE TERRITORIES.

§ 342. The New Code provides certain specific offenses for the Territories of the United States, which do not, as we understand it, interfere with any Territorial statute that may be existing.—Any conflict between the statutory offenses herein defined and those defined and established by any Territorial statute, would in no way render the Territorial statute illegal or void or unconstitutional. It would remain in force and be the law of the Territory. *In re* Nelson, 69 Federal, 712.

The offenses herein treated of are not confined to the Territories, but are punishable if committed within or upon any place within the exclusive jurisdiction of the United States, such as forts or arsenals, Government reservations, public building sites, Etc., as is shown by Section 311, which reads as follows:

"Sec. 311. Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States."

§ 343. **Circulation of Obscene Literature; Promoting Abortion; How Punished.**—Section 312 of the New Code includes practically all of the elements of the statute the abuse of the United States mails in the transmission of obscene, etc., matter, and in the Interstate Commerce Statute, which relates to the shipping or carrying of obscene matter, etc. Section 312 of the New Code is in the following language, which displaces all provisions of old Section 5389:

"Sec. 312. Whoever shall sell, lend, give away, or in any manner exhibit, or offer to sell, lend, give away, or in any manner exhibit, or shall otherwise publish or offer to publish in any manner, or shall have in his possession for any such purpose, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion, or shall advertise the same for sale, or shall write or print, or cause to be written or printed, any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or by what means, any of the articles above mentioned can be purchased or obtained, or shall manufacture, draw, or print, or in any wise make any of such articles, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both."

§ 344. **Polygamy.**—Section 313 of the New Code displaces old Statute 5352, and the Act of March twenty-second, 1882, shown in First Supplement, 331, and is in the following language:

"Sec. 313. Every person who has a husband or wife living, who marries another, whether married or single, and any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be fined not more than five hundred dollars and imprisoned not more than five years. But this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract."

§ 345. **Unlawful Cohabitation.**—Section 314 of the New Code reads as follows:

"Sec. 314. If any male person cohabits with more than one woman, he shall be fined not more than three hundred dollars, or imprisoned not more than six months, or both."

§ 346. **Joinder of Counts.**—Section 315, which permits joinder in the same indictment of charges under the two above mentioned sections, is as follows:

"Sec. 315. Counts for any or all of the offenses named in the two sections last preceding may be joined in the same information or indictment."

§ 347. **Decisions.**—The offense of polygamy, as distinguished from open and notorious co-habitation, was not an offense under the Comon Law, and, therefore, is statutory in this country. The Supreme Court of the United States, in the Miles Case, 103 U. S., 311, announced the doctrine that the proof of marriage will not be limited to only such witnesses as were eye witnesses. Cohabitation and reputation of being husband and wife are usually considered together in questions concerning the proof of marriage. This was followed in United States vs. Higgerson, Volume 46, Federal Reporter, 750. It is always pertinent, under the offense of bigamy and adultery and kindred offenses, to prove the marriage relation. In the leading case of Cannon vs. United States, 116 U. S., page 55; 29 Law Ed., 561, the Supreme Court held that a man "co-habits" with more than one woman when holding out to the world two or more women as his wives, by his language or conduct, or both, and when he lives in the same house with them, and eats at the table of each a portion of the time, although he may not occupy the same bed, sleep in the same room, or actually have sexual intercourse with either of them.

In *ex parte* Snow, 120 U. S., 274, 30 Law Ed., 658, the Supreme Court held that co-habiting was a continuous offense, and can be committed but once for the purpose of indictment or prosecution, prior to the time the prosecution is instituted; and a grand jury cannot divide the offense into separate offenses, and find separate indictments; as, where a man unlawfully co-

habited with seven women for twenty-five months, there could be but one indictment.

§ 348. **Adultery.**—Section 316 of the New Code takes the place of the Act of March third, 1887, shown at First Supplement, 568, and is in the following words:

"Sec. 316. Whoever shall commit adultery shall be imprisoned not more than three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery."

§ 349. **Incest.**—Section 317 of the New Code displaces the Act of March third, 1887, shown at First Supplement, 568, and is in the following words:

"Sec. 317. Whoever, being related to another person within and not including the fourth degree of consanguinity computed according to the rules of the civil law, shall marry or cohabit with, or have sexual intercourse with such other so related person, knowing her or him to be within said degree of relationship, shall be deemed guilty of incest, and shall be imprisoned not more than fifteen years."

Incest was not an offense at Common Law, though it was punished in the churches. The language of the statute demands knowing intercourse between parties related within the fourth degree of consanguinity, such relationship to be computed according to the rules of the Civil Law. It will be borne in mind that the method of computing relationship differs in the *Canon Law,* as adopted into the Common Law, and the Civil Law. In other words, under the Canon Law, or the Common Law, the computing begins at the common ancestor, and reckons downward, and in whatever degree the two persons, or the most remote, is distant from the common ancestor, that is the degree in which they are related. The method in the Civil Law is to count upward from either of the persons related, to the common ancestor, and then downward to the other, reckoning a degree for each person, both ascending and descending. In other words, the Canonists took the number of degrees in the longest line; the Civilians, the sum of the degrees in both lines. Anderson's Dictionary of Law, 229; 2 Blackstone's Commentary, 206-207; 4

Kent, 412; 2 Litt. Coke, 158. Under this statute, it is also necessary that the indictment allege, and the proof show, the fact of knowledge of such degree of relationship.

§ 350. **Fornication.**—Section 318 of the New Code, which is also a part of the Act of March third, 1887, First Supplement, 568, reads as follows:

"Sec. 318. If any unmarried man or woman commits fornication, each shall be fined not more than one hundred dollars, or imprisoned not more than six months."

§ 351. **Certificates of Marriage; Penalty for Failure to Record.**—From the Act of March 3, 1887, First Supplement, 568, comes Section 319 of the New Code, as follows:

"Sec. 319. Every ceremony of marriage, or in the nature of a marriage ceremony of any kind, whether either or both or more of the parties to such ceremony be lawfully competent to be the subject of such marriage or ceremony or not, shall be certified by a certificate stating the fact and nature of such ceremony, the full name of each of the parties concerned, and the full name of every officer, priest, and person, by whatever style or designation called or known, in any way taking part in the performance of such ceremony, which certificate shall be drawn up and signed by the parties to such ceremony and by every officer, priest, and person taking part in the performance of such ceremony, and shall be by the officer, priest, or other person solemnizing such marriage or ceremony filed in the office of the probate court, or, if there be none, in the office of the court having probate powers in the county or district in which such ceremony shall take place, for record, and shall be immediately recorded, and be at all times subject to inspection as other public records. Such certificate, or the record thereof, or a duly certified copy of such record, shall be prima facie evidence of the facts required by this section to be stated therein in any proceeding, civil or criminal, in which the matter shall be drawn in question. But nothing in this section shall be held to prevent the proof of marriages, whether lawful or unlawful, by any evidence otherwise legally admissible for that purpose. Whoever shall wilfully violate any provision of this section shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both. The provisions of this section shall apply only within the Territories of the United States."

It will be noted that this section applies only in the Territories, and, therefore, it would seem that the general provisions of Sec-

tion 311 of this chapter are excepted by this special provision in Section 319.

§ 352. **Prize Fights, Bull Fights, Etc.**—From the Act of February seventh, 1896, Second Supplement, 446, is taken in substance Section 320 of the New Code, in the following language:

"Sec. 320. Whoever shall voluntarily engage in a pugilistic encounter between man and man or a fight between a man and a bull or any other animal, for money or for other thing of value, or for any championship, or upon the result of which any money or anything of value is bet or wagered, or to see which any admission fee is directly or indirectly charged, shall be imprisoned not more than five years. The provisions of this section shall apply only within the Territories of the United States and the District of Columbia."

§ 353. **Pugilistic Encounter Defined.**—From the same last above mentioned Act also comes the definition of "pugilistic encounters," as shown in Section 321 of the New Code, as follows:

"Sec. 321. By the term "pugilistic encounter," as used in the section last preceding, is meant any voluntary fight by blows by means of fists or otherwise, whether with or without gloves, between two or more men, for money or for a prize of any character, or for any other thing of value, or for any championship, or upon the result of which any money or anything of value is bet or wagered, or to see which any admission fee is directly or indirectly charged."

§ 354. **Train Robberies in Territories, Etc.**—Section 322 of the New Code contains all of the elements of the Act of July first, 1902, and is in the following words:

"Sec. 322. Whoever shall wilfully and maliciously trespass upon or enter upon any railroad train, railroad car, or railroad locomotive, with the intent to commit murder, or robbery, shall be fined not more than five thousand dollars, or imprisoned not more than twenty years, or both. Whoever shall wilfully and maliciously trespass upon or enter upon any railroad train, railroad car, or railroad locomotive, with intent to commit any unlawful violence upon or against any passenger on said train, or car, or upon or against any engineer, conductor, fireman, brakeman, or any officer or employee connected with said locomotive, train, or car, or upon or against any express messenger, or mail agent on said train or any car thereof, or to commit any crime or offense against any person or property thereon, shall be fined not more than one thousand dollars, or imprisoned not more

than one year, or both. Whoever shall counsel, aid, abet, or assist in the perpetration of any of the offenses set forth in this section shall be deemed to be a principal therein. Upon the trial of any person charged with any offense set forth in this section, it shall not be necessary to set forth or prove the particular person against whom it was intended to commit such offense, or that it was intended to commit such offense against any particular person."

The wilful and malicious intent cannot be inferred from any uncertain statement in the indictment. It must be specificallly alleged.

CHAPTER XVI.

INTERNAL REVENUE.

§ 355. The question was early determined by the Supreme Court, in the license tax cases, 5 Wallace, 462, that the power of the United States Government to require licenses to be paid before a given business could be carried on within a State was not contrary to the Constitution, nor against public policy. The apparent inconsistency of such a position with the principle that the State shall have exclusive control over internal commerce, or its own domestic trade, is only apparent, and gives way to the more paramount principle that each Government, State and National, has such inherent powers as belong to sovereign govern-

ments. The compliance with a Federal Internal Revenue tax statute guarantees no rights against the State tax statutes. If there be a tax both by the Federal Government and by the State Government upon the same occupation, each tax must be paid, and the paying of one does not authorize the carrying on of the business with immunity from prosecutions by the other power. So, likewise, the punishment of one who fails to comply with the provisions of both Governments does not preclude his punishment by the other Government upon the doctrine that he would be twice punished for the same offense. One convicted under the State law for selling whiskey without license, and punished, could also be convicted and punished under the Federal law for the same offense. In Cross vs. North Carolina, 132 U. S., 131, 33 Law Ed., 287, the Supreme Court affirmed doctrine that one who forged note and passed it into books of National Bank to deceive examiner was liable to prosecution in both State and Federal Court.

§ 356. **Internal Revenue Offenses.**—This chapter will not attempt to deal with all of the Federal Internal Revenue offenses, but only such statutes as are mose frequently violated, and some of which are difficult to find.

Trade or Business Not to be Carried On Until Tax Paid.—Section 3232 of the Revised Statutes reads as follows:

"Sec. 3232. No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided."

The case of United States vs. Clair, 2 Federal, page 55, which construes Section 3232, has never been questioned as the proper construction; that is, that the provisions of the statute leave no room for doubt that the tax must be paid in advance. The business is prohibited, except when thus licensed; and until the tax is paid, it cannot be lawfully pursued. The case of United States vs. Pressy, 1 Lowell, 319, which arose during the Reconstruction Period, and which contained some *dicta* with reference to carrying on the business after an application for assessment, will not be confused into an authority contradicting the Clair case. The wording of the statute, and the entire spirit thereof, as well as the policy of the Government that it shall

take no chances, supports the construction noted in the Clair case. The license must be first secured.

This construction is further sppported by the case of the United States vs. Angell, 11 Federal, page 34, wherein the Court held that a receipt for a license tax is not retroactive, and cannot be admitted in evidence on the charge for selling spiritous liquors by retail during a period of time prior to its date. To hold otherwise, would be to permit the violator to pay his tax after he had become a dealer, and thus, in effect, secure a pardon. Judge Clark says, in the Angell case:

"Again, the penalty had been incurred before the payment of the tax, and the receipt given would not operate as a pardon. The law makes no provision for such an effect; nor could the collector of taxes confer it. The collector could not pardon the offense; the President alone could do that."

See also United States vs. Van Horn, 20 Internal R. E.. C., 145; U. S. vs. Devilin, 6 Blatchf., 71; and Section 53 of the Act of October first, 1890, page 869, First Volume, Supplement, which contains the statement that the tax is due "on commencing any trade or business."

§ 357. **Partnerships.**—By Section 3234, it is provided that any number of persons doing business in co-partnerships at one place shall be required to pay but one special tax; and so under the authorities of United States vs. Blab, 99 U. S., 228; and United States vs. Davis, 37 Federal, 468, the dissolution of such partnership, whereby one of two partners who has paid drops out, and the remaining member of the firm conducts the business, a new license is not necessary. If, however, a new partner buys into the business, a new tax must be paid.

§ 358. **Must Exhibit Stamp.**—Section 3239 of the Revised Statutes reads as follows:

"Ses. 3239. Every person engaged in any business, avocation, or employment, who is thereby made liable to a special tax, except tobacco peddlers, shall place and keep conspicuously in his establishment and place of business all stamps denoting the payment of said special tax; and any person who shall, through negligence, fail to so place and keep said [*stamp*] [stamps], shall be liable to a penalty equal to the special tax for which his business rendered him liable, and the costs of prosecution; but in no case

shall said penalty be less than ten dollars. And where the failure to comply with the foregoing provision of law shall be through wilful neglect or refusal, then the penalty shall be double the amount above prescribed: *Provided*, That nothing in this section shall in any way affect the liability of any person for exercising or carrying on any trade, business, or profession, or doing any act for the exercising, carrying on, or doing of which a special tax is imposed by law, without the payment thereof."

§ 359 **Rectifiers, Liquor Dealers, Etc., Carrying on Business Without Paying Special Tax, Etc.** Old Section 3242 of the Revised Statutes becomes by the Act of March third, 1883, page 60, First Volume, Supplement, Section 16, which provides punishments for those who carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale liquor dealer in malt liquors, retail dealer in malt liquors, or, manufacturer of stills, in the following language:

"Sec. 16. That any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than one hundred dollars nor more than five thousand dollars and imprisoned not less than thirty days nor more than two years."

The use of the word "business" in the statute, of course, requires its use in the indictment and proof in the testimony. It is not the making of a sale that the statute denounces, because one may carry on the business without ever making a sale. So, also one may make a sale without carrying on the business. The safe criterion is the Ledbetter decision, 170 U. S., 606; 42 Law Ed., 1162, which approves the opinion of United States vs. Jackson, 1 Hughes, 541, and United States vs. Remmecke, 38 Federal, 847, to the effect that,

"While it has been sometimes held that proof of sale to one person was at least prima facie evidence of criminality, the real offense consists in carrying on such business, and if only a single sale were proved, it might be a good defense to show that such

sale was exceptional, accidental, or made under such circumstances as to indicate that it was not the business of the offender."

An indictment under this section should allege the carrying on of the business, the day on which it was carried on, the town, county, and district in which it was carried on. A form of indictment will be found herein.

§ 360. **C. O. D. Decisions.**—The case in the 23 Federal, page 134, and the case in the 26 Federal, 515, each of which holds that in shipments of liquor, C. O. D., the shipper is a dealer at the place of destination, are not the law. By the ranking and best line of authorities, the sale takes place at the point where the specific quantity is segregated from the mass; and as this takes place at the point from which the liquor is shipped, the authorities are that the sale takes place there, and that is, therefore, the place where the license should be paid.

In United States vs. Chevallier, 107 Federal, 434, the Circuit Court of Appeals for the Ninth Circuit, in a case where the defendant was a wholesale liquor dealer in San Francisco, who maintained a branch house in Portland, bearing his sign, and where, presumably, samples of his trade were kept, and where the public were invited to purchase, the manager of which place was a salesman, required to sell judiciously, the right to cancel his contracts being reserved to his principal, who filled all orders, and without prepaying the freight, delivered the goods to a carrier at San Francisco, consigned to purchasers in various parts of the agent's territory: held, that the sales were made wholly at San Francisco, notwithstanding the agent may have been authorized to make binding contracts and collect the purchase money, and that the defendant was not subject to the internal revenue tax as an Oregon dealer, even though his method of transacting business may have been devised purposely to evade such tax.

In United States vs. Adams Express Company, 119 Federal, 240, an express company was charged with being a retail liquor dealer on a state of facts which showed that it, as a common carrier, received liquors from liquor companies, and carried them to the consignee, receiving the money, which it transported to the

liquor company. The Court held that the title to the liquors passed to the consignee on delivery to the express company, and that the company acted as the vendee in carrying the liquor and as agent of the vendor in collecting the money, and was not, therefore, a dealer. In this case, Judge McPherson reviews the authorities known as the C. O. D. decisions, and holds as first indicated. U. S. Sup. Court, May 13, 1907, in Adams Express Company vs. Ky., holds State law making C. O. D. sale at delivery point, unconstitutional.

In Burk vs. Platt, 172 Federal, 777, the Court held express companies can make reasonable regulations refusing C. O. D. shipments. See also Jones vs. United States, 170 Federal, page 1; U. S. vs. Lackey, 120 Federal, 57; American Express Company vs. Iowa, 196 U. S., 133; O'Neil vs. Vermont, 144 U. S.; and U. S. vs. Parker, 121 U. S., 596.

§ 361. **Fact Cases.**—In United States vs. Allen, 38 Federal, 736, the facts showed that the defendant was engaged in procuring and furnishing to anyone who would patronize him, liquors in quantities less than five gallons. He testified that he received orders, requiring the person ordering to pay ten cents down for a bottle of beer, and when the beer was delivered, an extra fifteen cents as remuneration for going to a neighboring State to procure it; but the evidence failed to show that the defendant bought specific quantities of liquor to correspond with special orders, but showed that he bought beer by the case, and paid for it, and sold it to anyone desiring it. Held, that the defendant was a dealer under this section. (Syllabus.)

In United States vs. Woods, 28 Federal Cases No. 16759, it was held that a club formed for the purpose of social amusement, owning spiritous liquors, keeping them for use by the members of the club, who were entitled to such use upon payment to the janitor, which money went into the treasury of the Club, the janitor was held to be a retail dealer. So, also, in United States vs. Alexis Club, 98 Federal, 725, it was held that a club organized for social purposes was liable to the payment of special tax as retail dealer, when it sold drinks to its members. See also United States vs. Rolinger, 27 Federal Case No. 16190-A. Neither can a physician

supply spiritous liquors to his patients. United States vs. Smith, 45 Federal, 115. To the contrary would be the case of United States vs. Calhoun, 39 Federal Reporter, 604, which decided that an apothecary who uses spiritous liquors in a bona fide way, exclusively in the preparation of making up medicines, would not be subject to the tax. A druggist, however, under the authority of United States vs. White, 42 Federal, 138, is to be weighed by the scales of good faith, to ascertain whether he is using intoxicants solely for the compounding of medicines. A clerk or hired servant, not acting for himself, but as an employee of another, will not be convicted. United States vs. White, 42 Federal, 138; United States vs. Logan, 26 Federal Cases No. 15624. In Quinn vs. Diamond, 72 Federal, 993, commission merchants who made a commission upon sales of liquors were held to be dealers. In United States vs. Morfew, 136 Federal, 491, the Court held that a druggist who sold a medicinal preparation which contained more alcohol than was necessary to preserve the medicinal properties of the drugs therein contained, became liable to the payment of the tax as a retail liquor dealer.

In United States vs. Lewis, decided June 21, 1904, the Court determined that it was not necessary to make one a liquor dealer, that the beverage should be intoxicating. Hop ale is also included in the term of the statute specifying malt-liquor dealers. For decisions with reference to proprietary medicines, such as Digg's Appetizer, Lemon Ginger, and tonics, see United States vs. Bray, 113 Federal, 1009; United States vs. Starnes, 37 Federal, 665; United States vs. Stubblefield, 40 Federal, 454; United States vs. Cota, 17 Federal, 734. In South Carolina vs. United States, decided by the Supreme Court on December 5, 1905, it was held that even a State must pay this Federal tax.

§ 362. **Proof of License.**—Under the authority of Morris vs. United States, 161 Federal, 672, the prosecution makes out its case by proving that the defendant carried on the business at a certain time and place; the payment of tax being a matter of defense, which, if relied upon, must be proved by the defendant.

§ 363. **Distiller Defrauding or Attempting to Defraud the United**

States of Tax on Spirits.—Section 3257 of the Revised Statutes is in the following words:

"Sec. 3257. Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years."

The Court held, in United States vs. Ridnour, 119 Federal, 401, that the Act establishing bonded warehouses, dated March third, 1877, 19 Statute at Large, 393, did not repeal this section. This same case also held that apple brandy was included in the general terms "distilled spirits."

The intent to defraud must exist before there can be an offense under this section. United States vs. 100 Barrels of Spirits, 2 Abbott, 305. See other cases, Dobbin's Distillery vs. United States, 96 U. S., 395; United States vs. Three Copper Stills, 47 Federal, 495. On the authority of Coffee vs. United States, 116 U. S., 445, 29 Law Ed., 684, a judgment of acquittal in a criminal prosecution for violation of this section is conclusive in favor of the defendant as a claimant of the property involved in a subsequent suit *in rem* under the latter part of the statute. See also 109 Barrels of Whiskey vs. United States, 94 U. S., 86; United States vs. Cushman, 1 Low., 414.

§ 364. **Breaking Locks; Gaining Access to Cistern, Etc., Penalty.**—Section 3268 of the Revised Statutes reads as follows:

"Sec. 3268. Every person who destroys, breaks, injures, or tampers with any lock or seal which may be placed on any cistern-room or building by the duly authorized officers of the revenue, or opens said lock or seal, or the door to said cistern-room or building, or in any manner gains access to the contents therein, in the absence of the proper officer, shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than one year nor more than three years."

In Pilcher vs. United States, 113 Federal, 248, the Circuit Court of Appeals for the Fifth Circuit held that an acquittal of

a defendant for a violation of Section 3296 of the Revised Statutes did not preclude prosecution under this statute.

§ 365. **Signs to be Put Up by Distillers and Dealers, and Other Regulations.**—Section 3279 of the old Statutes requires that distillers and wholesale dealers shall keep on the outside of the pace of such business a sign carrying the name of the firm and other information.

Section 3280 provides that the distiller shall not carry on business until the law is complied with.

Section 3281 provides that the giving of bond and a criminal punishment if this is not done.

In Terry vs. United States, 120 Federal, 483, the Circuit Court of Appeals for the Fourth Circuit held that an indictment for unlawfully and knowingly carrying and delivering raw material to a distillery was insufficient if it failed to state that such distillery was one for the production of spirits, and was also insufficient if it did not set forth the kind of raw material which was furnished.

Section 3296 denounces the removal, concealment, etc., of spirits contrary to law, and fixes a penalty. The case of Pilcher vs. United States, 113 Federal, 248, was a case decided under that section.

§ 366. **Books to be Kept by Rectifiers and Wholesale Dealers; Penalty.**—Section 3318 of the Revised Statutes provides as follows:

"Sec. 3318. Every rectifier and wholesale liquor dealer shall provide a book, to be prepared and kept in such form as may be prescribed by the Commissioner of Internal Revenue, and shall, on the same day on which he receives any foreign or domestic spirits, and before he draws off any part thereof, or adds water or anything thereto, or in any respect alters the same, enter in such book and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence the spirits were received, by whom distilled, rectified, or compounded, and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine-gallons and proof-gallons, the kind of spirit, and the number and kind of adhesive stamps thereon. And every such rectifier and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the

same are removed from his premises, enter in like manner in the said book the day when and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and kind or quantity of such spirits, the number of gallons and fractions of a gallon at proof, and, if in the original packages in which they were received, the name of the distiller and the serial number of the package. Every such book shall be at all times kept in some public or open place on the premises of such rectifier or wholesale dealer for inspection, and any revenue officer may examine it and take an abstract therefrom; and when it has been filled up as aforesaid, it shall be preserved by such rectifier or wholesale liquor dealer for a period not less than two years; and during such time it shall be produced by him to every revenue officer demanding it. And whenever any rectifier or wholesale liquor dealer refuses or neglects to provide such book, or to make entries therein as aforesaid, or cancels, alters, obliterates, or destroys any part of such book, or any entry [*therin*] [therein], or makes such false entry therein, or hinders or obstructs such revenue officer from examining such book, or making any entry therein, or taking any abstract therefrom; or whenever such book is not preserved or is not produced by any rectifier or wholesale liquor dealer as hereinbefore directed, he shall pay a penalty of one hundred dollars, and shall [on conviction] be fined not less than one hundred dollars nor more than five thousand dolars, and imprisoned not less than three months nor more than three years."

In the case of Williams vs. United States, 158 Federal, 30, the Circuit Court of Appeals for the Eighth Circuit held that an indictment under this section need not set out the quantity of spirits which were sent out without being recorded in the book provided for in the statute, because the quantity sent out was not the essential element, and, therefore, an indictment charging that the defendant, a wholesale liquor dealer, sent out of his stock two casks of distilled spirits, without making any required entries, was not fatally defective in failing to specify the quantity shipped. Neither need the indictment specify the name of the consignee or the place where the casks were sent.

In the cases of United States vs. Amann, 24 Federal Case No. 14438, a quantity of distilled spirits, 3 Ben., 552, it was determined in substance, that if it was a mere accidental omission to enter in the record, the defendant should not be convicted, but that the defendants were responsible for the action of their clerks

and bookkeepers, and that they were bound to see that their duties with reference to these entries was fully and properly performed; and if, through the neglect or carelessness of the employee, it was not performed, the employer was responsible. See also United States vs. 1412 Gallons of Spirits, 10 Blatchf., 428.

§ 367. **Stamps and Brands to be Effaced from Empty Casks.**—Section 3324 of the Revised Statutes provides as follows:

"Sec. 3324. Every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package bearing any mark, brand, or stamp required by law, shall, at the time of emptying such cask or package, efface and obliterate said mark, stamp, or brand. Every such cask or package from which said mark, brand, or stamp is not effaced and obliterated, as herein required, shall be forfeited to the United States, and may be seized by any officer of internal revenue wherever found. And every railroad company or other transportation company, or person who receives or transports, or has in possession with intent to transport, or with intent to cause or procure to be transported, any such empty cask or package, or any part thereof, having thereon any brand, mark, or stamp, required by law to be placed on any cask or package, or any part thereof, so received or transported, or had in possession with the intent aforesaid; and every boat, railroad car, cart, dray, wagon, or other vehicle, and all horses or other animals used in carrying or transporting the same, shall be forfeited to the United States. Every person who fails to efface and obliterate said mark, stamp, or brand, at the time of emptying such cask or package, or who receives any such cask or package, or any part thereof, with the intent aforesaid, or who transports the same, or knowingly aids or asists therein, or who removes any stamp provided by law from any cask or package containing, or which had contained, distilled spirits, without defacing and destroying the same at the time of such removal, or who aids or assists therein, or who has in his possession any such stamp so removed as aforesaid, or has in his possession any cancelled stamp, or any stamp which has been used, or which purports to have been used, upon any package of distilled spirits, shall be deemed guilty of a felony, and shall be fined not less than five hundred dollars nor more than ten thousand dollars, and imprisoned not less than one year nor more than five years."

There are no words expressing intention with reference to this offense in this section, and under the authority of United States

vs. Gallant, 177 Federal, 281, an inadvertant and negligent omission to do the things demanded by the section is an offense.

§ 368. **Re-use of Bottles, Etc., Without Removing and Destroying Stamps.**—The Act of March third, 1897, 29 Statute at Large, 627, Section 6, provides as follows:

"Sec. 6. That any person who shall re-use any stamp provided under this Act after the same shall have been once affixed to a bottle as provided herein, or who shall re-use a bottle for the purpose of containing distilled spirits which has once been filled and stamped under the provisions of this Act without removing and destroying the stamp so previously affixed to such bottle, or who shall, contrary to the provisions of this Act or the regulations issued thereunder remove or cause to be removed from any bonded warehouse any distilled spirits inspected or bottled under the provisions of this Act, or who shall bottle or case any spirits in violation of this Act, or of any regulation issued thereunder, or who shall, during the transportation and before the exportation of any such spirits, open or cause to be opened, any case or bottle containing such spirits, or who shall wilfully remove, change or deface any stamp, brand, label, or seal affixed to any such case or to any bottle contained therein, shall for each such offense be fined not less than one hundred nor more than one thousand dollars, and be imprisoned not more than two years, in the discretion of the court, and such spirits shall be forfeited to the United States."

In United States vs. Guthrie, 171 Federal, 528, the following points with reference to the above statute were determined:

First. The offense is complete if the bottle is re-used without destroying the stamps, and does not depend on its being done knowingly and wilfully.

Second. The employer is guilty if the act is performed by his bartender or agent acting within the scope of his employment.

§ 369. **Removing any Liquors or Wines Under any Other than Trade Names; Penalty.**—Section 3449 of the Revised Statutes reads as follows:

"Sec. 3449. Whenever any person ships, transports, or removes any spirituous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such act to be done, he shall forfeit said liquors or wines, and casks or packages, and be subject to pay a fine of five hundred dollars."

In United States vs. Twenty Casks, etc., 133 Federal, 910, the Court held that this section did not apply to a cask shipped without a label, nor does it apply when the cask was labeled, "Glass: with care," etc. In United States vs. Liquor Dealers' Supply Company, 156 Federal, 219, the Court held that spirituous liquors under this section contained in bottles and packed in barrels, and shipped the barrels, being marked "————" in violation of this section, and also that prosecutions under this section contained no questions of fraud or fraudulent intent. This case was a case of the indictment of a corporation for a violation of this section. See also United States vs. Sandefuhr, 145 Federal, page 849.

This statute has been held not to apply to private persons, but only to distillers and dealers.

§ 370. **Oleomargarine.**—The Act of August second, 1886, 24 Statute at Large, 209, is what is known as the Oleomargarine Act, and contains a definition of butter and oleomargarine.

Section 3 of the Act provides a schedule of special taxes upon manufacturers of six hundred dollars, wholesale dealers of four hundred eighty dollars, and retail dealers of forty-eight dollars. The manufacturer is any person who manufactures oleomargarine for sale, and also any person who mixes with oleomargarine any artificial coloration. A wholesale dealer is any person who sells or offers for sale oleomargarine in the original manufacturer's packages; and the retailer is any person who sells oleomargarine in quantities of less than ten pounds at one time.

Section 4 of the Act provides the penalties for the carrying on of the business without the payment of the tax; that is, if the manufacturer carries on his business without the payment of his special tax, he shall be fined not less than one thousand and not more than five thousand dollars; the person who carries on the business of a wholesale dealer without paying the special tax, besides being liable to the payment of the tax, shall be fined not less than five hundred, nor more than two thousand, dollars; and every person who carries on the business of a retail dealer without paying the special tax, shall, besides being liable for the tax, be fined not less than fifty, nor more than five hundred, dollars.

Section 6 is for packing and marking oleomargarine, and provides the penalty, and reads as follows:

"Sec. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years."

Section 6, above quoted, has been declared to be Constitutional in *in re* Kollock, 165 U. S., 526; 41 Law Ed., 813, and Dougherty vs. United States, 108 Federal, 56, which affirmed U. S. vs. Dougherty, 101 Federal, 439, upon the reasoning that the Act does not constitute a delegation of power to the Commissioner of Internal Revenue and the Secretary of the Treasury to determine what acts shall be criminal, but the Act itself sufficiently defines the offense, by requiring the packages to be marked and branded, and the punishment therefor, leaving the mere discretion of the particular marks, stamps, and brands to be determined by the officers aforesaid. The Supreme Court, in the Kollock case, said that the primary object of oleomargarine legislation was to secure revenue by internal taxation, and to prevent fraud in the collection of such revenue.

In the case of Ripper vs. United States, 178 Federal, page 24, the Circuit Court of Appeals held that evidence secured by the unlawful issuance of a search warrant, which was itself relevant was not inadmissible because obtained by such illegal search and

seizure; and that same case held that in order to constitute the offense of neglect or refusal to destroy the stamp from the emptied oleomargarine package, it need only appear that the package had a stamp on it denoting the payment of the tax; that it was emptied of its contents; that it was in defendant's possession in its emptied condition; and that he wilfully neglected or refused to destroy the stamp while the empty package was in his possession.

That same case also reasoned that the Act authorized three classes of persons to conduct the business of manufacturing and selling oleomargarine; namely, the manufacturer, the wholesale dealer, and the retail dealer; and that section 6 declares that retail dealers must sell only from original stamped packages, in quantities not exceeding ten pounds, and that the restriction on retail dealers violates no Constitutional right, and that persons selling oleomargarine at retail in original packages in quantities greater than ten pounds at any one time are violators of the law, and do not form a class outside of its provisions.

In this case, the Court also held that the penalty provided in Section 6 does not apply to that part of the section prohibiting retail dealers from selling in quantities exceeding ten pounds, thousand dollars, without imprisonment, as prescribed by Section 18 of the Act, which reads as follows:

"Sec. 18. That if any manufacturer of oleomargarine, any dealer therein, or any importer or exporter thereof shall knowingly and wilfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States."

In Dougherty vs. United States, 108 Federal, 56, the Court of Appeals for the Third Circuit, in passing upon the case originating under Section 6 of the Act, said that the section first requires manufacturers to pack oleomargarine in new wooden or paper

packages, marked, stamped, and branded as prescribed; and sales by manufacturers and wholesale dealers are also required to be "in original stamped packages." Thereafter, it provides that they shall pack it "in suitable wooden or paper packages, marked and branded as prescribed." The penal clause thereof provides that every person who knowingly sells oleomargarine otherwise than in new wooden or paper packages as above described, shall be fined, and held that such clause applied to retail dealers as well as others.

The Court also passed upon the form of an indictment.

A new indictment, in conformity with the ruling of the Court in United States vs. Lockwood, 164 Federal, 772, was found, and a conviction resulted, which conviction was affirmed in Lockwood vs. United States, 178 Federal, 437, wherein the Court re-affirmed the Constitutionality of the Act. In the Lockwood case, 164 Federal, 772, it was held that when the indictment was for selling in packages that were not as prescribed by the Commissioner of Internal Revenue, the particular in which such packages did not conform therewith should be set out in the indictment. The regulations of the Commissioner provide that retail packages must have the name and address of the dealer printed or branded thereon; likewise, the words "pound" and "oleomargarine" in letters not less than one quarter of an inch square, so as to be plainly visible to the purchaser at the time of delivery to him, and the color of the ink must be in the strongest contrast to the color of the packages.

In Wesoky vs. United States, 175 Federal, 333, the Circuit Court of Appeals for the Third Circuit passed upon certain evidence that was admitted, and holds the rulings of the trial judge not erroneous, in an oleomargarine prosecution. In this case it was held, following Graves vs. United States, 105 U. S., 121, 37 Law Ed., 1021, that the wife of a defendant indicted in a Federal Court, is not a competent witness.

In United States vs. Lamson, 173 Federal, 673, the Court held that the Oleomargarine Act, which provides that wholesale dealers shall keep such books and render such returns as the Internal Revenue Commissioner may require, did not limit the power of the commissioner to the sole making of regulations requiring the

returns; but he was authorized thereunder to adopt regulations requiring such dealers to make monthly returns, showing the packages and pounds received, quantity disposed of, and the names and addresses of the consignees, and that such regulation was reasonable, and when such names were fictitious and erroneous, there was a violation of the regulation.

In United States vs. Union Supply Company, the Supreme Court of the United States, in an opinion rendered November 8, 1909, held that a corporation was a person, within the meaning of Section 6 of the Act of May 9, 1902, 32 Stat. L., 193, which required wholesale dealers in oleomargarine to keep certain books and make certain returns, and this although Section 5 of the same Act applies in express terms to corporations. In Vermont vs. United States, 174 Federal, 792, the Circuit Court of Appeals for the Eighth Circuit held that the term "any person" in the Act of 1886, as amended by the Act of May 9, 1902, is not limited to licensed wholesale or retail dealers, but is comprehensive enough to embrace all persons, whether licensed dealers or not. This case also affirms the doctrine heretofore mentioned with reference to elements of that portion of the Act relating to the destruction of stamps.

In United States vs. Joyce, 138 Federal, 455, the Court held that that portion of the Act of 1886 relating to the payment of tax by wholesale dealers, might be prosecuted by either information or indictment. A form of indictment is also approved in that case for wholesale dealers who do not pay the tax.

In United States vs. Ford, 50 Federal, 467, the Court held that an indictment under Section 6 for neglect to properly mark the package of oleomargarine should set out the regulation of the commissioner covering the marks and brands in substance.

In apparent contradiction of Vermont vs. United States, 174 Federal, cited *supra*, seems to be the case of Morris vs. United States, 168 Federal, 682. In the Morris case, the Circuit Court of Appeals for the Eighth Circuit, in passing upon Section 6 of the Act of 1886, and referring to the words "every person," should be construed to refer solely to manufacturers and dealers previously therein mentioned, so that an indictment for violating such section which fails to charge that the accused was either a

manufacturer or dealer in oleomargarine would state no offense. The safe rule, therefore, is to allege that the defendant is either a manufacturer or a wholesale or retail dealer, and that the facts of each prosecution will substantiate the allegation; otherwise, there should be no prosecution.

Prosecution for sale and delivery, though different offenses, if same transaction, may be under different counts in same indictment, Goll vs. U. S., 166 F., 419.

In U. S. vs. Eaton, 144 U. S., 688, 36 Law Ed., 591, Sec. 18 of Act requiring certain reports and books by wholesale dealers was held inoperative.

CHAPTER XVII.

NATIONAL BANKS.

§ 371. Any number of persons not less than five may form an association for the purpose of conducting a national bank. The Articles of Association and organization certificate should state the name assumed, the place where operations are to be carried on, the amount of capital stock, and the number of shares thereof, the names and residences of the share-holders, and the number of shares held by each. When these dockets are filed with the Comptroller of the Currency, the association becomes a body corporate, empowered to use a corporate seal, have a life for twenty years, the right to make contracts, to sue and to be sued, elect directors, and appoint other officers; to have by-laws which are not inconsistent with the law for the conduct of the general business, and the exercise of its national banking privileges. No other bank, of course, is authorized to use the word "national" as a portion of its title. An association may exist with or without power to use circulation. To obtain circulation notes, an association must deposit with the Comptroller of the United States bonds as security for the redemption of such notes as it may issue, whereby, within limits, notes of various denominations may be furnished by the Comptroller. The States can exercise only such control over national banks as Congress permits, Farmers' National Bank vs. Deering, 91 U. S., 33.

The sections in the Revised Statutes relating to the organization and powers, etc., of national banks are from 5133 to 5156, inclusive. The sections in the Revised Statutes relating to the obtaining and issuing of circulating notes are from 5157 to 5189, inclusive. The sections relating to the regulation of the banking business are from 5190 to 5219, inclusive. The sections relating to dissolution and receivership are from 5220 to 5243, inclusive.

§ 372. **Falsely Certifying Checks.**—Section 5208 of the Revised Statutes of 1878, which reads as follows:

"Sec. 5208. It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the comptroller as provided for in Section fifty-two hundred and thirty-four,"

relates to the penalty for falsely certifying checks. The penalties of the section, it will be noted, are both against the individual and against the association. The comptroller has the authority to place the association whose officer is guilty of a violation of this section, in the hands of a receiver, as provided in Section 5234.

This section includes four criminal offenses: first, the wilful certification of checks drawn upon the association by any person or company, unless such person or company has, at the time such check is certified, on deposit with the association, an amount of money equal to the amount specified in such check; second, the resorting to any device, in order to evade the provisions of the section; third, the receipt of any fictitious obligation, directly or collaterally, in order to evade the provisions of the section; and fourth, the certifying of checks before the amount shall have been regularly entered to the credit of the dealer upon the books of the association.

Anderson's Dictionary of Law, under the head of the words "Certified Check," says it "implies that there are funds in the

bank with which to pay it; that the same are set apart for its satisfaction; and that they will be so applied when the check is presented for payment."

The act of certifying is equivalent to an acceptance of the check. The object is to enable the holder to use the check as money. The bank charges the check to the account of the drawer; credits it in a certified check account; and when paid, debits that account with the amount. The bank thus becomes the debtor of the holder. Merchants' Bank vs. The State Bank, 10 Wallace, 647; Espy vs. Bank of Cincinnati, 18 Wallace, 619; Bank vs. Whitman, 94 U. S., 343; same case, 100 U. S., 689; Bank of British North America, 91 N. Y., 110. It will be borne in mind that the statute relates alone to "check." Draft, or letter, or telegram, or any other certificate that is not included in the technical and legal term "check," is not included within the statute.

In Potter vs. United States, 155 U. S., 444; 39 Law Ed., 216, the Supreme Court held that the word "certified," as commonly understood, implies that the check upon which the words of certification have been written has passed from the custody of the bank into the hands of some other party; and when the charge is, that the defendant "did unlawfully, knowingly, and wilfully certify a certain check," the import of that accusation is not simply that he wrote certain words upon the face of the check, but that he did it in such a manner as to create an obligation of the bank, in such a way as to make an instrument which can properly be called a certified check.

§ 373. **Wilfully.**—The use of the word "wilfully" in the statute implies on the part of the officer who commits the offense, knowledge and purpose to do wrong. Something more is required than the act of certification made in excess of the actual deposit but in ignorance of that fact, but without a purpose to evade or disobey the mandates of the law. In Potter vs. United States, cited supra, this language is used:

"The significance of the word "wilfully" in criminal statutes has been considered by this Court. In Felton vs. United States, 96 U. S., 699, 24 Law Ed., 875, it was said: 'Doing or omitting to do a thing knowingly and wilfully implies not only knowledge

of the thing, but a determination, with a bad intent, to do it. The word "wilful," says Chief Justice Shaw, in the ordinary sense in which it is used in statutes, means not merely voluntary, but with a bad purpose, Com. vs. Kneeland, 20 Pick. 220. It is frequently understood, says Bishop, as signifying an evil intent without justifiable excuse, I. Bishop, as signifying an evil intent and later, in the case of Evans vs. United States, 153 U. S., 584. 38 Law Ed., 830, there was this reference to the words 'wilfully misapplied': 'In fact the gravamen of the offense consists in the evil design with which the misapplication is made, and a count which should omit the words "wilfully, etc., and with intent to defraud," would be clearly bad.'.....As wilful wrong is of the essence of the accusation, testimony bearing directly on the question of wilfulness is of vital importance, and error in rejecting it cannot be regarded otherwise than as material and manifestly prejudicial."

The original Potter case, which was treated in the writ of error above, will be found in 56 Federal, page 93. The Supreme Court, in Spurr vs. United States, 174 U. S., 728, held that the trial judge, in answering a question of the jury in a prosecution, under this section, when they came in after consultation, and asked for the law as to certification when no money appeared to the credit of the drawer, which answer failed to explain the meaning of "wilful violation," when he was requested so to do by the defendant's counsel, was reversible error.

United States vs. Heinze, 161 Federad, 425, holds that Section 5208 creates no criminal offense until read in connection with Section 13 of the Act of July twelfth, 1882, 22 St. L., 166, Section 13 of said Act fixing the punishment. Judge Hough, in the Heinze case, said that Courts were bound to take judicial notice of the meaning of the word "certified" as applied to bank checks, and that such meaning was that certain words have been written or printed on a check, and that the check has passed from the custody of the bank into the hands of some other party, and that thereby the person certifying created an obligation of the bank. That case also held that an indictment was not fatally defective for failure to set out *totidem verbis* the written certifications under the rule that in an indictment in Federal Courts it is not necessary to allege the tenor of an instrument, unless it touches the gist of the crime, such rule limiting, in the Federal Courts,

the setting out in full of the instrument mainly, if not wholly, to the cases of forgery, counterfeiting, and sending threatening letters.

§ 374. **Acting by Others.**—In the Heinze case, the facts as alleged in the indictment were that the defendant did not certify in the sense of personally signing the certification stamped on the checks in question; and a motion to quash was made upon the ground that, therefore, he personally could not be indicted under this section. The Court answered this objection by stating that, "The whole indictment taken together shows that the first fifteen counts must fail unless the prosecution can prove that the individuals who actually executed the certification endorsed were but the physical instruments of the defendant in doing what was done; and that an indictment will lie for causing or procuring a coerced subordinate to do the forbidden act, is distinctly held by Judge Putnam in the Potter case."

§ 375. **Embezzlement, Abstraction, Misapplication, False Entries, Etc., Penalty.**—By long odds, the most important Federal statute for the preservation of the people's property and the integrity of the national banking system, is Section 5209, which reads as follows:

"Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies, any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The statute, it will be noted, punishes every president, director, cashier, teller, clerk, or agent, who (1) embezzles, (2) ab-

stracts, (3) wilfully misapplies, any of the (1) moneys, (2) funds, or (3) credits, of the association. In other words, as stated by Terrell, in his book on national banking, at page 13, the statute covers embezzlement by the persons named, of any of the moneys, funds, or credits of the association, provided such embezzlement be with the intent to injure or defraud (1) the association, (2) any other company, body politic or corporate, or (3) any individual person. The word "embezzle," as used in this statute, says Terrell, has a well-defined technical meaning. It is the unlawful conversion, by an officer of a bank, to his own use, of the moneys, funds, or credits of the association entrusted to him, with the intent to injure or defraud the bank, United States vs. Youtzey, 91 Federal, 867. It involves a breach of trust or duty in respect of the moneys, goods, or properties entrusted to the party's possesion, beionging to another, and also the wrongful appropriation thereof to the party's own use. Though kin to theft or larceny, embezzlement is a separate and distinct offense. In order to constitute this crime, it is necessary that the property, money or personal effects embezzled should have previously come lawfully into the hands, possession, or custody, of the party charged with such offense, and that while so entrusted to his possession and custody, and held for the use and benefit of the real owner, he wrongfully converts the same to his own use, United States vs. Harper, 33 Federal, 474. The Supreme Court, in Moore vs. United States, 160 U. S., 269, defines embezzlement to be "The fraudulent appropriation of property, by a person to whom such property has been entrusted, or into whose hands it has lawfully come. Such custody need not be actual, manual possession. United States vs. Harper, 33 Federal, 475.

In United States vs. Northway, 120 U. S., 336; 30 Law Ed., 664, the Court held in substance that the wilful and criminal misapplication of the funds of a national bank, as defined by this section, may be made by an officer or agent, without having previously received them into his manual possession. There is a distinction between said offense and embezzlement. In the former it is unnecessary to charge possession in the indictment, while in

the latter a charge of possession is required in describing the offense.

§ 376. **Abstraction.**—The president, director, cashier, teller, clerk, or agent of any national banking association who abstracts any of the (1) moneys, (2) funds, or (3) credits, of the association, with the intent to injure or defraud (1) the association, (2) any other company, body politic or corporate, or (3) any individual person, is guilty of abstraction. Abstraction, from definitions taken from United States vs. Eno, 56 Federal, 220, and United States vs. McKnight, 115 Federal, 972, means to take or withdraw from; so that, to abstract the funds of a bank, or a portion of them, is to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted. Such abstraction must be, of course, without its knowledge and consent, and with the intent to injure or defraud it or some other person or company. The Supreme Court, in speaking of the word "abstraction" in the Northway case, 120 U. S., says:

"We do not admit the proposition that the offense of abstracting the funds of the bank under this section is necessarily equivalent to the offense of larceny. The offense of larceny is not complete without the *animus furandi,* the intent to deprive the owner of his property; but under Section 5209, an officer of the bank may be guilty of abstracting the funds and money and credits of the bank without that particular intent. The statute may be satisfied with an intent to injure or defraud some other company or body politic or corporate, or individual person, than the banking association whose property is abstracted, but merely to deceive some other officer of the association or an agent appointed to examine its affairs. This intent may exist in a case of abstracting, without that intent which is necessary to constitute the offense of stealing. Previous possession is not necessary in order to the commission of this offense. United States vs. Harper, 33 Federal, 480. In United States vs. Breese, 131 Federal, 921, abstraction is defined as the act of one who, being an officer of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and without its knowledge and consent. It may be done by one act, or by a succession of acts. It may be done under color of loans,

discounts, checks, or the like. The means does not change the nature of the act."

§ 377. **Misapplication.**—Wilful misapplication is the misapplying by any president, director, cashier, teller, clerk, or agent, etc., of (1) moneys, (2) funds, or (3) credits of the association, with the intent to injure or defraud (1) the association, (2) any other company, body politic or corporate, or (3) any individual person, or with the intent to deceive (1) any officer of the association, or (2) any agent appointed to examine the affairs of the association. Misapplication, as defined by the Supreme Court in the Northway case, 120 U. S., may be comprehended by the following language:

"In order to misapply the funds of the bank, it is not necessary that the officer charged should be in actual possession of them by virtue of a trust committed to him. He may abstract them from the other funds of the bank unlawfully, and afterwards criminally misapply them; or, by virtue of his official relation to the bank, he may have such control, direction, and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offense of wilful misapplication. And when it is charged, as in the counts of this indictment, that he did wilfully misapply certain funds belonging to the association, by causing them to be paid out to his own use and benefit in unauthorized and unlawful purchases, without the knowledge and consent of the association, and with the intent to injure it, it necessarily implies that the acts charged were done by him in his official capacity, and by virtue of the power, control, and management which he was enabled to exert by virtue of his official relation. This, we think, completes the offense intended by the statute, of a wilful misapplication of the moneys and funds of a national banking association."

§ 378. **False Entries.**—Every president, director, cashier, teller, clerk, or agent of any national banking association who make any false entry in (1) any book, (2) any report, or (3) any statement, of the association, with the intent, (1) to injure, (2) or defraud, (1) the association, (2) or any company, body politic, or corporate, or (3) any individual person, or (4) with the intent to deceive (1) any officer of the association, or (2) any agent appointed to examine the affairs of such association, is

guilty of the offense of making false entries, within the meaning of the statute.

It will be borne in mind that Section 5211 of the Revised Statutes provides for the making of five reports to the Comptroller of the Currency of the condition of the affairs of the association, at such time and upon such dates as the Comptroller may demand, and it is of these reports that the statute, in speaking of false entries in reports relates.

All of the offenses denounced in the statute rest for their complete fulfillment upon the "intent" to either injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of such association. This intent is an essential ingredient of the indictment and the offense, U. S. vs. Britton, 170 U. S., 655; United States vs. Voorhes, 9 Federal, 143; McKnight vs. U. S., 111 Federal, 735. The cases of Agnew vs. United States, 165 U. S., 36; United States vs. Youtsey, 91 Federal, 864; United States vs. Allis, 73 Federal, 165; Peters vs. United States, 94 Federal, 127; United States vs. Kenney, 90 Federal, 257; and Evans vs. United States, 153 U. S., 584, announce no new doctrine in the criminal law when they hold, in substance, that such intent does not necessarily involve malice or ill-will toward the bank, for the law presumes that a person intends the necessary and natural consequences of his acts, and it is sufficient that the wrongful or fraudulent act will necessarily or naturally injure or defraud the bank as set forth in the statute.

In Flickenger vs. United States, 150 Federal, page 1, the Circuit Court of Appeals for the Sixth Circuit adopted this view, and said:

"There could be no proper presumption that the directors, in the ordinary course of business, would consent to the discount, by the president, of worthless and fictitious paper, with intent to injure and defraud the bank, and, therefore, no necessity to insert in the indictment an averment to negative such authority."

Any entry which is intentionally made to represent what is not true, or does not exist, is a false entry, Agnew vs. United States, 165 U. S., 36. An entry of a note as paid, when it has

only been endorsed by the bank and re-discounted, is a false entry, Dorsey vs. United States, 101 Federal, 746. An entry as money deposited of a sum of money left with the bank in a sack as a special deposit, is a false entry, United States vs. Peters, 87 Federal, 985. The entry on a bank book of a transaction just as it occurred, although such transaction be a fraud on the bank, is not a false entry, Dow vs. United States, 82 Federal, 904; U. S. vs. Young, 128 Federal, 111. And the crime of making false entries may be committed personally or by direction, and an officer directing the making of false entries is laible therefor, Agnew vs. United States, 165 U. S., 36; United States vs. Youtsey, 91 Federal, 864; Scott vs. United States, 130 Federal, 429; United States vs. Allis, 73 Federal, 165; United States vs. Harper, 33 Federal, 480; United States vs. Fisk, 24 Federal, 585; 5 Federal Statutes Annotated, 150. Entries in the book of a national bank, which correctly record actual transactions of the bank, although such transactions may have been unauthorized, or even fraudulent, are not false entries, and will not sustain an indictment, Twining vs. United States, 141 Federal, 41. That the including of an account of an accommodation note, given to cover overdrafts, in a report made to the Comptroller was not a false entry within the meaning of the statute, was decided by the Circuit Court of Appeals for the Eighth Circuit in Hayes vs. United States, 169 Federal, 101. Any false entry made in a report to the Comptroller is within the meaning of this statute. Cochran vs. United States, 157 U. S., 293; United States vs. Bartow, 10 Federal, 874; United States vs. Means, 42 Federal, 599; United States vs. Hughitt, 45 Federal, 47; United States vs. Allen, 47 Federal, 696; United States vs. French, 57 Federal, 382.

In Harper vs. United States, 170 Federal, 385, the Circuit Court of Appeals for the Eighth Circuit held that the section makes it a criminal offense for any officer or agent of a national bank to make any false entry in a report of the association, with the intent to deceive any officer of the association, etc., whether the report was voluntarily made, or was one required by law, if the false entry was made with the requisite unlawful intent. This case also passes upon the sufficiency of an indictment and its re-

quisite averments in the matter of setting out the report, and holds that if the indictment shows the date upon which the report was made, and that it was a report made to the comptroller showing resources and liabilities on a certain date, it is sufficient to authorize the presumption that it was a report made by the association under Section 5211.

District Judge Sanborn, in United States vs. Corbett, 162 Federal, 687, held that an indictment which charged an officer of a bank with making a false entry in a report made by him, "with intent to deceive an agent appointed to examine the affairs of the association, to wit, the Comptroller of the Currency of the United States," did not charge an offense; holding that the Comptroller was not charged with the duty to examine national banks. Without accepting this doctrine as the law, it is suggested that in the drafting of indictments under this portion of the statute, the allegation should be made that the intent was to deceive an agent appointed to examine the affairs of the association, to wit, a national bank examiner.

In United States vs. Morse, 161 Federal, 429, the Court held that the word "entry" in the statute means "any item in an account." In United States vs. Wilson, 176 Federal, 806, District Judge Sheppard held that the intent to deceive may be inferred from the making of the entry, and such false entry may be made either personally, or by direction. In Morse vs. United States, 174 Federal, 539, the Circuit Court of Appeals for the Second Circuit affirmed the doctrine that false entries may be made by direction. In other words, the defendant, in that case, did not make the entries with his own pen. All of them were made by the employees of the company, as a part of their routine work. The Court held that it was wholly immaterial whether such officer acts through a pen or a clerk controlled by him.

§ 379. **Other Cases.**—In United States vs. Morse, 161 Federal, 429, the Court held that the subsequent return of the money was no defense to a prosecution for misapplication, such fact being only evidence to negative the officer's intent to defraud at the time of the alleged offense, and thus testimony could be introduced for jury purposes. In United States vs. Hillegass, 176 Federal, 444, will be found a copy of indictment for aiding and

abetting under this statute. See also Brown vs. United States, a prosecution for aiding and abetting, 142 Federal, page 2. In Walsh vs. United States, 174 Federal, 621, the defendant was convicted, and his conviction was affirmed while he was on bond. After the affirmance, the United States filed a motion to have him appear and show cause why his bail should not be set aside. The Court refused the petition, on the ground that no unusual reason was shown why he was not likely to remain within the jurisdiction pending a motion for re-hearing which he had made. In Walsh vs. United States, 174 Federal, 615, the Court held that it was misapplication for an officer of a national bank, who is also a promoter of various enterprises, to obtain the funds of the bank on the security of unmarketable bonds of his own enterprises at the risk of the interests of the bank. In that case, it was also determined on the same writ of error that a juror on a criminal case cannot afterwards impeach a verdict in which he joined.

In Woods vs. United States, 174 Federal, 651, the Circuit Court of Appeals for the Fifth Circuit affirmed the well-established doctrine in a bank case applicable in all Federal criminal cases, that a general verdict and judgment on an indictment containing several counts, cannot be reversed on error, if one of the counts is good and warrants the judgment.

It has been held, of course, that a conspiracy to violate this section is indictable under Section 5440 of the old Code, Scott vs. United States, 130 Federal, 429.

For a definition of "moneys, funds, and credits," see United States vs. Smith, 152 Federal, 542, which holds, in substance, that the word "moneys" refers to the currency or circulating medium of the country; the word "funds" refers to Government, State, county, municipal, or other bonds, and to other forms of obligations and securities in which investments may be made; and the word "credits" refers to notes and bills payable to the bank, and other forms of direct promises to pay money to it.

In Thompson vs. United States, 159 Federal, 801, the Circuit Court of Appeals for the First Circuit approves an indictment against a cashier, which charged that that officer unlawfully "converted" certain moneys, funds, and credits to the use of another. The Court said:

"The word 'convert' has such force at Common Law that when used in an indictment with a statement as to whose use the conversion was made, it needs no amplification, any more than the word 'embezzle' or the words 'take, steal, and carry away' (citing the Jewett case, 100 Federal, 832). It is true that the word 'convert' is also awkward in the place where we find it here, but no objection was attempted on that ground, and its use, as used here, has been accepted by the Supreme Court in a like connection for the same purpose. Coffin vs. United States, 156 U. S., 432, 39 Law Ed., 481; same case, 162 U. S., 666, 40 Law Ed., 1109. The word 'convert' under the circumstances, must be accepted as intending exactly the same thing as when spoken in connection with the use of the person who was guilty of the conversion."

In the case of United States vs. Steinman, 172 Federal, 913, the Circuit Court of Appeals for the Third Circuit held that wilful misapplication of the funds of a national bank, in order to constitute an offense under this section, must be a wilful misapplication, for the use or benefit of the accused, or of some person or company other than the banking association, with intent to injure and defraud the association, or some other body, etc.; being entirely different from facts constituting unofficial maladministration, subjecting the bank to a forfeiture of its charter, and an unintentional overdraft by a depositor in good standing and possessing ample means to pay, or an overdraft to be paid pursuant to a prior agreement, resting on abundant credit, does not constitute misapplication.

In that case also, there was a count for aiding and abetting, and the Court held that in a prosecution for aiding and abetting the officers of a national bank to wilfully abstract the funds of the bank, by means of certain overdrafts, evidence that prior to the making of such overdrafts, it was agreed that the bank should furnish funds for the operations of certain corporations, in which the accused and the bank's president and cashier were officers, and that from time to time notes should be given by such corporations to take up the overdrafts, and that at the time of the advances the value of the corporations' property was more than three hundred thousand dollars, while the overdrafts aggregated only thirty thousand dollars, was admissible to show absence of criminal intent.

CHAPTER XVIII.

BANKRUPTCY.

§ 380. The National Bankrupt Act, passed in 1898, in answer to a universal demand, and under the authority of the Constitution, has been amended twice by Congress in matters that do not relate to its criminal sections. Original Section 29 of the Bankrupt Act, which is the law to-day with reference to offenses against that Act, reads as follows:

"Sec. 29. *a.* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b. A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or an agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

"*c.* A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly

or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

"*d.* A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense."

Section *a* of the Act relates alone and exclusively to punishment of the trustee for having knowingly and fraudulently appropriated to his own use, embezzled, or spent, or transferred, or secreted, or destroyed any of the property, or any document belonging to an estate which he administers as such officer of the Court.

A satisfactory indictment under this section must necessarily allege an adjudication, the time and date of the appointment of the trustee, and his qualification, and then set out specifically the property he is charged to have converted, destroyed, or transferred, as fully and specifically as if the offense was for larceny, with the exception that consent of the bankrupt is unnecessary, for the reason that the title vests in the trustee under the satute. The section includes not only an apropriation to the trustee's own use, but an unlawful transfer of the property for the use of another. It is true the word "unlawfully" as used with reference to the transfer would perhaps include some sort of a gain or motive beneficial, or supposedly beneficial to the trustees. If, however, the proof showed a reckless disregard of his obligations and duties as trustee, in the way of wilful destruction or secretion of the property or documents of the estate, manifestly for the purpose of defeating a proper administration of the trust, a case would be made out under this section.

§ 381. **Other Offenses of the Section.**—Paragraphs 1, 2, and 5, of sub-division *b* of Section 29, relate to offenses committed by the bankrupt. Paragraphs 2, 3, 4, and 5 of sub-division *b* of Section 29, create offenses that may be committed by persons who are not bankrupts. Section *c* of sub-division *b* of Section 29 relates to offenses by the referee in bankruptcy, and sub-division *d* of the section creates a particular statute of limitation for all the

bankrupt offenses described in the entire section, to wit, that the indictment must be found, or the information filed, within one year.

§ 382. **Decisions.**—An indictment in the terms of the section, which charges the knowing and fraudulent concealment, while a bankrupt, or after his discharge, from his trustee, of any of the property belonging to his estate in bankruptcy, sets forth the elements of the offense, and is sufficient. United States vs. Comstock, 161 Federal, 644. It is not necessary to allege in the indictment that the bankrupt, at the time of the concealing of his property, knew either the fact that a trustee had been appointed for his estate, or the name of such trustee. United States vs. Comstock, 161 Federal, 644.

The word "conceal" as used in the section, is of plain import, and when coupled in an indictment with the words "unlawful, knowingly, and fraudulently," clearly excludes unintentional acts, United States vs. Comstock, 161 Federal, 644. The offense of concealing property, by a bankrupt, from his trustee, consists of a continuous concealment of the property from the trustee during the whole course of the bankruptcy proceedings, or beyond, and is, therefore, not necessarily consummated by an omission of the property from the schedules, Johnson vs. United States, 163 Federal, 30.

In an indictment against a bankrupt and others for a conspiracy to conceal assets of the estate from his trustee in bankruptcy, an averment that the trustee was "duly" appointed trustee is sufficient; the matter of appointment being an incidental matter only, and not a vital element of the crime.

In United States vs. Lake, 129 Federal, 499, Judge Treber held, on demurrer, that an indictment against the president of a bankrupt corporation, for making a false oath to its schedules, which showed that the defendant, as its president, in compliance with the bankrupt law, did file in the bankruptcy proceedings, with the referee, the schedules required by law, subscribed and sworn to by him, as president; that the defendant stated on his oath that such schedules contained a true and complete statement of all the corporation's property; and that the statement that the bankrupt corporation had then on hand only the

sum of a hundred dollars, which was all the money the corporation then and there had,—was false, such an indictment followed the strict language of the Act, and sufficiently showed the materiality of the false statement, without the express averment thereof.

An indictment for conspiracy to fraudulently conceal, etc., property from a trustee, is not insufficient because it charges that the property was removed and concealed prior to the bankruptcy, where it also avers that the concealment was continued after the bankruptcy, and after the appointment of the trustee, and that the property was not scheduled by the bankrupt.

A charge of conspiracy to conceal, etc., may be supported by evidence that the property was sold under a chattel mortgage, given by the bankrupt prior to the bankruptcy, where it is shown that such mortgage and sale were merely colorable, and that the property in fact remained that of the bankrupt. In United States vs. Grodson, 164 Federal, 157, the Cohen case is affirmed, but Judge Sanborn holds that an indictment charging a conspiracy to sell, etc., where it shows that the conspiracy was formed and the property removed and concealed, prior to the bankruptcy, but does not aver that it was in contemplation of bankruptcy, or that any overt act was committed after the bankruptcy, although it charges a further conspiracy thereafter to continue the concealment, is insufficient. The officer of a bankrupt corporation, who is not, and has not been, a bankrupt, is not liable under this section for having fraudulently and knowingly concealed the property of the estate of the corporation in bankruptcy from its trustee. The present or past bankruptcy of the accused is an indispensable element of the offense denounced by the statute. A penal statute which creates and denounces a new offense, must be strictly construed. Where it is plain and unambiguous, the courts may not lawfully extend it by interpretation, to a class of persons who are excluded from its effect by its terms, for the reason that their acts may be as mischievous as those of the class whose deed it denounces, Circuit Court of Appeals for the Eighth Circuit, in Field vs. United States, 137 Federal, page 6.

To the same effect is United States vs. Lake, 129 Federal, 499.

where it was held that paragraph *b* of the Act, providing that a person shall be punished on conviction for having knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustees, any of the property belonging to his estate in bankruptcy, must be strictly construed, and does not include officers of a corporation declared a bankrupt. A bankrupt corporation may commit the criminal offense of knowingly and fraudulently concealing its property from its trustee, defined and made punishable by the Act, and individuals who conspire to cause a corporation to commit such offense are indictable under old Section 5440, and it is immaterial that the corporation is not, or cannot be, indicted as one of the conspirators, Circuit Court of Appeals for the Second Circuit, in Cohen vs. United States, 157 Federal, 651.

From the above decisions, will be drawn this line of law, to wit:

First, that an officer of a banking corporation cannot be indicted for concealing the property of the bankrupt from the trustees, because he, the officer, is not the bankrupt.

Second, The corporation may be indicted for concealing this property from the bankrupt.

Third, Individuals who conspire to conceal the property of a bankrupt corporation may be indicted for an offense under the general conspiracy statute, which was old Section 5440, as amended.

The case of Johnson vs. United States, 170 Federal, 581, by the Circuit Court of Appeals for the First Circuit, permits the trustee in bankruptcy to testify that he had never learned from the bankrupt that there was property belonging to the bankrupt stored in the places where the goods covered by the indictment were found, and that the trustee himself found the goods in question, apparently without the assistance of the bankrupt, even though such testimony was objected to on the ground that it was an attempt to disclose the bankrupt's testimony before the referee. The decision distinguishes the cases of Jacobs vs. United States, 161 Federal, 694, and Johnson vs. United States, 163 Federal, page 30, which two cases those respective courts held to be indirect methods of introducing the bankrupt's schedule of assets and liabilities against him in criminal cases; the Johnson

and Jacobs cases holding that this cannot be done, of course, directly or indirectly.

The Circuit Court of Appeals for the First Circuit, in Kerrch vs. United States, 171 Federal, 366, held that on the trial of an involuntary bankrupt for conspiracy to conceal property from its trustees, it was not error to admit in evidence, over the defendant's objection and claim of privilege, his books of account, which had been taken possession of by a receiver appointed by the bankruptcy court.

In Wechsler vs. United States, 158 Federal, 579, the Circuit Court of Appeals for the Second Circuit held that Section 7 of the Bankrupt Act, which requires the bankrupt to submit to an examination under oath as to various matters specified, with the proviso that "no testimony given by him shall be offered in evidence against him in any criminal proceeding," does not give immunity from prosecution for giving false testimony upon any such examination. That case further holds that if there be false testimony upon such examination, it may be prosecuted under the old perjury statute, which was old Section 5392, or under the bankrupt statute, now being considered, for making a false oath. See also United States vs. Bartlett, for perjury in schedules, 106 Federal, page 884; and for other cases bearing upon this section, United States vs. Owen, 32 Federal, 534; United States vs. Bozer, 4 Dillon, 407; also cases in 5 Federal, 681, and 7 Federal, 715; United States vs. Jackson, 2 Federal, 502; United States vs. Bayer, 4 Dillon, 407, Federal Case No. 14547; United States vs. Houghton, 14 Federal, 544. In Johnson vs. United States, 158 Federal, page 69, the Circuit Court of Appeals for the Fifth Circuit reversed a judgment of conviction and dismissed the indictment and discharged the defendant under an indictment which charged a conspiracy under old Section 5440, to conceal property from the trustee, where the indictment alleged that the conspirators were the trustee, the bankrupt, and a third party; the bankrupt and the third party having been convicted. The Court of Appeals dismissed the indictment, and discharged the trustee, holding that the trustee could not conspire to conceal from himself. A consideration of this opinion is advised, together with the reasoning in Cohen vs. United

States, 157 Federal, 651, where the Court of Appeals for the Second Circuit held that in a conspiracy prosecution, it was immaterial that the corporation is not, or cannot be, indicted as one of the conspirators; also with the case of 3 Howells' State Trials, 402, where a husband was convicted for conspiring to rape his own wife, even though he himself could not commit such rape.

§ 383. **Failure to Pay Over Money.**—From the power of a court of equity, administering the Bankrupt Statute, to require the bankrupt to pay over money or other property shown clearly to be in his possession, or go to jail for contempt, has arisen what may be termed another criminal feature of the law. One of the earliest cases under this power of the statute is *in re* Purvine, 96 Federal, 192, wherein a commitment to the Dallas County Jail, by District Judge Meek, of the bankrupt for failure to pay over certain funds shown to be in the possession of the bankrupt, was affirmed by the Circuit Court of Appeals for the Fifth Circuit. In that opinion, the Court says:

"If the court of bankruptcy is powerless in this respect, persons, by becoming bankrupts, obtain an immunity not allowable in any other court of equal dignity, either Federal or State, in this country."

A similar jurisdiction was invoked under the Act of 1867.

In *in re* Mize *et al,* 172 Federal, 945, District Judge Grubb maintains the same power, and cites a number of similar decisions, and holds:

"The courts have been very careful not to permit contempt proceedings to be converted into a means of coercing payment of debts from funds other than assets wrongfully withheld by the bankrupt, and for this reason, have required the clearest evidence that the bankrupt had the assets in his possession, and the present ability to turn them over to the trustee, as directed by the order."

See also Clay vs. Waters, 178 Federal, 385, and *in re* Marks, 176 Federal, 1018, where it was held that a bankrupt should not be committed for contempt for a failure to comply with an order requiring him to turn over money to his trustee, alleged to have been withheld, where the Court is convinced that the bankrupt is without physical ability to comply; citing also 171 Federal, 281.

CHAPTER XIX.

FOOD AND DRUGS.

§ 384. The Act of June 30, 1906, 34 Stat. L., 768, is what is known as the Pure Food Act. This statute contains thirteen sections, the first two of which create criminal offenses. The third provides for rules and regulations by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor. The fourth provides for certain chemical examinations, hearings, etc. The fifth provides for legal proceedings by the District Attorney. The sixth defines drugs and food. The seventh defines adulterations, etc. The eighth defines misbranding, etc. The ninth relates to a guaranty by the manufacturer. The tenth fixes a method for seizure of original packages. The eleventh provides for an examination of imported foods and drugs. And the twelfth includes the insular possessions, and defines "person."

§ 385. **Criminal Sections.**—The first two sections are, therefore, of interest to us here. The first section provides that it shall be unlawful for any person to manufacture, within any Territory, or the District of Columbia, any article of food, or drugs, which is adulterated or misbranded, within the meaning of the Act, and fixes a penalty of a fine not to exceed five hundred dollars, or one year's imprisonment, or both such fine and imprisonment. The second section is more comprehensive, because it applies to all interstate commerce, and reads as follows:

"Sec. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory, or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this

Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country; or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adultered or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: Provided, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act."

§ 386. **Decisions.**—In *in re* Wilson, 168 Federal, 566, District Judge Brown held that syrup, ten per cent. of which is made from maple sugar and ninety per cent. from white sugar, put up in bottles having thereon labels containing the name "Gold Leaf Syrup," with a trade-mark consisting of a gold leaf in the form of a maple leaf, and stalks of sugar cane, and the words "composed of maple and white sugar" in plain and distinct letters, with the name of the maker, cannot be said to be misbranded, so that its shipment in interstate commerce constitutes a misdemeanor under this Act.

There seems to have been some trend toward including within the spirit of the statute such articles of food and drugs as may claim more, in an advertiseing way, than can actually be done; but the purpose of the statute was to rid the streams of com-

merce of deleterious and poisonous food and drugs. That is the spirit of the statute, the evil that prompted its passage; and a construction of the statute that would run from the market food and drugs that may be advertised in a high-sounding way, but which are not in any sense injurious to the health of the people, would be unjustified. There is a distinction between the enforcement of law and the abuse of law.

Under the authority of the United States vs. Maufield, 177 Federal, 765, the officers of a corporation which manufactured a food product, shipped by its manager in interstate commerce, and which was adulterated or misbranded, are subject to prosecution under the Act, where they employed the manager and authorized him to operate the plant and sell the product without restriction, and the previous course of business had been to ship on orders to other states.

That case also determined that the provision of the Act, Section 9, that no dealer shall be prosecuted thereunder for shipping in interstate commerce any adulterated or misbranded article of food or drugs, when he can establish a guaranty signed by the manufacturer, that such article is not adulterated or misbranded, is not available to a dealer only when such guaranty relates to the identical article shipped by him, and affords no defense to him where it relates only to a constituent used by him in manufacturing the articles shipped.

In United States vs. 779 Cases of Molasses, the Circuit Court of Appeals for the Eighth Circuit, in 174 Federal, 325, held that an article of food put up and sold in cases bearing labels describing the contents as a particular brand of molasses, but plainly stating, in three separate places, that the product in a compound of molasses and corn syrup, and also containing all the other information required by the Act and the regulations thereunder, and which article is in fact a compound of molasses and commercial glucose, is not adulterated or misbranded, within the meaning of the Act, it being shown that it contains nothing deleterious to health.

To the same effect is United States vs. Boeckmann, 176 Federal, 382, where it was held that a food product, labeled "Compound; pure comb and strained honey and corn syrup," is not

misbranded, within the meaning of this Act, merely because the percentage of corn syrup in the compound largely exceeds that of honey. So, also, in the case of United States vs. 68 Cases of Syrup, 172 Federal, 781, it was held that all of the label will be construed together, and that construing all the words of the bottle labels together, the same meaning was intended as in the labels together, the same meaning was intended as in the labels on the cases, namely, that the bottles and the boxes contained blended maple syrup. That case continues to hold that the Act provides that an article which does not contain any added poisonous or deleterious ingredients, shall not be deemed to be adulterated or misbranded, if labeled so as to plainly indicate that it is a compound imitation or blend, and the word "blend" is plainly stated on the package, which term shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients, used for coloring purposes only.

The term "offal," under the authority of United States vs. 650 Cases of Tomato Catsup, 166 Federal, 773, does not have an exact legal signification to make it equivalent to "filthy, decomposed, or putrid vegetable substance," as used in the Act, and, therefore, that a libel containing that term was insufficient, it being essential that the label shall set forth the branding and facts inconsistent with the Act. The Court held, in United States vs. 50 Barrels of Whiskey, that it was no defense to proceedings under this Act that the brand was placed upon the packages containing such liquor by the United States guager, upon information received from the distiller, in accordance with the usual practice, or that the same kind of liquor had, for a number of years, been so branded and sold under such brand, to the knowledge of the agents and officers of the United States.

This, of course, is a statement of the well established rule that sovereignty cannot be bound by the omission or commission of its agents.

The same case held that a preliminary examination by the Department of Agriculture, as provided for in Section 4, is not at all a necessary condition precedent to the filing of a libel for the condemnation of the product.

Judge Cochran, in Savage vs. Scovell, 171 Federal, 566, in

passing upon the objection to the Kentucky Pure Food Law, that the Federal Pure Food Law had done away with the Kentucky Statute, said:

"It is questionable whether Congress can affect a State inspection law, simply by legislation covering the same subject—whether, in order to do so, it must not enact legislation under Clause 2, Section 10, Article I., of the Federal Constitution, expressly revising and controlling same; but, this apart, the two laws do not cover the same territory. The Federal law merely covers the subject of adulteration and misbranding. The State law has nothing to do with either. It has to do with the subject of disclosing the ingredients of the articles covered by it. Its policy is to compel a statement of ingredients, so that purchasers thereof, in Kentucky, may know exactly what they are buying. There may be no adulteration or misbranding—no violation of the Federal law, and yet there may be a violation of the State law in not disclosing the ingredients."

§ 387. **Importation of Opium.**—The Act of February 9, 1909, Chapter 100, 35 Stat. L., 614, reads as follows:

"Sec. 1. That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; *Provided*, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.

"Sec. 2. That if any person shall fraudulently or knowingly import or bring into the United States or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited, and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

CHAPTER XX.

PANDERING AND PROHIBITING IMMORAL USE OF WOMEN AND GIRLS.

§ 388. The Act of February 20, 1907, 34 Stat. L., 898, contains forty-four sections, relating to immigration. It prohibits the importing of women for prostitution, the importing of contract labor, the advertising for labor abroad, the soliciting by vessel owners, and the illegal landing of aliens. Sections 3 and 4 of the Act are the ones most frequently made use of to cleanse, as far as possible, the stream of immigration. Section 3 reads as follows:

"Sec. 3. That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any such woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully

within the United States, and shall be deported as provided by sections twenty and twenty-one of this Act."

Judge Hough, in United States vs. Bitty, 155 Federal, 938, held that the words "any other immoral purpose," as used in the above section must be construed with reference to the preceding word "prostitution," and to relate only to a like immoral purpose, and, so construed, cannot be held to include concubinage; and he, therefore, sustained a demurrer to the indictment. The Government had gone, by writ of error, direct to the Supreme Court of the United States, by virtue of the Act of March second, 1907, 34 Stat. L., 1246, authorizing writs of error by the United States, and the Supreme Court held, in United States vs. Bitty, 208 U. S., 393, 52 Law Ed., 544, that the importation of an alien woman into the United States, in order that she may live with the person importing her, as his concubine, is for an immoral purpose, within the meaning of the above section, making it a crime against the United States to import alien women for the purpose of prostitution, or for any other immoral purpose.

In Keller vs. United States, 213 U. S., 138, the Supreme Court held that that portion of the above section which makes it a felony to harbor alien prostitutes was unconstitutional, as to one harboring such a prostitute without knowledge of her alienage, or in connection with her coming into the United States, as a regulation of a matter within the police power reserved to the State, and not without any power delegated to Congress by the Constitution. The portion, therefore, of the section held to be unconstitutional on this state of facts, begins at the words "whoever shall keep," and ends with the words "not more than five thousand dollars."

In line with this decision was the case of *ex parte* Lair, 177 Federal, 789, which held that in so far as the section provides for the criminal punishment of the mere keeping, maintaining, supporting, or harboring an alien woman within three years after entry for the purposes of prostitution, is unconstitutional, such offense being within the police power of the State, and not subject to Congressional regulation. That case also held that the Act of March third, 1903, 32 Stat. L., 1214, in so far as it places

no limitation on the length of the holding of a female alien for prostitution, for which the holder might be prosecuted, was repealed by the Act under discussion. That case also held that the venue for the importing of a female for immoral purposes was within the district of the seaport where the alien first landed and entered the United States. In the case of United States vs. Sibray, 178 Federal, 144, the Court held, upon a writ of *habeas corpus*, that a warrant by an immigration inspector under the Act, which authorizes the inspectors to proceed without going before any other United States Courts or United States Commissioner, while not required to have the formality and particularity of an indictment, it must, in charging that the relator was an alien who was a member of the excluded class, in that he imported a woman for immoral purposes, and that he had been convicted of, or had admitted, having committed a felony or other crime or misdemeanor involving moral turpitude, prior to his entry into the United States, was fatally defective for failure to specify the specific act or acts which it was claimed brought the relator within the excluded classes. In other words, the decision throughout demands that such warrants must state facts, and not mere conclusions. The Court also held that proof that an alien, prior to his emigration, committed a single act of adultery or fornication in the country from which he came, was insufficient to justify his deportation as an alien having been convicted of, or having admitted, committing a felony or other crime or misdemeanor involving moral turpitude; also that an alien living in adultery within the United States is not ground for deportation; such conduct being solely within the police power of the statute. See also United States vs. Sibray, 178 Federal, 150, where it was held that a warrant for a woman stating generally that she entered the United States for an immoral purpose, was not sufficiently specific.

§ 390. **Importing Contract Labor.**—Section 4 of the Act reads as follows:

"That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to pre-

pay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisions contained in section two of this Act." (34 Stat. L., 900.)

See United States vs. Tsokas, 163 Federal, 129.

§ 391. **Pandering.**—The Act of June twenty-fifth, 1910, to define and punish pandering, reads as follows:

"That any person who, by threats by himself, or through another, induces, or by any device or scheme inveigles, any female into a house of prostitution, or of assignation, in the District of Columbia, against her will, or by any threat or duress detains her against her will, for the purpose of prostitution or sexual intercourse, or takes or detains a female against her will with intent to compel her by force, threats, menace, or duress to marry him, or to marry any other person, or if any parent, guardian, or other person having legal custody of the person of a female consents to her taking or detention by any person for the purpose of prostitution or sexual intercourse, is guilty of pandering, and shall be punished by imprisonment for a term of not less than one nor more than five years and fined not more than one thousand dollars.

"Sec. 2. That any person who, against her will, shall place any female in the charge or custody of any other person or persons or in a house of prostitution with the intent that she shall live a life of prostitution, or any person who shall compel any female, against her will, to reside with him or with any other person for the purpose of prostitution, or compel her against her will to live a life of prostitution, is guilty of pandering and shall be punished by a fine of not less than one thousand dollars and imprisonment for not less than one nor more than five years.

"Sec. 3. That any person who shall receive any money or other valuable thing for or on account of procuring for or placing in a house of prostitution or elsewhere any female for the purpose of causing her illegally to cohabit with any male person or persons shall be guilty of a felony, and upon conviction thereof shall be imprisoned for not less than one nor more than five years.

"Sec. 4. That any person who by force, fraud, intimidation, or threats places or leaves, or procures any other person or persons to place or leave, his wife in a house of prostitution, or to lead a life of prostitution, shall be guilty of a felony, and upon

conviction thereof shall be imprisoned not less than one nor more than ten years.

"Sec. 5. That any person or persons who attempt to detain any girl or woman in a disorderly house or house of prostitution because of any debt or debts she has contracted, or is said to have contracted, while living in said house of prostitution or disorderly house shall be guilty of a felony, and on conviction thereof be imprisoned for a term not less than one nor more than five years."

Pandering is defined by the Century Dictionary to mean to cater for the lusts of others; to administer to others' passions or prejudices for selfish ends; to pimp for; one who administers to the gratification of any of the baser passions of others. It is sometimes written pandar, formerly pandor, and was doubtless taken from the name of a man, Pandare, who procured for Troilus the love and good grace of Cressida.

The Act of June twenty-fifth, 1910, entitled an Act to further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes, was directed at what is called the "White Slave" evil, and, as far as it relates to the criminal features, is as follows:

"That the term 'interstate commerce,' as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, and the term 'foreign commerce,' as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the Ditsrict of Columbia.

"Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the Distriet of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl

in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment in the discretion of the court.

"Sec. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 5. That any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or from, through, or into which any such woman, or girl may have been carried or transported as a passenger in interstate or foreign commerce, or in any Territory or the District of Columbia, contrary to the provisions of any of said sections."

CHAPTER XXI.

SOME GENERAL AND SPECIAL PROVISIONS.

§ 393. **Punishment of Death by Hanging.**—Section 323 of the New Code is in the exact words of old Statute 5325, to wit:

"Sec. 323. The manner of inflicting the punishment of death shall be by hanging."

§ 394. **No Conviction to Work Corruption of Blood or Forfeiture of Estate.**—Section 324 of the New Code is in the identical words of the old Statute 5326, as follows:

"Sec. 324. No conviction or judgment shall work corruption blood or any forfeiture of estate."

In England, felony comprises every species of crime which at Common Law worked a forfeiture of goods and lands.

§ 395. **Whipping and the Pillory Abolished.**—Section 325 of the New Code uses the words of old Statute 5327, as follows:

"Sec. 325. The punishment of whipping and of standing in the pillory shall not be inflicted."

§ 396. **Jurisdiction of State Courts.**—Section 326 of the New Code uses the words of the old Statute 5328, as follows:

"Sec. 326. Nothing in this Title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

The word "Title" used in the above section must necessarily mean all of the sections in the New Code; that is, from Section 1 to Section 325 inclusive. It could not be limited to the few sections in Chapter XIV. of the New Code, which treats alone of general and special provisions.

Decisions.—The efforts of the Courts to maintain the sovereignty of the Federal and State Governments without impingement from either side have been both commendable and successful. It is true that at times the line has been difficult to trace, and conflict seemed imminent, but careful reasoning and a thorough determination to preserve the autonomy and virgin jurisdiction of each Government have usually triumphed. Even the Supreme Court of the United States has not hesitated to distinguish its own decisions so as to keep the line as distinct as possible. In the case of New York vs. Eno, 155 U. S., page 89, hereinafter noticed, it became necessary for the preservation of the State lines to distinguish *in re* Loney, 134 U. S., 372, and the Court did so by announcing that the Loney decision was one of urgency, which involved the authority and operation of the general Government.

It may be announced as the general rule, gathered from the decisions, that where there is an apparent conflict of authority, and the State court secures jurisdiction of the person, that person must exhaust all State remedies before appealing to the Federal Courts for relief. If, however, as in the Loney case, immediate action is urgent, not to the interests of the person, but to the interests of the general Government, then and in that event the Courts of the general Government will interfere before all State remedies have been exhausted. So, too, if Congress has taken exclusive jurisdiction of an offense interference by similar prosecutions in the State Courts are not permitted.

§ 397. **Illustrations.** In the case of Cross vs. North Carolina, 132 U. S., 140, 33 Law Ed., 287, the Supreme Court held that where an officer of a national bank forged a promissory note and entered it upon the books of the bank for the purpose of sustaining false entries in the books and in order to deceive the United States Bank Examiner, he could be tried and convicted of forgery of the note in the State Court although the offense of making such false entries is one against the United States, of which its courts have exclusive cognizance. In other words, the crime of forgery against the State could not be excused or obliterated by committing another and distinct crime against the United States; and the act, or series of acts, constituting an offense equally against the United States and the State, subjects the guilty party to punishment under the laws of each Government. In Thomas vs. Loney, 134 U. S., 377, 33 Law Ed., 949, the Supreme Court of the United States discharged, upon *habeas corpus* applicant Loney from imprisonment under a warrant of arrest from a justice of the peace of Virginia, upon a complaint charging him with the perjury in giving his deposition as a witness before a notary public of the city of Richmond, in the case of a contested election of a member of the House of Representatives of the United States, and held, in substance, that the notary public designated by Congress to take depositions in case of a contested election of a member of the House of Representatives of the United States, performs this function under the authority of Congress, and not under that of the State, and testimony taken in such a case stands on the same ground as if taken before a judge or officer of the United States, and a witness giving his testimony in such a case is accountable for the truth of his testimony to the United States only, and the power to punish such witness belongs exclusively to the Government in whose tribunals that proceeding is had.

This case affirms the same case in 38 Federal, 101. In the same report, on page 380, 33 Law Ed., 951, in the case of Fitzgerald vs. Green, the Supreme Court reversed the decision of the Circuit Court of the United States, discharging upon *habeas corpus* Green from imprisonment under a judgment of the Court of Virginia, imposed upon him for unlawfully voting for pres-

idential electors, and held, in substance, that the State has the power to punish for illegal and fraudulent voting for presidential electors, because Congress has never undertaken to interfere with the manner of appointing electors, or the mode of appointment prescribed by the law of the State to regulate the conduct of such election, or to punish any fraud in voting for electors, but has left these matters to the control of the States.

In McPherson vs. Blacker, 146 U. S., page 1; 36 Law Ed., page 869, the Supreme Court of the United States maintained its right, under Section 709 of the Revised Statutes of the United States, to inquire into the method, upon proper petition, pursued by a State in the selection of its presidential electors; and after so maintaining its jurisdiction, determined that the Constitution did not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors, and that the appointment and mode of appointment of the electors was exclusively left to the States under the Constitution of the United States, and upheld the Michigan Act, even though the same was questioned as being repugnant to the Constitution of the United States.

In Pettibone vs. United States, 148 U. S., 197, 37 Law Ed., 419, the Supreme Court held that persons cannot be convicted of obstructing the administration of justice in a Federal Court under United States Revised Statute 5399, because of a criminal intent on their part to commit a crime against the State, in the deciding of which the Court affirmed the doctrine that United States Courts have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States.

In the case of Ohio vs. Brooks, 173 U. S., page 299, 43 Law Ed., page 699, the Supreme Court discharged, upon *habeas corpus*, Thomas, who was the Superintendent of the United States Soldiers' Home, and who had been convicted in the State Court for serving oleomargarine in violation of the State law, to disabled soldiers under his charge at the said home, and held that the Governor of a Soldiers' Home, which is under the sole jurisdiction of Congress, even though jurisdiction has not been ceded

to the land upon which the home is situated by the State Legislature, is not subject to the State Law concerning the use of oleomargarine when he furnishes that article to the inmates of the home, as a part of the rations furnished for them under appropriations made by Congress therefor.

In United States vs. Eno, 155 U. S., page 89, 39 Law Ed., page 80, arose upon a writ of *habeas corpus* sued out by Eno, who alleged that he was in the city prison of New York City, by reason of certain bench warrants issued upon indictment against him in a State Court of New York for certain offenses over which the State Courts had no jurisdiction; such offenses being the making of false entries in the books of a national bank. He was discharged by the Circuit Court of the United States, and the State of New York appealed to the Supreme Court, which Court reversed the judgment of the Circuit Court of the United States, and held, in substance, that the Circuit Court of the United States should not, except in cases of urgency, discharge upon *habeas corpus* from custody under warrants issued by a State Court, one charged with the offense committed while president of a national bank, of forgery by making false entries in the books of the bank, with intent to defraud, where he is not indicted in any Court of the United States for such offense. The claim of the accused of immunity from prosecution under the State Court should be first passed upon by the highest Court of the State; and if any Federal right is denied him, he may then take the case to the Supreme Court of the United States for redress.

In referring to the Loney case, 134 U. S., cited *supra,* the Court said:

"It may be well to refer to the case of Thomas vs. Loney, 134 U. S. It will be observed that this Court, in *ex parte* Royall, recognized certain cases as constituting exceptions to the general rule—among which are cases of urgency, involving the authority and operations of the general government. Loney's case was of that class. It appeared from the record that he was duly summoned to give his deposition in a contested election case, pending in the House of Representatives of the Congress of the United States,—a summons he was obliged to obey, unless prevented by sickness or unavoidable accident, under the penalty of forfeiting

a named sum to the party at whose instance he was summoned, and of becoming subject to fine and imprisonment, that he appeared before a notary public in obedience to such summons, and proceeded to give his deposition; and that while in the office of an attorney, for the purpose of completing his testimony, he was arrested under a warrant issued by a justice of the peace based upon the affidavit of one of the parties in the contested election case, charging him with wilful perjury, committed in his deposition.....It is clear from this statement that that case was one of urgency, involving, in a substantial sense, the authority and operations of the general Government."

Exclusive Jurisdiction of the United States.—It will be well, in considering this line of decisions, and ofttimes in viewing just where the jurisdiction of the State Court ends and the jurisdiction of the Federal Court begins, and just where the Federal Court will exercise exclusive jurisdiction, to bear in mind Section 711 of the Revised Statutes of the United States, wherein the Courts of the United States are given exclusive jurisdiction over such matters as are therein named, to wit: all crimes and offenses cognizable under the authority of the laws of the United States; all suits for penalties and forfeitures incurred under the laws of the United States; all civil cases of admiralty and maritime jurisdiction; all seizures under the laws of the United States on land or on sea; all cases arising under the patent-right or copy-right laws of the United States; all matters and proceedings in bankruptcy; all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens; and all suits or proceedings against ambassadors or other public ministers or their servants, or against consuls or vice-consuls.

§ 398. **Other Decisions.**—In United States vs. Lackey, 99 Federal, 952, which was a case arising upon prosecution for alleged violations of Section 5507 and 5508, growing out of indictments for alleged interference with the rights secured by the Fifteenth Amendment, the Court held that neither the Fifteenth Amendment, nor the statutes enacted for its enforcement, were intended in any primary sense, to protect any right or interest of the United States, and the fact that the national Government had no direct interest in an election does not affect the applicability of

such statutes, or constitute a defense to an indictment for their violation in connection with such election. In other words, this decision holds, and it seems to be the law, that one may be prosecuted in the Federal Courts for a violation of the acts of Congress which are made to give life to the Fifteenth Amendment, even though the rights interfered with under the Fifteenth Amendment were civil rights under the State.

In *in re* Welch, 57 Federal, 576, Circuit Judge Lacombe held that the question as to whether the State Court has jurisdiction over a pilot indicted for manslaughter, in causing the death of another person on another boat, by causing the boat in his charge to collide therewith, cannot be raised by an application for a writ of *habeas corpus,* when the prisoner may raise it by appeal or otherwise in the State Courts, and may carry it thence, should the decision be adverse, to the United States Supreme Court by writ of error.

In *in re* Waite, 81 Federal, 359, District Judge Shiras held that an officer or agent of the United States engaged in the performance of a duty arising under the laws and authority of the United States, is not liable to a criminal prosecution in the Courts of a State for acts done by him in his official capacity, and such agent or officer need not wait to carry the case to the highest Court, and then, by writ of error, to the United States Supreme Court, but may have his release at once upon *habeas corpus,* if necessary, since the operations of the Federal Government would in the meantime be obstructed by the confinement of its officer. This decision was affirmed in Campbell vs. Waite, by the Circuit Court of Appeals for the Eighth Circuit, in 88 Federal, page 102.

In *in re* Miller, 42 Federal, 307, the Court held that where a United States Marshal is arrested under State authority, on a charge of forgery, the fact that at the time of his arrest he was on his way to serve process issued by a United States Commissioner, did not oust the State authorities from jurisdiction, where it does not appear that he was arrested for any act done in pursuance of Federal authority, or with the intent to interfere with the service of the process in his hands.

The case of *ex parte* Geisler, 50 Federal, 411, recites the clause

in the counterfeiting statute which authorizes prosecution for that offense in the State Courts, and holds, of course, that the State Courts have power to punish counterfeiting under the State statutes.

§ 399. **Pardoning Power.**—Section 327 of the New Code is in the exact words of old Section 5330, and reads as follows:

"Sec. 327. Whenever, by the judgment of any court or judicial officer of the United States, in any criminal proceeding, any person is sentenced to two kinds of punishment, the one pecuniary and the other corporal, the President shall have full discretionary power to pardon or remit, in whole or in part, either one of the two kinds, without, in any manner, impairing the legal validity of the other kind, or of any portion of either kind, not pardoned or remitted."

This section does not mean that a pardon releases the offender from all of the disabilities imposed by the offense, to the extent of undoing any rights which have vested in others directly, as property rights, Knote vs. United States, 94 U. S., 157, 24 Law Ed., 442.

Under the rules of the Department of Justice, those who seek pardons should make their applications direct to the President, who, in turn, refers the papers to the Attorney General, who thereafter refers them to the District Attorney in the proper District, with instructions to report thereon, and obtain, if possible, the views of the trial Judge. Both trial Judges and District Attorneys are requested by the Department of Justice not to make recommendations or give letters for commutation until requested so to do by the Department of Justice.

§ 400. **Qualified Verdicts in Certain Cases.**—Section 330 of the New Code, re-enacts the Act of the fifteenth of January, 1897, 29 Stat. L., 487, Second Supplement, 538, and is in the following words:

"Sec. 330. In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto "without capital punishment"; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."

§ 401. **Body of Executed Offender May be Delivered to Surgeon**

for Dissection.—Section 5340 of the old statutes becomes, in substance, Section 331 of the New Code, as follows:

"Sec. 331. The court before which any person is convicted of murder in the first degree, or rape, may, in its discretion, add to the judgment of death, that the body of the offender be delivered to a surgeon for dissection; and the marshal who executes such judgment shall deliver the body, after execution, to such surgeon as the court may direct; and such surgeon, or some person appointed by him, shall receive and take away the body at the time of execution."

§ 402. **Who Are Principals.**—Sections 5323 and 5427 become 332 of the New Code, in the following words:

"Sec. 332. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

§ 403. **Punishment of Accessories.**—Section 333 of the New Code comprises the substantial elements of 5533, 5534, and 5535 of the old statutes, and is in the following words:

"Sec. 333. Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years.

§ 404. **Felonies and Misdemeanors.**—Section 335 of the New Code is one of the most important and most practical of the entire Act, because it settles for all time the much mooted question often raised upon challenges and elsewhere as to when a given offense is a misdemeanor or a felony. The Section is in the following words:

"§ Sec. 335. All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

§ 405. **Omission of Words "Hard Labor" Not to Deprive Court of Power to Impose.**—Section 338 of the New Code reads as follows:

"Sec. 338. The omission of the words "hard labor" from the provisions prescribing the punishment in the various sections

of this Act, shall not be construed as depriving the court of the power to impose hard labor as a part of the punishment, in any case where such power now exists."

§ 406. Repealing provisions, Chapter XV. of the New Code, which includes Sections 341 to 345, repeal such sections of the old Code as are necessary to make effective the New Code; providing that accrued rights shall not be affected, and announcing that prosecutions and acts of limitations are not affected.

§ 407. **Parol of United States Prisoners.**—The Act of Congress dated June twenty-fifth, 1910, provides that the Superintendent of Prisons of the Department of Justice and the warden and physician of each United States Penitentiary, shall constitute a board of parole of such prison, and provides, in general terms, for the release on parol of convicts so recommended by the Board. The Act is in ten sections.

§ 408. **Witnesses for Poor Accused.**—Section 878 of the old statutes provides that when any person is indicted in any Court of the United States who is unable to pay for witnesses in his behalf, he shall make an affidavit setting forth facts in accordance with the terms of the section, in which event the Court orders the process at the expense of the United States.

The Act of June twenty-fifth, 1910, authorizes suits, writs of error, etc., by poor persons upon making of certain certificates and oaths therein provided for.

§ 409. **Publicity of Contributions.**—An Act approved June twenty-fifth, 1910, provides for the publicity of the contributions made to all political parties, which shall in two or more States influence the result, or attempt to influence the result, of an election at which representatives in Congress are to be elected. The Act is in ten sections, and provides in Section 6 that the public statements shall give the name and address of each contributor, the total sum contributed, the total sum of all promises and loans and advances, the total sum disbursed, advanced, or promised, and provides a penalty in Section 10, as follows:

"That every person wilfully violating any of the provisions of this Act shall, upon conviction, be fined not more than one thousand dollars or imprisoned not more than one year, or both."

CHAPTER XXII.

FORM OF INDICTMENT.

Form of Indictment under Section 225, old Section 4046, etc., for embezzlement:

"The United States of America.

"At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said district, on the first Tuesday of December in the year of our Lord one thousand nine hundred and nine.

"First Count. The jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that Frank H. Mason, of Boston, in said district, during all of the year nineteen hundred and eight, was, and ever since then has been, an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and, on the first day of February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, certain money of the United States, a particular description whereof is to said grand jurors unknown, to the amount and value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight had come into his possession and under his control in the execution of his office as such officer and clerk, and under authority and claim of authority as such officer and clerk, and which he should, on said first day of February, in the year nineteen hundred and nine, have accounted for and paid to the United States at Boston aforesaid in the manner provided by law; and that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the same money unlawfully and feloniously did embezzle.

"Second Count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason during all of the year nineteen hundred and eight was, and ever since has been, an officer of the United States, to wit, clerk of the District Court of the United States for the district of Massachusetts and on said first day of February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, certain public moneys of the United States, a

particular description whereof is to said grand jurors unknown, to wit, moneys to the amount and of the value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and eight, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, as such officer, was charged, by certain acts of Congress, to wit, sections 823, 828, and 844, of the Revised Statutes of the United States, and the Act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other Acts of Congress, safely to keep; that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the same public moneys unlawfully did fail safely to keep as required by said Acts of Congress, and, on the contrary, the same then and there unlawfully did convert to his own use, and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted."

For Loss of Life by Misconduct of Officers, Owners, Charterers, Inspectors, Etc., of Vessels, Under Section 282.

(Approved in U. S. vs. Van Schaick, 134 Federal, 594.)

Indictment No. 1 charges that Van Schaick was—

Guilty of misconduct, negligence and inattention to duty on such vessel as such master and captain, in that he then and there unlawfully had and kept on said vessel, among other life preservers, adjustable to the bodies of human beings, which had been placed thereon for the use of the passengers and other persons on board of the said vessel in case of emergency, and intended for such use, divers, to wit, nine hundred and upwards, unsuitable, inefficient, and useless life preservers; that is to say, in the respect that, according to the laws relating thereto, and the regulations thereunder, the said life preservers on said vessel were required to be in good order and accessible for immediate use, adjustable to the bodies of passengers, and made of good sound cork blocks, or other suitable material, with belts and

shoulder-straps properly attached in the manner prescribed by the laws of Congress relating thereto and the rules and regulations thereunder as aforesaid, and that every such life preserver should contain at least six pounds of good cork, which should have a buoyancy of at least four pounds to each pound of cork; but in truth and in fact, large numbers of the same, to the amount of nine hundred and upwards, as aforesaid, through the unlawful misconduct, negligence, and inattention to his duties by the said master and captain as aforesaid, were unsafe, unsuitable, and unserviceable, so that, at the times aforesaid, while the said William H. Van Schaick was master and captain as aforesaid, of the said steamboat, the said life preservers, in large numbers, to wit, nine hundred of the same and upwards, were utterly useless for the protection and saving of human life, in that, in many instances, the covers thereof were rotten, and not of sufficient strength and soundness to make them impervious to water, and the shoulder-straps and bands of the same were so decayed that it was impossible to securely fasten the said life preservers to the human body; and the said life preservers did not have the buoyancy required by law; and the unsuitability and the inefficiency and uselessness of the said life preservers for the purpose which they were intended to serve should have been known to the said William H. Van Schaick, and he might, by the exercise of ordinary observation and inquiry, have ascertained the same, and should so have ascertained before the said vessel started on the excursion hereinafter mentioned; and which said unsuitable and inefficient appliances, he, the said William H. Van Schaick, notwithstanding the premises, unlawfully caused, suffered, and permitted to be and remain on said vessel, and he was guilty of misconduct, negligence and inattention to his duties upon said vessel, in that he permitted the said vessel to go, and took the said vessel, on said excursion, with the said unsuitable and inefficient life preservers on board, and caused, suffered, and permitted the same to be tendered and held out for the use of the passengers and other persons on board of said steamboat, at the time of her destruction by fire as hereinafter mentioned.

For Conspiracy to Violate the Lottery Statute.

(Champion vs. Ames, 47 Law Ed., 496.)

The indictment charged, in its first count, that on or about the 1st day of February, A. D. 1899, in Dallas County, Texas, "C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park, did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the United States, to wit, for the purpose of disposing of the same, to cause to be carried from one state to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, certain papers, certificates, and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, and interests in and dependent upon the event of a lottery, offering prizes dependent upon lot and chance, that is to say, caused to be carried, as aforesaid, for the purpose of disposing of the same, papers, certificates, or instruments purporting to be tickets to represent the chances, shares, and interests in the prizes which by lot and chance might be awarded to persons, to these grand jurors unknown, who might purchase said papers, certificates, and instruments, representing and purporting to be tickets, as aforesaid, with the numbers thereon shown and indicated and printed, which by lot and chance should be on a certain day, draw a prize or prizes at the purported lottery or chance company, to wit, at the purported monthly drawing of the so-called Pan-American Lottery Company, which purported to draw monthly at Asuncion, Paraguy, which said Pan-American Lottery Company purported to be an enterprise offering prizes dependent upon lot and chance, the specific method of such drawing being unknown to the grand jurors, but which said papers, certificates, and instruments purporting to be and representing tickets upon their face purporting to be entitled to participation in the drawing for a certain capital prize amounting to the sum of $32,000, and which said drawings for said capital prize, or the part or parts thereof allotted or to be allotted in conformity with the scheme of lot and chance, were to take place monthly, the manner and form of

which is to the grand jurors unknown, but that said drawing and lot and chance by which said prize or prizes were to be drawn was purported to be under the supervision and direction of Enrigue Montes de Leon, manager, and Bernardo Lopez, intervener, and which said papers, certificates, and instruments purporting to be tickets of the said Pan-American Lottery Company were so divided as to be called whole, half, quarter, and eighth tickets, the whole tickets to be sold for the sum of $2, the half tickets for the sum of $1, the quarter tickets for the sum of 50 cents, and the eighth tickets for the sum of 25 cents."

The indictment further charged that "in pursuance to said conspiracy, and to effect the object thereof, to wit, for the purpose of causing to be carried from one state to another in the United States, to wit, from the State of Texas to the State of California aforesaid, for the purpose of disposing of the same, papers, certificates, and instruments purporting to be and representing tickets, chances, and shares and interests in and dependent upon lot and chance, as aforesaid, as they then and there well knew, said W. F. Champion and Charles B. Pard did then and there, to wit, on or about the last day aforesaid, in the Dallas Division of the Northern District of Texas aforesaid, unlawfully, knowingly, and feloniously, for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, for the purpose of disposing of the same, deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway, and from Dallas, Texas, to Fresno, California, for hire, one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is hereto annexed by the grand jury to this indictment and made a part hereof."

Under Section 5508, Conspiracy to Endanger, Etc., Citizens in the Exercise of Civil Rights.

(157 Federal, page 722.)

Omitting formal parts, the eleventh count of the indictment is as follows:

That on the 1st day of June, 1906, the defendants (naming them) did unlawfully and feloniously conspire, combine, confederate, and agree together to injure, oppress, threaten and intimidate a certain citizen of the United States, to wit, John Reed, in the free exercise and enjoyment of rights and privileges secured to him by the Constitution and laws of the United States, to wit, the right to the free exercise and enjoyment of freedom from involuntary servitude and slavery; that in pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said defendants (naming them) did then and there unlawfully and feloniously arrest, hold, imprison, and guard him, the said John Reed, and then and there unlawfully and feloniously compel by threats and intimidation him, the said John Reed, to then and there work and labor involuntarily and against his will for said defendants (naming them), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Under Peonage Statute.

(United States vs. McClellan, 127 Federal, page 971.)

The grand jurors of the United States, selected, chosen, and sworn in and for the Eastern Division of the Southern District of Georgia, upon their oaths present: That heretofore, to wit, on the eleventh day of August in the year of our Lord one thousand nine hundred and two, one Thomas J. McClellan, late of said division and district, within said division and district, and within the jurisdiction of this court, did then and there knowingly and unlawfully cause one John Wesley Boney to be held to a condition of peonage; for that the said Thomas J. McClellan

in the county of Ware, in the State of Georgia, did forcibly seize the body of the said John Wesley Boney, without his consent and without authority of law, and did then and there sell the body of the said John Wesley Boney, without his consent and without authority of law, to Edward J. McRee, William McRee, and Frank I. McRee, then and there causing him, the said John Wesley Boney, to be held by the said Edward J. McRee, William McRee, and Frank I. McRee to a condition of peonage; for that the said Edward J. McRee, William McRee, and Frank I. McRee then and there having obtained the custody of the body of the said John Wesley Boney, did then and there, by force and against the will of him, the said John Wesley Boney, and without authority of law, transport the body of the said John Wesley Boney to the county of Lowndes, in said State, and did then and there hold the said John Wesley Boney, against his will, to labor for them, to work out a debt which they, the said Edward J. McRee, William McRee, and Frank I. McRee, claimed to be due them by the said John Wesley Boney, and to labor under the terms of an alleged contract between them, the said Edward J. McRee, William McRee, and Frank I. McRee, and the said John Wesley Boney; he, the said Thomas J. McClellan, then and there well knowing that the said John Wesley Boney would be so held as aforesaid by the said Edward J. McRee, William McRee, and Frank I. McRee; whereby, in the manner aforesaid, the said Thomas J. McClellan did cause the said John Wesley Boney to be held to a condition of peonage; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

For Returning One To Peonage.

(Page 727, 49 Law Ed.; approved in Clyatt vs. U. S., by the Supreme Court, 197 U. S., 207.)

The grand jurors of the United States of America impaneled and sworn within and for the district aforesaid, on their oaths present that one Samuel M. Clyatt, heretofore, to wit: on the eleventh day of February, in the year of our Lord one thousand

nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid, and within the jurisdiction of this court, did then and there unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly, and against the will of them, the said Will Gordon and the said Mose Ridley, returning them, the said Will Gordon and Mose Ridley, to work to and for Samuel M. Clyatt and H. H. Tift, co-partners doing business under the firm name and style of Clyatt & Tift, to be held by them, the said Clyatt & Tift, to work out a debt claimed to be due to them, the said Clyatt & Tift, by the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

For Polygamy, Under Section 313, Approved by Supreme Court in Cannon vs. United States, 116 U. S., 55, 29 Law Ed., 563.

The grand jury of the United States of America, within and for the district aforesaid, in the territory aforesaid, being duly empaneled and sworn, on their oaths do find and present: that Angus M. Cannon, late of said district, in the territory aforesaid, to wit: on the first day of June, in the year of our Lord 1882, and on divers other days and continuously between the said first day of June, A. D. 1882, and the first day of February, A. D. 1885, at the County of Salt Lake and Territory of Utah, did unlawfully cohabit with more than one woman, to wit: one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same.

Under Section 3242 as Amended Illegal Retail Liquor Dealer, Approved in Ledbetter vs. U. S., 170 U. S., 608, 42 Law Ed., 1162.

That Lewis Ledbetter, late of said district, heretofore, to wit, on the 10th day of April, A. D. 1896, in the County of Appanoose, and town of Dallas, in the Southern District of Iowa, and within the jurisdiction of this court, did then and there wilfully, unlawfully, and feloniously carry on the business of a retail

liquor dealer without first having paid the special tax therefor, as required by law, contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America.

For Sale of Oleomargarine Not Properly Marked and Branded; Approved in Ex Parte Kollock, 165 U. S., 526, Law Ed., 814.

The first indictment against Kollock set forth that pursuant to the authority conferred on the Commissioner of Internal Revenue by the 6th section of the Act of August 2, 1886, "the said commissioner, with the approval of the Secretary of the Treasury, did, on the twelfth day of March, in the year of our Lord one thousand eight hundred and ninety-one, prescribe certain regulations, in substance and to the effect, among other things, that the wooden or paper packages in which retail dealers in oleomargarine were required by said Act of Congress to pack the oleomargarine sold by them, such retail dealers, should have printed or branded upon them in the case of each sale, the name and address of the retail dealer making the same; likewise, the words 'pound' and 'oleomargarine' in letters not less than one-fourth of one inch square, and likewise a figure or figures of the same size, indicating (in connection with the said words 'pound' and 'oleomargarine'), the quantity of oleomargarine so sold, written, printed, or branded on such wooden or paper packages and placed before the said word 'pound,' and that the said words 'oleomargarine' and 'pound' so required to be printed or branded on such packages as aforesaid in the case of each sale as aforesaid, and the said figure or figures so indicative of quantity as aforesaid in the case of each sale as aforesaid, and so required to be written, printed, or branded on such packages as aforesaid should be so placed thereon as to be plainly visible to the purchaser at the time of the delivery to him, such purchaser, by retail dealers of the oleomargarine sold to such purchaser by them, such retail dealers."

And thus continued:

"That on the fourteenth day of January, in the year of our Lord one thousand eight hundred and ninety-six, and at the

District aforesaid, one Israel C. Kollock, late of the District aforesaid, being then and there engaged in business as a retail dealer in oleomargarine, at a store of him, the said Israel C. Kollock, situated on Fourth Street, southeast, in the city of Washington, in the said district, did then and there, and at said store knowingly sell and deliver to a certain Florence Davis one-half of one pound of oleomargarine as and for butter, which said one-half of one pound of oleomargarine was not then and there and at the time of such sale and delivery thereof, packed in a new wooden or paper package having then and there printed or branded thereon the name and address of him, the said Israel C. Kollock, in letters one-fourth of one inch square, and the words 'pound' and 'oleomargarine' in letters of like size, and a figure or figures of like size written, printed, or branded thereon indicative (in connection with the said words 'pound' and 'oleomargarine') of the quantity of oleomargarine so sold and delivered to her, the said Florence Davis, as aforesaid, and which said one-half of one pound of oleomargarine at the time it was so knowingly sold and delivered to her, the said Florence Davis, as aforesaid, by him, the said Israel C. Kollock, as aforesaid, was then and there and at the time of the sale and delivery thereof as aforesaid packed in a paper package upon which there had not been printed, branded, or written any or either of the marks and characters aforesaid so required by the said regulations to be placed thereon as aforesaid, as he, the said Israel C. Kollock, then and there well knew, against the form of the statute, etc., etc."

For Conspiracy to Violate Section 5358, to Plunder or Steal from Vessel, (7 Federal, 716).

The indictment alleges that the defendants—

"Did conspire, combine, confederate, and agree together, between and among themselves, to plunder certain goods and merchandise, a more particular description of which said goods and merchandise being to the grand jurors aforesaid unknown, then and there belonging to the steamboat City of Vicksburg, the said steamboat being then and there wrecked and in distress on the waters of the Mississippi River, within the admiralty and mar-

itime jurisdiction of the United States, while engaged in commerce and navigation in said river, to wit, between Vicksburg, in the State of Mississippi, and St. Louis, in the State of Missouri; and that, to effect the object of the said conspiracy the said Hercules Sanche then and there furnished and loaned to the said John Woods and Elias Boatright a certain skiff to be used by them, the said Woods and the said Boatright, in plundering said goods and merchandise from the said steamboat."

Under Section 5438, (Bridgeman vs. United States, 140 Federal, 578).

The twenty-first count is in these words:

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present: That one Morris L. Bridgeman, late of the State and district of Montana, before and on the 5th day of October, A. D. 1901, and thenceforth until and on and after the 31st day of January, A. D. 1902, was then and there the United States Indian Agent at and of the Fort Belknap Indian reservation, in the State and district of Montana. That on the said 31st day of January, A. D. 1902, in the State and district of Montana, the said Morris L. Bridgeman, United States Indian Agent as aforesaid, did then and there knowingly, wilfully, and unlawfully make and cause to be made, and present and cause to be presented, for approval, to the Commissioner of Indian Affairs of the United States, being then and there an officer of the civil service of the United States, a false, fictitious, and fraudulent claim upon and against the government of the United States for the sum of two hundred and eighty-five dollars and eighty-eight cents; that is to say, a certain claim purporting that the said Morris L. Bridgeman, as United States Indian Agent as aforesaid, had then and there expended and paid the said sum of two hundred and eighty-five dollars and eighty-eight cents to two certain Indians, to wit, Turns Around and Bracelet, in payment of fourteen thousand two hundred and ninety-four feet of rough lumber, and that the said aggregate sum of two hundred and eighty-five dollars and eighty-eight cents had been so expended and paid by said Morris

L. Bridgeman, as United States Indian Agent, as aforesaid by paying to said Indian, Turns Around, the sum of eighty-five dollars and eighty-eight cents for four thousand two hundred and ninety-four feet of rough lumber, and by paying to said Indian, Bracelet, the sum of two hundred dollars for ten thousand feet of rough lumber. That the said claim was then and there, to wit, at the time of the making and presenting thereof as aforesaid, false, fictitious, and fraudulent in this: that the said Morris L. Bridgeman, United States Indian Agent, as aforesaid, had not paid the said sum of two hundred and eighty-five dollars and eighty-eight cents to said Indians, Turns Around and Bracelet, or either of them, in payment of fourteen thousand two hundred and ninety-four feet of rough lumber, and had not paid to said Indian, Turns Around, the sum of eighty-five dollars and eighty-eight cents for four thousand two hundred and ninety-four feet of rough lumber, and had not paid to said Indian, Bracelet, the sum of two hundred dollars for ten thousand feet of rough lumber; and that the said Morris L. Bridgeman, United States Indian Agent, as aforesaid, was not then and there entitled to have the said claim, so made and presented by him, as aforesaid, approved, he, the said Morris L. Bridgeman, United States Indian Agent, as aforesaid, at the time of so making and presenting the said claim, then and there well knowing the same to be false, fictitious, and fraudulent. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Morris L. Bridgeman, United States Indian Agent, as aforesaid, in the State and district of Montana, and in manner and form aforesaid, did, on the thirty-first day of January, A. D. 1902, make and cause to be made, and present and cause to be presented, for approval, to the said Commissioner of Indian Affairs of the United States, a claim upon and against the Government of the United States, which said claim, he, the said Morris L. Bridgeman, then and there well knew to be false, fictitous and fraudulent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

Under Section 39, (Vernon vs. United States, 146 Federal, 122).

"That J. B. Vernon, whose Christian name is to the grand jurors aforesaid unknown, on the 1st day of August, in the year 1902, in the Northern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of this court, did unlawfully, feloniously and corruptly offer and give a large sum (the exact amount thereof being to the grand jurors aforesaid unknown) of the lawful money of the United States to one Charles L. Blanton, who was then and there, as he the said J. B. Vernon then and there well knew, a person acting for and on behalf of the United States in an official function, under and by the authority of a department of the Government, to wit, the Treasury Department of the United States, with the intent then and there of him, the said J. B. Vernon, to unlawfully, feloniously and corruptly influence the action of the said Charles L. Blanton on a matter then and there pending before him in said official function as aforesaid, that is to say, in making examination of and reporting and recommending to the Secretary of the Treasury a site for a United States post-office at Kirksville, Missouri, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

For Larceny of Personal Property of United States, Under Section 46, (United States vs. Jones, 69 Fed., 973).

The first count of the indictment charged that the defendant, on the fifteenth day of June, 1893, and before the finding of this indictment,—

"Did unlawfully and feloniously take, steal and carry away from the United States Mint at Carson City, State and District of Nevada, personal property, to wit, gold metal, which said personal property belonged to the United States of America, and which said personal property was of the value of $23,000; the said unlawful and felonious taking and carrying away being with the intent, then and there, to steal the said property, and defraud the United States of America thereof," etc.

Under Section 79, (Green vs. United States, 150 Federal, 561).

"He, the said John Francis Green, then and there being at the time and place of said registration as aforesaid, came in person before Frank Asche Faron, then and before that time being a deputy registrar of voters at said registration for said election aforesaid, and made application and made and subscribed an affidavit for the purpose of causing himself to be registered as a voter at said registration, for said election; and the said John Francis Green so making the said application to be registered at said registration, at and upon the making of said affidavit, it became and was then and there material to know whether the said John Francis Green had been naturalized as a citizen of the United States of America; and, thereupon, the said John Francis Green then and there was in due manner sworn by the said Frank Asche Faron, and made oath before him then and there of and concerning the truth of the matter contained in the said affidavit; he, the said Frank Asche Faron, then and there being said deputy registrar of voters as aforesaid, and having then and there competent authority to administer the said oath to the said John Francis Green in that behalf; and the said John Francis Green so being sworn as aforesaid, then and there, in and by his said affidavit, wilfully, corruptly, and falsely, and contrary to his said oath, did depose and swear, as in the said affidavit set forth, that he was naturalized in the State of California on the 8th day of November, in the year 1900, whereas, in truth and fact, as the said John Francis Green well knew at the time he was so sworn and made affidavit, as aforesaid, the said John Francis Green, at the time he was so sworn and made affidavit, as aforesaid, had never been naturalized as a citizen of the United States of America, and was an alien."

Under Section 126, Subornation of Perjury, (Boren vs. United States, 144 Federal, 801).

The first count charges that the accused, "on the fourteenth day of November, in the year of our Lord one thousand nine hundred and four, at Redding, in the county of Shasta, State

and Northern District of California, then and there being, did then and there unlawfully, wilfully, knowingly, and feloniously procure, instigate, and suborn one John M. Layton to appear and take an oath before one Frank M. Swasey that a certain declaration and affidavit by him, John M. Layton, subscribed was true, said declaration and affidavit being then and there a matter in which the laws of the United States authorize an oath to be administered—that is to say, a sworn statement,—for the purchase of timber and stone lands described therein as the northwest quarter of Section eight, township thirty-two north, of range eight west, in the district of lands subject to sale at Redding, California, and said Frank M. Swasey was then and there an officer competent to administer said oath—that is to say, the register of the United States land office at Redding,—and that, in accordance with said procurement, instigation, and subornation, the said Frank M. Layton did appear before the said Frank M. Swasey and take an oath that said declaration and affidavit was true; and that the said Harry W. Miller, Frank E. Kincart, and William H. Boren, and each of them, did then and there unlawfully, wilfully, knowingly, and feloniously procure, instigate, and suborn said John M. Layton wilfully and contrary to his oath to state and subscribe in said declaration and affidavit a certain false and untrue material statement that he, John M. Layton, had personally examined the lands mentioned in said declaration and affidavit, and that he did not apply to purchase the land above described on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title he might acquire from the United States may inure in whole or in part to the benefit of any person except himself, which statement he, John M. Layton, at the time of stating and subscribing the same, did not believe to be true, and knew to be untrue, in this: that he, John M. Layton had not personally examined said lands, and had theretofore entered into a contract for the sale of said land to the Washington Mill & Lumber Company. And that the said Harry W. Miller, Frank E. Kincart, and William H. Boren, and each of them, at the time of the afore-

said procurement, instigation, and subornation, well knew that the aforesaid statement was a false and untrue material statement, and well knew that said John M. Layton did not believe the same to be true."

Under Section Clause of Section 5395, False Oath in Naturalization, (Moore vs. United States, 144 Fed., 962).

"That George K. Moore, to wit, on the 10th day of November, in the year of our Lord nineteen hundred and two, in the said district and within the jurisdiction of said court, in a proceeding for naturalization of one Setrak G. Moomjian, then and there in the Common Pleas Division of the Supreme Court of the State of Rhode Island, in and for the county of Providence pending, knowingly and falsely before Alfred O. Makee, a notary public in and for the County of Providence, in said State of Rhode Island, duly qualified and authorized to administer oaths to persons making affidavits in proceedings for naturalization, did make a false affidavit touching matters in issue, and material in said proceedings for the naturalization of said Setrak G. Moomjian; in this, to wit, that he, the said George K. Moore, in said affidavit falsely swore that he, said Setrak G. Moomjian, had resided in Providence, in the said State of Rhode Island, for seven years last past, whereas in truth and in fact, the said Setrak G. Moomjian was at the date aforesaid, to wit, on the 10th day of November, A. D. 1902, a resident of the commonwealth of Massachusetts, to wit, the city of Worcester, and was not a resident of the State of Rhode Island, nor had he been such resident for a period of more than one year next before the 10th day of November, A. D. 1902. And the grand jurors aforesaid, on their oath aforesaid, further present that said affidavit so as aforesaid made by the said George K. Moore was false and untrue, and was by the said George K. Moore known to be so false and untrue at the time of the making thereof, and that the said George K. Moore therein swore falsely to the residence of said Setrak G. Moomjian, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

For Murder on the High Seas, (St. Clair vs. United States, Book 38 Law Ed., 937).

The indictment charged that Thomas St. Clair, Herman Sparf, and Hans Hansen, mariners, late of that district, on the 13th day of January, 1893, with force and arms, on the high seas, and within the jurisdiction of the court, and within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State of the United States, in and on board of an American vessel, the bark Hesper, belonging to a citizen or citizens of the United States, whose name or names are or were to the grand jurors unknown, did, with a certain instrument or weapon (the character and name of which were to the grand jury unknown) then and there held in the hands of one of the defendants (but of which particular one was to the grand jurors unknown) "then and there piratically, wilfully, and feloniously, and with malice aforethought, strike and beat the said Maurice Fitzgerald, then and there giving to the said Maurice Fitzgerald, several grievous, dangerous, and mortal wounds, and did then and there, to wit, at the time and place last above mentioned, him the said Maurice Fitzgerald cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him the said Maurice Fitzgerald in the sea aforesaid; of which said mortal wounds, casting, throwing, plunging, sinking, and drowning the said Maurice Fitzgerald in and upon the high seas aforesaid, out of the jurisdiction of any particular State of the United States of America, then and there instantly died.

"And the grand jurors aforesaid, upon their oath aforesaid, do say, that by reason of the casting and throwing the said Maurice Fitzgerald in the sea as aforesaid, they cannot describe the said mortal wounds or the character and nature of said weapon or instrument. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Thomas St. Clair, Herman Sparf, and Hans Hansen, him the said Maurice Fitzgerald at the time and place as aforesaid, upon the high seas as aforesaid, out of the jurisdiction of any particular State of the United States of America, in and upon the said American vessel,

within the jurisdiction of the United States of America and of the admiralty and maritime jurisdiction of the said United States of America and of this court, in the manner and form aforesaid, piratically, wilfully, feloniously, and with malice aforethought, did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America, in such case made and provided."

For Falsely Certifying Checks Under Section 5208.

(Approved in Potter vs. U. S., 155 U. S., 444; 39 Law Ed., 215.)

The count, after stating time and venue, and that the defendant was president of the Maverick National Bank, and authorized to lawfully certify checks, charged,

"That said Potter as such president as aforesaid, did then and there, to wit, on said twenty-third day of July, at Boston, aforesaid, within said district, and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain check which said check was then and there drawn upon said association for the amount of twenty-four hundred and fifty dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, copartners, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said check was then and there of the tenor following —that is to say:

'Boston, July 23, 1891. $2450. No. 54493.
Maverick National Bank.
Pay to the order of Hayward & Townsend,
$2450, twenty-four hundred and fifty dollars.
Irving A. Evans & Co.'

by then and there writing, placing, and putting in and upon and across the face of said check the words and figures following —that is to say:

'Maverick National Bank.
Certified Jul. 23, 1891.
Pay only through clearing house.
A. P. Potter, *P.*'

(meaning said Asa P. Potter, such president as aforesaid.)

'————— —————, *Paying Teller.*'

that the said persons, as copartners under the firm name and style as aforesaid, by whom said check was then and there drawn as aforesaid, did not then and there, to wit, at the time said check was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check, to wit, the amount of twenty-four hundred and fifty dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided."

Under Section 5209, for Embezzlement by Bank Officers.

(Approved in United States vs. Northway, 120 U. S., 327; 30 Law Ed., page 665.)

The count charges that the defendant, with proper allegations of time and place, "was then and there president and agent of a certain national banking association; to wit, 'The Second National Bank of Jefferson,' theretofore duly organized and established and then existing and doing business in the Village of Jefferson and County of Ashtabula, in the division and district aforesaid, under the laws of the United States; and the said Stephen A. Northway, as such president and agent, then and there had and received in and into his possession certain of the moneys and funds of said banking association of the amount and value of twelve thousand dollars, to wit, then and there being the property of said banking association, and then and there being in the possession of said Stephen A. Northway, as such president and agent aforesaid, he, the said Stephen A. Northway, then and there wrongfully, unlawfully, and with intent to injure and defraud said banking association, did embezzle and convert to his, said Stephen A. Northway's own use," etc.

Under Section 32 for Falsely Pretending to be an United States Officer.

.....did then and there unlawfully, fraudulently, and

falsely assume and pretend to be an officer, acting under the authority of the United States, to wit, a Deputy United States Marshal, and did then and there take upon himself to act as such Deputy United States Marshal, and did then and there, in such pretended character, obtain from.....five dollars, lawful current money of the United States of America, and of the value of five dollars, with the intention of him, the said ..... to defraud the said.....: and the said five dollars was obtained from the said.....by the said.....pretending to be an officer of the United States, as aforesaid, and acting under the authority of the United States, with the intention of him, the said....., so pretending to be an officer as aforesaid, to defraud the said.....of the said five dollars, and the value thereof: all of which was against the peace, etc.

General Form for Beginning and Ending of Indictment.

At a regular term of the United States District Court for the Northern District of Texas, begun and holden at Dallas, Texas, on the second Monday of January, A. D. 1911, which was the eleventh day of said month, the grand jurors wherefor, good and lawful men, duly selected, empaneled, sworn, and charged to inquire into and a true presentment make of all crimes and offenses cognizable under the authority of the laws of the United States of America, committed within the Northern District of Texas, upon their oaths present into open Court that heretofore, to wit, etc.,.....all of which was contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

.....
Foreman of the Grand Jury.

.....
District Attorney.

Under Section 37 of the New Code, for Conspiracy Against the United States.

.....that heretofore, to wit, on the .....day of ....., A. D. 1910, one John Doe and one Richard Roe, did unlawfully, fraudulently, and feloniously conspire together to commit an offense against the United States of America, to wit, to transport from one State to another State in the United States, certain obscene, lewd, and lascivious matter; and he, the said John Doe, and he, the said Richard Roe, in pursuance to said conspiracy, and to effect the object thereof, did, on the .....day of ....., transport, carry, and send from Dallas, in the State of Texas, to Little Rock, in the State of Arkansas, certain obscene, lewd, and lascivious pamphlets, which said obscene, lewd, and lascivious pamphlets were too lewd, obscene, and lascivious to be here set out and made a part of the records of this honorable Court, but which said pamphlets began with the words.....and ended with the words.....; contrary to the form of, etc.

Under Section 211 of the New Code, Old Section 3893, for Mailing Obscene Matter.

.....that heretofore, to wit, on the ..... day of ....., John Doe did unlawfully, knowingly, and wilfully, deposit and cause to be deposited in the United States Post-office at Dallas, Texas, fo rmailing and delivery, certain non-mailable matter; that is to say, he, the said John Doe, on the date aforesaid, and within the venue aforesaid, did unlawfully, knowingly, and wilfully deposit and cause to be deposited, for mailing and delivery in the post-office of the United States at Dallas, Texas, a certain envelope, which said envelope was duly stamped with a two-cent United States postage stamp, and which said envelope was addressed "Mrs. Richard Roe, St. Louis, Missouri," and which said envelope, so stamped and so addressed, and so deposited and caused to be deposited, then and there contained one sheet of paper, upon which said sheet of paper there was writing, but which said writing is too obscene,

lewd, and lascivious to be here set out and made a part of the records of this honorable Court, but which said writing began ....., and ended.....; and the said envelope so deposited and caused to be deposited, and so containing the said sheet of paper, with the writing thereof aforesaid, was by him, the said John Doe, so deposited and caused to be deposited, with full knowledge upon his part of the writing aforesaid upon the said sheet of paper, and the import thereof; all of which was contrary, etc.

Under Section 192 of the New Code, Old Section 5478, for Breaking Into and Entering Post-office.

.....did unlawfully, forcibly, and feloniously, break into and enter a certain building used in part as the Post-office of the United States at ————, with the intent to commit larceny in that part of said building so used as said United States Post-office at ————; contrary, etc.

Under Section 215 of the New Code, old Section 5480, for Use of United States Mails to Promote Fraud.

.....did unlawfully, knowingly, and fraudulently devise a scheme and artifice to defraud, which said scheme and artifice to defraud was to be effected by the use and misuse of the United States Post-office establishment; and in furtherance of said scheme, did deposit and cause to be deposited in the United States mails, for mailing and delivery, divers letters and packets; which said scheme and artifice to defraud was, in substance, as follows, to wit: that the said.....would pretend to be engaged in the legitimate business of a wholesale dealer in produce, able and willing to pay for consignments of produce, and being financially responsible, and that he would make prompt and ready remittance for such consignments of produce as were made to him; that such representations would be made to produce dealers throughout the United States of America who were residents of towns other than that in which the said..... would purport to carry on the said business; that when the said

producee dealers residing in towns other than that in which the said.....would purport to carry on said business, would make consignments in answer to said letters, of produce, to the said....., that the said..... would sell the said produce and convert the proceeds thereof to his own use and benefit, and make no remittance for the said producee, or any part thereof, and that the said.....did not intend to make remittance for the said produce, or any part thereof, or to pay for the same at any time, but, as aforesaid, he would convert the produce and the proceeds to his own use and benefit; and in pursuance of such scheme and artifice, and to effect the object thereof, he, the said....., on the.....day of ..... within the jurisdiction of this court, to wit, within..... etc., did unlawfully, knowingly, fraudulently, and feloniously deposit and cause to be deposited, for mailing and delivery in the United States Post-office at....., a certain envelope, duly stamped with two-cent United States postage stamps, and addressed to....., and which said envelope, so deposited, and so stamped and addressed, contained the following letter, to wit:.....

and the grand jurors aforesaid, upon their oaths aforesaid, represent and show to the court that the said.....did not intend to pay the prices for the produce in said letter set forth and promised; that he was not financially responsible as represented in said letter; that he was not a reputable and legitimate produce dealer, as represented in said letter, but intended, as aforesaid, to appropriate the proceeds of the produce shipped to him in response thereto to his own use and benefit, and to not pay for the same, or any part thereof; contrary to the form, etc.

Under Section 206 of the New Code, False Returns to Increase Compensation of Postmaster.

.....one John Doe was postmaster of the United States Post-office at ..... in said county and district, the same being a post-office of the fourth class; and the said....., so being such postmaster, as aforesaid, on the date aforesaid, and in the county and district aforesaid, did unlawfully, knowingly,

and fraudulently, for the purpose of fraudulently increasing his compensation as such postmaster, under the Acts of Congress, make a certain false return to the Auditor of the Treasury for the Post-office Department of the United States; that is to say, a certain false return of the amount of postage stamps, stamped envelopes, postal-cards, and newspaper and periodical stamps canceled as postages on matter actually mailed at the said post-office, and of postage due stamps canceled in payment of undercharges and unpaid postages upon matter delivered at the said post-office during the quarter ending the.....day of ....., by which said return the said amount appeared and was alleged to be.....dollars and.....cents, which said return, at the time it was so made, as aforesaid, was false in this: that the amount of postage stamps, stamped envelopes, postal cards, and newspaper and periodical stamps canceled as postage on matter actually mailed at the said post-office, and of postage due stamps canceled in payment of undercharges and unpaid postages upon matter delivered at the said post-office during the quarter aforesaid, was not.....dollars and .....cents, or any such sum, but was a different and much smaller sum, to wit,.....dollars, as he, the said....., at the time of making the said return, as aforesaid, then and there well knew; all of which was contrary, etc.

Form of Indictment Under Section 125, Old Section 5392, for Perjury.

"The United States of America.

"At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said district, on the first Tuesday of December in the year of our Lord one thousand nine hundred and nine.

"First Count. The jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that Frank H. Mason, of Boston, in said district, at the several times of the committing of the several offenses in this indictment hereafter charged, was clerk of the District Court of the United States for the District of Massachusetts, and as such clerk was by law required to make to the Attorney General of the United States, on the first days of January and July, in each year, and in the form prescribed by said Attorney

General, a written return for the half year ending on said days respectively, showing, among other things, all the fees and emoluments of his office, of every name and character, and all the necessary expenses of his office, and to verify such return by his oath; that said Frank H. Mason, on the twenty-fourth day of September, in the year nineteen hundred and eight, at Boston aforesaid, then so being such clerk, came in person before the Honorable Frederic Dodge, then and before that time judge of the District Court of the United States for the District of Massachusetts, and then and there made and subscribed a certain declaration and certificate in writing before said judge, on the occasion of his making his return as aforesaid as such clerk for the half year ending on the thirtieth day of June, in the year 1908, and was, on the day first aforesaid, there in due manner sworn by said judge touching the truth of the matters contained in said return, and took his corporal oath, before said judge, that said written declaration and certificate by him the said Frank H. Mason subscribed was then just and true, he the said Frederic Dodge as such judge then and there having competent authority, and being a tribunal and officer having authority, to administer said oath and take said written declaration and certificate; and that said Frank H. Mason then and there falsely, corruptly, and wilfully, and contrary to his said oath, did in and by his said written declaration and certificate declare and certify certain material matters, among other things, in substance and to the effect that said return was in all respects just and true, according to his best knowledge and belief, and that he had neither received, directly or indirectly, any other money or consideration than therein stated; that the total amount of fees and emoluments received in bankruptcy proceedings was six thousand five hundred and fifteen dollars and eighty-five cents; that the total amount of fees and emoluments, not in bankruptcy proceedings, earned from parties other than the United States, was six hundred and thirty-four dollars and eighty-three cents; and that the balance then due to the United States from him as such clerk was four thousand and nineteen dollars and forty-six cents; whereas in truth and in fact said Frank H. Mason, at the time he took said oath and made and subscribed said written declaration and certificate, had, as he then well knew, received as such clerk, during said half year, fees and emoluments in bankruptcy proceedings a much greater total sum, to wit, the sum of six thousand six hundred and seventy-four dollars and eighty-five cents, and had earned fees and emoluments, not in bankruptcy proceedings, from parties other than the United States, a much greater total sum, to wit, the

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sum of six hundred and eighty-one dollars and eighty-three cents, and the balance then due to the United States from him as such clerk was a much greater sum, to wit, four thousand two hundred and twenty-five dollars and forty-six cents; and whereas in truth and fact said Frank H. Mason did not then believe it to be true that the total amount of such fees and emoluments so received by him in bankruptcy proceedings was six thousand five hundred and fifteen dollars and eighty-five cents, or that the total amount of fees and emoluments so earned by him, not in bankruptcy proceedings and from parties other than the United States, was six hundred and thirty-four dollars and eighty-three cents, or that such balance then due to the United States was four thousand and nineteen dollars and forty-six cents; and so said Frank H. Mason, at the time and place, and in the manner and form aforesaid, unlawfully did commit wilful and corrupt perjury.

Under Section 125 of the New Code, Old Section 5392, for Perjury.

.....that heretofore, to wit, on the .....day of ....., in the year....., there came on to be tried in the District aforesaid, and in the United States District Court, before the Honorable....., judge thereof, and a jury duly empaneled and sworn for that purpose, a certain issue duly joined between the said United States of America and one ....., upon a criminal indictment duly returned and then pending in said court against the said.....for having unlawfully engaged in the business of a retail liquor dealer without first having paid the special tax therefor, as required by the United States statutes; and at and upon a trial of the said issue in the said court, before the said judge and jury, to wit, on the.....day of.....in the same said year of ....., and within the city and district aforesaid, and State aforesaid, one John Jones appeared and was produced as a witness for and on behalf of the said defendant, the said....., in the said indictment, and was then and there duly sworn, and took his oath as such witness before the said court, that the evidence which he, the said John Jones, should give on the said trial should be the truth, the whole truth, and nothing but the truth, the said court then and there having had competent authority to administer the said oath to the said John Jones in

that behalf; and the said John Jones, so being sworn, as aforesaid, in the cause aforesaid, in and by the court aforesaid, it then and there, upon the said trial of the said issue, became and was a material inquiry whether.....and whether..... .....; and the grand jurors show, upon their oaths aforesaid, that the said John Jones, so being sworn and so having taken his oath as aforesaid, on the said.....day of..... ....., in the said year of....., and within the said county, division, district, and state aforesaid, upon the said trial of the said issue, as aforesaid, wilfully and corruptly, and contrary to his said oath, did swear and depose before the said court and jury, amongst other things, in substance and to the effect following; that is to say, that.....and that.....; whereas, in fact it was not, and is not, true, that.....and that.....; and at the time of so swearing and deposing, the said John Jones did not believe it to be true that..... and that.....; and the grand jurors aforesaid, upon their oaths aforesaid, do say that the said John Jones, in the manner and form aforesaid, having taken an oath before a competent tribunal aforesaid, in a case wherein a law of the said United States authorized an oath to be administered that he would truly depose and testify, wilfully, and contrary to his said oath, did depose and state material matters which he did not then believe to be true, and thereby did commit wilful and corrupt perjury; contrary, etc.

For Making and Forging and Counterfeiting National Bank Notes, New Section 149, Old Section 5414.

.....one.....with intent to defraud certain persons to the grand jurors unknown, did unlawfully, feloniously, and fraudulently falsely make, forge, and counterfeit ten notes, in imitation of, and purporting to be, circulating notes of the national bank currency of the United States, to wit, the circulating notes of the.....banking association, each of which said falsely made, forged, and counterfeited notes was in this tenor, as follows, to wit: (Here set out fully, or as nearly completely as possible); and the said counterfeited, falsely made,

and forged circulating notes, as aforesaid, were so falsely made, forged, and counterfeited for the purpose of defrauding certain persons, to the grand jurors unknown; contrary, etc.

For Passing or Attempting to Pass Counterfeit Notes of National Banking Associations.

.....did unlawfully, knowingly, fraudulently, and feloniously pass, utter, and publish, and attempt to pass, utter, and publish as true and genuine, a certain falsely made, forged, and counterfeited note, purporting to be issued by the..... bank of....., a banking association which had theretofore been authorized, and was acting under the laws of the United States of America, upon and to John Jones, with the intent and purpose of him, the said.....of defrauding the said John Jones, the tenor of which said false, forged, and counterfeit note is as follows, to wit; that is to say, (here set out the note) he, the said....., at the time of so passing, uttering, and publishing, and attempting to pass, utter, and publish the aforementioned falsely made, forged, and counterfeited note, upon and to the said John Jones, then and there well knew that the same said falsely made, forged, and counterfeited note was falsely made, forged, and counterfeited, and then and thereby intended to defraud the said John Jones; contrary, etc.

Under Section 163 of the New Code, Old Section 5457, for Counterfeiting Coins.

.....did then and there knowingly, wrongfully, unlawfully, fraudulently, and feloniously falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly aided and assisted in falsely making, forging, and counterfeiting, five hundred certain false, forged, and counterfeit coins, each of which said false, forged, and counterfeit coins was then and there in the resemblance and similitude of the silver coins which had theretofore been coined at the mints of the United States, and called silver dollars, and he, the said John Doe, then and there knowing the said false,

forged, and counterfeit coins to be then and there false, forged, and counterfeited, with the intent of him, the said John Doe, then and there to defraud certain persons to the grand jurors unknown; contrary, etc.

For Passing, Etc., Counterfeit Coins, Section 163 of the New Code, Old Section 5457.

.....And the grand jurors aforesaid, upon their oaths aforesaid, do further present into open Court, that heretofore, to wit, on the.....day of....., A. D....., one John Doe, within the.....Division of the..... District of....., did then and there knowingly, wrongfully, feloniously, and fraudulently, have in his possession five hundred certain false, forged, and counterfeited coins, each of which said false, forged, and counterfeited coins was then and there in the resemblance and similitude of the silver coins which had theretofore been coined at the mints of the United States and called silver dollars, he, the said John Doe, then and there knowing the said false, forged, and counterfeited coins to be then and there false, forged, and counterfeited, did then and there knowingly, wrongfully, unlawfully, and fraudulently pass, utter, and publish one of the said false, forged, and counterfeited coins upon and to one John Jones, with the intent of him, the said John Doe, to defraud the said John Jones, he, the said John Doe, then and there knowing the said coin so passed upon the said John Jones to be false, forged, and counterfeited, as aforesaid; contrary, etc.

For Receipting for Larger Sums Than Are Paid, New Section 86, Old Section 5483.

(Approved in U. S. vs. Mayers, 81 Fed., 159.)

"The jurors of the United States of America within and for the district and circuit aforesaid, on their oaths present that G. F. Mayers, late of Frederick County, in the district aforesaid, at said county, heretofore, to wit, on the.....day of....., in the year of our Lord one thousand eight hundred and ninety-

two, at the said Western District of Virginia, and within the jurisdiction of this court, the said G. F. Myers being then and there an officer of the United States, to wit, postmaster at Stevens City, Virginia, charged with the payment of an appropriation made by an Act of Congress, to wit, an appropriation for the payment of letter carriers at experimental free delivery offices, did unlawfully pay to an employee of the United States, to wit, one Douglas K. Drake, and, to wit, one Edgar C. Cadwallader, who were then and there employees of the United States, to wit, letter carriers, a sum less than that provided by law, to wit, the sum of $122.92, and required said employees to give vouchers for an amount greater than that actually paid to and received by them, to wit, the sum of $306.17, against the peace of the said United States and their dignity, and against the form of the statute of the said United States in such case made and provided."

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(Explanation: The first figures indicate the pages and the letter "S" before a figure means the Section, thus 414 S. 400 means page 414, Section 400.)