FEDERAL CRIMINAL LAW AND PROCEDURE

Volume One

FEDERAL CRIMINAL LAW AND PROCEDURE

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DEDICATED

TO THE HONORABLE

Edward Douglass White

Chief Justice of the United States

WHOSE JUDICIAL OPINIONS, STRONG IN REASON AND LIBERAL IN PRINCIPLE, HAVE BEEN A SOURCE OF INSPIRATION TO THE AUTHOR IN THE DEVELOPMENT OF THIS WORK

INTRODUCTION

Almost fifty years ago the Law School of Harvard University, in 1872–73, invited Benjamin R. Curtis, who had been a Justice of the Supreme Court of the United States, to deliver a course of lectures before its students on the Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States. He began that course of lectures by saying that when he came to the bar, forty years before, there were comparatively few cases tried in the courts of the United States. The practice, he said, was then in the hands of a few leaders of the bar in the great cities or the large towns where the courts were held, and gentlemen of the bar residing elsewhere did not trouble themselves to acquire any knowledge, or they acquired but very slight knowledge, concerning either the jurisdiction or practice of those courts. In truth "they had nothing to do with them except, perhaps, in some accidental way." He then proceeded to explain that because of the extension of the powers of Congress over many subjects previously left to the exclusive legislation of the States, and for other reasons which will readily suggest themselves, the business of the courts of the United States had greatly increased and they were likely in the future to operate with greater efficiency. He therefore impressed upon the students that if they neglected to inform themselves concerning the peculiar jurisprudence of the United States courts they would disregard important means of usefulness and success. The increase in the amount of litigation in the courts referred to, and the importance of that litigation, have advanced in the years that have passed since the statement referred to was made and in far greater proportion than in the period between 1832 and 1872 to which Judge Curtis referred. That this would be so he predicted and the facts have more than justified it. The prediction has been fulfilled both as respects the civil and the criminal jurisdiction of the courts.

The report of the Attorney General of the United States for the year 1919 shows that the total number of criminal cases of all classes commenced under the direction of the Criminal Division of the Department of Justice during the fiscal year was 47,443. The number of acquittals was 2000 and the number of cases dismissed and nol-prossed amounted to 7954. The total number of cases arising under the postal laws was 2092, and the number of convictions was 1463. The number of criminal prosecutions under the internal revenue laws, including illicit distilling cases, amounted to 5807, and the convictions were 2590. There were prosecutions of 39 defendants for a violation of the National Banking Laws, resulting in a conviction of 32 and an acquittal of 7 persons. The Criminal Division is the Division of the Department to which is assigned all criminal matters arising under Federal laws except prosecutions under the food bill, the anti-trust act, and violations of the war-time prohibition bill. It advises and directs the criminal work of the several United States Attorneys. The records of the Department of Justice show that the number of criminal cases pending in the circuit and district courts of the United States at the end of the year 1871 was 5586, and that the number of criminal cases terminated in said courts during that calendar year was 8187. The statistics for 1832 are not available as the Department of Justice was not then in existence.

The Clerk of the United States District Court for the Southern District of New York, Mr. Alexander Gilchrist, Jr., informs me that in 1832 the number of indictments filed in that court was twelve, in 1872 the number had increased to 131, and in 1919 it had reached 1326 and there were 7572 Selective Draft Informations. For the first six months of the present year the indictments filed in that court number 1236. The Southern District does not include the whole of the City of New York. In 1865 the Eastern District of New York was created and since that time the jurisdiction of the District Court for the Southern District has not included the Borough of Brooklyn or any portion of the City of New York lying east of the East River. The number of criminal cases commenced in the Eastern District of New York then was eight in the district court and seven in

the circuit court. During the year 1919, as I am informed by the Clerk of the Court, Mr. Percy B. Gilkes, there were 295 cases in that Court. These figures and those contained in the Attorney General's report are significant. They make apparent the great importance now attaching to the Federal Criminal Law and Procedure. This importance already great has been enhanced by the ratification of the Eighteenth Amendment, and by the enactment of legislation by the Congress to give effect to its provisions.

Prior to the publication of the present volumes there has been no adequate work on Federal Criminal Law and Procedure. That such a work is and long has been most desirable is apparent. The author has rendered a real service to the Federal Bar and Bench by writing a work on this subject. His very considerable experience, first as a member of the Bar of Chicago and later as a member of the Bar of the City of New York, especially qualified him for the task which he has now so well performed.

The annual appropriations made at the 2d session of the 65th Congress, 1919, amounted to $25,598,967,517. The amount appropriated for the Navy in 1919 was $1,573,384,061. The new *Indiana*, dreadnought begun in 1919, is to cost, completed, $22,000,000. In view of these figures the fact is interesting that the cost of running the United States courts for the fiscal year ended June 30, 1920, amounted to only $17,329,631.93. The figures include expenses in Alaska, Hawaii and Porto Rico as well as in the Continental United States. These expenditures were distributed as follows:

(*A*) Departmental

General salaries and contingent funds, including rent and public printing	$ 693,438.69
District attorneys, regular assistants and special assistants	1,794,772.78
Witnesses	1,171,817.75
Special legal branches of departmental work	331,260.11
Investigation	2,467,499.76
Maintenance of prisoners, etc.	2,302,235.67
Public works, *i.e.* construction of penal institutions	546,589.19
Not specially classified	606,258.20
Total	$9,913,872.15

(*B*) United States Courts

Supreme Court of the United States	$ 187,196.94
United States Court of Customs Appeals	73,202.89
Court of Claims	100,446.49
District of Columbia Courts	196,421.99
Circuit Courts of Appeals, District and Territorial Courts	6,086,221.98
Total	$6,643,490.29

(*C*) Special Items

Increase of Compensation, Department of Justice and D. C.	$ 772,269.49
Grand Total	$17,329,631.93

The Articles of Confederation of the United States of America did not create an independent government, and did not establish a judicial system. They failed to provide either a Federal Executive or a Federal Judiciary, and all the powers of government were vested in a one chamber assembly in which each state, great and small, had one vote. The germ of a judicial system is, however, found in Article IX. That Article gave to the Congress the power of appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captives. It also provided that Congress should be the last resort on appeal in all disputes and differences "now subsisting or that hereafter may arise" between two or more States concerning boundary, jurisdiction or any other cause whatever, and directed how the "commissioners or judges" should be selected by the States, as each controversy arose, to hear and determine it. There were 110 prize cases decided under the provision above referred to. And under the provision as to boundary disputes between the States a number of cases were commenced only one of which ever proceeded to judgment. That was the case involving the boundary dispute between Connecticut and Pennsylvania which involved the right to the Wyoming Valley which Connecticut claimed and which was finally awarded to Pennsylvania.

But in the cases in which the United States provided courts under the Articles no officers of the United States were provided to compel the execution of the decrees, and in all such cases it was necessary to appeal to the officers of the State courts. And if the State courts refused, as they sometimes did, to enforce the

decrees of the courts of the United States there was no way by which those decrees could be enforced.

The Congress was not given power under the Articles to punish offenses against the law of nations. It was not even authorized to punish treason against the United States, or crimes against its postal or coinage laws. The lack of a judicial system of its own demonstrated in time the impossibility of carrying on an independent government without one and made a new Constitution necessary — with provision for a system of Federal Courts which should have power to try, condemn and punish those guilty of an infraction of its laws. Without a judicial system of its own no independent government could be maintained.

The task of creating a Constitution for the Federal government was complicated and difficult. But the Constitutional Convention of 1787 accomplished it in eighty-six working days. In less than three hundred words the judicial power of the United States was established, and it was done in a manner which, considered with reference to its adaptation to the purposes of its creation, has been described as one of the most admirable and felicitous structures that human governments have exhibited.[1]

When the Constitution superseded the Articles of Confederation a government was created which had no prototype in history. In providing for a Federal Judiciary it established a Supreme Court. This court, as Sir Henry Sumner Maine said, was "a virtually unique creation of the founders of the constitution. . . . There is no exact precedent for it, either in the ancient or modern world."

The importance of all the Federal courts constantly increases. In 1795 John Jay resigned as Chief Justice of the Supreme Court to become Governor of the State of New York. And when, in 1801, John Adams nominated him to be again Chief Justice he declined the honor, stating that he had left the bench perfectly convinced that under a system so defectively devised it would not obtain the energy, weight and dignity which were essential to its affording due support to the national government, neither would it acquire the public confidence and respect which it should possess![2]

[1] Curtis' Constitutional History of the United States, Vol. 1, p. 585.

[2] Correspondence and Public Works of John Jay, Vol. 4, p. 285.

However the Constitutional Convention differed upon other questions there was one matter upon which it was united. There was to be a judicial department and a Supreme Court. But a difference of opinion existed whether there should be simply one central tribunal to which appeals might be carried from the State courts, or whether there should also be inferior Federal tribunals established within the several States. The provision for a central tribunal, a Supreme Court, was made imperative while the right to create the inferior tribunals was conferred upon Congress and left discretionary with that body.

The Constitution declares that "The judicial power shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." It defines the subjects to which the judicial power shall extend, and the cases over which the Supreme Court shall have original jurisdiction and provides that in all the other cases to which the judicial power extends it shall have appellate jurisdiction, with such exceptions and under such regulations as the Congress shall make.

The power given to Congress to create courts inferior to the Supreme Court was plainly intended to enable the national government to establish in the several States tribunals competent to determine matters of national jurisdiction within their limits. The objection was urged that it was unnecessary to create Federal courts for this purpose, as the same result might be obtained through the instrumentality of the State courts. Hamilton answered this objection in the *Federalist*, stating that in his opinion there were substantial reasons against it. "The most discerning," he said, "could not foresee how far the prevalency of a local spirit might be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State Judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." [3]

Legislation being necessary to determine what courts inferior to the Supreme Court should be created and with how much of

[3] Hamilton's Works, Lodge's ed. Vol. 9, p. 506.

the judicial power of the United States they should be invested, the matter received the attention of the First Congress which assembled after the Constitution was ratified and the government was established. That Congress adopted the Judiciary Act of 1789. It is regarded as the most important and the most satisfactory act which Congress ever passed. The honor of its authorship is Oliver Ellsworth's. He represented Connecticut in the Senate where he was the leader of the Federalists in that body. He subsequently became Chief Justice of the Supreme Court. The original bill is in his handwriting. It passed both Houses with but slight alterations. The general structure of the Federal judicial system which it established has remained in its essentials unaltered from that day to this, although it has been amended from time to time and its phraseology has been changed.

The Act provided that the Supreme Court should consist of a chief justice and five associate justices and divided the United States into thirteen judicial districts, one for each State, and into three circuits. The circuits were designated as the Eastern, Middle and Southern Circuits. The Eastern Circuit included the States of Connecticut, Massachusetts, New Hampshire and New York. The Middle Circuit was constituted of Delaware, Maryland, New Jersey, Pennsylvania and Virginia. The Southern Circuit consisted of Georgia and South Carolina. A district court was established for each district, and a circuit court for each circuit. There was to be one district judge in each district.

The circuit court for each circuit was to be composed of two justices of the Supreme Court and a district judge. It evidently was intended to be a court of distinction and importance.

The Act gave to the district courts, exclusively of the courts of the several States, the cognizance of all crimes and offenses that should become cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months was to be inflicted, together with civil causes of admiralty and maritime jurisdiction, etc.[4]

[4] U. S. Stat. L. Vol. 1, p. 76, Section 9.

The Act gave to circuit courts, in addition to their civil jurisdiction, exclusive jurisdiction of all crimes and offenses cognizable under the authority of the United States, except as otherwise directed by the laws of the United States, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein.[5]

It also provided for the appointment in each district of "a meet person learned in the law" to act as attorney for the United States in such district whose duty it was made to prosecute in such district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States should be concerned except before the Supreme Court. And it provided for the appointment of an Attorney General for the United States who was also to be "a meet person learned in the law", and whose duty it was made to prosecute and conduct all suits in the Supreme Court in which the United States should be concerned, and who was to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments.[6]

The Act of February 13, 1801,[7] was a carefully drawn and comprehensive Act. It abolished the circuit courts as previously established, and made no provision requiring the justices of the Supreme Court to sit in the new circuit courts which the Act created. The States were divided into districts and the districts were distributed between six circuits and it was provided that there should be a circuit court of the United States in each of the circuits, and that there should be in each circuit three judges to attend the sessions of the court, any two of whom should constitute a quorum. It was enacted that the circuit courts should hold two sessions annually at the times and places named in the Act, and it authorized the judges to hold special sessions for the trial of criminal causes at any other time or times at their discretion. It invested the new circuit courts with all the powers which the old circuit courts possessed, except as otherwise provided by the Act.

[5] U. S. Stat. L. p. 78, Section 11.
[6] U. S. Stat. L. p. 92, Section 35.
[7] U. S. Stat. L. Vol. 2, p. 89.

This legislation worked a separation of the district, circuit and supreme courts, and provided for a separate set of judges for each of them, making necessary the appointment of eighteen new judges. As it was enacted less than a month before Mr. Jefferson was to take office and the Federalists took advantage of the opportunity to fill the positions with their adherents it provoked great resentment on the part of Jefferson and his party. The Federalists, as Jefferson said, driven from the legislative and the executive departments of the government retreated into the judicial department where they intrenched themselves as in a stronghold. They filled the new courts as well as the vacancies existing in the other courts in the last hours of Mr. Adams' administration. In his first Message to Congress, December 8, 1801, Jefferson directed the attention of that body to the subject and submitted what he called an exact statement of all the causes decided since the first establishment of the courts, and of those which were depending when additional courts and judges were brought in to their aid. His intention was to show that there was no necessity for the creation of the additional judges. The legislation was made the subject of a bitter party controversy. In the first volume of his History of the United States Henry Adams devotes two chapters to a discussion of the subject of the repeal of the Act which was accomplished in 1802.[8] The repealing Act re-established the circuit courts as they were originally created, and the justices of the Supreme Court were again obliged to hold the circuit courts. This duty was one which they cordially disliked as it required them to spend much time in travel.

An Act of April 29, 1802, divided the districts into six circuits, excepting the districts of Maine, Kentucky and Tennessee. Under this division the first circuit included New Hampshire, Massachusetts and Rhode Island; the second circuit, Connecticut, New York, and Vermont; the third circuit, New Jersey and Pennsylvania; the fourth circuit, Maryland and Delaware; the fifth circuit, Virginia and North Carolina; and the sixth circuit, South Carolina and Georgia.[9] This Act provided that the circuit courts should be held by one justice of the Supreme Court instead of two, as under the Act of 1789, and a district judge. It also

[8] U. S. Stat. L. Vol. 2, p. 132. [9] U. S. Stat. L. Vol. 2, p. 156.

provided that from and after its passage the Supreme Court should be holden at the City of Washington. The Judiciary Act of 1789 specified where the district and circuit courts should be held, and it declared that the Supreme Court should hold its sessions at "the seat of the government." The court was accordingly organized in New York City, on February 2, 1790, that being then the seat of the government. John Jay, who had been appointed Chief Justice, met, in the old Federal Hall, with his associate justices and the letters patent appointing them were read, and a "cryer" was appointed. In 1791 the February term was held in Philadelphia, to which city the seat of the government had been transferred. In 1800 the seat of government was removed from Philadelphia to Washington. The first session of the court ever held in Washington opened on February 4, 1801, and at that time John Marshall first took his seat as Chief Justice.

The Act of April 29, 1802, provided that whenever any question occurred before a circuit court upon which the opinions of the judges were opposed the point upon which disagreement happened should during the same term, upon the request of either party, or their counsel, be certified to the Supreme Court to be finally decided. But it was provided that the certification of the question should not prevent the cause from proceeding if in the opinion of the court further proceedings could be had without prejudice to the merits; and it provided also, that imprisonment should not be allowed, nor punishment in any case be inflicted where the judges of the said court divided in opinion upon the question touching the said imprisonment or punishment.

To carry into effect the provision of the Judiciary Act of 1789 assigning two Supreme Court justices to each circuit, Chief Justice Jay and Associate Justice Cushing took the Eastern Circuit, Justices Wilson and Blair the Middle Circuit, and Justices Rutledge and Iredell the Southern Circuit. In the discharge of their duties in the circuit courts they laid the foundation of the Federal judicial system. Originally they were required to hold two circuits a year in each district in their particular circuits. This for a time they could very readily do as there were few cases in the Supreme Court to be heard and determined. For a number of

years they spent three fourths of their time in traveling from one court town to another within their respective circuits. Many most important trials were conducted in the circuit courts before the justices of the Supreme Court sitting as circuit judges. It was before Chief Justice Marshall sitting in the circuit court at Richmond in 1807 that Aaron Burr was tried for the crime of high treason. The trial began on May 22 and lasted with some interruptions for six months. The trial, with the exception of the impeachment of Andrew Johnson, was the most memorable one in our entire judicial history. There was an array of distinguished counsel on each side, William Wirt being preëminent among those who appeared for the prosecution, and Luther Martin among those who conducted the defense.

On April 4, 1790, John Jay, at the time Chief Justice of the Supreme Court but sitting in the circuit court in New York City, delivered his first charge to a Federal grand jury. One passage in that charge cannot be too often repeated. "Let it be remembered," he said, "that civil liberty consists not in a right to every man to do just what he pleases; but it consists in an equal right to all the citizens to have, enjoy, and do, in peace, security, and without molestation, whatever the equal and constitutional laws of the country admit to be consistent with the public good." As his circuit embraced New York and New England and he held court in New York City, Albany, Boston, Exeter, Providence, Hartford and New Haven it is not surprising to be told that he spent far more time in the saddle than on the bench.

The Act of 1789 made no provision for the appointment of a distinct class of judges who were to be known as circuit judges. The judges who were to hold the circuit court under that Act as already said were the Supreme Court justices and the district judges. The Act of 1801 which did create a class of circuit judges we have seen remained on the statute books for a single year. In 1869, however, Congress passed an Act which created or authorized the President, with the consent of the Senate, to appoint circuit judges. This Act of 1869 was made necessary by the growth of the docket of the Supreme Court and the impossibility of the justices of that court giving the required attention to the work of the circuit courts. As early as 1792 Congress

had modified the necessity for the constant attendance of the justices of the Supreme Court in the circuit courts; and in 1793 by the Act of March 2d, the number of Supreme Court justices that should compose the circuit was reduced from two to one. It declared that the attendance of only one of the justices of the Supreme Court at the several circuit courts should be sufficient, but provided that the Supreme Court could, when special circumstances made it necessary, assign two of the justices to attend. And now the Act of 1869 provided that thereafter the circuit court in each circuit should be held by the justice of the Supreme Court allotted to the particular circuit, *or* by the circuit judge, *or* by the district judge of the district sitting alone. By a further provision it limited the duties of the Supreme Court justice in the circuit courts to a visit once in two years. The original dignity of the circuit court was thus diminished by the practical withdrawal of the Supreme Court justice. At the same time the real usefulness of the court was increased by the addition of a circuit judge who was always to be present in the circuit. And there were those who thought they saw in this legislation that the future extinction of the circuit court was foreshadowed by the fact that its whole functions might thereafter be discharged by a district judge sitting alone.

The Act of February 13, 1801, to which reference has already been made, was passed to tie the hands of President Jefferson as to judicial appointments, and it provided that after the next vacancy in the Supreme Court the court should consist of only five justices, one chief justice and four associates, and the court continued to consist of six members until the Act of 1807 was passed by which the number was increased to seven.[10] The Act of March 3, 1837, provided that the Supreme Court should consist of nine members. The first six circuits remained as before constituted. The seventh circuit included Ohio, Indiana, Illinois and Michigan; the eighth circuit, Kentucky and Tennessee; the ninth, Alabama, Louisiana, Mississippi and Arkansas.[11] The Act of March, 3, 1863, increased the membership of the court to ten. But the Act of July 23, 1866, passed to tie the hands of President Johnson, provided that no vacancy in the

[10] U. S. Stat. L. Vol. 2, p. 420.

[11] U. S. Stat. L. Vol. 5, p. 176.

office of associate justice of the Supreme Court was to be filled by appointment until the number of associate justices, by reason of death or resignation, would be reduced to six, and it declared that thereafter the said Supreme Court should consist of a chief justice of the United States and six associate justices. There were still to be nine circuits, however, the first and second remaining as previously constituted.[12]

Congress by Act of April 10, 1869, again declared that thereafter the Supreme Court should consist of nine members, a chief justice and eight associate justices, any six of whom should constitute a quorum. In creating the new class of judges heretofore commented upon it provided that for each of the nine existing judicial circuits there should be appointed a circuit judge who should reside in his circuit and possess the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit.[13]

The Act of August 23, 1842, gave the district courts of the United States concurrent jurisdiction with the circuit courts of all crimes and offenses against the United States, the punishment of which was not capital. It also provided that in the districts where the business of the court required it to be done for the purposes of justice and to prevent undue expenses and delays in the trial of criminal causes, the district courts should hold monthly adjournments of the regular terms thereof for the trial and hearing of such causes.[14]

The circuit courts of appeals are established by the Act of March 3, 1891.[15] It provides that there shall be in each circuit a circuit court of appeals to consist of three judges, and it confers upon such courts appellate jurisdiction. The old circuit courts were not abolished by the Act, but they were deprived of all their appellate jurisdiction.

The judgments and decrees of the circuit courts of appeals are final in most of the matters within their jurisdiction, subject of course to the right of the judges to certify to the Supreme Court under Section 239 of the Judicial Code, and subject to the right of the Supreme Court under Section 240 of that Code

[12] U. S. Stat. L. Vol. 14, p. 209.
[13] U. S. Stat. L. Vol. 16, p. 44.
[14] U. S. Stat. L. Vol. 5, p. 517.
[15] U. S. Stat. L. Vol. 26, ch. 517, p. 826.

to require a case to be brought before it upon certiorari. The jurisdiction of the circuit courts of appeals is wholly appellate. Its power is to review by appeal or writ of error final decisions in the district courts in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court.[16] And cases can be taken direct to the Supreme Court from the district court in any case in which the jurisdiction of the court is in issue, from final sentences and decrees in prize causes, in any case that involves the construction or application of the Constitution of the United States, in any case in which the constitutionality of any law of the United States or the validity or constitutionality of any treaty made under its authority is drawn in question, and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.[17]

The judgments and decrees of a circuit court of appeals, subject to the provisions above referred to, are final in all cases in which jurisdiction is dependent upon opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under *the criminal laws*, and in admiralty cases.[18] Recent legislation, the Act of January 28, 1915, Ch. 22 in Section 4, makes the decisions of the circuit courts of appeals final in cases arising under the Bankruptcy Act.[19]

The Act of 1891 which established circuit courts of appeals took away entirely the right of appeal from the district courts to the circuit courts and made both the district and circuit courts to be courts of original jurisdiction only and divided all cases in those courts into two classes. It made one class appealable directly to the Supreme Court. It made the other class appealable to the circuit court of appeals.

The act was introduced into the House of Representatives in April, 1890. It passed the House with only fifteen votes recorded against it. The Senate did not approve that portion of the bill

[16] Judicial Code Sec. 128.

[17] *Ibid.*

[18] 36 St. at L. 1133 as amended by 38 St. at L. 803. Sec. 128 of Judicial Code.

[19] Its decisions are also made final in proceedings and causes arising under the Employers Liability Act, the Hours of Service Act, the Ash Pan Act, and the Safety Appliance Act.

which abolished the original jurisdiction of the circuit courts, and that provision was stricken out. The matter was sent to a conference committee of the two Houses and that committee accepted the Senate provisions. The report of that committee came up for action on March 3, 1891, the day before the expiration of that Congress. The House very reluctantly accepted it, but it passed the bill as amended, as not to do so would have resulted in withholding from the Supreme Court the relief so sorely needed. The hope was that at an early day the Congress would rectify the mistake and abolish the circuit courts. This was finally accomplished by the Act of March 3, 1911.

The Act of 1891 creating the circuit courts of appeals originated in the American Bar Association which earnestly advocated its adoption by Congress as a means of relieving the Supreme Court which was quite unable to keep up with its docket. At the October term, 1890, the docket contained 1177 appeals which were undisposed of at the preceding term, together with 623 new appeals and 16 cases of original jurisdiction, which made a total of 1816 cases. As the court was only able to dispose of 617 cases during the term, this left 1199 undecided cases. The court was therefore unable to dispose of as many of the old cases as there were new cases added, and instead of gaining on its docket was increasing the number of the undecided cases which had to be continued. Delay in the administration of justice often amounts to a denial of justice. The demand for immediate relief was therefore loud and imperative.

In 1872 Congress passed an Act which provided that whenever in any suit or proceeding in a circuit court of the United States being held by a justice of the Supreme Court and the circuit judge or a district judge, or by the circuit judge and a district judge, there occurred any difference of opinion between the judges as to any matter to be decided the opinion of the presiding judge should prevail, and be considered the opinion of the court for the time being.[20] And if there were a certificate of difference of opinion and the case was one which the Supreme Court might review either party might remove the judgment to that court.

The Act further provided that no indictment found and pre-

[20] U. S. Stat. L. Vol. 17, ch. 255, p. 196.

sented by a grand jury in any district or circuit or other court of the United States should be deemed insufficient, nor should the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which did not tend to the prejudice of the defendant.[21]

It provided also that in all criminal causes the defendant might be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or might be found guilty of an attempt to commit the offense so charged: *Provided*, That such attempt be itself a separate offense.

And it enacted that on an indictment against several, if the jury could not agree upon a verdict as to all, they might render a verdict as to those in regard to whom they agreed, on which a judgment should be entered accordingly; and the cause as to the other defendants might be tried by another jury.

In 1889 Congress, by the Act of February 6th, provided that in all cases of conviction of crime in any Federal court the punishment of which provided by law was death the final judgment might be reëxamined, reversed or affirmed by the Supreme Court of the United States upon a writ of error.[22]

And the Act of March 2, 1907, commonly called the Criminal Appeals Act, provides that a writ of error may be taken by and on behalf of the United States from certain decisions of the district courts direct to the Supreme Court of the United States in criminal cases in the following instances:[23]

1. From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

2. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

3. From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

In all such the writ of error is to be taken within thirty days, is

[21] U. S. Stat. L. Vol. 17, ch. 255, p. 198.

[22] 25 Stat. L. ch. p. 656.

[23] 34 Stat. L. ch. 2564, p. 1246.

to be diligently prosecuted, and to have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances the defendant is to be admitted to bail on his own recognizance.

No writ of error can be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

The Act of March 3, 1911, in Section 269, provided that "All of the said courts (of the United States) shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." And this section was amended by an Act approved on February 26, 1919, by adding the following provision: "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." [24] Much of the credit for the passage of this Act is due to the American Bar Association and to its Committee appointed to Suggest Remedies and Propose Laws Relating to Procedure.[25]

The Judiciary Act of 1789 authorized the taking out of writs of error in civil cases but made no provision for a writ of error in criminal cases. The law so remained until 1879 when the circuit courts were authorized by the Act of March 3d to review upon a writ of error all criminal cases tried before a district court where the sentence was imprisonment, or fine and imprisonment, or where, if a fine only the fine exceeded the sum of three hundred dollars. And in 1889 the Supreme Court, by the Act of February 6th, which became a law without the approval of the President, was authorized to issue writs of error to any court of the United States in capital cases. The Act of March 3, 1891, which created the Circuit Courts of Appeals allowed writs of error to be taken to the Supreme Court direct from the district courts or the then

[24] U. S. Stat. L. Vol. 40, p. 1181, ch. 48.

[25] The chairman of this Committee for many years has been Mr. Everett P. Wheeler of New York City, who has been indefatigable in his efforts to obtain needed legislation to reform the rules of procedure in the Federal courts.

existing circuit courts in cases of conviction "of a capital or otherwise infamous crime." In other criminal cases the circuit courts of appeals were authorized to review and determine upon writ of error and their decisions were made final. And the Act of January 20th, 1897, amended the preceding Act by striking out the words "or otherwise infamous", so that the right to go direct to the Supreme Court in a criminal case was permitted still in cases of conviction of a capital crime, but it was expressly provided that "appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital."

The American Bar Association in 1907 created a Special Committee charged with the duty of considering evils in judicial administration and remedial procedure. The Committee reported in 1908 [26] and commenting on writs of error in criminal cases said: "A still more flagrant abuse which exists in judicial procedure is also an innovation upon the common law. This is the unrestricted right to a writ of error in criminal cases. These writs are constantly sued out solely for delay. The punishment of notorious criminals is constantly being postponed in violation of every principle of justice. This is especially flagrant in the suing out of writs of error from the Supreme Court of the United States to review the decision of the highest courts of criminal jurisdiction in the different States. We recommend that no writ of error in criminal cases, returnable to the Supreme Court of the United States, should be allowed, unless a justice of that court shall certify that there is probable cause to believe that the defendant was unjustly convicted.

"At common law there was no writ of error in criminal cases, nor was such jurisdiction conferred upon the Supreme Court of the United States until the organization of the Circuit Courts of Appeals. We submit respectfully that the Circuit Courts of Appeals are entirely competent to decide upon writs of error in all criminal cases and that the jurisdiction of the Supreme Court in such cases is generally invoked chiefly for purpose of delay."

The report then went on to explain that it was not intended to

[26] Reports of Am. Bar Ass. Vol. 33, p. 542.

divest the Supreme Court of jurisdiction of writs of error in criminal cases which involve questions of constitutional law. But that it was essential to the administration of justice that such writs of error should not be sued out as a matter of right, but only when a justice of the Supreme Court certified that there is probable cause to believe that the defendant had been unjustly convicted. It was said to be well known that constitutional questions had been ostensibly raised on the record upon frivolous pretexts and solely for the purpose of obtaining delay by writ of error returnable to the Supreme Court. The recommendation of the Committee met the approval of the Bar Association.[27] It has not, however, met the approval of Congress.

The present law of England allows an appeal in a criminal case. In 1907 Parliament established a Court of Criminal Appeal. It consists of all judges of the King's Bench Division and the Lord Chief Justice of England. A person convicted on an indictment may appeal to this court on any ground of appeal *with leave of the court of Criminal Appeal or upon the certificate of the judge who tried him* on questions of fact alone or on questions of mixed law and fact. With the permission of the appellate tribunal he is permitted to appeal even against the amount of his sentence unless that is fixed by law. On hearing the appeal the court may alter the sentence, but not necessarily in the appellant's favor. If the court thinks the appellant was rightly convicted it is not bound to decide in his favor on a technical point, and even though the appellant succeeds in upsetting the conviction on one charge in an indictment, or in showing that he has been found guilty of an offense which he did not commit he may be made to serve a proportionate sentence in respect of a charge on which he was properly found guilty, and be sentenced on the offense which he in fact committed.[28]

A great difference of opinion exists in England and in the United States over the question whether a writ of error should be allowed in any criminal case, and if it should be, then for what reasons. It is mere *argumentum ad hominem* to say that it should be granted in a criminal case which involves life and liberty because it is

[27] Reports of Am. Bar Ass. Vol. 33, p. 49.

[28] 7 Edw. 7, c. 23, amended by 8 Edw. 7, c. 46.

allowed in nearly all civil cases which involve money or property. It is allowed in civil cases not so much for the purpose of ascertaining what the truth is as for the purpose of satisfying the parties. And society has more concern in the prompt disposition of criminal than of civil cases. Indeed in the just and prompt disposition of criminal cases the public is about as much interested as the person accused. The vigor of the criminal law depends upon the prompt and final decision of the cases which arise under it, and appeals and consequent delays have the effect of "breaking its point and blunting its edge." It is beyond doubt true that all unnecessary delay in carrying it into execution "is so much taken away from its capacity of preventing crime." [29] The cases are few in which innocent persons accused of crime are found guilty by juries. And a writ of error in a criminal case ought to be sparingly granted. There is much wisdom in the words of Lombroso: "'Injustice makes judgment bitter,' wrote Bacon, 'delay turns it sour.' As much may be said in our day, when, thanks to appeals, the penalty is no longer either prompt, certain or severe."

No grant of criminal jurisdiction is expressly given in the Constitution except the power to provide for the punishment of counterfeiting the security and current coin of the United States, to define and punish piracies and felonies on the high seas and offenses against the law of nations. There is, however, a recognition of the power of Congress to enact criminal laws in the various amendments to the Constitution relating to indictments, trials and punishments. The power to pass criminal laws may also be included in the express power granted in Art. 1, Sec. 8, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or any Department, or officer thereof."

The provisions of the Constitution which deal with criminal matters relate, almost exclusively, to procedure. Thus we find it provided that

"The trial of all crimes, except in cases of punishment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed

[29] Stephen's General View of the Criminal Law of England, 2d ed. p. 173.

within any State, the trial shall be at such place or places as the Congress may by law have directed.

"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.

"No attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

"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.

"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.

"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 a witness against himself; nor be deprived of life, liberty, or property, without due process of law.

"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 to 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.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

All the foregoing provisions of our fundamental law are a part of the adjective criminal law. When we look to ascertain what

the substantive criminal law of the United States is we must find it in the Acts of Congress, for next to nothing of it is in the Constitution.

The Constitution does, however, declare the crime of treason. It says that "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

The Supreme Court has said many times that there is no common law of the Federal courts, and this is the prevalent opinion of the profession. It is said, however, that there is a class of civil cases which fall beyond State control, and which have not been touched by Congressional action, in which the Federal courts enforce a "common law" derived from some source not clearly indicated.[30] With that we are not now concerned. The question, which in this connection is important, is whether there is a common law of crimes which the Federal courts administer.

The question came before a circuit court in 1789 in United States *v.* Worrall, 2 Dallas, 384. One Worrall was charged with an attempt to bribe the Commissioner of the Revenue. There was no Act of Congress creating or defining the crime, and it was claimed that the common law could be relied upon to supply its place. The case was heard before Justices Chase and Peters. Mr. Justice Chase expressed himself with great force and clearness to the effect that the Federal government had no common law and that no indictment could be sustained for an offense at common law. "It is attempted, however," he said, "to supply the silence of the Constitution and Statutes of the Union, by resorting to the common law, for a definition and punishment of the offence which has been committed. But in my opinion, the United States, as a Federal government, have no common law; and consequently, no indictment can be maintained in their courts, for offences at the common law. If, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England; and yet it is impossible to trace when or how the system was adopted, or introduced. With respect to the individual States the difficulty does not occur. When the American colonies were first settled by our ancestors,

[30] See an article by Edward C. Eliot in Am. Law Review, 1902, Vol. 36, p. 498.

it was held, as well by the settlers as by the Judges and lawyers of England, that they brought hither, as a birthright and inheritance, so much, of the common law, as was applicable to their local situation and change of circumstances. But each colony judges for itself what parts of the common law were applicable to its new condition; and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others. Hence, he who shall travel through the different States, will soon discover that the whole of the common law of England has been nowhere introduced; that some States have rejected what others have adopted; and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one State is not the common law of another; but the common law of England is the law of each State, so far as each State has adopted it; and it results from that position, connected with the judicial act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a Federal or State court." The matter is so well and clearly put that the length of the quotation is justified. Mr. Justice Peters was not convinced, however, and took an opposing view. The opinion of Mr. Justice Chase was ultimately established beyond question by the subsequent decisions of the Supreme Court. It is interesting to observe that though the Court was equally divided as to the law the defendant was sentenced to imprisonment for three months and to pay a fine of $200. Before sentence the judges and the United States attorney had expressed a wish that the case might be put into such form as to obtain an ultimate decision from the Supreme Court, but the counsel for the defendant said that they did not feel authorized to enter into a compromise of that nature. Then followed brief consultation between the two judges, and the character of the sentence shows that it was a compromise between them. The result has been fittingly characterized as "a lame and impotent conclusion."

It has long been the established law that the criminal jurisdiction of the Federal courts is confined to such offenses as are brought within their jurisdiction by an Act of Congress. The matter

was settled in 1812 in United States *v.* Hudson, 7 Cranch, 32. The court said that the only question which the case presented was whether the circuit courts of the United States can exercise a common law jurisdiction in criminal cases. This question was answered by saying: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

The Congress appreciated the necessity of legislating on this subject, and the year after the Judiciary Act was passed it passed the Act of April 30, 1790, which declared what should constitute criminal offenses against the United States and what punishment should be imposed. It imposed the penalty of death for treason, murder and piracy, and declared that the manner of inflicting that punishment should be by hanging by the neck until dead the persons convicted. It was thought necessary to declare that there should be no benefit of clergy in cases where the punishment is death. The Act also expressly provided that no conviction or judgment for any of the offenses defined in the Act should work corruption of blood or any forfeiture of the estate. It declared that if a person indicted of any of the offenses set forth in the Act for which the punishment imposed was death stood mute or would not answer to the indictment the trial should proceed as if he had pleaded not guilty. The offenses against the United States for which punishment was imposed were those of treason, piracy, murder, manslaughter, maiming, forgery and counterfeiting, stealing and larceny, perjury and subornation of perjury, bribery and resisting an officer and obstruction of process. It was provided that if any person or persons should within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States commit the crime of willful murder such person on conviction should suffer death. And it gave to the court pronouncing sentence the discretionary right to add to the judgment that the body of the offender should be delivered to a surgeon for dissection, in which case it was made the duty of the marshal to deliver the body to the surgeon after the execution. Provision was made for the punishment of any person suing out a writ or process in any court of a State, or of the United States, whereby the person of any ambas-

sador or public minister who had been received as such by the President, or any domestic of such person, might be arrested or imprisoned or his goods attached. All persons suing out such writ or process as well as his attorneys and the officers executing such a writ were declared violators of the laws of nations and disturbers of the public repose. They were made liable to imprisonment for not exceeding three years, and to be fined at the discretion of the court. It was also provided that any person who should assault, strike, wound, imprison, or in any other manner infract the law of nations by offering violence to the person of an ambassador, or other public minister, should on conviction be liable to imprisonment for not exceeding three years, and to be fined at the discretion of the court. Provision was also made for the punishment of certain offenses committed upon the high seas, or in any river, haven, basin or bay out of the jurisdiction of any particular State.[31]

Viscount Bryce, writing in his *American Commonwealth*, volume 2 (1st ed.), p. 497, and commenting on the administration of justice, seems to entertain the opinion that in the United States civil justice is better administered than criminal justice. He says: "I shrink from making positive statements on so large a matter as the administration of justice over a vast country whose States differ in many respects. But so far as I could ascertain, civil justice is better administered than might be expected from the character which the Bench bears in most of the States. In the Federal courts and in the superior courts of the six or seven States [32] just mentioned it is equal to the justice dispensed in the superior courts of England, France and Germany. In the remainder it is inferior, that is to say, civil trials, whether the issue be of law or of fact, more frequently give an unsatisfactory result; the opinions delivered by the judges are wanting in scientific accuracy, and the law becomes loose and uncertain. . . . The injury to the quality of State law is mitigated by the fact that abundance of good law is produced by the Federal courts, by the highest courts

[31] U. S. St. at L. Vol. 1, ch. 9, p. 112.

[32] "In six or seven commonwealths, of which Massachusetts is the best example among Eastern and Michigan among Western States, they (State judges) stand high." This was written in 1888.

of the best States, and by the judges of England, whose reported decisions are frequently referred to. Having constantly questioned those I met on the subject, I have heard comparatively few complaints from commercial men as to the efficiency of State tribunals, and not many even from the leading lawyers, though their interest in the scientific character of law makes them severe critics of current legislation, and opponents of those schemes for codifying the common law which have been dangled before the multitude in several States. It is otherwise as regards criminal justice. It is accused of being slow, uncertain, and unduly lenient both to crimes of violence and to commercial frauds. Yet the accusers charge the fault less on the judges than on the soft-heartedness of juries, and on the facilities for escape which a cumbrous and highly technical procedure, allowing numerous opportunities for interposing delays and raising points of law, provides for prisoners. Indulgence to prisoners is now as marked as harshness to them was in England before the days of Bentham and Romilly. The legislatures must bear the blame of this procedure, though stronger men on the Bench would more often over-rule trivial points of law and expedite convictions." The importance of this criticism is enhanced when we remember that it comes from one who is a member of the legal profession, a barrister of Lincoln's Inn, and who for more than twenty years was Regius Professor of Civil Law at Oxford University.

Notwithstanding the attention which this criticism directed to the subject the administration of criminal justice in this country has not improved so much as could be desired. Some years later, in 1905, Ex-President Taft, speaking at the Yale Law School but not noticing the criticism of Bryce, did not hesitate to say: "that the administration of the criminal law in all the States of the Union (there may be one or two exceptions) is a disgrace to our civilization." [33]

In 1911 Mr. Moorfield Storey, a former President of the American Bar Association and one of the foremost lawyers of the country, said in an address before the law students of Yale University: "There is no part of its work in which the law fails so absolutely and so ludicrously as in the conviction and punishment of criminals,

[33] Yale Law Journal for 1905.

and its failures in this respect endanger the whole foundation of society."

Mr. Henry W. Taft, delivering before the New York Bar Association in January, 1920, the President's Address, called attention to the alarming increase of the crime of homicide in this country and the small percentage of the convictions for its commission. He gives the following table as showing the homicides and executions for the years from 1912 to 1918 inclusive:

Year	*Homicides*	*Executions*
1912	9,152	145
1913	8,902	88
1914	8,251	74
1915	9,230	119
1916	9,850	106
1917	9,180	70
1918	8,850	71

In 1913, in England and Wales, 314 persons were tried for murder and homicides and there were 91 convictions. In 1914 there were 62 persons charged with the offense and 27 were convicted.

Even making due allowance for imperfect records, and varying methods of keeping records, Mr. Taft says: "The figures show what is measurably near a scandalous condition in the administration of criminal justice."

President Eliot has been quoted as saying that "the defences of society against criminals have broken down."

There has not been any very serious attempt made to show that these criticisms upon the administration of the criminal law in this country are altogether undeserved. It must be borne in mind, however, that there is no one system of criminal procedure in our country, and that the practice varies greatly not only in different States but between the States and the United States. While the administration of the criminal law in the State courts, and in the Federal courts as well, is not all that any of us would like it to be, it must in fairness be said that the criminal procedure in some of the jurisdictions is very much better than in others. And it may be added that in all jurisdictions for some years to

come the Bar and the Bench should coöperate to secure such changes in criminal procedure as may be necessary to improve the administration of the criminal law throughout the whole country.

It is interesting in connection with this important subject to recall what one of the leaders of the American Bar has said concerning it. In his address as President of the New York State Bar Association, in 1912, Mr. Root said: "It is true that defects in procedure, that technicalities and delays which impede the course of justice here and elsewhere, have tended to decrease the general respect of the community for every one concerned in the administration of the law, but I think this applies less to the courts themselves than it does to the Bar, and justly so. It is the Bar that makes up a great part of all our Legislatures and is responsible for the stupid and mischievous legislation regarding procedure which hampers the courts in their efforts to do justice. It is the Bar which, knowing all the facts and familiar with all the evils, insists upon the continuance of our methods to promote the immunity of criminals and the hindrance of justice to the point of denial. The primary fault and the primary duty of reform rest with us. I do not think that this matter plays any very great part in the creation of the feeling against the courts."

Whether Mr. Root has properly apportioned the responsibility we need not now inquire. The important thing is that whatever the defects in the administration of criminal justice they should be corrected, and that those of us who have any responsibility in the matter whether at the Bar or on the Bench should discharge it.

We must admit that the Bar and the Bench have come all too slowly to realize that it is necessary to put our house in order. And if the criminal laws of a nation reflect the ethical characteristics of the people of which the nation is composed are we in all respects prepared now to be so judged?

The matters upon which criticism has been chiefly directed are the following:

The quashing of indictments or granting of new trials because of the disqualification of a grand juror, or some technical error in the indictment or at the trial.

The undue amount of time used in selecting juries.

The constitutional provision which declares that no person

shall be compelled in any criminal case to be a witness against himself, and the prohibition which exists in a number of the states against commenting to the jury upon the failure of the accused voluntarily to testify.

The methods used in the examination of witnesses, and especially of experts.

The methods employed in charging juries.

Delays by appeals and the taking of writs of habeas corpus.

In 1900 one lecturing before the students in Lincoln's Inn on Changes in the English Criminal Law since 1800, informed them that to go back to the beginning of the century was to go back, so far as the Criminal Law was concerned, to an age of barbarism. "The sentence on a traitor was," he said, "that he must be drawn on a hurdle from the gaol to the place of execution, and when he came there he must be hanged by the neck, but *not till he be dead*, for he must be *cut down alive*, then his bowels must be taken out and burnt before his face, then his head must be severed from his body, and his body divided into four quarters, and these must be at the King's disposal." [34]

For the way in which such sentences were carried out attention was called to Townley's case, 18 State Trials, 350, 351, in 1746. The law of England remained unchanged in this particular until 1814 when it was altered by abolishing the disemboweling and burning, but drawing on a hurdle, beheading and quartering remained and were not abolished until 1870. And at the beginning of the present century there still remained unrepealed an act passed in the time of George III which authorized the monarch to direct that the head of a traitor "shall be severed from the body whilst alive."

There cannot be found in any penal law which the United States ever enacted any penalties which in cruelty and barbarism equal, or which in any degree resemble, those of the English law at the time the Constitution of the United States was adopted and for years thereafter. The Congress has never passed an Act authorizing the torture, disemboweling, branding or mutilation of any human being convicted of crime. If such an Act had ever

[34] A Century of Law Reform (London 1901), p. 43.

been passed no court would have enforced it as it would have been void under the Eighth amendment which declares that cruel and unusual punishments cannot be inflicted.

In this country the colonial criminal laws were severe but much less so than were those of England. The General Court of Connecticut in 1642 adopted the Mosaic Code and specified twelve capital offenses including witchcraft and blasphemy. The law read: "If any Man or Woman be a Witch, that is, hath or consulteth with a Familiar Spiritt, they shall be put to Death." On December 7, 1648, a "Bill of Inditement" was found against Mary Johnson that by "her owne Confession, shee is guilty of Familiarity with the Devill." There is no statement as to whom she bewitched or how. She was executed in 1649 or 1650. There were ten executions in Connecticut for witchcraft. There were other executions for witchcraft in the New England Colonies — for the belief in witchcraft was general, and it was regarded as the blackest of crimes. It was supposed that Satan exercised his malevolent influence through the agency of human beings, who, by formal compact, had agreed to become his subjects and to serve him. After 1665 all convictions for witchcraft in Connecticut were virtually quashed by the court. Bad as all this was, it was worse in England. Late in the eighteenth century Hutchinson said without contradiction then or since that "more have been put to death in a single county in England, in a short space of time, than have suffered in all New England from the first settlement to this time." The settlers of New England were Englishmen and had not fully emancipated themselves from their prejudices in favor of English laws. Witchcraft had been made a felony without benefit of clergy by 33 Henry VIII, c. 8, and 5 Eliz. c. 16, and the Statute of 1 James I, ch. 12. A belief in witchcraft was held by Coke, Bacon, Hale and Blackstone. The latter in speaking of the crime of witchcraft in his commentaries says that "To deny the possibility, nay actual existence of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the Old and New Testament."

In 1650 the Ludlow Code was adopted in Connecticut which added two capital crimes to those specified in the Code of 1642. It provided that a child above sixteen years of age who should

curse or smite its parents should be put to death. It declared that "a rebellious son, who, having been chastened by his father, would not obey his voice and chastisement, but lived in sundry and notorious crimes, should be put to death." It also provided that for the crime of burglary the offender should be branded upon the forehead with the letter "B"; for a second offense that he should be branded and whipped; and that for a third offense he should be put to death as incorrigible. If the offense were committed upon the Lord's Day to the punishment of branding was to be added that of cutting off the offender's ears.[35]

In the margin is an indictment brought in Connecticut for witchcraft.[36]

An indictment in 1697 closed the Connecticut witchcraft prosecutions.[37]

In this country the criminal laws became humane long before the rigorous and inhuman laws of England were modified. In 1796 when Chief Justice Swift published his System of the Laws of Connecticut the crimes for which death was the penalty were high treason, murder, rape, mayhem and arson endangering life.

The "flaw in the indictment" has been the highway of escape for many convicted criminals. The technicalities in which some courts in this country have indulged have been frequently referred to as a reproach to the administration of justice and a mortification to the profession. A conviction of murder has been set aside because in the name of the murdered man, Patrick Fitz-Patrick, the indictment spelled the second "patrick" with a small "p." In another case a convicted murderer was granted a new trial because the indictment which alleged that he stabbed a man who did "instantly die" omitted the words "then and there"

[35] Two Centuries of American Law, p. 353.

[36] John Carrington thou art indited by the name of John Carrington of Wethersfield — carpenter —, that not having the feare of God before thine eyes thou hast interteined familiarity with Satan the great enemye of God and man-kinde and by his helpe hast done workes above the course of nature for which both according to the lawe of God and the established lawe of this Commonwealth thou deservest to dye. — Record Particular Court, 2:17 1650–51. Taylor's Witchcraft Delusion in Colonial Connecticut, p. viii.

[37] See Clark's History of Connecticut, p. 153.

before "instantly." The court must have thought that the man could have died "instantly" without dying "then and there."

In one case an information was held insufficient which charged that "Lee Look" had unlawfully and with malice aforethought killed "Lee Wing" but failed to aver either that Lee Wing was a human being or that he had been "murdered." In another case a conviction was set aside where an indictment charged that A killed B "by firing a Colt's revolver loaded with gunpowder and leaden balls, which he, A, then and there had and held in his hands," because it did not allege that the pistol was fired at B. It was said that the pistol might have been fired into the air, or at a flock of birds. The court could not see that B was hit; he might have been a feeble man who died of fright at the discharge of the pistol for anything the indictment contained! If either of these things had been the fact it would have been disclosed at the trial and if disclosed the defendant could not have been convicted. An indictment which charged A with having defrauded the "First National Bank of G" was held defective because it did not state whether the bank was an individual, a partnership or a corporation. An ordinary person would presume that a "national" bank was a corporation! So an indictment has been set aside because the "—— Railroad Corporation" was described as the "—— Railroad *Company*." A conviction for forgery has been set aside where the forged instrument was literally copied into the indictment because the copy was preceded by the words "*in substance*" and the law required the words to be set out according to their "tenor" which meant according to its purport and effect and not its actual words an exact copy. A man who was the guardian of a young woman ravished her. He was indicted for rape by a grand jury and upon trial by a petit jury was convicted. His conviction was set aside on writ of error because of the omission of the definite article "*the*" before "State" in the concluding phrase of the indictment. The omission may have been due to the carelessness of a draftsman or to the oversight of a copyist. That the criminal could have been prejudiced by the mistake was impossible. The natural effect of such a miscarriage of justice upon a community is to impair, if not to destroy, respect for the administration of justice through the courts. It

has been well asked what would be the answer if later a similar crime had been committed in that neighborhood and the natural resentment which it provoked kindled the people to mob violence, and some one had asked the mob to leave the matter to the courts and been told, "We have no respect for a law which puts the definite article *the* in sanctity above the chastity of our wives and daughters"? [38] A conviction has been set aside and a new trial granted because the letter "n" was accidentally omitted from the word larceny in an indictment. If courts think they must render such decisions, then there is need of a statute providing that objections to indictments must be made before trial, and the indictment amended where objection is made and the trial judge deems it necessary. A statute to that effect exists in England and in some of our States. But before the English Statute was passed Mr. Justice Buller had quashed an indictment for murder because it said that "the jurors on their oath" present, etc., instead of "on their oaths." It is not easily tolerable that the highway of justice should be long obstructed by a barbed network of technicalities and subtleties and meticulous rules. Law and justice ought to be synonymous, and there should be no occasion for complaining that "This may be law but it is not justice."

Lord Hale complained in his day "that more offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence, to the shame of the Government, to the reproach of the law, to the encouragement of villany and to the dishonor of God." Are his words wholly inapplicable in our own day?

When the punishment for crime was so severe as to shock the moral sense of the courts, the lawyers and the public, technicalities grew up which in the present state of the law are without reason or justification and which bring the law into disrepute and sometimes make it absurd.

When stealing a handkerchief worth one shilling was punished by death, and there were nearly two hundred capital offenses, it was to the credit of humanity, as the New York Court of Ap-

[38] People *v.* Gilbert, 199 N. Y. 28.

peals has said, that technicalities should be invoked in order to prevent the cruelty of a strict and literal enforcement of the law.[39] Those times have passed. The criminal law is no longer inhumane. It has outgrown the extreme technicalities of the early times and to indulge in them now shocks common sense.

It is essential to an efficient administration of the criminal law that no unreasonable delays should be permitted. There should be no excuse for saying that when criminals are at length brought to justice the punishment is so far removed in time from the crime as to have no proper punitive effect. In England from the earliest times a prisoner has had the legal right to a speedy trial. In the United States the Constitution of the Nation and the constitutions of the States declare that in all criminal prosecutions the accused shall enjoy the right to a speedy trial. That there should be a speedy trial, let it not be forgotten, is in the interest of society as well as in the interest of accused persons. At five o'clock in the afternoon of May 11, 1812, the Prime Minister of England, Spencer Perceval, as he was entering the House of Commons, was shot by a Liverpool broker by the name of Bellingham. On May 15th Bellingham was arraigned for trial and on May 18th he was convicted and hanged. Mr. Justice Riddle of the Supreme Court of Ontario, Canada, recently publicly stated that he had been at the Bar and on the Bench for over thirty years and that he had never seen it take more than half an hour to get a jury in a criminal case. He had prosecuted, he said, a score of prisoners charged with murder, and had defended at least as many. But he had never heard of a murder case in the Province of Ontario that took longer than four days to try, and that was only one. "I never was," he said, "in any case but that murder case which took more than two days. I never tried a murder case that took more than a day and a quarter." Speaking in 1913 he made this impressive statement: "I had a conversation with him (President Taft) in Augusta, Georgia, some four years ago concerning the administration of criminal justice in the United States and Canada, and he expressed to me the opinion, which one of the speakers this afternoon has

[39] See the remarks of Hon. Frederick W. Lehman of Missouri before the Am. Bar Association, Reports, Vol. 34, p. 78.

quoted to you, that the administration of criminal justice in the United States was a disgrace to the nation. I said, 'Mr. President, the last Assize Court I was at was in the City of London, Ontario, which is about two hours this side of the City of Detroit, in the State of Michigan. I went up there and opened an Assize Court on the same day that in the City of Detroit they began to get a jury in a criminal case. I had tried a murder case, a manslaughter case, and two fraud cases, all with a jury of course, and without a jury I tried seven civil cases, closed my civil and criminal list and was home in Toronto, having finished the Assize, the jurymen all gone home, the whole matter over, four prisoners convicted and on their way to the Kingston Penitentiary, when in Detroit they had not got six jurymen!'"

In the famous prosecution of Calhoun in a State court in California a few years ago it is said that ninety-one days were spent in getting a jury. In the recent prosecution of William Bross Lloyd in the criminal court of Cook County, Illinois, fifty working days were spent in obtaining a jury. The trouble in all such cases grows out of the abuse in this country of the right of challenge. For centuries challenges have been uncommon in England. Fitz-James Stephen states that he could not remember more than two cases in that country in which any considerable number of challenges had been made in thirty-five years.[40] A system of procedure which makes such things possible makes it unnecessarily difficult to protect society against crime, and society must be protected.

At common law an accused person was incompetent to testify, his incompetency being based on his interest in the matter. Congress by the Act of March 16, 1878, has provided that in the trial of crimes, offenses, and misdemeanors in the United States courts the person so charged shall at his own request but not otherwise be a competent witness. It also is declared that his failure to make such request shall not create any presumption against him.[41] The various States also have passed statutes removing the disability. The statutes now give the defendant the right at his own election and on his own behalf to become a witness and permit no inference to be drawn from his silence.

[40] General View of the Criminal Law of England, p. 166.

[41] 20 Stat. L. 20.

While these statutes render him a competent witness he cannot be compelled, because of the constitutional provisions, to become a witness against himself.

The constitutional prohibition which declares that no person shall be compelled in any criminal case to be a witness against himself is not only found in the Constitution of the United States where it is made obligatory in all criminal proceedings in the Federal courts, but is also found in the several State Constitutions. The provision was incorporated in the Constitution to make impossible a recurrence of the Inquisitional proceedings in which torture was resorted to in periods of arbitrary power. But it has been construed to mean and is so established that in a criminal case the defendant cannot be compelled at his trial to take the stand and submit himself to an examination before the jury. In England and in this country the original common law rule did not permit a defendant to testify if he would. But in both countries that rule has been abrogated and the defendant may take the stand if he so desires, and the prosecution cannot comment on his failure to do so in most of the States in which this has been allowed. The change was made in the interest of justice, and experience has justified the wisdom of it. There seems to be an increasing number of those who think, and the writer admits himself to be one of them, that as the administration of the criminal law is for the purpose of convicting those who are guilty of crime the accomplishment of that result is seriously and without good reason interfered with by the constitutional restriction now under discussion. This is not because there has developed less regard for the rights of individuals who are accused of crime, but it is because the rights of society on the one hand and of the person accused are better understood and more justly appreciated. The privilege of one accused of crime to remain silent before court and jury when he is summoned to the bar of justice is an ancient and musty inheritance which we in this country have outgrown. It had its basis in an age when governments practiced cruelty, persecution and oppression. In an age of the inquisition it was needed to protect the innocent. But it is out of place, I venture to say, in the age and civilization in which we are living. It runs counter to any just conception of what is due to those who

are charged with the responsibility of protecting society against the criminal classes. It denies to courts the easiest and most certain way of determining the truth. It no longer serves a useful purpose and its effect is to make more difficult the conviction of the guilty. The aim and purpose of the administration of justice in criminal cases, as in civil, is first to ascertain the truth, and the path which leads to its ascertainment should not be closed to courts. A rule of procedure which tends not to reveal the truth but to conceal and suppress it helps to make the administration of justice inefficient, and so helps to create popular discontent with the judicial system. Criminals are the enemies of society. The innocent are not now in need of protection against society, but society is in great need of protection against the criminal classes. What was intended as a cloak for innocence has been made into "a coat of mail which wards off from the criminal the shaft of truth which ought to pierce him."

The constitutional limitation upon unreasonable searches and seizures, as well as that which entitles the defendant to be confronted with the witnesses who testify against him, although he may use depositions without number in his defense, make it unnecessarily difficult, if not impossible in many cases, to convict the guilty.

Trial by jury secured under the Constitution is not an infallible mode of ascertaining truth. No one has made that claim for it. That it has its imperfections is admitted. But it is regarded as the best protection for innocence and the surest mode of punishing guilt that has yet been discovered. That it has stood the test of a longer experience and borne it better than any other legal institution that ever existed among men has been justifiably claimed for it. "England owes," said Jeremiah S. Black, at one time Attorney General of the United States as well as Secretary of State, "more of her freedom, her grandeur and her prosperity to that, than to all other causes put together."

The trial by jury which is guaranteed by the Sixth Amendment to persons accused of crime is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts. In the courts of the United States, there being no constitutional or

statutory restrictions changing the common law rule, the judge in his charge to the jury is entitled to express an opinion on disputed questions of fact in criminal as well as in civil cases, provided he makes it plain that his opinion as to the facts is not controlling the ultimate determination being left to them. A bill was introduced into the 63rd and 64th Congresses which proposed to amend the practice and procedure in Federal courts in this respect, and to make it reversible error for a judge presiding in any United States court to express his personal opinion as to the credibility of witnesses or as to the weight of the testimony involved. The bill was strenuously opposed by a Committee of the American Bar Association and defeated. It appeared to be the opinion of that Association that the rule which the Bill sought to impose upon the Federal courts was one which would tend to bring the administration of justice into disrepute, and that it was one of doubtful constitutionality.[42] In the Federal courts, as in England, a trial is one not by jury and lawyers, but by judge and jury and the judge is a very important part of it. A judge in Pennsylvania, not a Federal judge be it noted, said a few years ago that he thought it would be found that those States in which the powers of the trial judge had been curtailed so that he could not express an opinion on the facts were the States in which there existed the greatest dissatisfaction with the administration of the criminal law.[43] He also said that "Probably no legislation that has been passed has done more to bring discredit upon criminal trials than those statutes which have restricted the powers of the trial judge in charging the jury. In some States he is not permitted to comment on the testimony; in others he must reduce his charge to writing and give it to counsel before they begin their arguments; in others counsel may write out a charge and if it is correct in law, the judge must read it to the jury." [44]

As I am not a trial judge I shall venture to say that I share in the opinion that such legislation does not promote the

[42] The Am. Bar Ass. Journal, Vol. 2, pp. 607–610; and *Ibid.* Vol. 4, 500–503.

[43] The Am. Bar Ass. Journal, Vol. 2, pp. 99, 100.

[44] *Ibid.* p. 96. Address of Judge Robert Ralston of Philadelphia as President of the American Institute of Criminal Law and Criminology in 1915.

administration of criminal justice. It tends to make the conviction of the guilty as difficult as possible, converts the trial judge into a nobody and deprives the jury composed of men inexperienced in such matters of the benefit of his experience and wisdom. It is another safeguard extended to accused persons, which adds to the wonder that convictions are secured at all.

In his *General View of the Criminal Law of England* [45] Sir James Fitz-James Stephen says: "A judge who merely states to the jury certain propositions of law and then reads over his notes, does not discharge his duty. . . . he ought not to conceal his opinion from the jury, nor do I see how it is possible for him to do so, if he arranges the evidence in the order in which it strikes his mind. The mere effort to see what is essential to a story, in what order the important events happened, and in what relation they stand to each other, must of necessity point to some conclusion. The act of stating for the jury the questions which they have to answer, and of stating the evidence bearing on those questions and showing in what respects it is important, generally goes a considerable way toward suggesting an answer to them; and if a judge does not do as much at least as this, he does almost nothing."

Criminal procedure in England was distinguished from that in Europe and in this country by the fact that crimes were left like civil injuries to be prosecuted by the persons injured. It was not until 1879 that an act was passed in England which created the office of a Public Prosecutor, or Director of Public Prosecutions, whose duty it was made to institute and carry on criminal proceedings, and to give advice and assistance to police officers and other persons, official or private, concerned in criminal proceedings.[46] The statute strictly preserves, however, the right of a private person to institute a criminal prosecution if he so desires. It has already been pointed out that in this country the Judiciary Act of 1789 provided for the appointment of an Attorney of the United States in each Federal District whose duty it should be to represent the United States in all cases, civil or criminal, in which its interests are concerned.

And it is one of the marked distinctions between the criminal

[45] P. 170.

[46] 42 & 43 Vict. c. 22, s. 2.

procedure of England and of the United States, and indeed of almost all other countries, that in England the Public Prosecutor can do nothing whatever which might not equally be done by any private person through his solicitor. It certainly is "a curious feature" of the English law that any person may present a bill of indictment against any person whatever for almost any crime whatever without any notice to the accused and without going before a magistrate. It seems to us almost incredible that in that country it would be perfectly lawful for any man to accuse the most distinguished person of such crimes as treason, murder or rape and without any previous authority or inquiry have him arrested and locked up in prison, and yet such is said to be the law.[47]

In England accused persons were not allowed to be defended by counsel, except in cases of high treason, until the Prisoner's Counsel Act of 1836. Sir Fitz-James Stephen fixes at the same date the entire exemption of prisoners from interrogation. But it was written into our Constitution nearly fifty years earlier that the accused should have the assistance of counsel for his defense.

There exists in this country a popular criticism of the judicial system of the States and of the United States. The strength of the dissatisfaction was seen in the demand for the recall of judges and of judicial decisions, and of other radical and revolutionary demands. These strange demands had their origin in a feeling that in some way or other the judicial system is wrong and inefficient, and that the administration of the courts results too often in injustice. The discontent cannot be denied. One cause of it lies in a system of procedure which in some few respects has been archaic and radically wrong, and especially so in matters of criminal procedure. When the rules of criminal procedure result in an inefficient administration of criminal justice there is a duty to correct them.

In England the necessity of a reform in judicial procedure was recognized long before the importance of the subject attracted much attention in this country, with the result that in England the rules of procedure were changed and the simplicity and ex-

[47] Stephen's General View of the Criminal Law of England, p. 157 (2d ed.).

pedition of procedure in the English courts for a number of years have been recognized throughout the world. The way to a more efficient administration of the criminal law in the United States lies in a radical reform in our procedure.

In his Message to Congress of December 6, 1910, President Taft declared that he was strongly convinced that the best method of improving judicial procedure at law was to empower the Supreme Court to do it through the medium of the rules of the court. He added that he could not conceive any higher duty that the Supreme Court could perform than in leading the way to a simplification of procedure in the United States courts. And in an address before the Kentucky State Bar Association on July 12, 1911, President Wilson put in the first place "the critical matter of reform of legal procedure." He declared that "The actual miscarriages of justice, because of nothing more than a mere slip in a phrase or a mere error in an immaterial form, are nothing less than shocking. Their number is incalculable, but much more incalculable than their number is the damage they do to the reputation of the profession and to the majesty and integrity of the law." In an address at Indianapolis on January 9, 1915, he again referred to the matter, saying: "I do know that the United States, in its judicial procedure, is many decades behind every other civilized government in the world; and I say that it is an immediate and imperative call upon us to rectify that." In an address at New York in November, 1916, he once more recurred to the subject, saying: "The procedure of our courts is antiquated and a hindrance, not an aid, in the just administration of the law. We must simplify and reform it as other enlightened nations have done, and make courts of justice out of our courts of law."

A bill drawn by a committee of the American Bar Association and having the approval of that Association was introduced into both Houses of Congress in 1912. It provided that the Supreme Court should have the power to regulate pleading, procedure, and practice on the common law side of the Federal courts. The purpose of the bill was to give to the Supreme Court the same authority to make rules governing the entire procedure in cases at law that it already possessed to regulate procedure in equity and admiralty

and the bankruptcy courts. Congress has never seen fit to confer the authority. The effort to secure the consent of Congress has not been abandoned. The latest attempt to that end was a bill introduced in the House of Representatives on July 23, 1919. It was referred to the Committee on the Judiciary and ordered to be printed. Nothing appears to have been done about it since. It provided that the Supreme Court should have power to regulate and prescribe by rules the forms for and the kind and character of the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law of whatever nature by the district courts of the United States and the courts of the District of Columbia. The passage of such a bill would lead to a much needed simplification of the system of pleading, practice and procedure, and would promote the speedy determination of litigation on the merits.

It of course is not within the power of either the Congress or of the courts to affect, by any legislation or by any rules which may be established, the constitutional safeguards and guarantees relating to procedure in criminal cases in the Federal courts. It goes without saying that constitutional provisions can only be changed by amendments to the Constitution, and such amendments are not to be expected for years to come.

It is not to be inferred from anything said in this Introduction that I hold the opinion that in the United States the administration of the criminal law is a failure. I do not entertain that opinion. I am, however, convinced that the law is not as effectively administered as the interests of society require. The amount of crime committed in this country is excessive. Too many of its perpetrators are never apprehended. Too many of those who are apprehended escape punishment. Trials are unduly prolonged, and the time between conviction and actual punishment is often so great as seriously to impair if not to destroy the deterrent influence of the conviction and sentence. All rules of procedure which are unnecessarily technical and artificial and which make for unreasonable delay should be reformed. If in some particulars we stand alone among all civilized countries in

the unjustifiable obstacles we interpose to a more satisfactory administration of the criminal law they should be removed from the pathway of justice. The *finis et fructus* of law is justice. No matter what may be the theory or the science of the law, unless justice is worked out through its administration, there may be expected reproach and discontent. If defects exist in a system of criminal law which in the main is excellent, they should be sought out and eradicated. Nothing in the world is more important than justice. The safety of society and the perpetuity of government depends upon it. The publication of Zoline's *Federal Criminal Law and Procedure,* by making more accessible to all the legislation of Congress and the decisions of the Federal courts, makes easier the task of ascertaining wherein the defects lie.

HENRY WADE ROGERS.

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PREFACE

In presenting to the profession this work on the subject of Federal Criminal Law and Procedure, in three volumes, the author feels that he should state the reasons which prompted him to engage in this undertaking.

It is now definitely settled that the rules of evidence and the practice and procedure prevailing in the courts of the State where the Federal tribunal is situated have no application in the trial of criminal cases in the National Courts. Many reasons exist for maintaining the Federal criminal jurisprudence separate and distinct from that of the State Courts.

They may be summarized as follows:

(*a*) The adoption of the State laws and of State procedure for the government of the Federal Courts in criminal cases would have the direct effect of placing the criminal jurisprudence of one sovereignty under the immediate control of another.

(*b*) It would produce confusion and lack of uniformity because one of the effects expected from the establishment of a national judiciary was the uniformity of judicial decisions and such uniformity could not be expected if the judicial authority were shared by so many tribunals and,

(*c*) Whenever the people of the United States by any constitutional provision or whenever Congress in the exercise of its constitutional powers have legislated specially upon any matter of practice, such legislation is to that extent exclusive of any enactment of a State upon the same subject matter. The difference between the State and Federal jurisdictions was aptly pointed out by Chief Justice Waite, in the *Cruikshank* Case (92 U. S. 542, 550), in the following language:

> "The People of the United States resident within any State are subject to two governments; one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not.

They are established for different purposes, and have separate jurisdictions."

The foregoing, without more, explains the need of a well-arranged, up-to-date, comprehensive work on the subject of Federal Criminal Law and Procedure, as distinguished from a general work on Criminal Law or Criminal Procedure, but additional reasons are not wanting.

The extension of Federal power in recent years to matters theretofore wholly within the control of the States, and the passage of so many new acts virtually embracing all forms of human endeavor and industry, in addition to the many thousands of Federal offenses heretofore existing, carrying with them, as they do, heavy fines and penalties, furnish at this time even greater reason for a book on Federal Criminal Procedure, wherein the liabilities, rights, privileges and immunities of a person accused of crime in the Courts of the United States are clearly defined and set forth.

The fact that the "fathers" were so zealous in safe-guarding the personal rights and liberties of the individual that, in framing the Constitution of the United States, they actually prescribed the most important parts of the whole procedure to be followed in criminal cases in the Courts of the United States and the matters and things which should or should not be done in the trial of a criminal case, will no doubt be a revelation to many, for it will be readily conceded that the Constitution of the United States is less understood and studied than, for instance, the law of contracts, and, it may be safely asserted, is rarely, if ever, relied upon or consulted for a solution of a point of criminal practice. Yet it is all there. The protection of the Constitution is thrown around the accused from the very commencement of the prosecution, *i.e.* from the arrest to the very end of the trial; and, furthermore, in the event of a conviction the Constitution steps in again and decrees the kind of punishment which may not be inflicted. Nor does it stop there; for it further provides the mode of reviewing the judgment in an appellate tribunal; and lastly, if unsuccessful in his writ of error, it has devised another method of relief, namely, an appeal to Executive clemency, vest-

ing ample powers in the President to grant pardons, commutations and reprieves. A brief summary of the various constitutional provisions will easily sustain the author's contention:

Arrest — ". . . No Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ." (Fourth Amendment.)

Bail — "Excessive bail shall not be required. . . ." (Eighth Amendment.)

Due Process of Law — "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." (Fifth Amendment.)

Searches and Seizures — "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 person or things to be seized.*" (Fourth Amendment.)

Venue — "The Trial of all Crimes, *except* in Cases of Impeachment . . . shall be held in the *State* where the said Crimes shall have been committed. . . ." (Art. III. Sec. 2, Clause 3.) This provision was modified by the Sixth Amendment to the extent that the trial must be had in the *State and district* where the crime was committed, which district shall have been previously ascertained by law.

Right to Counsel — "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." (Sixth Amendment.)

Privileges and Immunities Against Self-Incrimination — ". . . Nor shall (any person) be compelled in any Criminal Case to be a witness against himself. . . ." (Fifth Amendment.)

Confrontation with Witnesses — "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." (Sixth Amendment.)

Speedy and Public Trial — "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." (Sixth Amendment.)

Indictments — "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." (Fifth Amendment.)

Trial by Jury — "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ." (Art. III. Sec. 2, Clause 3.)

Sentence and Judgment — ". . . Nor cruel and unusual punishment (shall not be) inflicted." (Eighth Amendment.)

Ex Post Facto and Bills of Attainder — "No Bill of Attainder or *ex post facto* Law shall be passed." (Art. I. Sec. 9, Clause 3.)

Pardon — "The President shall . . . have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." (Art. II. Sec. 2, Clause 1.)

Former Jeopardy — ". . . Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." (Fifth Amendment.)

Review of Judgment — ". . . No fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." (Seventh Amendment.)

To this may be added that the crime of treason and the mode of trial for such an offense is also defined by the Constitution and that the Writ of Habeas Corpus and the proceedings on Extradition, both international and interstate, are of a constitutional character.

Each clause of these constitutional provisions has received judicial construction from the highest Court of the land, and statutes have from time to time been passed in aid of them. It is therefore surprising that no one has heretofore undertaken to write a work on Federal Criminal Law and Procedure along constitutional lines.

Times like the present are full of danger to constitutional order and to the rights of the people; and, if we expect to retain the institutions of liberty and justice created at such sacrifices by the founders of the republic, it is imperative that each and all

should scrupulously observe the letter and spirit of the Constitution, which should include the administrative and judicial departments of the Government.

"Unconstitutional practices," said Mr. Justice Bradley, "get their first footing by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of the person and property should be liberally construed." (*Boyd* v. *United States*, 116 U. S. 616.)

Feeling that such a work ought to be written, the author proceeded in his labors with all the industry of which he was capable, and can he but succeed in stimulating others to a greater observance of the Constitution of the United States and a deeper study of its underlying principles, he will, indeed, feel himself amply rewarded for his arduous task.

In developing this work on Federal lines, the author was not unmindful of the rights of the States, and, accordingly, at the very outset, he has devoted a whole chapter to the powers of Congress to enact criminal laws, wherein he has pointed out the lines of demarcation between the powers of the States and those of the United States. While this topic more properly belongs to the domain of constitutional law, it forms an important part of the administration of criminal law.

Bearing in mind the essential differences between the Federal and non-federal systems prevailing in this country, the author has written what he has reason to believe is a complete, logical, concise and comprehensive up-to-date work, dealing with every phase of Federal criminal substantive and adjective law from the standpoint of an active and experienced federal practitioner of long standing. He has aimed to cover the law applicable, *during any stage of a proceeding, to every condition arising in and out of court,* in which a person may find himself when deprived of his liberty, or when called upon to defend himself against a charge of having committed a crime or offense against any of the laws of the United States.

To accomplish this, he has assembled in the *first volume* of this work the entire body of the Federal law relating to criminal procedure, including the rules of evidence applicable in criminal

cases in the Federal Courts. They embrace constitutional and statutory provisions, the decisions of the Supreme Court of the United States, of the United States Circuit Courts of Appeals and, in some instances, the decisions of the Federal District Courts pertaining to the subjects treated. Some of these have to some extent been dealt with by other authors in many separate text-books, such as works on Constitutional Law, Evidence, Habeas Corpus, Extradition, Bankruptcy, Contempt, Interstate and Foreign Commerce, etc., but as these subjects frequently arise while the prisoner is at the bar, when there is no time to consult so many different books, and when the law applicable to the situation must be applied irrespective of classification, they were for practical reasons incorporated in this work as a part of Federal criminal procedure, where in the author's opinion they properly belong. In addition to that, the author has also pointed out, in many parts of this work, how and when to raise a constitutional question, by which a person convicted of a violation of a Federal statute may be enabled to and become entitled to sue out a writ of error directly to the Supreme Court of the United States or to have the point properly considered in the United States Circuit Court of Appeals.

The various subjects covered by this work will be found under appropriate chapter heads and sectional headnotes. All points treated are correlated to the main subject, conveniently and logically arranged, and brought down to date. The references include Volume 250 of the United States Supreme Court Reports and Volume 264 of the Federal Reports. And in arranging his material the author followed the plan and arrangement of his book on Federal Appellate Jurisdiction and Procedure, which he has reason to believe proved to be entirely satisfactory to the profession. All obsolete statutes, hasty, crude and antiquated decisions have been disregarded. Only the law as it is now is given, although in many instances the old statutes or decisions have been referred to for a better understanding of the new rulings or the later statutes.

The *second volume* deals with the *substantive criminal law*. It contains the entire Federal Criminal Code with all the amendments thereto, to the date of this publication. The subjects of

"Conspiracy" and "Using the Mails to Defraud," being of the greatest importance, have been treated in separate chapters. It also contains the most important acts not contained in the Criminal Code, such as the Pure Food Laws, Oleomargarine, The Sherman and Clayton Anti-trust Acts, National Banking Acts, Bankruptcy, Interstate Commerce Acts, etc., etc., and which carry with them penal provisions. The assembling of the different Federal acts, embodying criminal provisions, all in one volume, should prove to be most helpful, saving both time and labor. Any one who has attempted to find a particular act of Congress, merely by a reference to the date of its passage, either through the Statutes at Large or in any compilation of the Revised Statutes of the United States, no matter how well arranged, as most of them are, will appreciate the plan and arrangement of this volume.

The trend of the modern authorities is to the effect that there is no exact definition of the term "civil liberty"; that the term only expresses the *balance* or *residue* of natural liberty, which is not prohibited and which the laws have left to the individual. How much of that natural and inherent liberty will be left in the individual if the Congress of the United States and the legislatures of the several States should continue, at the pace at which they have gone, to prohibit the things which are still lawful to do, by making criminal certain acts which are innocent in themselves, is a question deserving the earnest and thoughtful consideration of all liberty-loving people. This volume, grouping, as it does, most of the matters and things which are prohibited and penalized by Federal law, *should bring the question of further criminal legislation vividly to the attention of Congress.* Most of the federal criminal statutes define the offenses in alternative clauses, so that it is not infrequent that as many as ten or more offenses are defined in one section. By multiplying these, the number of Federal offenses run into the thousands.

The editorial comments under each penal section or act are complete and all important decisions up to the date of this publication have been incorporated therein. They not only deal with the construction and interpretation of the particular sections of the Federal Criminal Code and of the Acts of Congress, but in many instances call attention to a rule of evidence or of pleading and

practice governing the specific section or Act under consideration. These notes, together with the work on procedure, *i.e.* Volume One, and the forms contained in Volume Three, the author believes furnish all the necessary data for a proper understanding or solution of any matter arising in the administration of the criminal laws of the United States.

The *third volume* consists of useful forms dealing with every phase or feature likely to arise in the course of a Federal Criminal cause coming before the trial courts or on review before an appellate tribunal. Therein are included also *instructions to juries.* These forms are classified under the particular crimes or sections of the Criminal Code or Acts in connection with which they were used. Most of them were carefully selected by the author from the printed records of the various cases on file in the offices of the respective clerks of the United States Circuit Courts of Appeals and in which decisions have been rendered quite recently. These forms will no doubt, in many instances, furnish a guide even to the most experienced practitioner and will supply many hints for the development of any case under preparation, either in the court below or above and, when used in connection with the other parts of this work, should be found to be most helpful.

Treating, as he had to, the subject of Federal Criminal Law and Procedure as a distinct and separate branch of American Jurisprudence, and freely conceding that state decisions in criminal causes are not controlling on the Federal Courts, in the administration of Federal criminal law, the author nevertheless felt that the decisions of the highest courts of the several States ought not to be altogether ignored, for most, if not all, of the constitutions of the States composing the Union are modeled and patterned after the Constitution of the United States, and in this manner the systems of jurisprudence of the States and of the United States bear in many respects a close resemblance to each other, so as to reflect the thought and wisdom of the whole country. Together they form one whole and harmonious system of laws and furnish the people of the United States with a complete government.

For these reasons the decisions of the State Courts, particularly when expounding the rules of the common law or when treating

upon a subject of criminal law not yet covered by a Federal statute or Federal decision, are entitled to great weight and ordinarily are, as they should be, accepted as authority in the courts of the United States. Accordingly, the author has endeavored in this work to cite and correlate certain important State decisions with such parts of the Federal law to which they are directly applicable.

It would be impracticable to detail at length, or even to make mention of, the numerous subjects and topics treated and discussed in this work, except to state the scope of it in a general way. For this reason, the author refers the reader to the Table of Contents, showing an analysis of the chapters. While the work is so arranged that each topic will be found where it logically ought to be, nevertheless, for greater certainty, the author has prepared a full and complete general Index, as well as an Index to the Forms in Volume Three, and a Table of the Cases cited, all alphabetically arranged. It is therefore hoped that there will be no difficulty in locating any point treated in the three volumes.

The author is much indebted to the Hon. Henry Wade Rogers, Judge of the United States Circuit Court of Appeals for the Second Circuit, not only for his scholarly and most interesting and excellent introduction to these volumes, but also for the interest taken by him while this work was being written, which served as an encouragement to the author in the difficult task undertaken by him. The learned jurist read this work both in manuscript and in proof and made many valuable suggestions, all of which have been incorporated therein.

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ELIJAH N. ZOLINE.

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FEDERAL CRIMINAL LAW AND PROCEDURE

VOLUME ONE

CHAPTER I

POWER OF CONGRESS TO CREATE AND DEFINE OFFENSES AND PRESCRIBE THE JURISDICTION AND PROCEDURE THEREFOR

§ 1. Restriction on Powers of National Government.

The Government of the United States is one of delegated, limited and enumerated powers.[1] Therefore, every Act of Congress must find in the Constitution of the United States some warrant for its passage. This is manifest from an inspection of the following provisions: Section 1 of the first Article declares that all legislative powers granted by the Constitution shall be vested in the Congress of the United States. Section 8 of the same Article enumerates the powers granted to Congress and concludes the enumeration with a grant of power "To make

§ 1. [1] Hammer *v.* Dagenhart, 247 U. S. 251, 62 L. ed. 110, 38 S. C. 529; Keller *v.* United States, 213 U. S. 138, 53 L. ed. 737, 29 S. C. 470; M'Culloch *v.* Maryland, 4 Wheat. 316, 4 L. ed. 579; Gibbons *v.* Ogden, 9 Wheat. 1, 6 L. ed. 23; United States *v.* Ferger, 256 Fed. 388; United States *v.* Hicks, 256 Fed. 707.

all Laws which shall be necessary and proper to carry into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof." The Tenth Amendment to the Constitution declares that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

§ 2. Test of Constitutionality of an Act of Congress.

The Constitution is the supreme, permanent and fixed will of the people in their original, unlimited and sovereign capacity. Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power is expressed in the Constitution. If it be, the question, of course, is foreclosed. If not expressed, the next inquiry must be, whether the act of Congress is properly an incident to an express power and necessary to its execution. Where Congress is by the Constitution clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such powers to the States, as in levying taxes,[1] the regulation of commerce in interstate and with foreign nations, and with the Indian Tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, etc., Congress has power to pass laws for the regulation of the subjects specified and to provide punishments for the violation of such laws and regulations.[2] In United States *v.* Fisher,[3] the court said that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." "The sound construction of the Constitution," said Chief Justice Marshall,[4] "must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most bene-

§ 2. [1] United States *v.* Doremus, 249 U. S. 86.

[2] Clark Distilling Co. *v.* Western Maryland Ry. Co., 242 U. S. 311, 61 L. ed. 326, 37 S. C. 180; United States *v.* Arjona, 120 U. S. 479, 30 L. ed. 728, 7 S. C. 628.

[3] 2 Cranch (U.S.), 358, 2 L. ed. 304.

[4] M'Culloch *v.* Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605.

ficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." And an act will not be declared unconstitutional because its effects may be to accomplish another purpose as well as the one for which it was expressly passed.[5]

§ 3. The United States Cannot Exercise Police Powers within a State.

Offenses which come within the accepted definition of police power are reserved to the several States, for there is in the Constitution no grant thereof to Congress.[1]

§ 4. Definition of Police Power.

There is no exact definition of the term "police power", but whatever differences of opinion may exist as to the extent and boundaries of police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens and to the preservation of good order and public morals. It belongs unquestionably to that class of objects which demand the maxim, *salus populi suprema lex.*[1] Within its own boundaries, the State has the exclusive power to regulate, restrain and prohibit under penalty vice and immorality and to enact legislation in furtherance thereof.[2] There

[5] In re Kollok, 165 U. S. 526, 41 L. ed. 813, 17 S. C. 444; United States *v.* Doremus, 249 U. S. 86, 63 L. ed. 286, 39 S. C. 217.

§ 3. [1] Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115; Savage *v.* Jones, 225 U. S. 501, 56 L. ed. 1182, 32 S. C. 715; License Cases, 5 How. 504, 12 L. ed. 256; Keller *v.* United States, 213 U. S. 138, 53 L. ed. 737, 29 S. C. 470; Hammer *v.* Dagenhart, 247 U. S. 251, 62 L. ed. 1104, 38 S. C. 529.

§ 4. [1] Corn Products Refining Co. *v.* Eddy, *et al.*, 249 U. S. 427, — L. ed. —, — S. C. —; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989.

[2] Keller *v.* United States, 213 U. S. 138, 53 L. ed. 737, 29 S. C. 470; License Cases, 5 How. 504, 582, 12 L. ed. 256, 291; Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115; Slaughter House Cases, 16 Wall. 36, 64, 21 L. ed. 394, 404; Re: Rahrer (Wilkerson *v.* Rahrer), 140 U. S. 546, 555, 35 L. ed. 572, 574, 11 S. C. 865; Trade Mark Cases, 100 U. S. 82, 96, 25 L. ed. 550, 552; Williams *v.* Fears, 179 U. S. 270, 45 L. ed. 186, 21 S. C. 128.

is a dictum in Wilson *v.* United States,[3] to the effect that the United States possesses to some extent police powers within a State when exercising its powers over interstate commerce, but what was said must be limited to the facts in that particular case and it should not be construed as the announcement of a new principle of law.[4] It is established by repeated decisions that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.[5] And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety.[6] The courts may not concern themselves with the policy of legislation, or its economic wisdom, or folly. Those are considerations belonging exclusively to the Legislature.[7]

§ 5. The Exercise of Police Power Must Not Transgress Fundamental Rights under the Constitution of the United States.

In this connection it must be also remembered that the state when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States,

[3] 232 U. S. 563, 567, 58 L. ed. 728, 34 S. C. 347.

[4] United States *v.* Union Mfg. Co., 240 U. S. 605, 60 L. ed. 822.

[5] Chicago & Alton Railroad Company *v.* Tranbarger, 238 U. S. 67, 77; 59 L. ed. 1204; 35 S. C. 678; Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 S. C. 364, and cases cited.

[6] Chicago & Alton Railroad Company *v.* Tranbarger, 238 U. S. 67, 77, 59 L. ed. 1204, 35 S. C. 678; Lake Shore & M. S. R. Co. *v.* Ohio, 173 U. S. 285, 292, 43 L. ed. 702, 704, 19 S. C. 465; Chicago B. & Q. R. Co. *v.* Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 S. C. 341; Bacon *v.* Walker, 204 U. S. 311, 317, 51 L. ed. 499, 502, 27 S. C. 289.

[7] C. B. & Q. Ry. Co. *v.* McGuire, 219 U. S. 549, 569, 55 L. ed. 328, 31 S. C. 259; Price *v.* Illinois, 238 U. S. 446, 451, 452, 59 L. ed. 1400, 35 S. C. 892; Rast *v.* Van Deman & Lewis, 240 U. S. 342, 357, 60 L. ed. 679, 36 S. C. 370; Merrick *v.* Halsey, 242 U. S. 568, 586, 588, 61 L. ed. 498, 37 S. C. 227.

and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government,[1] but, unless the legislation is palpably unreasonable and arbitrary, it will ordinarily not be disturbed.[2]

§ 6. **The Dividing Line.**

The principles stated in the preceding sections briefly sum up the law as to the respective powers and obligations of the States and nation. The very nature of the Constitution, as observed by Chief Justice Marshall, "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . ."[1] Both the State and Federal Governments have maintained their sovereign rights and will continue to do so as long as the Union exists. Federal statutes are upheld when they are within the power of Congress and are often held unconstitutional if they invade the rights of the several States. As was said in Houston *v.* Moore:[2] "Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution."[3] And generally speaking the citizen's right to personal liberty and security within a State is primarily within the jurisdiction of the State.[4]

§ 5. [1] Mugler *v.* Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. C. 273; Hannibal & St. Joseph R. R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 S. C. 252; Walling *v.* Michigan, 116 U. S. 446, 29 L. ed. 691, 6 S. C. 454; Yick Wo *v.* Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. C. 1064; Morgan's Louisiana, etc., Steamship Co. *v.* Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 S. C. 1114; Dobbins *v.* Los Angeles, 195 U. S. 223, 241, 49 L. ed. 169, 25 S. C. 18, holding that the exercise of police power is subject to judicial review and that property rights cannot be destroyed by arbitrary enactment.

[2] Price *v.* Illinois, 238 U. S. 446, 59 L. ed. 1400, 35 S. C. 892.

§ 6. [1] M'Culloch *v.* Maryland, 4 Wheat. 316, 407, 4 L. ed. 579, 601.

[2] 5 Wheat. 1, 48, 5 L. ed. 19.

[3] Approved in Keller *v.* United States, *supra*.

[4] United States *v.* Eberhardt, 127 Fed. 254; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77; United States *v.* Bathgate, 246 U. S. 220, 62 L. ed. 676, 38 S. C. 269; United States *v.* Gradwell, 243 U. S. 476, 61 L. ed.

§ 7. Effect of Unconstitutionality of Part of an Act.

It is now well settled that an Act of Congress may be in part constitutional and in part unconstitutional and if the parts of the statute are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. On the other hand, if the different parts of a statute are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that Congress intended to pass the Act as a whole, and that, if all could not be carried into effect, it would not have passed the residue independently, and it is found that some parts of same are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.[1] Where, however, a statute is susceptible of two constructions, one within the power of Congress and the other not, the former will be adopted.[2]

§ 7 *a*. Enjoining Criminal Prosecutions under Unconstitutional Statutes.

It has been held [1] by the United States Circuit Court of Appeals for the Second Circuit, that a United States Attorney cannot be enjoined from instituting criminal proceedings under a valid act of Congress. Prior to this decision the Supreme Court of the United States by divided Court sustained a decree enjoining the United States Attorney for the Western District of North Carolina from prosecuting by indictment or information and enforcing an Act of Congress prohibiting the shipment of articles produced in establishments where children under a certain age were employed on the ground that the statute was unconstitutional.[2] Jurisdiction in equity was also entertained [3] in a suit for injunction against

857, 37 S. C. 407; United States *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588.

§ 7. [1] Poindexter *v.* Greenhow, 114 U. S. 270, 304, 29 L. ed. 185, 197, 5 S. C. 903; Spraigue *v.* Thompson, 118 U. S. 90, 95, 30 L. ed. 115, 117, 6 S. C. 988; Pollock *v.* Farmers Loan & Trust Co., 158 U. S. 601, 39 L. ed. 1108, 15 S. C. 912.

[2] United States *v.* Metzdorf, 252 Fed. 933.

§ 7 *a*. [1] Jacob Hoffman Brewing Company *v.* McElligott, 259 Fed. 525 (C. C. A. 2d Cir.).

[2] Hammer *v.* United States, 247 U. S. 251, 62 L. ed. 1101, 38 S. C. 529.

[3] Wilson *v.* New, 243 U. S. 332, 61 L. ed. 755, 37 S. C. 298.

the United States Attorney for the Western District of Missouri to restrain the enforcement of an Act of Congress establishing an eight-hour day for employees engaged in interstate and foreign commerce and providing a punishment for the violation of said Act. A bill in equity framed upon the theory that an act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of the State, are about to proceed wrongfully to the complainant's injury through interference with his employment, cannot be regarded as one against the State.[4] It is also settled that while a court of equity, generally speaking, has "no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors" [5] a distinction obtains and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property.[6] Likewise an injunction will be granted against the administrative officers of the Government to restrain the enforcement of a rule promulgated by a superior officer which was beyond the power of such superior officer to make.[7] But it has been held that a suit in equity will not lie to restrain the enforcement of a criminal statute which is constitutional but which it is claimed has been wrongfully interpreted and applied in a particular case.[8] Where proceedings under an unconstitu-

[4] Griesedieck Bros. Brewery Co. *v.* Moore, 262 Fed. 582; Ex parte Young, 209 U. S. 123, 155, 161, 52 L. ed. 714, 727, 729, 28 S. C. 441. *Followed by* Ludwig *v.* Western Union Teleg. Co., 216 U. S. 146, 54 L. ed. 423, 30 S. C. 280; Western Union Teleg. Co. *v.* Andrews, 216 U. S. 165, 54 L. ed. 430, 30 S. C. 286; Herndon *v.* Chicago R. I. & P. R. Co., 218 U. S. 135, 155, 54 L. ed. 970, 976, 30 S. C. 633; Hopkins *v.* Clemson Agri. College, 221 U. S. 636, 643, 645, 55 L. ed. 890, 894, 895, 31 S. C. 654; Philadelphia Co. *v.* Stimson, 223 U. S. 607, 620, 56 L. ed. 572, 576, 32 S. C. 340; Home Teleph. & Teleg. Co. *v.* Los Angeles, 227 U. S. 278, 293, 57 L. ed. 510, 517, 33 S. C. 312; Truax *v.* Raich, 239 U. S. 33, 60 L. ed. 131.

[5] Re Sawyer, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 S. C. 482.

[6] Davis & F. Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 218, 47 L. ed 778, 780, 23 S. C. 498; Dobbins *v.* Los Angeles, 195 U. S. 223, 241, 49 L. ed. 169, 177, 25 S. C. 18; Ex parte Young, 209 U. S. 123, 155, 161, 52 L. ed. 714, 727, 729, 28 S. C. 441; Philadelphia Co. *v.* Stimson, 223 U. S. 621, 56 L. ed. 577, 32 S. C. 340.

[7] Waite *v.* Macy, 246 U. S. 606, 610, 62 L. ed. 892.

[8] Jacob Hoffman Brewing Co. *v.* M'Elligott, 259 Fed. 525 (C. C. A. 2d Cir.).

tional enactment are enjoined, the suit is not construed as one against the State.[9] An action does not usually lie against an officer of the United States, acting in the exercise of his office,[10] unless he exceeds the authority conferred by statute.[11] When an indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court, having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed.[12] But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a State court.[13] Where a criminal proceeding is commenced against one who is already party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings.[14] In Dobbins *v.* Los Angeles,[15] it is remarked by Mr. Justice Day, in delivering the opinion of the court, that "it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity." Smyth *v.* Ames[16] distinctly enjoined the proceedings in indictment to compel obedience to the rate act.[17] These cases show that a court of equity is not always precluded from granting an injunction to stay proceedings in criminal cases.

[9] Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 S. C. 441; Western Union Telegraph Co. *v.* Andrews, 216 U. S. 165; 54 L. ed. 430, 30 S. C. 286.

[10] Fitts *v.* McGhee, 172 U. S. 516, 43 L. ed. 535, 19 S. C. 269; New Orleans *v.* Paine, 147 U. S. 261, 37 L. ed. 162, 13 S. C. 303.

[11] *See* Philadelphia Co. *v.* Stimson, 223 U. S. 605, 619, *et seq.*, 56 L. ed. 570, 32 S. C. 340; Baker *v.* Swigart, 196 Fed. 569, 571.

[12] Prout *v.* Starr, 188 U. S. 537, 544, 47 L. ed. 584, 23 S. C. 398.

[13] Taylor *v.* Taintor, 16 Wall. (U. S.) 366, 370, 21 L. ed. 287; Harkrader *v.* Wadley, 172 U. S. 148, 43 L. ed. 399, 19 S. C. 119; Ex parte Young, 209 U. S. 123, 155, 161, 52 L. ed. 714, 727, 28 S. C. 441.

[14] Davis etc. Co. *v.* Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 S. C. 498.

[15] 195 U. S. 223, 241, 49 L. ed. 169, 25 S. C. 18. *See also*, Davis etc. Co. *v.* Los Angeles, *supra*.

[16] 169 U. S. 466, 42 L. ed. 819, 18 S. C. 418.

[17] Ex parte Young, 209 U. S. 123, 155, 161, 52 L. ed. 714, 28 S. C. 441.

The decision In re Sawyer[18] is not to the contrary. That case holds that in general a court of equity has no jurisdiction of a bill to stay criminal proceedings, but it expressly states an exception, unless they are instituted by a party to the suit already pending before it and to try the same right that is in issue there.[19]

[18] 124 U. S. 200, 211, 31 L. ed. 402, 8 S. C. 482.

[19] Ex parte Young, *supra*.

CHAPTER II

JURISDICTION OF THE FEDERAL COURTS

§ 8. Exclusive Character of Jurisdiction.

Section 24 of the Federal Judicial Code provides that the District courts shall have original jurisdiction of all crimes and offenses cognizable under the authority of the United States, while Section 256 of the same Code makes the jurisdiction of the Federal courts in criminal cases exclusive. Whether or not the Federal Judicial Code which came into effect January 1, 1912, repealed by implication Section 1014 of the Revised Statutes of the United States authorizing State officials and magistrates to issue warrants for Federal offenses and conduct preliminary hearings has not been decided. It is therefore safe to assume that aside from the powers granted in Section 1014 of the Revised Statutes to the State authorities, the jurisdiction of the Federal courts is exclusive and that as to the powers granted in Section 1014 the jurisdiction of the Federal courts is concurrent with that of the State courts. In a recent case [1]

§ 8. [1] United States *v.* Mayer, 235 U. S. 55, 59 L. ed. 129, 35 S. C. 16.

the Supreme Court of the United States held that jurisdiction cannot be conferred by consent of the parties in a criminal case. The question of jurisdiction relates to the power of the court and not to the mode of procedure. Accordingly, it was held that a District court of the United States was without power after term to entertain an application for new trial for newly discovered evidence although the United States Attorney duly consented to the hearing of same.

§ 8 *a*. **Who May Bring Suit.**

A criminal suit in the Federal courts must be brought in the name of the United States by the United States Attorney.[1] The United States District Attorney, in virtue of his official duty, and to the extent that criminal charges are susceptible of being preferred by information, has the power to present such informations without the previous approval of the court; and that by the same token the duty of the district attorney to direct the attention of a grand jury to crimes which he thinks have been committed is coterminous with the authority of the grand jury to entertain such charges.[2]

§ 9. **Distinction between a Court and Judge.**

A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authority. A court is defined to be a place in which justice is administered. It is the exercise of judicial power, by the proper office or officers, at a time and place appointed by law.[1]

§ 10. **The Procedure in the Federal Courts in Criminal Cases — What Law Controls.**

Where the procedure in criminal cases is prescribed by the Constitution, a Federal statute, or a rule of court, that is controlling. When not so provided, the procedure is regulated by the common law and not by any statute or rule of the State where the Federal

§ 8 *a*. [1] Jacob Hoffman Brewing Co. *v.* McElligott, 259 Fed. 525, — C. C. A. — (2d Cir.); Confiscation Cases, 7 Wall. (U. S.) 454, 457, 19 L. ed. 196.

[2] United States *v.* Thompson (U. S. Sup. Ct. decided March 1, 1920).

§ 9. [1] Todd *v.* United States, 158 U. S. 278, 39 L. ed. 982, 15 S. C. 889.

court is situated.[1] The reason for this rule is that the Constitution of the United States has in a large sense, for the protection of the individual, prescribed the mode of procedure and defined the rights and privileges of a person accused of crime within the jurisdiction of the national courts; as the Constitution of the United States is the supreme law of the land, it is self evident that the State procedure and State laws cannot be controlling in the Federal courts.[2]

§ 11. Common Law Rules — How Construed.

Many of the rules of the common law governing criminal cases have been superseded by statute. However, in considering to what extent a Federal statute has abrogated a rule of common law, care should be taken that the common or the general law is not further abrogated by such a statute than the clear import of its language necessarily requires.[1] Whenever a departure from common law rules and definitions is claimed, the purpose of making such departure should be clearly shown.[2]

§ 12. Rights under Federal Constitution as Distinguished from Those Guaranteed by State Laws.

The rights, privileges and immunities of citizens and residents of the United States, which are protected by the Constitution of the United States, are those which arise out of the very nature and essential character of the national government, as distinguished from those belonging to the citizens of the several States.[1] In United States *v.* Cruikshank, Chief Justice Waite pointed out this distinction in the following language: "The people of

§ 10. [1] Tucker *v.* United States, 196 Fed. 260, 262, 116 C. C. A. 62 (7th Cir.); Logan *v.* United States, 144 U. S. 263, 301, 36 L. ed. 429, 442, 12 S. C. 617; St. Clair *v.* United States, 154 U. S. 134, 154, 38 L. ed. 936, 943, 14 S. C. 1002; Jones *v.* United States, 162 Fed. 417, 89 C. C. A. 303 (9th Cir.); Simmons *v.* United States, 142 U. S. 148, 35 L. ed. 968, 12 S. C. 171; Withaup *v.* United States, 127 Fed. 530, 62 C. C. A. 328.

[2] Tinsley *v.* Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. C. 430.

§ 11. [1] Johnson *v.* Southern Pac. Co., 117 Fed. 462, 54 C. C. A. 508 (8th Cir.).

[2] Northern Securities *v.* United States, 193 U. S. 197, 48 L. ed. 679, 24 S. C. 436.

§ 12. [1] United States *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588. *See also* In re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. C. 930; Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394; Orr *v.* Gilman, 183 U. S. 278, 46 L. ed. 196, 22 S. C. 213, and authorities in note 4 to § 6, *supra*.

the United States resident within any State are subject to two governments: one State and the other National. . . . He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return he can demand protection from each within its own jurisdiction. . . . The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. . . ." The courts of the United States in determining what constitutes an offense against the United States must resort to the statutes of the United States enacted in pursuance of the Constitution.[2]

§ 13. **The Constitution of the United States as a Guide to Procedure.**

From the very commencement of a prosecution to final judgment, and even the method of review, a person within the territorial jurisdiction of the United States is protected in his rights to personal liberty and security by the several provisions of the Constitution of the United States, and the Amendments thereto which in most instances are self-executing. Therefore it is incumbent upon all to first consult the Constitution of the United States in any criminal proceeding or whenever an investigation of any kind is conducted under any act of Congress.[1] From time to time Congress enacted certain laws to effectuate the purposes set forth in the Constitution. These constitutional provisions, together with the statutes and decisions relating thereto, must be strictly followed during every step of the case. They will be found in this work in the order of events as they are likely to arise in actual practice.

§ 14. **How to Preserve the Rights Guaranteed by the Federal Constitution.**

Care should be taken in the matter of presenting constitutional questions. In Sugarman *v.* United States,[1] Mr. Justice Brandeis

[2] In re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 S. C. 444.

§ 13. [1] Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 S. C. 1125.

§ 14. [1] Sugarman *v.* United States, 249 U. S. 182, — L. ed. —, — S. C. —. Decided March 3, 1919.

held that a constitutional question must be properly raised and that mere reference to the Constitution of the United States or even to a specific provision of same, or a mere assertion to a claim under it will not authorize the Supreme Court of the United States to entertain jurisdiction to review the questions presented unless the questions raised are substantial in character and were properly presented in the court below. It is therefore imperative that the practitioner should state with clearness the claim of privilege or immunity arising under the Constitution or laws of the United States, the specific section of the Constitution or Statute relied upon and also wherein and how the constitutional rights of the accused were or are being infringed upon. If it is contended that a statute contravenes the provisions of the Constitution of the United States, the statute should be set forth in detail and reasons given why and wherein it is unconstitutional. Many writs of error are dismissed for want of jurisdiction for failure to observe these simple rules. It cannot be too often emphasized that the constitutional question thus raised must be substantial in character or the writ of error will be dismissed as frivolous. Where a substantial constitutional question is presented, it becomes the duty of the United States Supreme Court to pass upon it. As was said by Marshall, C. J. in Cohens *v.* Virginia:[2] "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."

§ 14 *a*. Removal of Criminal Cases from State to the Federal Court.

The statute provides: "That when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other

[2] 6 Wheat. 264, 404, 19 L. ed. 257, 291. How to raise a Federal question, *see also* Zoline's Federal Appellate Jurisdiction and Procedure, p. 142, § 28, also p. 67, §§ 27, 28, §§ 31, 32, p. 69.

person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of the office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petitions shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the Clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in the court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpœna, petition, or any other process except capias, the clerk of the district court shall issue a writ of certiorari to the State court requiring it to send to the district court the record and the proceedings in the cause. When it is commenced by capias or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court or left at his office by the marshal of the district or his deputy or by some other person duly authorized thereto; and thereupon it shall be the duty of the

State court to stay all further proceedings in the cause and the suit or prosecution upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court, shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed de nova and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non prosequitur may be rendered against him, with costs for the defendant." In the case of persons engaged in the military service of the United States it is provided by the articles of War[1] "When any civil suit or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section thirty-three of the Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary', approved March third, nineteen hundred and eleven, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had

§ 14 *a*. [1] Section 33 of the Judicial Code as amended by the Act of August 23, 1916, chap. 399, 39 Stat. L. 532.

therein in said State court prior to its removal and said district court shall have full power to hear and determine said cause."[2] Former Section 33 of the Judicial Code was restricted to revenue officers only and the statute was strictly construed. The amended statute embraces all Federal officers.

[2] R. S. Section 1342, amended August 20, 1916, c. 418, Section 3, 39 Stat. 663.

CHAPTER III

DUE PROCESS OF LAW

§ 15. Constitutional Provision and Definition.

The Fifth Amendment to the Constitution of the United States among other things provides: "Nor (shall any person) be deprived of life, liberty or property, without due process of law . . . ." Regarding the definition of the term "due process of law", the United States Supreme Court said:[1] "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles then are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. *We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions.* If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our

§ 15. [1] John Den ex dem. Murray v. Hoboken Land & Improvement Co., 18 How. 272, 276, 277, 15 L. ed. 372, 374.

ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. . . ." It is the duty of the court to protect a defendant in his constitutional rights and the court will not permit a violation of such rights either directly or indirectly.[2] The privileges and immunities designated in the Constitution of the United States are those which of right belong to the citizens of all free governments.[3] "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances."[4] The phrase "due process of law" is synonymous with "the law of the land" in Magna Charta.[5] In another case,[6] Mr. Justice Shiras defined the term in a few words: "Due process of law is process according to the law of the land. . . ." The forms of law should be strictly observed, for as Mr. Justice Bradley well said: "Unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of the person and property should be liberally construed."[7]

§ 16. "Due Process" as Applied to Criminal Procedure.

In the administration of criminal law it may be laid down broadly that no one can be deprived of life or liberty except by due process of law and that any deprivation of any right of an accused person guaranteed to him by the Constitution of the United States, or by any act of Congress or by the settled usage of the common law, is tantamount to a denial of due process of law. For the purpose of ascertaining whether an accused person was accorded

[2] McKnight *v.* United States, 115 Fed. 972 (C. C. A. 6th Cir.).

[3] Slaughter House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

[4] Ex parte Orozco, 201 Fed. 106. (Approving Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281.); but, *see* remarks of Holmes, J. in Schenk *v.* United States, 249 U. S. 47, — L. ed. —.

[5] Davidson *v.* Board of Administrators of New Orleans, 96 U. S. 97, 24 L. ed. 616.

[6] French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 45 L. ed. 879, 21 S. C. 625.

[7] Boyd *v.* United States, 116 U. S. 616, 635, 29 L. ed. 746, 6 S. C. 524.

due process of law, the several provisions of the Constitution of the United States relating to personal liberty and security should be read together with the "due process of law" clause contained in the Fifth Amendment to the Constitution of the United States.[1] "Every freeman has a right to demand the enjoyment of proving his innocence simultaneous with the first step of the prosecution."[2] Accordingly, it is not within the province of a legislature or Congress to declare an individual guilty of a crime.[3] Hence a trial without a compliance with the Constitutional requirements is without due process of law and absolutely void.[4] "Due process of law" requires notice and an opportunity to be heard.[5] The right of the citizen to his personal liberty, except when restrained of it upon a charge of crime, and for the purpose of judicial investigation, or under the command of the law pronounced through a judicial tribunal, is one of those elementary facts which lie at the foundation of our political structure. The cardinal object of our Constitution, as it is the end of all good government, is to secure the people in their right to life, liberty and property. The more certainly to attain this end, the framers of our Constitution not only proclaimed certain great principles in the bill of rights, but they distributed governmental power into three distinct departments, each of which, while acting in its proper sphere, was designed to be independent of the others. To the legislative department is delegated the duty to declare the causes for which the liberty of a citizen may be taken from him, to the judicial department to

§ 16. [1] Callan *v.* Wilson, 127 U. S. 540, 32 L. ed. 223, 8 S. C. 1301; Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524.

[2] United States *v.* Almeda, U. S. Cir. Ct. 2 Wheel. Cr. 570, *approved* in Hastings *v.* Murchie, 219 Fed. 83 (C. C. A. 1st Cir.).

[3] McFarland *v.* American Sugar Refining Co., 241 U. S. 79, 60 L. ed. 899, 36 S. C. 498.

[4] Callan *v.* Wilson, 127 U. S. 540, 32 L. ed. 223, 8 S. C. 1301; Ex Parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 S. C. 935; In Re Bain, 121 U. S. 1, 30 L. ed. 849, 7 S. C. 781; Ex parte McClusky, 40 Fed. 71; United States *v.* De Walt, 128 U. S. 393, 32 L. ed. 485, 9 S. C. 111; Ex Parte Van Vranken, 47 Fed. 888.

[5] Hovey *v.* Elliott, 167 U. S. 409, 42 L. ed. 215, 17 S. C. 841; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Webster *v.* Reid, 11 How. (U. S.) 437, 13 L. ed. 678; Windsor *v.* McVeigh, 93 U. S. 274, 23 L. ed. 914; Reynolds *v.* Stockton, 140 U. S. 254, 35 L. ed. 464, 11 S. C. 773; Simon *v.* Craft, 182 U. S. 427, 45 L. ed. 1165, 21 S. C. 836; Lasere *v.* Rochereau, 17 Wall. 437, 21 L. ed. 694.

determine the existence of such causes in any given case, and to the executive to enforce the sentence of the court. If a citizen can be arrested, except upon a charge of violated law, and for the purpose of taking him before some judicial tribunal for investigation, then it is plain that the executive department has usurped the functions of the other two, and the whole theory of our government, so far as it relates to the protection of private rights, is overthrown. But on this question we are not left merely to arguments drawn from the general spirit and object of our Constitution. Our forefathers had fresh in their memory the struggles which it had cost in England to secure those two great charters of freedom, the Magna Charta of King John's time and the bill of rights of 1688, and they incorporated into our fundamental law whatever was most valuable in those instruments for the security of life, liberty and property. They provided in Article 4 of the amendments, that "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." They further provided in Article 5, that "No person shall . . . be deprived of life, liberty, or property, without due process of law," and in Article 6, that "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 to 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." A general warrant without a sufficient description of the person or thing to be seized is wanting in due process of law.[6] Such warrants may suit the purposes of a despotic power, "but cannot abide the pure atmosphere of political liberty and personal freedom."[7] The Fourth and Fifth Amendments to the Constitution are interrelated.[8] The basic principle of English and American

[6] Boyd *v.* United States, 116 U. S. 616, 629, 29 L. ed. 746, 6 S. C. 524.

[7] Boyd *v.* United States, *supra*, 632.

[8] Boyd *v.* United States, *supra*, 663.

jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law; and notice of the charge or claim against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportunity to prepare his defense, is an indispensable element of that process. When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading.[9] It is essential to the sufficiency of an indictment that it set forth the facts, which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction.[10]

§ 17. "Due Process of Law" Holds Good Even in Time of War.

The "due process of law" clause of the Constitution of the United States is applicable in time of war as well as in peace. Martial law can never exist when the courts are open, and this applies even to the locality of actual war. Presidential warrants are prohibited,[1]

[9] Fontana *v.* United States, 262 Fed. 283, 286 (C. C. A. 8th Cir.); Miller *v.* United States, 133 Fed. 337, 341, 66 C. C. A. 399, 403; Naftzger *v.* United States, 200 Fed. 494, 502, 118 C. C. A. 598, 604.

[10] Fontana *v.* United States, 262 Fed. 283, at page 286, — C. C. A. — (8th Cir.); United States *v.* Britton, 107 U. S. 665, 669, 670, 27 L. ed. 520, 2 S. C. 512; United States *v.* Hess, 124 U. S. 483, 488, 31 L. ed. 516, 8 S. C. 571; Miller *v.* United States, 133 Fed. 337, 341, 66 C. C. A. 399, 403; Armour Pkg. Co. *v.* United States, 153 Fed. 1, 16, 17, 82 C. C. A. 135, 150, 151; Etheredge *v.* United States, 186 Fed. 434, 108 C. C. A. 356; Winters *v.* United States, 201 Fed. 845, 848, 120 C. C. A. 175, 178; Horn *v.* United States, 182 Fed. 721, 722, 105 C. C. A. 163, 167.

§ 17. [1] Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; *but see*, note 4 to § 15, *supra*.

but the constitutionality of the recent statute granting the President the power to cause the arrest and internment of enemy aliens was upheld by a Federal District Judge,[2] and[3] a conviction was sustained for rescuing an enemy alien arrested upon a presidential warrant under the provision of §§ 4067–4070 Rev. Stat. of United States, and the Court further held that the "Due Process of Law" clause of the Constitution does not apply to an alien enemy. This case also holds that *habeas corpus* does not lie at the instance of an alien enemy. Whether one is subject to military law and trial by court martial depends on whether he is a member of the land and naval forces of the United States.[4]

§ 17 *a*. **When Civil Suits Are within the Meaning of the Fourth and Fifth Amendments.**

Suits for penalties and forfeitures incurred by the commission of offenses against the law are of a *quasi-criminal* nature and are within the reason of criminal proceedings for all the purposes of the Fourth and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself and a defendant cannot be compelled to produce his private books and papers. Such compulsion is equivalent to compelling him to be a witness against himself and amounts to an unreasonable search and seizure.[1]

§ 17 *b*. **"Due Process" as Applied to a Deaf Person.**

When a totally deaf person is on trial, it is the duty of the Court to see that the defendant is provided with an ear drum, or the evidence read or repeated to him, so that he may be advised what is going on at the trial. But when no request is made to this effect by the accused or his counsel, the failure to so provide the defendant with a proper appliance so that he may hear the evidence, or to read or to repeat the evidence, will be regarded merely as an irregularity and not as a trial wanting in due process of law.[1]

[2] Ex parte Graber, 247 Fed. 882.
[3] De Lacy *v.* United States, 249 Fed. 625 (C. C. A. 9th Cir.).
[4] Ex parte Jochen, 257 Fed. 200.
§ 17 *a*. [1] Boyd *v.* United States, 116 U. S. 616, 635, 29 L. ed. 746, 6 S. C. 524.
§ 17 *b*. [1] Felts *v.* Murphy, 201 U. S. 123, 50 L. ed. 689, 26 S. C. 366.

§ 17 *c*. "Due Process" Applied to Corporations.

While the provision against self-incrimination is not available to corporations,[1] nevertheless all provisions as to due process of law are applicable to corporations as well as to natural persons. In one case [2] Chief Justice Waite said: "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does. . . ."

§ 17 *c*. [1] Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 S. C. 370. *See also* Chapter SELF-INCRIMINATION.

[2] Santa Clara County *v.* Southern Railway Company, 118 U. S. 394, 30 L. Ed. 118, 6 S. C. 1132. *See also* Pembina Mining Company *v.* Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 8 S. C. 737; Missouri Pacific Railway Company *v.* Mackey, 127 U. S. 205, 32 L. ed. 107, 8 S. C. 1161; Minneapolis & St. Louis Railway Company *v.* Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 S. C. 207; Charlotte &c. Railroad *v.* Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 S. C. 255; Monongahela Navigation Company *v.* United States, 148 U. S. 312, 37 L. ed. 463, 13 S. C. 622; Gulf, Colorado & Santa Fe Ry. *v.* Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 17 S. C. 255, and cases cited; Chicago, Burlington & Quincy Railroad Company *v.* Chicago, 166 U. S. 226, 41 L. ed. 679, 17 S. C. 581.

CHAPTER IV

ARREST WITHOUT WARRANT

§ 18. "Due Process of Law" as a Protection from Arrest without Warrant — Exceptions to Rule.

It is an elementary principle of our political institutions that every person in our land is entitled to immunity from arrest, *except by due process of law and for cause.* A peace officer or a United States Marshal may, without a warrant, arrest a person who commits or attempts to commit a crime in his presence; or when a felony is committed not in his presence where he has reasonable cause for believing the person arrested committed the felony.[1] And in making such an arrest it is the duty and right

§ 18. [1] Snead *v.* Bonnoil, 166 N. Y. 325, 59 N. E. 899; Chandler *v.* Rutherford, 101 Fed. 775, 43 C. C. A. 218 (8th Cir.); Hauser *v.* Bieber, 197 S. W. 68, 271 Missouri, 326; Allen *v.* Lopinsky, 94 S. E. 369; State *v.* Evans, 161 Missouri, 95, 61 S. W. 95; Burroughs *v.* Eastman, 101 Mich. 419, 59 N. W. 817, 24 L. R. A. 859, 45 Am. St.

of every citizen to assist, and it is also a citizen's duty to disclose to the executive officers any information he may have of the commission of any offense against the laws.[2] And it may be safely laid down as rule that the protection of the individual against unlawful restraints and false accusations commences at the inception of any criminal proceeding.[3] Imprisonment without process is false imprisonment.[4] And except by due process of law no one can be deprived of liberty. Mr. Justice Field [5] says that by the term "liberty", as used in the Fifth Amendment, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with equal rights of others, as his judgment may dictate for the promotion of his happiness; that by the term "life", as referred to in the same amendment, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed.

§ 19. Arrest for Felony.

The rule of common law as to the right of arrest without a warrant in cases of felony was generally adopted by the courts of the several States.[1] A fugitive from justice may be arrested without a warrant by a proper peace officer provided he has reasonable cause to believe he has committed a felony.[2] The authority to hold a prisoner for a reasonable time for such pro-

Rep. 419. Snead *v.* Bonnoil, 166 N. Y. 325 is cited in People *v.* Marendi, 107 N. E. 1058, 213 N. Y. 610: "There is no such lawful thing as an arrest without an apparent or disclosed cause." Shugart *v.* Cruise, 260 Fed. 36, — C. C. A. — (4th Cir.).

[2] In Re Quarles, 158 U. S. 532, 39 L. ed. 1080, 15 S. C. 959.

[3] United States *v.* Rubin, 214 Fed. 507.

[4] Town of Odell *v.* Schroeder, 58 Ill. 353; Shugart *v.* Cruise, 260 Fed. 36, — C. C. A. — (4th Cir.).

[5] Munn *v.* Illinois, 94 U. S. 113, 142, 24 L. ed. 77, 90.

§ 19. [1] Kurtz *v.* Moffitt, 115 U. S. 487, 29 L. ed. 458, 6 S. C. 148; Pritchett *v.* Sullivan, 182 Fed. 480, 104 C. C. A. 624 (8th Cir.); Union Pac. R. Co. *v.* Belek, 211 Fed. 699, 702.

[2] Union Pac. R. Co. *v.* Belek, 211 Fed. 699; State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 42 L. R. A. 673, 67 Am. St. Rep. 648; State *v.* Anderson, 1 Hill (S. C.), 327; In re Henry, 29 How. Prac. (N. Y.) 185; Cochran *v.* Toher, 14 Minn. 385 (Gil. 293); Simmons *v.* Vandyke, 138 Ind. 380, 37 N. E. 973, 26 L. R. A. 33, 46 Am. St. Rep. 411. As to arrest on Telegram *see* Voorhees on Arrest, 2d ed. § 20.

ceedings to be instituted is well established.[3] The officer making the arrest from personal observation will be held liable for making a false arrest, if no offense was in fact committed.[4] The arrest and detention of a person without a warrant by an officer for a felony cannot be justified on the ground that at the time of the arrest the person so arrested was, unknown to the officer arresting him, guilty of carrying concealed weapons.[5] Judge Hanford [6] held that though a person arrested and imprisoned without warrant, and for an alleged crime of which the officer arresting had no personal knowledge and the person arrested is in fact innocent, it is nevertheless not false imprisonment, if the officer acted upon information received from one on whom he had reason to rely. The authority to hold one in proceedings instituted under Section 1014 Revised Statutes of the United States, the culmination of which means the removal of the person to another State, is quite distinct from the authority to make a preliminary arrest, until a proper complaint can be made, and a warrant obtained.[7] An officer who has not witnessed the commission of the offense may not, after it had ceased, arrest the wrongdoer,[8] unless the arrest was for felony. It has been recently held [9] that an officer may be resisted by force, when he undertakes to arrest a person without a warrant in a case where he is not authorized to do so by law.

§ 20. Arrest without Warrant in Revenue Cases.

Congress made special provision for arrest in revenue cases. They are as follows: "Operating illicit distillery; arrest; bail. Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be

[3] Union Pac. R. Co. *v.* Belek, 211 Fed. 699, 707, and cases cited.

[4] Sigmon *v.* Shell, 165 N. C. 582, 81 S. E. 739.

[5] Gobbet *v.* Grey, 4 Ex. 729; Jackson *v.* Knowlton, 173 Mass. 94; 53 N. E. 134; Snead *v.* Bonnoil, 166 N. Y. 325, 59 N. E. 899.

[6] Van *v.* Pacific Coast Co., 120 Fed. 669.

[7] See Virginia *v.* Paul, 148 U. S. 119, 37 L. ed. 386, 13 S. C. 536; Union Pac. R. Co. *v.* Belek, 211 Fed. 699, 707.

[8] Newton *v.* Locklin, 77 Ill. 103; People *v.* Haley, 48 Mich. 495, 12 N. W. 671; State *v.* Lewis, 50 Ohio, 179, 33 N. E. 405; Jameson *v.* Gaernett, 10 Bush. 221.

[9] Montana *v.* Bradshaw, 53 Montana, 96, 161 Pac. 710.

lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer named in section one thousand and fourteen of the Revised Statutes, who may reside in the county of arrest or if none, in that nearest to the place of arrest, to be dealt with according to the provisions of sections ten hundred and fourteen, ten hundred and fifteen, ten hundred and sixteen of the said Revised Statutes." [1] "Warrants of arrest for violation of internal revenue laws may be issued by United States commissioners upon the *sworn* complaint of a United States district attorney, assistant United States district attorney, collector or deputy collector of internal revenue or revenue agent or private citizen, but no such warrant of arrest shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney." [2]

§ 21. **Arrest without Warrant of Army and Navy Deserter.** The general rule has always been that a police officer of the State or private citizen cannot lawfully arrest a deserter from the army without a warrant or military order.[1] During the Spanish American War, by congressional enactment, this rule was changed.[2] But this act was held not to give any protection to a private detective making an arrest of an alleged deserter or straggler from the navy without a warrant.[3]

§ 22. **Special Provisions for Arrest in Forest Reservations.** By an act for the protection of the public forest reserves and national parks of the United States,[1] it is provided: "That all persons employed in the forest reserve and national park service of the United States shall have authority to make arrest for the violation of the laws and regulations relating to the forest reserves

§ 20. [1] Act of March 1, 1879, c. 125, § 9, 20 Stat. L. 341.

[2] Act of May 28, 1896, c. 252, § 19, 29 Stat. L. 184.

§ 21. [1] Kurtz *v.* Moffitt, 115 U. S. 487, 29 L. ed. 458, 6 S. C. 148.

[2] Act of June 18, 1898, c. 469, ¶ 6, 30 Stat. L. 484, U. S. Compiled Stat. 1916, No. 2297; Act of Feb. 16, 1909, Chap. 131, § 15. In re Matthews, 122 Fed. 248; In re Fair, 100 Fed. 149; State *v.* Pritchett, 219 Missouri, 696.

[3] People *v.* Hamilton, 183 App. Div. (N. Y.) 55, 170 N. Y. Suppl. 705.

§ 22. [1] Act of Feb. 6, 1905, c. 456, 33 Stat. L. 700.

and national parks, and any person so arrested shall be taken before the nearest United States Commissioner, within whose jurisdiction the reservation or national park is located, for trial; and upon sworn information by any competent person any United States commissioner in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said laws and regulations; but nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating said laws and regulations."

§ 23. Who May Make an Arrest.

Section 270 of the Federal Judicial Code provides: "The judges of the Supreme Courts and of the Circuit Courts of Appeals and District Courts, United States Commissioners, and the judges and other magistrates of the several States, who are or may be authorized by law to make arrests for offenses against the United States, shall have like authority to hold for security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them." [1]

§ 24. Powers and Duties of United States Marshals.

The scope of power of a United States Marshal or his deputy depends on the law of the State in which he is making the arrest. He has the same rights and powers in making arrests as the sheriff has in the particular State.[1] A United States Marshal has only power to act in the State to which he has been assigned.[2] A United States Marshal may be sued in the State court by the injured party in trespass *vi et armis* for damages sustained by reason of the wrongful arrest.[3] An officer may arrest without warrant

§ 23. [1] *See also* Chapters 7 and 9 on ARREST ON WARRANT, PRELIMINARY HEARING, and POWERS OF UNITED STATES COMMISSIONERS.

§ 24. [1] United States *v.* Harden, 10 Fed. 802; In re Acker, 66 Fed. 290; *but see* United States *v.* Fuelhart, 106 Fed. 911; Sec. 788, U. S. Revised Statutes. But under new statute the right to remove exists. *See* § 14 *a*.

[2] In re Anderson, 94 Fed. 487.

[3] Hannah *v.* Steinberger, 6 Blatchf. 520.

one who threatens to commit a felony. When sued for false arrest he must show reasonable cause as an affirmative defense.[4]

§ 25. **Arrest for Misdemeanor.**

At common law a peace officer could not arrest without a warrant a person who committed a misdemeanor whether in his presence or not. A breach of the peace was the one exception to this rule.[1] An officer could arrest one who committed a breach of the peace in his presence.[2]

§ 26. **Officer Must Exhibit Warrant.**

An officer when making arrest must produce his warrant upon request.[1] It is illegal for a peace officer to arrest a person charged with the commission of a misdemeanor unless he has in his possession a warrant for this person's arrest. It is no defense that a warrant has been issued, or that it is in the possession of the constable's superior officer, or that the person arrested made no demand for the warrant.[2] After demanding the opening of the doors of a man's dwelling house, it is the duty of an officer with a warrant charging a misdemeanor to break the doors, and, if the accused resists, and in the struggle injures or kills the officer, he is a wrongdoer.[3] An officer has the right to stop a train or stage-coach to effect an arrest.[4] Inevitably it follows that if in the exercise of the duty to stop the train and make the arrest the officer steps on the engine, and the engineer initiates a struggle with the officer to wrest the temporary control of the engine from him,

[4] Schwarz *v.* Poehlmann, 178 Ill. App. 235; Cook *v.* Hastings, 150 Michigan, 289, 114 N. W. 71.

§ 25. [1] John Bad Elk *v.* United States, 177 U. S. 529, 44 L. ed. 874, 20 S. C. 729; Wooding *v.* Oxley, 9 C. & P. 1; Burns *v.* Erben, 40 N. Y. 463; Palmer *v.* Maine C. Ry. Co., 92 Maine, 399; McCullough *v.* Greenfield, 133 Mich. 463, 95 N. W. 532; Baynes *v.* Brewster, 2 Queens Bench, 375; McMorris *v.* Howell, 89 Appellate Div. (N. Y.) 272; Porter *v.* The State, 124 Georgia, 297, 52 S. E. 283.

[2] The Matter of Way, 41 Michigan, 299, 1 N. W. 1021; Roberts *v.* The State, 14 Missouri, 138.

§ 26. [1] Gaillard *v.* Laxton, 2 Best & Smith Queens Bench Reports, 363.

[2] Gaillard *v.* Laxton, 2 Best & Smith Queens Bench Reports, 363. *But see* local statutes changing this rule, particularly acts, 1912 c. 482, Laws of Massachusetts.

[3] Weissengoff *v.* Davis, 260 Fed. 16, — C. C. A. — (4th Cir.).

[4] Weissengoff *v.* Davis, *supra.*

he is liable for the consequences of the struggle. It would hardly be disputed that if defendant after arrest had pointed a gun at the sheriff as a means of effecting his escape, and in the struggle for the possession of the gun it had been accidentally discharged, and killed the sheriff, the defendant would be civilly liable. It is true that, if in such a struggle initiated by the defendant the officer does a wanton or malicious act resulting in injury to the defendant, he, and not the defendant, would be responsible.[5] In Ex parte Siebold,[6] the following pertinent remarks were made by Mr. Justice Bradley: "Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? . . . The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction." The fact that the mails may be interrupted through the making of an arrest of a government employee charged with the commission of an offense, will not relieve the accused person from arrest and the officer making the arrest will be protected.[7]

§ 27. Arrest under an Invalid Statute — Liability of Officer. An unconstitutional statute cannot be pleaded in justification of arrest.[1] The maxim *Ignoratia Juris non Excusat* in its appli-

[5] 2 R. C. L. 470, 5 C. J. 424.

[6] 100 U. S. 371, 25 L. ed. 717.

[7] U. S. *v.* Hart, Pet. (U. S. C. C.), 390.

§ 27. [1] Stanton *v.* Seymour, 5 McLean (U. S.), 267; Scott *v.* Flowers, 60 Neb. 675, 84 N. W. 81; Bartley *v.* West, 29 Wisc. 316; Cooley on Const. Limit., star p. 188; Patterson *v.* Prior, 18 Ind. 440; Kelly *v.* Bemis, 70 Mass. 83; Grotan *v.* Fresel, 20 Ill. 292.

cation to human affairs, frequently operates harshly and yet it is manifest that, if ignorance of the law were a ground of exemption, the administration of justice would be arrested and society could not exist, for in every case ignorance of the law would be alleged.[2] For this reason an officer making an illegal arrest is not relieved from responsibility by pleading ignorance of the fact that the law under which the arrest was made was invalid.[3] An unconstitutional law is void, and is as no law. An offense created by it is not a crime.[4]

§ 28. **Burden on Officer to Prove Probable Cause.**

Where an officer without a warrant undertakes to arrest a person on a charge of felony, not committed in his presence, he must show, to relieve himself of liability for making the arrest, that he acted on information such as would justify a reasonable man in believing that a felony had been committed and that the particular person arrested was guilty of the felony. An officer making such an arrest may also be sued on his official bond.[1] Where an arrest is made without a warrant, it is a question of fact for the jury to decide whether there was reasonable ground for the officer's belief that the person arrested had committed a felony.[2]

§ 29. **Duty of Arresting Officer to Take Prisoner without Delay to Nearest Magistrate.**

To afford protection to the officer or person making the arrest the authority must be strictly pursued and no unreasonable delay in procuring a proper warrant for the prisoner's detention can be excused or tolerated. Any other rule would leave the power open

[2] Patterson *v.* Prior, 18 Ind. 440; Campbell *v.* Sherman, 35 Wisc. 103; Deveridge *v.* Sheldon, 83 Ill. 390.

[3] Campbell *v.* Sherman, 35 Wisc. 103; Wise *v.* Withers, 3 Cranch, 331, 2 L. ed. 457; Sunner *v.* Beeler, 50 Mo. 341; Sanford *v.* Nicols, 13 Mass. 286; Peane *v.* Atwood, 13 Mass. 324.

[4] Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Griesedieck Bros. Brewery Co. *v.* Moore, 262 Fed. 582, 585.

§ 28. [1] Chandler *v.* Rutherford, 101 Fed. 775, 43 C. C. A. 218 (8th Cir.); Lammon *v.* Fensier, 111 U. S. 17, 28 L. ed. 373, 4 S. C. 286.

[2] Snead *v.* Bonnoil, 166 N. Y. 325, 59 N. E. 899; Chandler *v.* Rutherford, 101 Fed. 775, 43 C. C. A. 218 (8th Cir.).

to great abuse.[1] This rule was also enacted by statute, which is as follows: "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof."[2] A failure to take the prisoner at once and without delay to the nearest magistrate will subject the officer to damages for false arrest and imprisonment.[3] An officer has no right after making an arrest to defer the bringing of the prisoner to the nearest magistrate in order to eat dinner, clean his clothes or look after witnesses.[4] And even the magistrate is guilty of false imprisonment if, knowing of an arrest, he neglects to have the prisoner brought before him.[5]

§ 30. **Rewards for Arrest.**

The rule in England and in this country is that it is contrary to public policy for private individuals to enter into contracts with public officials for compensation for the arrest and capture of an individual, and such contract will not be enforced by the courts, but this rule does not apply to rewards offered by competent legislative or executive authority.[1]

§ 29. [1] Leger *v.* Warren, 62 Ohio, 500, 57 N. E. 506.

[2] Aug. 18, 1894, c. 301, § 1, 28 Stat. L. 416.

[3] Von Arx *v.* Shafer, 241 Fed. 649 (C. C. A. 9th Cir.); Stewart *v.* Feeley, 118 Ia. 524, 92 N. W. 670; Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875; Schoetts *v.* Drake, 139 Wisc. 18, 120 N. W. 393; Newhall *v.* Egan, 28 R. I. 584; Wood *v.* Olson, 117 Ill. App. 128; Snead *v.* Bonnoil, 166 N. Y. 325, 59 N. E. 899.

[4] Von Arx *v.* Shafer, 241 Fed. 649 (C. C. A. 9th Cir.); Keefe *v.* Hart, 213 Mass. 476, 100 N. E. 558; Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875; Ocean S. S. Co. *v.* Williams, 69 Ga. 251.

[5] Von Arx *v.* Shafer, 241 Fed. 649 (C. C. A. 9th Cir.).

§ 30. [1] United States *v.* Matthews, 173 U. S. 381, 43 L. ed. 738, 19 S. C. 413.

§ 31. **Arrest by a Private Individual.**

At common law any person could arrest without warrant one who was breaking the peace in his presence.[1] The rule was the same when a person threatened to break the peace.[2] But a private person must never arrest for a misdemeanor without a warrant. A breach of the peace is the one exception.[3] A private person may arrest without a warrant one who commits a felony in his presence.[4] When not in his presence he does so at his peril should the person be innocent.[5] This was not the common law rule since at common law a person was under duty to arrest a felon.[6] And this applies also to a railroad company.[7] The right to arrest without a warrant by a private individual has been relaxed and increased by statute in the various States.[8] If a private individual reasonably believes that a felony is to be committed, he may arrest without a warrant in order to prevent the crime.[9] In order to justify the arrest after the fact, a private individual must prove that a felony has actually been committed.[10]

§ 31. [1] Timothy *v.* Simpson, 6 C. & P. 499; Ross *v.* Leggett, 61 Mich. 445, 28 N. W. 695; Alford *v.* State, 8 Texas Appeal, 545.

[2] Timothy *v.* Simpson, 6 C. & P. 489; Sloane *v.* Schomaker, 136 Pa. 382, 20 Atl. 525; Tobin *v.* Bell, 73 App. Div. (N. Y.) 41, 76 N. Y. S. 425; *but see* Martin *v.* State, 97 Arkansas, 212.

[3] State *v.* Lewis, 50 Ohio, 179; Palmer *v.* Maine, Cent. R. Co., 92 Maine, 399; Scharsmith *v.* Knapp, 164 N. Y. Suppl. 578; Mingo *v.* Levy, 165 N. Y. Suppl. 276.

[4] Phillips *v.* Trull, 11 Johnston (N. Y.), 486; Enright *v.* Gibson, 219 Ill. 550, 76 N. E. 689; Bergeron *v.* Peyton, 106 Wisc. 377, 82 N. W. 291.

[5] Alabama Ry. *v.* Kuhn, 78 Miss. 114; Garnier *v.* Squiers, 62 Kansas, 321; Martin *v.* Houck, 141 N. C. 317.

[6] Kennedy *v.* State, 107 Indiana, 144; Long *v.* The State, 12 Ga. 293.

[7] Polousky *v.* Penn. R. R. Co., 184 Fed. 561, 106 C. C. A. 541 (Lacombe, J., dissenting: false imprisonment will not lie, but only malicious prosecution).

[8] The New York Code of Criminal Procedure, Section 183, permits a citizen to arrest any person who commits a crime in his presence. *But see* Caslin *v.* McCord, 116 Tenn. 690, 94 S. W. 79; Russel *v.* The State, 37 Texas Criminal Repts. 314; Palmer *v.* Maine C. Ry. Co., 92 Maine, 399, 42 Atl. 800; Tobin *v.* Bell, 73 App. Div. 41, 76 N. Y. Suppl. 425.

[9] State *v.* Davis, 50 S. C. 405, 27 S. E. 905.

[10] Beckwith *v.* Philley, 6 Barn. & Cr. 635.

CHAPTER V

VENUE

§ 32. Constitutional Provisions.

The Constitution of the United States provides that "The trial of all crimes, except in cases of impeachment, shall be by jury and *such Trial shall be held in the State where the said Crimes shall have been committed*"[1] and that "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. . . ."[2] The provisions of the Sixth Amendment relating to venue have reference only to offenses committed within a State and not outside of it.[3]

§ 32. [1] Article III, Section 2.

[2] Sixth Amendment to the Constitution of the United States.

[3] Cook *v.* United States, 138 U. S. 157, 34 L. ed. 882, 24 S. C. 605; Jones *v.* United States, 137 U. S. 202, 34 L. ed. 691, 11 S. C. 80; Billingsley *v.* United States, 178 Fed. 657, 101 C. C. A. 465 (8th Cir.).

§ 33. **Analysis of the Constitutional Provision.**

Article III, Section 2, clause 3, providing that the trial of the accused shall be held in the *State* where the offense was committed is modified by the Sixth Amendment to the extent that the trial must be had in the *State and district* where the crime was committed.[1] The object of the constitutional amendment is that the defendant shall be tried in the locality where the offense was committed.[2] The provision of Article III as to crimes "not committed within any State" that "the trial shall be at such place or places as the Congress may by law have directed", imposes no restriction as to the place of trial and may occur at any place which shall have been designated by Congress previous to the trial; and a statute conferring jurisdiction on a court over a murderer subsequent to the murder committed in Indian Territory, "not in any State," is no violation of this provision.[3] There is no principle of constitutional law which requires one to be tried for a criminal offense in the district where he resides.[4] And the jurisdictional requisites being present, a warrant for removal will be granted bringing the defendant to the district where he is indicted although there are indictments returned against him in the district where he resides.[5] Where the evidence shows that the offense was committed in a stated place, without mentioning the State or district, the court will take judicial notice of geography for the purpose of ascertaining the venue.[6] A conviction cannot be obtained where the evidence, so far as it showed the commission of an offense, indicated its commission in districts other than that in which the trial was had.[7] If a person be brought within the jurisdiction of one State from another, or from a foreign country, by the unlawful use of force, which would render the officer liable to a civil action or in a criminal proceeding because of the forcible abduction, such fact would not prevent the trial of the person thus abducted in the State

§ 33. [1] United States *v.* Berry, 24 Fed. 780, 783.

[2] Beavers *v.* Henkel, 194 U. S. 83, 48 L. ed. 882, 24 S. C. 605.

[3] Cook *v.* United States, 138 U. S. 157, 34 L. ed. 906, 11 S. C. 268.

[4] Haas *v.* Henkel, 216 U. S. 462, 54 L. ed. 569, 30 S. C. 249, 251, 17 Ann. Cas. 1112.

[5] In re Tillinghast, 233 Fed. 712.

[6] Goldstein *v.* United States, 256 Fed. 813 (7th Cir.).

[7] Vernon *v.* United States, 146 Fed. 121, 76 C. C. A. 547 (8th Cir.).

wherein he had committed an offense.[8] Venue may be proved by circumstantial evidence.[9] Under the constitutional provision, the venue is as material as any other allegation in the indictment, and the burden to prove it rests upon the government.[10] Where the proof of the bribery charged in the indictment may be presumed from the evidence in the case, the presumption of the venue may not be predicated on the first presumption.[11]

§ 34. **Legislation on the Subject — Capital Offenses.**

Section 40 of the Federal Judicial Code, formerly Section 729 of the Revised Statutes, provides that "the trial of offenses punishable by death shall be had in the county where the offense was committed, where that can be done without great inconvenience." Where it appears that the county where the offense was committed was in revolt and military law was in force, a motion that the trial be had in that county will be denied; and the court's decision that "great inconvenience" prevented the trial being held there is conclusive after verdict.[1]

§ 35. **Offenses on the High Seas.**

Section 41 of the Federal Judicial Code, formerly Section 730 of the Revised Statutes, provides that "the trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." The offense must be committed out of the jurisdiction of any particular State or district.[1] Acts committed in such a place are within the jurisdiction of the Federal courts.[2] Where the accused was charged with larceny and taken into custody while fishing with hook and

[8] Adams *v.* New York, 192 U. S. 585, 48 L. ed. 575, 24 S. C. 372; Kerr *v.* Illinois, 119 U. S. 436, 30 L. ed. 421, 7 S. C. 225; Mahon *v.* Justice, 127 U. S. 700, 32 L. ed. 283, 8 S. C. 1204.

[9] Wharton Criminal Ev. § 108; Commonwealth *v.* Costley, 118 Mass. 2; Bloom *v.* State, 68 Ark. 336, 58 S. W. 41; State *v.* Chamberlain, 89 Mo. 129, 1 S. W. 145; Vernon *v.* United States, 146 Fed. 121, 76 C. C. A. 547 (8th Cir.).

[10] Vernon *v.* United States, 146 Fed. 121, 76 C. C. A. 547 (8th Cir.).

[11] Vernon *v.* United States, 146 Fed. 121, 126, 76 C. C. A. 547 (8th Cir.), citing authorities.

§ 34. [1] United States *v.* Fries, 3 Dall. 515, 1 L. ed. 701.

§ 35. [1] United States *v.* Newark Meadows Improv. Co., 173 Fed. 426.

[2] United States *v.* Various Tugs and Scows, 225 Fed. 505, 507.

line from a boat moored to the pound and immediately brought ashore within the State, the Federal District Court within that State and district has jurisdiction to try the offense.[3] If the defendant has not been apprehended on the high seas and is found afterwards in another district, he is to be tried in the district where found.[4] An offense committed against the laws outside of the State is to be tried at such place as Congress may designate under this provision.[5] The courts of the United States have jurisdiction over a person charged with an assault committed on an American vessel in Canadian waters.[6]

§ 36. **Offenses Begun in One District and Terminated in Another.**

Section 42 of the Federal Judicial Code, formerly Section 731 of the Rev. Stat., provides that "when any offense against the United States is begun in one district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein." The object of this section was to provide that where a crime consists of distinctive parts which have different localities, the whole may be tried where any part can be proved to have been done or where it may be said there is a continuously moving act commencing with the offender and hence ultimately consummated through him, as the mailing of a letter, or where there is a confederation in purpose between two or more persons, its execution being by act elsewhere, as in conspiracy.[1]

§ 37. **Instances.**

An indictment for a violation of the national banking laws of the United States will lie where any part of the transaction was car-

[3] Miller *v.* United States, 242 Fed. 907, 155 C. C. A. 495 (3d Cir.); Writ of Certiorari denied in 245 U. S. 660, 62 L. ed. 535, 38 S. C. 150.

[4] United States *v.* Townsend, 219 Fed. 761; Kerr *v.* Shine, 136 Fed.61, 69 C. C. A. 69 (9th Cir.); Cook *v.* United States, 138 U. S. 157, 34 L. ed. 906, 11 S. C. 268; United States *v.* Dawson, 15 How. (U. S.) 467, 14 L. ed. 775.

[5] Article 3, Sec. 2, cl. 3; United States *v.* Dawson, 15 How. (U. S.) 467, 487, 14 L. ed. 775; Cook *v.* United States, 138 U. S. 157, 34 L. ed. 906, 11 S. C. 268.

[6] United States *v.* Rodgers, 150 U. S. 249, 37 L. ed. 1071, 14 S. C. 109.

§ 36. [1] United States *v.* Lombardo, 241 U. S. 73, 60 L. ed. 897, 36 S. C. 508.

ried out.[1] Where the defendants, charged with a conspiracy to illegally obtain coal lands in Wyoming, were never within that State until long after the alleged crime was committed and had no correspondence with those of the defendants that were in that State, but the facts tended to show that the parties all met and planned the scheme complained of in New York, they must be indicted and tried there and not in Wyoming.[2] A prosecution under the Pure Food and Drugs Law should be had in the district where the alleged misbranded article is started in motion on its way in interstate commerce, *e.g.*, at the point where it is delivered to a steamship company for transportation. The rule that applies in civil cases that a corporation must be sued in the district where it has its principal place of business has no application to criminal prosecutions.[3] Likewise, prosecutions for conspiracy may be maintained either in the district in which the conspiracy was entered into or in any district in which an overt act was done to effectuate the object of the conspiracy.[4] Some courts hold that the crime charged does not require the defendant's presence in the *locus in quo*.[5] Transportation of merchandise by a carrier for less than the published rate is a single continuing offense, continuously committed in each district through which the transportation is conducted at the prohibited rate and is not a series of separate offenses, and the provision in the law making such an offense triable in any of those districts confers jurisdiction on the court therein, and does not violate Section 2 of Article III, or the Sixth Amendment, providing that the accused shall be tried in the State and district where the crime was committed.[6] Violations of the Elkins Act, where goods are transported through a series of States, were held to be a single offense continuously committed in each district and not a series of offenses.[7] If the goods are illegally sent into a State

§ 37. [1] Simpson *v.* United States, 229 Fed. 940 (C. C. A. 9th Cir.).

[2] Ireland *v.* Henkle, 179 Fed. 993.

[3] United States *v.* Hopkins, 199 Fed. 649.

[4] Hyde *v.* United States, 225 U. S. 347, 56 L. ed. 1114, 32 S. C. 793; United States *v.* Rabinovich, 238 U. S. 78, 86, 59 L. ed. 1211, 35 S. C. 682; Tillinghast *v.* Richards, 225 Fed. 226.

[5] Ex parte Montgomery, 244 Fed. 967.

[6] Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. ed. 681, 28 S. C. 428; Hyde *v.* United States, 225 U. S. 347, 364, 56 L. ed. 1114, 32 S. C. 793.

[7] Armour Packing Co. *v.* United

from a foreign country, the Federal court of that State has jurisdiction.[8] A prosecution under the Act of February 4, 1887, as amended by the Act of June 18, 1910, for false billing, may when committed by the consignee be prosecuted in the district where the place of destination is situated.[9] An indictment under the Interstate Commerce Act and under the Elkins Act for the failure of a common carrier to file and publish its rates with the Interstate Commerce Commission must be found and tried in the District of Columbia and not in the district where the rates are to be effective.[10] A prosecution for illegally importing a female from a foreign country for the purposes of prostitution should be conducted in the district where the foreigner first set foot on American soil. The crime is committed at that point and a prosecution may not be conducted in whatever district the foreigner may wander.[11] Where the offense consists in a communication sent through the mails, the sender can be tried at the place where he mailed the letter, or where the letter is received.[12] False impersonation of an officer of the United States over the telephone may be prosecuted in either district.[13] The circulation of a libel in a federal reservation is not punishable by the laws of the United States, but by the laws of the State.[14] In prosecutions under the Bankruptcy Act, for concealing assets from the trustee, the venue is in the district where the property was located at the time of concealment.[15]

§ 38. Suits for Penalties and Forfeitures.

Section 43 of the Federal Judicial Code, formerly Section 732 of the Revised Statutes, provides that "all pecuniary penalties and

States, 209 U. S. 56, 52 L. ed. 681, 28 S. C. 428; United States *v.* Freeman, 239 U. S. 117, 60 L. ed. 172, 36 S. C. 32.

[8] United States *v.* Union Mfg. Co., 240 U. S. 605, 610, 60 L. ed. 822.

[9] United States *v.* Union Mfg. Co., 240 U. S. 605, 60 L. ed. 822.

[10] New York Central & H. R. R. Co. *v.* United States, 166 Fed. 267, 92 C. C. A. 331 (2d Cir.).

[11] Ex parte Lair, 177 Fed. 789, 794; United States *v.* Krsteff, 185 Fed. 201.

[12] In re Palliser, 136 U. S. 257, 34 L. ed. 514, 10 S. C. 1034; Burton *v.* United States, 202 U. S. 344, 50 L. ed. 1057, 26 S. C. 688.

[13] Lamar *v.* United States, 240 U. S. 60, 60 L. ed. 526, 36 S. C. 255.

[14] United States *v.* Press Publishing Co., 219 U. S. 1, 55 L. ed. 65, 31 S. C. 212.

[15] Gretsch *v.* United States, 231 Fed. 57, 145 C. C. A. 245 (3d Cir.).

forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found." The rules governing Sections 40 and 41 of the Federal Judicial Code are applicable to this section.[1]

§ 39. Internal Revenue Matters.

Section 44, Federal Judicial Code, holds that suits for the recovery of internal revenue taxes may be brought in the district where the liability for such tax occurs or in the district where the delinquent resides.[1]

§ 40. Seizures on High Seas.

Section 45 of the Federal Judicial Code provides that proceedings on seizures made on the high seas for forfeitures under any law of the United States, may be prosecuted in any district into which the property so seized is brought;[1] a seizure made within any district shall be prosecuted in the district[2] where the seizure is made. Section 46 of the Federal Judicial Code provides that proceedings for the condemnation of any property[3] captured on the high seas, or out of the limits of any judicial district, or within any district on account of its being purchased or acquired, sold or given, with intent to use the same in abetting or promoting any insurrection against the Government of the United States, or knowingly so used by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken. Section 47 of the Federal Judicial Code holds that proceedings on seizures for forfeitures of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods or chattels coming from a State or section proclaimed to be in insurrection into other ports of the United States, may be prosecuted in any district into which the property so seized may be taken.

§ 38. [1] Lees *v.* United States, 150 U. S. 476, 37 L. ed. 1150, 14 S. C. 163.

§ 39. [1] East Tenn. V. & G. R. Co. *v.* Atlanta & F. R. Co., 49 Fed. 608.

§ 40. [1] United States *v.* Larkin, 208 U. S. 333, 52 L. ed. 517, 28 S. C. 417.

[2] Ex parte Cooper, 143 U. S. 472, 36 L. ed. 232, 12 S. C. 453.

[3] Union Ins. Co. *v.* United States, 6 Wall. 759, 18 L. ed. 879.

§ 41. **Venue in Districts Containing More Than One Division.**

Section 53 of the Federal Judicial Code provides that "All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein." Prior to the enactment of this section an indictment could be found in a division in a State other than that in which the offense was committed, where it was both more convenient to the government and the witnesses and in no way unfair to the accused.[1] A suit under a statute against the importation of labor may be brought in the district where the alien was to perform labor.[2] The scope of this section includes both civil and criminal cases.[3] The terms of this section can apply only to suits brought in the district where the defendant resides.[4] It was recently held that proceedings before a grand jury do not come within the meaning of the word "prosecutions" as used in said Section 53, and that an indictment found in a division other than that in which the offense was charged may be transferred for trial to the proper division.[5]

§ 42. **Venue When New District Is Created.**

Section 59 of Federal Judicial Code provides that "Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecution for crimes and offenses committed within such district, division, county or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not

§ 41. [1] United States *v.* Chennault, 230 Fed. 942.

[2] Tomkins *v.* Paterson, 238 Fed. 879.

[3] United States *v.* Sutherland, 214 Fed. 320.

[4] Reich *v.* Tenn. Copper Co., 209 Fed. 880.

[5] Biggerstaff *v.* United States, 260 Fed. 926 (C. C. A. 8th Cir.).

been created, or such county or territory had not been transferred, unless the court, upon application of the defendant, shall order the cause to be removed to the new district or division for trial civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding."

§ 43. **Enforcement of Awards of Consuls by Imprisonment.**

Section 271 of the Federal Judicial Code provides that "The district courts and United States commissioners shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice consul or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge, application for the exercise of such power being first made to such court or commissioner, by petition of such consul, vice consul or commercial agent. And said courts and commissioners may issue all proper remedial process, *mesne* and final, to carry into full effect such award, arbitration or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice consul, or commercial agent, or his successor in office or by the authority of the foreign government appointing such consul, vice consul, or commercial agent: Provided however, That the expenses of the said imprisonment and

maintenance of the prisoners, and the cost of the proceedings shall be borne by such foreign government, or by its consul, vice consul, or commercial agent, requiring such imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners." This section embraces all consular agents whose governments give them jurisdiction, but the statute is so construed as to hold that the authority conferred upon such consular agents to sit as judge or arbitrator is limited to authority conferred by the consent of the United States either by express statute or treaty stipulation.[1]

§ 43 *a*. **Venue for Offenses in Violation of the Laws Relating to Indians.**

"All complaints for the arrest of any person or persons made for violation of any of the provisions of this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, . . .; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the State in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense." [1]

§ 43. [1] In re Aubrey, 26 Fed. 848.

§ 43 *a*. [1] Act of July 23, 1892, Ch. 234, 27 Stat. L. 261.

CHAPTER VI

RIGHT TO COUNSEL

§ 44. Constitutional Provisions — History.

The Sixth Amendment to the Constitution of the United States, among other things, provides: "In all criminal prosecutions the accused shall . . . have the assistance of counsel for his defense. . . ." The author of this work was unable to find any reported Federal case where the right of a person accused of crime to have the assistance of counsel has been either restricted or denied. The absence of such a case is the clearest evidence that this humane provision of the Constitution has been universally respected by the Federal judiciary. Speaking of the origin of this right in this country, Mr. Justice Brown, in Holden *v.* Hardy,[1] said: "The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, has been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process and for the attendance of his witnesses, it had not been changed in England. But to the credit of her American Colonies let it be said, that so oppressive a doctrine had never obtained a foot-hold there. . . ."

§ 45. Number of Counsel.

A judge may appoint as many attorneys as he deems necessary to defend a person unable to employ counsel.[1] The number of attorneys necessary is discretionary with the trial judge. An

§ 44. [1] 169 U. S. 366, 42 L. ed. 780, 18 S. C. 383.

§ 45. [1] Gordon *v.* Commissioners of Dearborn County, 52 Ind. 322.

Appellate Court will reverse only when it clearly appears that the trial judge abused this discretion.[2] Accordingly in a case where the court assigned an inexperienced attorney to defend the accused but later supplied him with a lawyer of ability, it was held that the defendant had the benefit of counsel within the meaning of the Constitution.[3] The number of counsel allowed for a prosecution necessarily varies. In one case, only two counsel were allowed.[4] The appointment of four counsel was held to be improper, but not ground for reversal.[5] In one case where the defendant had four attorneys representing him, the prosecuting attorney was allowed five assistants.[6]

§ 46. **Not Applicable in Alien Deportation Cases.**

The right to appear by counsel in criminal proceedings was held not to apply to proceedings seeking the deportation of an alien; but the court intimated that in such a proceeding, where the counsel for a prisoner seasonably requests the privilege of conferring with him before the trial and of being present during the taking of evidence, the refusal of that request puts upon the official so acting a great burden of explanation and of scrupulous regard for the prisoner's rights.[1] It was also held that aliens about to be deported have not a positive right to counsel on appeal to the Commissioner of Labor.[2]

§ 47. **Right of Counsel for Defense to Confer Privately with His Witnesses.**

There seems to be no reported Federal case on the question whether counsel for the defendant in a criminal case has the right to confer privately with his witnesses before the trial. The few decisions of the State Courts on this question are not entirely unanimous, although the great majority decides the question in

[2] Keyes *v.* The State, 122 Ind. 527.

[3] Simmons *v.* The State, 116 Ga. 583, 42 S. E. 779.

[4] Commonwealth *v.* Knapp, 26 Mass. 496.

[5] State *v.* Griffin, 87 Mo. 608.

[6] Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

§ 46. [1] Ex parte Chin Loy You, 223 Fed. 833; *followed*, in Ex parte Lalime, 244 Fed. 279; Ex parte Lam Pui, 217 Fed. 456; Jeung Bow *v.* United States, 228 Fed. 868 (C. C. A. 2d Cir.).

[2] Ex parte Chin Quock Wah, 224 Fed. 138.

the affirmative.[1] The Congress of the United States in Section 1034 of the Revised Statutes, made special provision for counsel and witnesses for persons indicted for *capital* crimes. The statute reads as follows: "Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours. He shall be allowed, in his defense, to make any proof that he can produce by lawful witnesses, and have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution." Such witnesses as the accused may desire must be summoned at the expense of the government, if the accused can show that he is financially unable to summon them.[2] The defendant's right to counsel is equally as absolute as is his right to compel the attendance of witnesses. If the court assigns the accused a counselor and later it develops that the accused is unable to meet the attorney's demand for fees, the government is under no obligation to the counselor to pay his fee.[3] The right of the accused to compel witnesses to appear in his behalf is practically universal in its application, having but one exception. It does not extend to foreign ambassadors or consuls, who by the rules of international law or express treaty are not amenable to the processes of the courts, and Section 25 of the Act of Congress, April 30th, 1790 (1 Stat. 118), specifically exempts ambassadors from the jurisdiction of the courts.[4] Both this statute, and the provisions of Amendment Six which correspond thereto, do not apply to members of Congress.[5] Counsel is assigned by the

§ 47. [1] State *v.* Papa, 80 Atl. 12, 32 R. I. 453; Shaw *v.* State, 79 Miss. 21; White *v.* State, 52 Miss. 216; Brown *v.* State, 3 Tex. Ct. App. 294; Holt *v.* State, 9 Tex. Ct. App. 571; Hudson *v.* State, 44 Tex. Cr. 251.

[2] United States *v.* Kenneally, 26 Fed. Cas. No. 760.

[3] Nabb *v.* United States, 1 Court Claims, 173.

[4] In re Dillon, 7 Fed. Cas. No. 710.

[5] United States *v.* Cooper, 25 Fed. Cas. No. 626 (members of the President's Cabinet); United States *v.* Smith, 27 Fed. Cas. No. 1192 (and to County Court Judges); United States *v.* Caldwell, 25 Fed. Cas. No. 238.

court only at the request of the accused.[6] The right to counsel as guaranteed by the Sixth Amendment to the Constitution of the United States applies exclusively to the powers exercised by the federal judiciary and is not a limitation upon the powers of the State.[7] Where the trial judge allowed the accused but ten minutes to confer with counsel just appointed, it was held to be violative of the fundamental principle granting the accused the benefit of counsel.[8] Judge Cooley, in his admirable work on Constitutional Limitations,[9] says: "In guaranteeing to parties accused of crime the right to the aid of counsel, the constitution secures it, with all its accustomed incidents. Among these is that shield of protection which is thrown around the confidence the relation of counsel and client requires, and which does not permit the disclosure by the former, even in the court of justice, of communications which may have been made to him by the latter with a view to pending or anticipated litigation. This is the client's privilege; the counsel cannot waive it, and the Court would not permit the disclosure even if the client were not present to take the objection." And the attorney will be protected in his rights to fully and properly preserve and protect the rights of his client.[10]

[6] State *v.* Sims, 117 La. 1036, 42 So. 494; Korf *v.* Jasper County, 132 Ia. 682, 108 N. W. 1031.

[7] State *v.* Murphy, 87 N. J. L. 515, 530, 94 Atl. 640.

[8] Reliford *v.* State, 140 Ga. 777, 79 S. E. 1128.

[9] Star, p. 334.

[10] In re Sachs, 190 U. S. 1, 47 L. ed. 933, 23 S. C. 718; Ex parte Garland, 71 U. S. 333, 379, 18 L. ed. 366.

CHAPTER VII

ARREST ON WARRANT

§ 48. Constitutional Requisite — History — Probable Cause.

The Fourth Amendment to the Constitution of the United States provides: "No warrant shall issue but upon probable cause supported by oath or affirmation." In a recent case,[1] Judge Henry Wade Rogers of the United States Circuit Court of Appeals, for the Second Circuit, traces with considerable care the history of prosecutions by information. According to Judge Rogers, proceedings by information were unpopular in England and to some extent in the American Colonies, but they have never been abolished in England, although in some of our States this has been done; that, at the time of the Declaration of Independence, it was a familiar mode of criminal procedure in all the Colonies. A very oppressive use was made of them for something more than a cen-

§ 48. [1] Weeks *v.* United States, 216 Fed. 292, 132 C. C. A. 436 (2d Cir.).

tury in the practice before the Court of Star Chamber. When the Court of Star Chamber was abolished, a strong prejudice existed against proceedings by information and it was contended that such procedure was illegal, but this contention was denied. The unpopularity of informations was not restricted to the mother country, but existed to some extent in this country. Prosecutions by information are as ancient as the common law itself. In the early years of the Federal Government, informations were principally used for the recovery of fines and forfeitures. Judge Rogers arrives at the conclusion that the weight of authority in this country is to the effect that informations used by the prosecuting officers are the informations used by the attorney-general in England and not those used by Masters of the Crown and which are governed by IV. and V. William and Mary, C. 18, and, inasmuch as under the common law informations could be filed by the attorney-general simply on his oath of office and without verification, therefore a verification of an information by a prosecuting attorney is unnecessary unless a warrant for the arrest of the accused is demanded or unless required by some constitutional or statutory provision. Judge Rogers' historical statement, which for reason of space cannot be given in extenso here, well merits a careful perusal of the case cited. The rule requiring a verification of complaint or information applies in any case where an application for the issuance of a warrant of arrest is made.[2] It was therefore held that an information for a violation of the Pure Food and Drug Act, where a warrant of arrest is sought, must be supported by the oath of some one having knowledge of the facts showing probable cause; the signature alone of the district attorney not being sufficient.[3] The Fourth Amendment to the Constitution of the United States furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an information unless it is supported by the oath of some one having knowledge of the facts showing the existence of probable cause.[4] Probable cause must be shown by the facts alleged. The conclusion from

[2] Weeks *v.* United States, 216 Fed. 292, at 300, 132 C. C. A. 436 (2d Cir.); United States *v.* Polite, 35 Fed. 58.

[3] United States *v.* Wells, 225 Fed. 320.

[4] United States *v.* Morgan, 222 U. S. 274, 56 L. ed. 198, 32 S. C. 81.

the averments of facts must be that of the magistrate, and not the opinion of the affiant.[5]

§ 49. **Congressional Legislation.**

Section 1014 of the Revised Statutes of the United States is as follows: "Arrest and removal for trial. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizance of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

§ 50. **General Warrants Prohibited — Description.**

By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him, sufficiently to identify him. If it does not, the officer making the arrest is liable to an action for false imprisonment, and this principle of the common law has been retained in the Constitution.[1] The provision of Section 1014 of the Revised Statutes of the United States is subordinate to the declaration of the Constitu-

[5] In re Rosenwasser Bros., Inc., 254 Fed. 171; United States *v.* Tureaud, 20 Fed. 621; United States *v.* Baumert, 179 Fed. 735.

§ 50. [1] West *v.* Cabell, 153 U. S. 78, 38 L. ed. 643, 14 S. C. 752. For the history of the opposition of the American Colonists to general warrants, *see* Opinion of Mr. Justice Bradley in Boyd *v.* United States, 116 U. S. at pp. 624 *et seq.*

tion that all warrants must particularly describe the person to be seized.[2]

§ 51. Must Designate Cause of Arrest.

A warrant of commitment will be quashed unless it states on its face some good cause certain, supported by affidavit establishing probable cause of the guilt of the accused.[1] In Howard *v.* Gosset,[2] a carefully considered case, Lord Coleridge stated the reason for the requirement that the warrant should disclose the cause of the arrest as follows: "Several reasons are given, not the least important is, that the party called upon to submit to the process of the law may know what it is that is charged against him, and for what it is that he is called upon to yield himself a prisoner. If no cause, or an insufficient cause, appear, he takes his measures accordingly at the time; and he must judge from the information communicated at the time. Should he resist, and kill or injure the officer in his resistance, and be brought to trial, it could not be contended that any fact could be added to the statement in the warrant to his prejudice. The act with which he is charged must take its character from the circumstances as they then stood. He was resisting a wrongful imprisonment, wrongful because the officer was not armed with a legal authority for arresting him; and that is the act for which he is to answer. This reasoning equally applies, if he submits and brings his action for damages. Whatever cause for imprisoning him may have existed, the action lies, because the imprisonment of which he complains was unauthorized and wrongful. As well might a new warrant be subsequently granted to the officer, and relied on by him as a defense, as facts be added in the plea to help out the defective warrant. These facts can only show that he might have been well arrested, not that he was, which is the question at issue. . . ."

§ 52. Who May Apply for Warrant.

A warrant may be applied for to any judicial officer mentioned in Section 1014 of the Revised Statutes of the United States, either

[2] West *v.* Cabell, 153 U. S. 78, 38 L. ed. 643, 14 S. C. 752.

§ 51. [1] Ex parte Burford, 3 Cranch (U. S.), 448, 2 L. ed. 495.

[2] 10 Q. B., Ad. & El. N. S. 359, *approved* in People *v.* Marendi, 213 N. Y. 608.

by the United States Attorney or by any person making oath upon his personal knowledge that a crime has been committed and stating facts showing probable cause for arresting the party against whom the warrant is sought.[1]

§ 53. United States Attorney May Not Revoke Warrant.

A United States Attorney has no power to direct a United States Marshal not to execute a warrant issued by any judicial officer mentioned in the above section. This issuance of warrant is a judicial act and can only be revoked by the judicial officer who signed same upon good cause shown.[1]

§ 54. Recitals in Warrant Not Conclusive.

The warrant of arrest, although regular on its face, is not necessarily conclusive evidence that the prisoner is rightfully deprived of his liberty and its regularity may be inquired into.[1]

§ 55. Privilege from Arrest.

A Congressman is privileged from arrest on any charge except treason, felony and breach of the peace.[1] A sentence on a member of Congress while his privilege continues is illegal and will not become valid by the expiration of the time for which he was elected.[2] Witnesses attending a hearing in the Federal Court in a criminal case are exempt from arrest on a civil process and such action will constitute contempt of court.[3]

§ 56. Complaints and Informations—Jurisdictional Requirements.

In all criminal cases the complaint must be sworn to, stating the facts upon which the complaint is based. If made on information and belief it must give the grounds of belief and sources of

§ 52. [1] United States *v.* Skinner, 2 Wheel. C. C. 232; United States *v.* Burr, 2 Wheel. C. C. 573; United States *v.* Bollman, 1 Cranch, C. C. 373. *See also* § 8 *a*, *supra*.

§ 53. [1] United States *v.* Scroggins, 3 Woods (U. S.), 529.

§ 54. [1] McNichols *v.* Pease, 207 U. S. 109, 52 L. ed. 121, 28 S. C. 30; Ex parte Jenkins, 2 Wall. Jr. 521, 528.

§ 55. [1] Constitution of the United States, Section 6; Williamson *v.* United States, 207 U. S. 425, 52 L. ed. 278, 28 S. C. 163.

[2] Williamson *v.* United States, *supra*.

[3] United States *v.* Zavelo, 177 Fed. 536, and cases cited.

information. A complaint on information and belief not based upon the complainant's personal knowledge confers no jurisdiction on the commissioner to issue a warrant of arrest.[1] In a recent case,[2] Judge Augustus N. Hand released a prisoner on *habeas corpus* on the ground that the complaint was fatally defective in this: that it did not state the sources of the affiant's information although the complainant promised to disclose same at the hearing. The complaint or information must be in the form of an affidavit giving a statement of facts with that degree of clearness and positiveness that if falsely made the affiant may be held guilty of perjury.[3]

§ 57. Rule Announced by Mr. Justice Bradley.

The rule which must govern all magistrates who authorize arrests under the Constitution of the United States, as the foundation for the issuance of warrants, is uniform, and is thus stated by Mr. Justice Bradley:[1] "After an examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the Constitution, which, by the Fourth Article of the amendments, declares that 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 that no warrants shall issue but upon probable cause supported by oath or affirmation describing the place to be searched and the persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that

§ 56. [1] In re Rosenwasser Bros., Inc., 254 Fed. 171; United States *v.* Wells, 225 Fed. 320; Lippman *v.* People, 175 Ill. 101, 51 N. E. 872; United States *v.* Baumert, 179 Fed. 735; Beavers *v.* Henkel, 194 U. S. 73, 48 L. ed. 882, 24 S. C. 605; Johnston *v.* United States, 87 Fed. 187, 30 C. C. A. 612 (5th Cir.); United States *v.* Sapinkow, 90 Fed. 654; United States *v.* Morgan, 222 U. S. 274, 56 L. ed. 198, 32 S. C. 81; United States *v.* Collins, 79 Fed. 65; United States *v.* Ruroede, 220 Fed. 210; United States *v.* Tureaud, 20 Fed. 621; Weeks *v.* United States, 216 Fed. 292, 132 C. C. A. 436 (2d Cir.).

[2] United States *v.* Ruroede, 220 Fed. 210.

[3] Johnston *v.* United States, 87 Fed. 187 (C. C. A. 5th Cir.); United States *v.* Collins, 79 Fed. 65; Myers *v.* The People, 67 Ill. 503; Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619; People *v.* Heffron, 53 Mich. 527, 19 N. W. 170.

§ 57. [1] 3 Woods, 502. *Approved* in United States *v.* Tureaud, 20 Fed. 623, and in Johnston *v.* United States, Fed. 187 (C. C. A. 5th Cir. 87).

the probable cause referred to and which must be supported by oath or affirmation, *must be submitted to the committing magistrate himself, and not merely to an official accuser*, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit or taken down by himself on a personal examination, exhibiting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded."

§ 58. **Quality of Proof.**

The measure of proof which is held to be requisite by the courts of the United States under the Fourth Amendment to the Constitution of the United States is such legal evidence of the offense having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendant.[1]

§ 59. **Effect of Failure to Observe Constitutional Requirement.**

A warrant is void if based upon a complaint or information where the facts are stated to be on information or belief without stating the sources of such belief. Such a warrant is no protection to the persons issuing same.[1]

§ 60. **Notary Cannot Take Oath.**

A notary public has no authority under the laws of the United States to administer any oaths in connection with criminal prosecutions, and an information or supporting affidavits sworn to before a notary public will be quashed on motion, if a warrant thereon is issued.[1] But this point cannot be raised for the first time on appeal.[2] Such a defect in the information will be waived if the

§ 58. [1] United States *v.* Tureaud, 20 Fed. 621; Ex parte Burford, 3 Cranch (U. S.), 448, 2 L. ed. 495; United States *v.* Baumert, 179 F. ed. 735.

§ 59. [1] Bryan *v.* Congdon, 86 Fed. 221, 29 C. C. A. 670 (8th Cir.), 57 U. S. App. 505; People *v.* Berry, 107 Mich. 256, 65 N. W. 98; Badger *v.* Reade, 39 Mich. 771.

§ 60. [1] United States *v.* Schallinger Produce Co., 230 Fed. 290.

[2] Simpson *v.* United States, 241 Fed. 841, 154 C. C. A. 543 (6th Cir.); *Writ of Certiorari denied* in 245 U. S. 664, 62 L. ed. 537, 38 S. C. 62; Abbott Bros. Co. *v.* United States, 242 Fed. 751 (C. C. A. 7th Cir.).

defendant pleads in bar to the information. No greater precision is required of an information than that required of an indictment.[3] An information sworn to before a notary public will not be quashed where no warrant of arrest has been sought.[4]

§ 61. **Liability of Magistrate and Officer for Causing Illegal Arrest.**

When a magistrate without authority of law issues a warrant of arrest, both he and the person at whose instance he so acts are liable for false arrest at the suit of the party illegally arrested by virtue of such warrant.[1] When the warrant is defective and void on its face, the officer has no right to arrest the person on whom he attempts to serve it and he thus acts as a trespasser. An officer or any other person who acts under a void precept stands on the same footing.[2] A warrant irregular on its face is no protection to a United States Marshal.[3] In some jurisdictions it has been held that an officer must establish the absolute regularity of the process.[4] But the better rule is that the officer making the arrest is not bound to look behind a regular warrant coming from a proper jurisdiction.[5] There is of course a clear distinction between a complaint utterly void, where the court does not obtain jurisdiction, and that which is merely voidable. In the latter class of cases magistrates and officers are exempt from liability for making an arrest based upon a mere insufficient complaint on grounds of public policy.[6] A magistrate can derive no jurisdiction from an

[3] Simpson *v.* United States, 241 Fed. 841, 154 C. C. A. 543 (6th Cir.).

[4] Abbott Bros. Co. *v.* United States, 242 Fed. 751 (C. C. A. 7th Cir.).

§ 61. [1] Strozzi *v.* Wines, 24 Nev. 389, 57 Pac. 832; Coffin *v.* Varila, 8 Tex. Cir. App. 417, 27 S. W. 956; Truesdel *v.* Combs, 33 Ohio St. 186; Gelzenleuchter *v.* Niemeyer, 64 Wis. 316, 25 N. W. 442.

[2] Commonwealth *v.* Crotty, 10 Allen (Mass.), 403; Pearce *v.* Atwood, 13 Mass. 324; Sanford *v.* Nichner, 5 Mod. a. c. 286; Commonwealth *v.* Kennard, 8 Pick. (Mass.) 133; Shadgett *v.* Clipson, 1 Chitt. Crim. Law 44, 8 East, 328; Rex *v.* Hood, 1 Mod. c. c. 281; Rex *v.* Osner, 5 East, 304; Hoye *v.* Bush, 2 Scott, N. R. 86.

[3] Ex parte Field, 9 Fed. Cas. No. 4761, 5 Blatchf. 63.

[4] Matthews *v.* Densmore, 43 Mich. 461; *but see* s. c. 109 U. S. 216, 27 L. ed. 912, 3 S. C. 126; Howard *v.* Manderfield, 31 Minn. 337, 17 N. W. 946.

[5] Brown *v.* Hadwin, 182 Mich. 491, 148 N. W. 693; Matthews *v.* Densmore, 109 U. S. 216, 27 L. ed. 912, 3 S. C. 126.

[6] Brinkman *v.* Drolesbaugh, 119 N. E. 451 (Ohio St.).

unconstitutional statute, and if he enforces an unconstitutional law, is liable for damages to the aggrieved party.[7] Trespass lies for the enforcement of an unconstitutional statute, or where the process is void.[8]

§ 62. No Verification Required Where No Warrant Is Demanded.

The provision of the Fourth Amendment requiring an information filed by the district attorney to be supported by an affidavit based on personal knowledge and showing probable cause is not mandatory where no warrant of arrest is issued thereunder.[1] Where no warrant is demanded and the defendant appears voluntarily, a complaint or information may be made by the district attorney on his oath of office, without verifying the complaint or information.[2]

[7] Kelly *v.* Bemis, 70 Mass. 83; Fisher *v.* McGirr, 1 Gray, 45; Piper *v.* Pearson, 2 Gray, 120; Clarke *v.* May, 2 Gray, 410; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717. *And see* § 27.

[8] McClaughry *v.* Cratzenberg, 39 Ill. 118; Johnson *v.* Von Kettler, 66 Ill. 63; Stanton *v.* Seymor, 5 McLean (C. C.), 267; Allen *v.* Greenlee, 2 Dev. (N. C.) 370; Price *v.* Graham, 3 Jones (N. C.), 545; Morris *v.* Scott, 21 Wend. (N. Y.) 281.

§ 62. [1] Weeks *v.* United States, 216 Fed. 292, 132 C. C. A. 436 (2d Cir.); Abbott Bros. Co. *v.* United States, 242 Fed. 751 (C. C. A. 7th Cir.).

[2] Weeks *v.* United States, 216 Fed. 292, 132 C. C. A. 436 (2d Cir.); Kelly *v.* United States, 250 Fed. 947 (C. C. A. 9th Cir.), 39 S. C. 182; United States *v.* Simon, 248 Fed. 980; Abbott Bros. *v.* United States, 242 Fed. 751 (C. C. A. 7th Cir.); United States *v.* Adams Express Co., 230 Fed. 531.

CHAPTER VIII

SPEEDY AND PUBLIC TRIAL

§ 63. Speedy Trial.

The Sixth Amendment to the Constitution of the United States provides "in all criminal prosecutions, the accused shall enjoy the right to a *speedy and public trial.*" This provision has no application to the order of trials in point of time of commission of the offense where the accused stands charged with more than one offense on several indictments. This provision merely means that a defendant is entitled to a speedy trial after the commencement of the action and by a jury of the district where it is alleged the offense was committed.[1] A defendant cannot acquiesce in the postponement of his trial and then, when it is called, move that the case be dismissed because he had not been given a speedy trial. It is his duty, if he wants a speedy trial, to ask for it.[2]

§ 64. The Trial Must Be Public.

The Sixth Amendment to the Constitution provides that "in all criminal prosecutions the accused shall enjoy the right to a . . . public trial." It has been held that an order of the trial Judge to clear the court room of all spectators, except relatives of the defendants, members of the bar and newspaper reporters, was a violation of the constitutional rights of the accused to a public trial and constituted reversible error.[1] A

§ 63. [1] Beavers *v.* Haubert, 198 U. S. 77, 49 L. ed. 950, 25 S. C. 573.
[2] Phillips *v.* United States, 201 Fed. 259 (C. C. A. 8th Cir.).

§ 64. [1] Davis *v.* United States, 247 Fed. 394 (C. C. A. 8th Cir.).

contrary conclusion was reached by the United States Circuit Court of Appeals for the 9th Circuit [2] where it was held that a defendant was not deprived of a public trial by an order clearing the court room of spectators, but permitting all persons connected with the court either as officers or members of the bar, and all persons in any manner connected with the case as witnesses to remain in the court room.

[2] Reagan *v.* United States, 202 Fed. 488.

CHAPTER IX

PRELIMINARY HEARING

§ 65. Preliminary Examination of Accused as a Pre-requisite to Indictment.

In his famous charge to the grand jury, Mr. Justice Field said:[1] "A preliminary examination of the accused before a magistrate where he can meet his prosecutor face to face, and cross-examine him, and the witnesses produced by him, and have the benefit of counsel, is the usual mode of initiating proceedings in criminal cases and is the one which presents to the citizen the greatest security against false accusations from any quarter. And this mode ought not to be departed from, except in those cases where the attention of the jury is directed to the consideration of particular offenses by the court, or by the district attorney, or the matter is brought to their knowledge in the course of their investigations, or from their own observations, or from disclosures made by some of their number. . . ." And in a recent case,[2] Judge Ward, of the United States Circuit Court of Appeals for the Second Circuit, speaks of the importance of a preliminary hearing before a United States Commissioner in the following language: "Ever since United States Commissioners were appointed . . . it has been the practice for them to conduct judicial hearings for the purpose of inquiring whether any crime has been committed, and, if so, whether there is reasonable ground for connecting the prisoner

§ 65. [1] 2 Sawyer, 667. [2] Safford *v.* United States, 252 Fed. 471.

with it, and thereupon either discharging him, imprisoning him, or admitting him to bail. It would be a scandal to arrest and imprison citizens without giving them a hearing, and we would not interfere with this uniform and wholesome practice except under absolute necessity." [3] Nevertheless, the right of an accused person to a preliminary hearing is not absolute, and it was held that a person accused of crime in the Federal court is not entitled as a matter of right to a preliminary hearing, but may be indicted without such a hearing by the Federal Grand Jury.[4]

§ 66. **Powers and Status of United States Commissioners.**

As the preliminary matters referred to in Section 1014 of the Revised Statutes of the United States are usually held before United States Commissioners, it is important to ascertain their jurisdiction and powers. These powers are collated in United States *v.* Allred,[1] by Mr. Justice Brown, as follows: "Acting under the constitutional provision, Art. 2, sec. 2, authorizing it to vest the appointment of inferior officers in courts of law, Congress provided, as early as 1793, for the appointment by circuit courts of 'one or more discreet persons, learned in the law, in any district for which said court is holden' for the taking of bail for the appearance of persons charged with crime, which authority, however, was 'revocable at the discretion of such court.' These officers took the name of 'Commissioners', and from time to time their duties were extended by different acts of Congress, until they have become an important feature of the Federal Judicial system. . . . The duties of these officers are prescribed by law, and they are, in general, to issue warrants for offenses against the United States; to cause the offenders to be arrested and imprisoned, or bailed, for trial, and to order the removal of offenders to other districts (Section 1014); to hold to security of the peace and for good behavior (Section 727); to carry into effect the award or arbitration, or decree of any consul of any foreign nation; to sit as judge or arbitrator in such differences as may

[3] For Preliminary Hearing on Removal from one district to another, *see* Chapter 12.

[4] United States *v.* Kerr, 159 Fed. 185; United States *v.* Baumert, 179 Fed. 735.

§ 66. [1] 155 U. S. 591, 39 L. ed. 273, 15 S. C. 231.

arise between the captains and crews of any vessels belonging to the nations whose interests are committed to his charge; and to enforce obedience by imprisonment until such award, arbitration, or decree is complied with (Section 728); to take bail and affidavits in civil causes (Section 945); to discharge poor convicts imprisoned for non-payment of fines (Section 1042); to take oaths and acknowledgments (Section 1778); to institute prosecutions under the laws relating to crimes against the elective franchise, and civil rights of citizens, and to appoint persons to execute warrants thereunder (Sections 1982–1985); to issue search warrants authorizing internal revenue officers to search premises, where a fraud upon the revenue has been committed (Section 3462); to issue warrants for deserting foreign seamen (Section 5280); to summon masters of vessels to appear before him and show cause why process should not issue against such vessel (Section 4546); to issue warrants for and examine persons charged with being fugitives from justice (Sections 5270, 5271). . . ." A United States Commissioner has power to administer oaths.[2] A Commissioner is not a court and cannot enter a judgment against a person brought before him upon a preliminary hearing.[3] Therefore, costs of a preliminary examination before a United States Commissioner cannot be charged to the defendant.[4] A preliminary examination before a Commissioner, or other officer, is not a case pending in any court of the United States.[5]

§ 67. **Procedure before United States Commissioner — Rules of Evidence.**

The proceedings before a Commissioner are not to be regarded as in the nature of a final trial by which the prisoner can be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take

[2] Safford *v.* United States, 252 Fed. 471 (C. C. A. 2d Cir.).

[3] Todd *v.* United States, 158 U. S. 278, 39 L. ed. 982, 15 S. C. 889.

[4] United States *v.* Schwartz, 249 Fed. 755.

[5] United States *v.* Briebach, 245 Fed. 204; Ocampo *v.* United States, 234 U. S. 91, 100, 58 L. ed. 1231, 34 S. C. 712; Todd *v.* United States, 158 U. S. 278, 39 L. ed. 982, 15 S. C. 889; Beavers *v.* Henkel, 194 U. S. 73, 48 L. ed. 883, 24 S. C. 605; Wright *v.* Henkel, 190 U. S. 40, 47 L. ed. 948, 23 S. C. 777.

place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, — either by imprisonment or under bail or ultimately answer to an indictment or other proceeding in which he shall be finally tried upon the charge made against him.[1] In proceedings before a United States Commissioner or before some other judicial officer, sitting as an examining magistrate, the method of procedure should correspond as nearly as possible to that prevailing in the courts of the State where the examination is conducted. Section 1014 of the Revised Statutes of the United States has, however, no relation to rules of evidence. The competency of witnesses in criminal trials in the courts of the United States is not governed by the laws of the State, but by the common law, except where Congress has made specific provisions on the subject.[2] Adjournments may be ordered from time to time by the magistrate conducting the preliminary examination.[3] A United States Commissioner has power to issue subpœnas to witnesses.[4] A magistrate has no jurisdiction and cannot serve subpœnas in another State to compel the attendance of witnesses for the accused.[5]

§ 68. **Contempt before Commissioner.**

The powers of a United States Commissioner are *stricti juris*, and there is no act of Congress which confers on him the power to punish for contempt. However, disobedience to his process and his authority is disobedience to the process and authority of the court, and he should refer the parties, witnesses and others guilty of contumacious conduct before him to the judge for punishment.[1]

§ 67. [1] Benson *v.* McMahon, 127 U. S. 457, 32 L. ed. 234, 8 S. C. 1240.

[2] Cohen *v.* United States, 214 Fed. 23 (C. C. A. 9th Cir.); United States *v.* Dunbar, 83 Fed. 151, 27 C. C. A. 488 (9th Cir.). Tinsley *v.* Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. C. 430; Logan *v.* United States, 144 U. S. 263, 36 L. ed. 429, 12 S. C. 617.

[3] United States *v.* Rundlett, 2 Curtis (U. S.), 41.

[4] United States *v.* Beavers, 125 Fed. 778.

[5] United States *v.* White, 2 Wash. (C. C.) 29.

§ 68. [1] In re Automatic Musical Co., 204 Fed. 334; United States *v.* Wah, 160 Fed. 207; In re Perkins, 100 Fed. 950.

§ 69. **Commissioner's Costs.**

Section 1014 of the Revised Statutes expressly provides that the hearing before a commissioner or other magistrate under that section shall be "at the expense of the United States." It seems clear that neither R. S. § 1014 nor § 974 directly authorizes the costs of the hearing before the commissioner to be taxed against the defendant. The commissioner, of course, is not a court, and has no power to enter a judgment against a person brought before him upon a preliminary hearing, for any purpose.[1] He can only inquire and determine whether or not there are reasonable grounds to hold the person to appear before the court having cognizance of the offense with which he is charged, and proceedings before the commissioner as an examining magistrate are not the commencement of a prosecution for the offense of which the person may be accused.[2] The United States District Court has supervisory jurisdiction over United States Commissioners and the latter may be directed to certify the proceedings to the court in order that the case may be there considered.[3]

§ 69. [1] Todd *v.* United States, 158 U. S. 278, 39 L. ed. 982, 15 S. C. 889; United States *v.* Schwartz, 249 Fed. 775.

[2] Virginia *v.* Paul, 148 U. S. 119, 37 L. ed. 386, 13 S. C. 536; United States *v.* Schwartz, 249 Fed. 755.

[3] United States *v.* Berry, 4 Fed. 779; Ex parte Gray, 4 Wash. (C. C.) 410; *but see, contra*, instructions by Hough, J. in United States *v.* Enrico Maresco (Southern District of New York), unreported, decided in March, 1920.

CHAPTER X

CONFRONTATION WITH WITNESSES

§ 70. Constitutional Provision.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." This provision was intended to prevent the conviction of the accused on *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right to cross-examination.[1]

§ 71. Waiver of Right.

The right is in the nature of a privilege extended to the accused, rather than a restriction upon him, and he is free to assert it or to waive it, as to him may seem advantageous.[1] The right is mutual and exists on the part of the government.[2]

§ 72. Right Absolute — Exceptions.

The right of confrontation with the witnesses is one without exception, if the witnesses are living. It exists, not only if the

§ 70. [1] Mattox *v.* United States, 156 U. S. 237, 39 L. ed. 410, 15 S. C. 337; Kirby *v.* United States, 174 U. S. 47, 43 L. ed. 890; 19 S. C. 574; Dowdell *v.* United States, 221 U. S. 325, 55 L. ed. 753, 31 S. C. 590.

§ 71. [1] Diaz *v.* United States, 223 U. S. 442, 56 L. ed. 500, 32 S. C. 250.

[2] United States *v.* Angell, 11 Fed. 34, 43.

witnesses can be produced, or if they be within the jurisdiction, but absolutely and on all occasions.[1] If the witness is living he must be produced, or his testimony cannot be received in a criminal case, even if he is beyond the jurisdiction of the court or of the United States.[2] There are cases where the testimony of the witness given at the preliminary examination has been admitted in evidence after his death, and where the accused was accorded the right of cross-examination.[3]

§ 73. **Former Testimony.**

The constitutional provision is not violated by permitting the testimony of a witness on a former trial, since deceased, to be read, the stenographer who made the stenographic report of the former testimony testifying to its correctness.[1] It is not enough that the witness has been present and confronted with the accused at the preliminary examination before the committing magistrate. The fair meaning of the Constitution is that wherever and whenever the accused is put on his final trial he shall be confronted with the witnesses against him, if they be alive.[2] The admission of a statement or deposition of a codefendant of the accused, taken at the preliminary examination before a commissioner, has been held a violation of the provision.[3] But if a witness who has testified on a former trial is absent by the accused's own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the direct consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but, if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he

§ 72. [1] United States *v.* Angell, 11 Fed. 34, 43.

[2] United States *v.* Angell, 11 Fed. 34, 43.

[3] United States *v.* Angell, 11 Fed. 34, 43.

§ 73. [1] Mattox *v.* United States, 156 U. S. 237, 240, 39 L. ed. 409, 410, 15 S. C. 337; United States *v.* Macomb, 5 McLean (U. S.), 285.

[2] United States *v.* Angell, 11 Fed. 34, 43.

[3] Motes *v.* United States, 178 U. S. 458, 471, 44 L. ed. 1150, 20 S. C. 993.

is in no condition to assert that his constitutional rights have been violated.[4]

§ 74. Dying Declaration.

The admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the Constitution, and was not intended to be abrogated.[1]

§ 75. When Provision Is Inoperative.

The provision obviously applies to criminal prosecutions tried in the United States, and not to persons extradited for trial under treaties with foreign countries, whose laws may be entirely different.[1]

§ 76. The Constitutional Protection Is Extended to a Defendant in a Criminal Case Only — Not Applicable to Contempts.

Therefore, a proceeding, which entitles the plaintiff, even though it be the government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not within the meaning of the amendment. So, a deposition of a living witness may be read in an action for the value of merchandise forfeited to the United States by acts in violation of law.[1] The Sixth Amendment to the Constitution, providing that the defendant shall be confronted with the witnesses against him, only means that the defendant is entitled to attend the trial and to hear the witnesses testify, and does not entitle such defendant as a matter of right to a list of the witnesses who testified before the grand jury, but it may be ordered in the discretion of the court.[2] The provision as to being confronted with the witnesses contained in the Sixth Amendment is not applicable to a criminal contempt case.[3]

[4] Reynolds *v.* United States, 98 U. S. 145, 160, 25 L. ed. 244.

§ 74. [1] Kirby *v.* United States, 174 U. S. 47, 43 L. ed. 890, 19 S. C. 574.

§ 75. [1] Ex parte La Mantia, 206 Fed. 330.

§ 76. [1] United States *v.* Zucker, 161 U. S. 475, 480, 40 L. ed. 777, 16 S. C. 641.

[2] Wilson *v.* United States, 221 U. S. 361, 55 L. ed. 771, 31 S. C. 538; United States *v.* Aviles, 222 Fed. 474.

[3] Merchant Stock & Grain Co. *v.* Board of Trade, 201 Fed. 20, 120 C. C. A. 582 (8th Cir.).

CHAPTER XI

BAIL

§ 77. Constitutional and Statutory Provision.

Article VIII of the Constitution of the United States provides "that excessive bail shall not be required." The statutes passed in amplification of the constitutional privilege to bail are as follows: "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death." This section deals with cases other than capital and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders.[1]

§ 78. Bail in Capital Cases.

Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken

§ 77. [1] Rev. Stat. § 1015. Writ of *habeas corpus* will lie where bail is refused or is excessive. United States *v.* Hamilton, 3 Dallas (U. S.), 17, 1 L. ed. 490; Ex parte Bollman, 4 Cranch (U. S.), 75, 2 L. ed. 554.

only by the Supreme Court or a circuit court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstances of the offense, and of the evidence, and to the usages of law.[1]

§ 79. **Bail in Treason Cases.**

A defendant accused of treason may be admitted to bail.[1] But it would seem that the right to bail is not absolute and it will not be granted as a rule until after indictment and upon a strong showing.[2]

§ 80. **Who May Admit to Bail.**

Section 1014 of the Revised Statutes provides that "for any crime against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeable to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. . . ." The Court has power, when advised by a deputy clerk that a prisoner desires to be admitted to bail, to fix the amount of the bail and direct the Clerk to accept certain persons as sureties on the bond.[1] In such a case the personal presence of the sureties in open court is not required. The presence[2] of the sureties in open court is only required when they enter in an open court common law recognizance. An open court common law recognizance is ordinarily not signed by the sureties. The sureties appear in court and solemnly pledge themselves to

§ 78. [1] Rev. Stat. § 1016.

§ 79. [1] United States *v.* Hamilton, 3 Dallas (U. S.), 17, 1 L. ed. 490; 1 Burr's Trial, 310.

[2] United States *v.* Stewart, 2 Dallas (U. S.), 343, 1 L. ed. 408.

§ 80. [1] Ewing *v.* United States, 240 Fed. 241, 153 C. C. A. 167 (6th Cir.).

[2] Hunt *v.* United States, 63 Fed. 568, 11 C. C. A. 340 (8th Cir.); Ewing *v.* United States, 240 Fed. 241, 153 C. C. A. 167 (6th Cir.).

produce the prisoner in court when required by law or rule of court.[3]

§ 81. **Reduction of Bail.**

Where a party is already out on bail on a civil process growing out of the same transaction, his bail in criminal cases will be proportionally reduced.[1]

§ 82. **Admission to Bail Pending Removal.**

Section 943 of the Revised Statutes of the United States provides: "When a defendant who has procured bail to respond to the judgment in a suit in any court of the United States in any district is afterward arrested in any other district and is committed to a jail, the use of which had been ceded to the United States for the custody of prisoners, the judge of the court wherein the suit in which the defendant has so procured bail is depending, shall, at the request of the bail, order that such defendant be held in said jail, in the custody of the marshal of the district in which it is. The said marshal, upon the delivery of such order, duly authenticated, shall receive such person into his custody, and thereupon be chargeable for an escape, and shall forthwith make a certificate, under his hand and seal, of such commitment, and transmit the same to the court from which the order issued, and, if required, shall make and deliver to such bail or to his attorney a duplicate thereof. Upon the return of said certificate, the court which made the said order, or any judge thereof, may direct that an exoneretur be entered upon his bail-piece, where special bail shall have been found, or otherwise discharge such bail."

§ 83. **Bail in Cases from State Courts.**

"When a writ of error is issued for the revision of the judgment of a State court, in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of, or commission held or authority exercised under, the United States, the defendant, if charged with an offense that is bailable by the laws of such State,

[3] Ewing *v.* United States, 240 Fed. 241, 153 C. C. A. 167 (6th Cir.).

§ 81. [1] Smith *v.* Lee, 13 Fed. 28.

shall not be released from custody until a final judgment upon such writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the State court, is given; and if the offense is not so bailable, until a final judgment upon the writ of error." [1]

§ 84. Bail Bond Is a Contract — Enforced by Scire Facias.

Under the laws of the United States a bail bond given in a criminal case is a contract between the sureties and the government that if the latter will release the principal from custody, the sureties will undertake that he shall personally appear at a specific time and place to answer. If the condition of the bail bond is broken by the failure of the principal to appear, the sureties become the absolute debtors of the United States for the amount of the penalty. Therefore a debt resulting from the forfeiture of a bail bond for the appearance of a party in a criminal case may be enforced by *scire facias* in the court possessing the record, or by an ordinary suit in any other court of competent jurisdiction.[1] The proceeding by *scire facias* is a civil action, separate and distinct from the criminal suit, as much so as would be an action in debt founded on same.[2]

§ 85. Surrender by Bail.

"Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to

§ 83. [1] Rev. Stat. § 1017.

§ 84. [1] United States *v.* Zarafonitis, *et al.*, 150 Fed. 97, 80 C. C. A. 51 (5th Cir.); United States *v.* Dunbar, 83 Fed. 151, 27 C. C. A. 488 (9th Cir.); Kirk *v.* United States, 124 Fed. 324, 333; United States *v.* Insley, 54 Fed. 221, 4 C. C. A. 296 (8th Cir.); United States *v.* Graner, 155 Fed. 679.

[2] United States *v.* Payne, 147 U. S. 687; 37 L. ed. 332, 13 S. C. 442; Hunt *v.* United States, 166 U. S. 424, 41 L. ed. 1063, 17 S. C. 609; Owens *v.* McCloskey, 161 U. S. 642; 40 L. ed. 837, 16 S. C. 693; Browne *v.* Chavez, 181 U. S. 68, 45 L. ed. 752, 21 S. C. 514; McRoberts *v.* Lyon, 79 Mich. 33; Hollister *v.* United States, 145 Fed. 773, 76 C. C. A. 339 (8th Cir.); Winder *v.* Caldwell, 14 How. (U. S.) 434, 443, 14 L. ed. 487; United States *v.* Stone, 2 Wall. (U. S.) 525, 535, 17 L. ed. 765; People *v.* Rubright, 241 Ill. 600, 602.

the custody of the marshal, and indorse on the recognizance or certified copy thereof, the discharge and exoneretur of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law." [1]

§ 86. New Bail.

When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.[1] Under this section it was held that a magistrate possesses power to order verbal arrests only in case of felony, breach of the peace committed in his presence, for contempt in open court, or so near thereto as to disturb his official proceedings.[2] When, however, proof is made before any magistrate with authority to commit on criminal charges that a person previously admitted to bail is about to abscond and that his bail is insufficient, such magistrate can order such person to furnish new security or remand him to prison and an order for his arrest may be indorsed on the former commitment or a new warrant therefor may be issued setting forth the cause.[3]

§ 87. Remission of Penalty of Recognizance — When Made.

"When any recognizance in a criminal cause, taken for, or in or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no wilful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced." [1] The court can remit the penalty in whole or in part

§ 85. [1] Rev. Stat. § 1018.

§ 86. [1] Rev. Stat. § 1019.

[2] United States *v.* Ebbs, 49 Fed. 149, 151; United States *v.* Ebbs, 10 Fed. 369.

[3] United States *v.* Ebbs, 49 Fed. 149.

§ 87. [1] Rev. Stat. § 1020.

only when the default of the defendant was not wilful.[2] Failing to appear at the trial because of advice of counsel is a wilful default.[3] An application to remit the penalty on a bail bond may be made at any time and is not governed by the rule that a motion to set aside a judgment must be made within the term.[4]

§ 88. **The Validity of a Recognizance Taken under an Unconstitutional Statute.**

The authorities are not in accord upon the proposition whether a bail bond taken under a penal statute which was afterwards declared unconstitutional is a binding obligation. In United States *v.* Sauer,[1] Judge Maxey upon the review of the authorities held that such a recognizance is absolutely void, while the United States Circuit Court of Appeals for the Seventh Circuit in the case of United States *v.* Du Faur [2] held to the contrary. The Court of Appeals placed its decision upon the ground that the bail bond was a contract and therefore enforceable. The soundness of this contention may be well questioned. An unconstitutional law is no law. It creates no rights and imposes no obligations. The court has no power to require a recognizance. The principal not being bound to appear the surety is deprived of the means of arresting him and of surrendering the bail. Such a contract is without consideration and is void *ab initio*.[3]

§ 89. **Bail during Trial.**

The right of a defendant to bail during the trial is discretionary with the court. A defendant in a criminal case has no absolute right to be admitted to bail during the trial.[1]

[2] United States *v.* Fabata, 253 Fed. 586; United States *v.* Robinson, 158 Fed. 410, 85 C. C. A. 520 (4th Cir.).

[3] United States *v.* Fabata, 253 Fed. 586.

[4] United States *v.* Jenkins, 176 Fed. 672, 100 C. C. A. 224 (4th Cir.); United States *v.* Traynor, 173 Fed. 114; Hunter *v.* United States, 195 Fed. 253 (8th Cir.). Liability of bail where the principal fails to appear from no fault of his own, including cases where the failure was due to his arrest and conviction on another charge, is discussed in the notes to Hargis *v.* Begley, 23 L. R. A. (N. S.) 136; State *v.* Funk, 30 L. R. A. (N. S.) 211, 50 L. R. A. (N. S.) 252; Metcalf *v.* State, L. R. A. 1916 E, 595, and in State *v.* Herber, L. R. A. 1918 F, 396.

§ 88. [1] 73 Fed. 671.

[2] 187 Fed. 812, 109 C. C. A. 572 (7th Cir.).

[3] United States *v.* Hand, 6 McLean, 274; United States *v.* Goldstein's Sureties, 1 Dill. 413, Fed. Cas. No. 15226.

§ 89. [1] United States *v.* Rice, 192 Fed. 720.

§ 90. **Bail after Conviction.**

In United States *v.* St. John,[1] Judge Evans held that a defendant has no absolute right to bail after conviction and pending a writ of error and that the admission to bail was discretionary. It was further held that the defendant, in any event, was not entitled to bail from a justice of the Court of Appeals without a presentation of a bill of exception. Pending a hearing in the Circuit Court of Appeals, a defendant convicted of crime may be released on bail in an amount to be fixed and approved by the court.[2] Where a defendant was allowed a writ of error and bail and failed to perfect his writ of error within six months, as provided by statute, the district court may vacate the order allowing the writ of error and bail and commit the defendant to the custody of the marshal to serve his term of imprisonment.[3] The Supreme Court of the United States laid down the rule that "the statutes of the United States have been framed upon this theory: that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."[4] The Trial Judge as well as the Court of Appeals has the power to release a convicted person on bail pending the determination of the writ of error and it is his duty to do so.[5]

§ 91. **Bail after Affirmance and Pending Petition for Certiorari.**

Bail is a stay of proceedings, arising out of, and is a part of, the pendency of a writ of error. The proceedings in error ended, the right to admit to bail is ended. But the court has the power, on a motion of the defendant, to defer the beginning of the sentence named in the judgment for such time as, within the judgment of

§ 90. [1] 254 Fed. 794 (7th Cir.).

[2] United States *v.* Billingsley, 242 Fed. 330; Hudson *v.* Parker, 156 U. S. 277; 39 L. ed. 424; 15 S. C. 450; Hardesty *v.* United States, 184 Fed. 269, 106 C. C. A. 411 (6th Cir.); Matter of Classen, 140 U. S. 200, 35 L. ed. 409; 11 S. C. 735.

[3] United States *v.* Pollak, 230 Fed. 532.

[4] Hudson *v.* Parker, 156 U. S. 277, 39 L. ed. 424, 15 S. C. 450.

[5] M'Knight *v.* United States, 113 Fed. 451, — C. C. A. — (6th Cir.); In re Classen, 140 U. S. 200, 35 L. ed. 409, 11 S. C. 735.

the court, is reasonable, as, for instance, in case of temporary illness, or a necessity involving the interest of others as well as himself, that his affairs should be arranged, or an application, in good faith, being about to be made to the Supreme Court, for a writ of certiorari pending such application, provided the same be within a reasonable time.[1]

§ 91. [1] Walsh *v.* United States, 177 Fed. 208, 209, 101 C. C. A. 378 (7th Cir.).

CHAPTER XII

REMOVAL FOR TRIAL FROM ONE DISTRICT TO ANOTHER UNDER SECTION 1014 OF THE REVISED STATUTES OF UNITED STATES

§ 92. Preliminary Hearing — Arrest — Opportunity to Be Heard.

A removal cannot be ordered until the defendant has been arrested and committed and given opportunity to show cause why he should not be removed.[1] Removal proceedings are not applicable to corporations,[2] as a corporation cannot be arrested *in corpore*.[3] A defendant charged with the commission of a Federal offense may be removed to the District of Columbia, as the Supreme Court of said District is a Court of the United States.[4]

§ 92. [1] United States *v.* Karlin, 85 Fed. 963; Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162 (2d Cir.). For release on bail pending removal proceedings, *see* BAIL.

[2] United States *v.* Standard Oil Co., 154 Fed. 728.

[3] In re Rosenwasser Bros., 254 Fed. 171.

[4] Benson *v.* Henkel, 198 U. S. 1, 49 L. ed. 919, 25 S. C. 509; United States *v.* Hyde, 132 Fed. 545, s. c. 199 U. S. 62, 50 L. ed. 90, 25 S. C. 760.

§ 93. **Who May Conduct Examination.**

While State officials have jurisdiction to hear the application under Section 1014 of the Revised Statutes the Courts of the United States prefer that the hearing shall take place before the nearest United States Commissioner.[1] The judicial tribunals of the United States Government have exclusive authority to determine whether a person held in custody by authority of the United States courts, its commissioner or officers, are held in conformity with law.[2] State procedure which denies a preliminary examination to a person charged with crime and about to be removed to another district is not applicable in the Federal Courts.[3] A United States Commissioner has no power to direct the removal for trial of a person charged with a Federal offense to another district. His jurisdiction extends only to the issuance of a warrant to hold the prisoner in custody until released on bail, if the offense is bailable, or until a warrant for his removal is issued by the United States District Judge.[4] In all removal proceedings identity of the prisoner must be first established.[5] Persons who were not in the district where the crime is alleged to have been committed should not be removed for trial in that district.[6] The examination should be directed to two main propositions, first, whether an offense has been committed and, second, whether there is probable cause to believe the defendant guilty.[7]

§ 94. **Indictment or Complaint as Pre-requisite.**

Before there can be a removal, there must, of course, be either an indictment returned against the accused or some other strong evidence based upon a complaint supported by oath tending to show that he committed the crime charged against him.[1] A person cannot be ordered removed for trial in another district, if the complaint or indictment charge no offense under the laws of the

§ 93. [1] United States *v.* Yarborough, 122 Fed. 293.

[2] Robb *v.* Connolly, 111 U. S. 624, 639, 28 L. ed. 542, 4 S. C. 544.

[3] Tinsley *v.* Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. C. 430.

[4] Hastings *v.* Murchie, 219 Fed. 83 (C. C. A. 1st Cir.).

[5] In re Burkhardt, 33 Fed. 25; Horner *v.* United States, 143 U. S. 207, 36 L. ed. 126, 12 S. C. 407; Gayon *v.* McCarthy (U. S. Supreme Court, March 1, 1920. Adv. Sheets No. 10, p. 280).

[6] Ireland *v.* Henkle, 179 Fed. 993.

[7] Pereles *v.* Weil, 157 Fed. 419.

§ 94. [1] Greene *v.* Henkel, 183 U. S. 249, 46 L. ed. 177, 22 S. C. 218.

United States or where it is fundamentally defective.[2] It is enough if the indictment or complaint charge in substance an offense against the United States. The commissioner must leave the question of the sufficiency of the indictment to be tested out before the court which returned the indictment.[3] Irregularities in connection with the organization of the grand jury cannot be tested out, in removal proceedings.[4] The earlier decisions, such as *In re Terrell,*[5] holding that a removal will be denied and the prisoner discharged on *habeas corpus* if in the opin on of the court the indictment may be quashed on demurrer, are limited by the decisions of the United States Supreme Court to the rule above stated. A prisoner may be discharged on *habeas corpus* only if the indictment utterly fails to charge any offense against the laws of the United States. Where the application for removal is based on an indictment containing several counts it is enough to justify an order for removal if the indictment contains one good count.[6] In a removal proceeding the first fundamental inquiry is the jurisdiction of the court of the district to which removal is sought and whether the indictment charges any offense against the United States. These questions may be raised at the preliminary hearing before the United States Commissioner, or the United States District Judge at the time when the warrant of arrest is applied for. If either of said requisites is wanting, the application for removal must be denied.[7]

[2] Stewart *v.* United States, 119 Fed. 89, 55 C. C. A. 631 (8th Cir.); Henry *v.* Henkel, 235 U. S. 219, 59 L. ed. 203, 35 S. C. 54.

[3] In re Benson, 130 Fed. 486, *affirmed* 198 U. S. 1, 49 L. ed. 919, 25 S. C. 569; Beavers *v.* Henkel, 194 U. S. 73, 48 L. ed. 882, 24 S. C. 605.

[4] Greene *v.* Henkel, 183 U. S. 249, 46 L. ed. 177, 22 S. C. 218; Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162 (2d Cir.).

[5] 51 Fed. 213 and the cases cited.

[6] Price *v.* Henkel, 216 U. S. 488, 54 L. ed. 581, 30 S. C. 257.

[7] Henry *v.* Henkel, 235 U. S. 219, 59 L. ed. 203, 35 S. C. 540; Tinsley *v.* Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. C. 430; In re Quinn, 176 Fed. 1020; Greene *v.* McDougall, 136 Fed. 618; In Re Huntington, 68 Fed. 882; United States *v.* Conners, 111 Fed. 734; Beavers *v.* Henkel, 194 U. S. 73, 48 L. ed. 882, 24 S. C. 605; Horner *v.* United States, 143 U. S. 207, 36 L. ed. 126, 12 S. C. 407; Ireland *v.* Henkel, 179 Fed. 993; United States *v.* Fowkes, 53 Fed. 13, 3 C. C. A. 394 (3d Cir.); United States *v.* Black, 160 Fed. 431, 87 C. C. A. 401 (7th Cir.); In re Richter, 100 Fed. 295; Greene *v.* Henkel, 183 U. S. 249, 46 L. ed. 171, 22 S. C. 120.

§ 95. **Indictment Is Only Prima Facie Evidence of Probable Cause.**

It is now well settled that in proceedings to remove a prisoner for trial to the district where the offense is charged to have been committed the indictment is *prima facie* evidence of probable cause that the defendant committed the offense in the district in which the indictment was found.[1] But the indictment is by no means conclusive and may be rebutted by evidence.[2]

§ 96. **Points Decided by the Tinsley Case.**[1]

(*a*) That the duty of the district judge, on an application for removal under Section 1014, is judicial, not merely ministerial, in the inquiry which it involves of probable cause for the charge upon which removal is sought. (*b*) That the indictment cannot be treated as conclusive; that it is only *prima facie* evidence which may be overcome by proof; and that evidence to that end is not only admissible upon inquiry, but must receive just consideration, in so far as it tends to disprove either jurisdiction for trial or amenability under the charge.[2]

§ 97. **Right of Accused to Offer Evidence.**

The defendant may present evidence to show that the offense was not committed within the district to which it is aimed to have him removed for trial or showing his innocence and the want of probable cause. He may also exhibit other legal reasons why the application for removal should be denied.[1] The evidence submitted by a defendant will not carry much weight if he claims the privilege of exemption from cross-examination, under a State statute.[2] The main fact that a grand jury sitting in another dis-

§ 95. [1] Beavers *v.* Henkel, 194 U. S. 73, 48 L. ed. 882, 24 S. C. 605.

[2] Tinsley *v.* Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. C. 430.

§ 96. [1] Tinsley *v.* Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. C. 430.

[2] United States *v.* Black, 160 Fed. 431, 87 C. C. A. 401 (7th Cir.).

§ 97. [1] In re Price, 83 Fed. 830; United States *v.* Pope, Fed. Cas. No. 16069; In re Wood, 95 Fed. 288; United States *v.* Greene, 100 Fed. 941, 183 U. S. 249, 46 L. ed. 177, 22 S. C. 218; United States *v.* Lee, 84 Fed. 626; Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162 (2d Cir.); United States *v.* Fowkes, 53 Fed. 13, 3 C. C. A. 394 (3d Cir.); Tinsley *v.* Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. C. 430; Hastings *v.* Murchie, 219 Fed. 83 (C. C. A. 1st Cir.).

[2] Beaver *v.* Hanbert, 198 U. S. 77, 49 L. ed. 950, 25 S. C. 573.

trict laid the venue of the same crime in its district is not sufficient evidence that the crime has been committed in the district on the indictment on which a removal is demanded.[3]

§ 98. **Return by United States Commissioner to United States District Court.**

It is the duty of the commissioner to return all papers and the evidence to the court and the ruling of the commissioner thereon.[1] Seasonable notice of the filing of the return to the commissioner must be given to the accused so that he may resist the application for removal before the judge.[2]

§ 99. **Review by District Judge.**

A person accused of crime is entitled to the judgment of the district judge as to the existence of probable cause on the evidence that was adduced before the United States Commissioner, or that might have been adduced had he been permitted to introduce same.[1] A Federal judge misconceives his duty and fails to protect the liberty of the citizen if he issues the warrant solely on the strength of an indictment found in a foreign district, which does not substantially state an offense under Federal laws.[2] The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon the record made before the United States Commissioner,[3] and he is not limited to such record but may demand further evidence.[4] As Mr. Justice Brewer appropriately observed in Beavers *v.* Henkel:[5] "It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be

[3] Haas *v.* Henkel, 216 U. S. 462, 54 L. ed. 569, 30 S. C. 249.

§ 98. [1] United States *v.* Yarborough, 122 Fed. 293.

[2] United States *v.* Yarborough, 122 Fed. 293; In re Beshears, 79 Fed. 70; United States *v.* Shepard, 1 Abb. (U. S.) 431, Fed. Cas. No. 16273.

§ 99. [1] Tinsley *v.* Treat, 205 U. S. 20, 59 L. ed. 203, 35 S. C. 54; Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162 (2d Cir.).

[2] Stewart *v.* United States, 119 Fed. 89, 55 C. C. A. 631 (8th Cir.).

[3] In re Richter, 100 Fed. 295; In re Greene, 52 Fed. 104, *Approved* in 205 U. S. 29, 51 L. ed. 689, 27 S. C. 430.

[4] United States *v.* Reddin, 193 Fed. 798; In re Richter, 100 Fed. 295.

[5] 194 U. S. 73, 48 L. ed. 882, 24 S. C. 605.

needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York, and statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting Section 1014 Revised Statute which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a *judicial* rather than a mere *ministerial* act. . . ."

§ 100. Right to Discharge.

When a warrant of removal is refused the defendant is entitled to his discharge.[1]

§ 101. Relief from Order of Removal by Habeas Corpus.

There are cases holding that even after the district judge has improperly ordered the removal of the accused from one district to another, application may be made for release by a petition for a writ of *habeas corpus*. No definite rule exists as to when a writ of *habeas corpus* will lie.[1] A petition for *habeas corpus* and *certiorari* may be presented to the United States Supreme Court. In these matters the court will exercise a wide discretion.[2] The opinion of the district judge on a removal proceeding reviewing the evidence is part of the record and takes the place of a finding.[3] On *habeas corpus*, the question is whether the evidence as a whole supports the finding of the commissioner. The court will review

§ 100. [1] In re Wood, 95 Fed. 288; Pereles *v.* Weil, 157 Fed. 419; In re Corning, 51 Fed. 205, 215; Ex Parte Black, 147 Fed. 832; United States *v.* Lee, 84 Fed. 626; In re Dana, 68 Fed. 886; United States *v.* Karlin, 85 Fed. 963; In re Greene, 52 Fed. 105; Re James, 18 Fed. 853; United States *v.* Greene, 100 Fed. 941, 183 U. S. 249, 46 L. ed. 177, 22 S. C. 218; Stewart *v.* United States, 119 Fed. 89, 55 C. C. A. 631 (8th Cir.); United States *v.* Lee, 84 Fed. 626; United States *v.* Fowkes, 53 Fed. 13, 3 C. C. A. 394 (3d Cir.); United States *v.* Rogers, 23 Fed. 658.

§ 101. [1] Henry *v.* Henkel, 235 U. S. 219, 59 L. ed. 203, 35 S. C. 54.

[2] Tinsley *v.* Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. C. 430; Henry *v.* Henkel, 235 U. S. 219, 59 L. ed. 203, 35 S. C. 54.

[3] Greene *v.* Henkel, 183 U. S. 249, 46 L. ed. 177, 22 S. C. 218.

the evidence to ascertain what it really shows, and if it finds that all the evidence taken together does not support the commissioner's finding of probable cause, this ruling may be disregarded, and the defendant discharged.[4]

§ 102. **Writ for Removal of Prisoner from One District to Another.**

"Only one writ or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed." [1]

§ 103. **Arrest and Removal to or from the Philippine Islands.**

"The provisions of section ten hundred and fourteen of the Revised Statutes, so far as applicable, shall apply throughout the United States for the arrest and removal therefrom to the Philippine Islands of any fugitive from justice charged with the commission of any crime or offense against the United States within the Philippine Islands, and shall apply within the Philippine Islands for the arrest and removal therefrom to the United States of any fugitive from justice charged with the commission of any crime or offense against the United States. Such fugitive may, by any judge or magistrate of the Philippine Islands and agreeably to the usual mode of process against offenders therein, be arrested and imprisoned, or bailed, as the case may be, pending the issuance of a warrant for his removal to the United States, which warrant it shall be the duty of a judge of the court of first instance season-

[4] Price *v.* Henkel, 216 U. S. 488, 54 L. ed. 581, 30 S. C. 257; United States *v.* Fowkes, 53 Fed. 13, 3 C. C. A. 394 (3d Cir.); United States *v.* Black, 160 Fed. 431, 87 C. C. A. 401 (7th Cir.); In re Byron, 18 Fed. 722; Horner *v.* United States, 143 U. S. 570, 36 L. ed. 266, 12 S. C. 522; Terlinden *v.* Ames, 184 U. S. 270, 46 L. ed. 534, 22 S. C. 484; Ornelas *v.* Ruiz, 161 U. S. 502, 40 L. ed. 787, 16 S. C. 689; Grin *v.* Shine, 187 U. S. 181, 41 L. ed. 130, 23 S. C. 98; United States *v.* Pecahan, 143 Fed. 625; Hyde *v.* Shine, 199 U. S. 62, 50 L. ed. 90, 25 S. C. 760.

§ 102. [1] Rev. Stat. § 1029.

ably to issue, and of the officer or agent of the United States designated for the purpose to execute. Such officer or agent, when engaged in executing such warrant without the Philippine Islands, shall have all the powers of a marshal of the United States, so far as such powers are requisite for the prisoner's safekeeping and the execution of the warrant." [1]

§ 103. [1] Act of Feb. 9, 1903, c. 529, § 1, 32 Stat. L. 806.

CHAPTER XIII

SEARCHES AND SEIZURES

§ 104. Constitutional Guarantees.

The language of the Fourth Amendment is as follows: "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."

§ 104 *a*. History of Amendment as Stated by Mr. Justice Bradley.[1]

"In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures', it is only necessary to recall the contemporary or then recent history of the controversies on

§ 104 *a*. [1] Boyd *v.* United States, 116 U. S. 616 (pp. 624–630), 29 L. ed. 746, 6 S. C. 524.

the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book'; since they placed 'the liberty of every man in the hands of every petty officer.'[2] This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the North Briton was started by John Wilkes, to April, 1766, when the House of Commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English Government and Wilkes in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the North Briton, particularly No. 45, had been very

[2] Note by the Court. — Cooley's Constitutional Limitations, 301–303 (5th ed. 368, 369). A very full and interesting account of this discussion will be found in the works of John Adams, Vol. 2, Appendix A, pp. 523–525; Vol. 10, pp. 183, 233, 244, 256, &c., and in Quincy's Reports, pp. 469–482; and *see* Paxton's Case, *Id.* 51–57, which was argued in November of the same year (1761). An elaborate history of the writs of assistance is given in the Appendix to Quincy's Reports, above referred to, written by Horace Gray, Jr., Esq., now a member of this court.

bold in denunciation of the government, and were esteemed heinously libellous. By authority of the secretary's warrant Wilkes's house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1000 against Wood, one of the party who made the search, and £4000 against Lord Halifax, the Secretary of State who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of Entick *v.* Carrington and Three Other King's Messengers, reported at length in 19 Howell's State Trials, 1029. The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, &c., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord Camden pronounced the judgment of the court in Michaelmas Term, 1765, and the law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time.[3] As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. We think, therefore, it is pertinent to the present subject of discussion to quote somewhat largely from this celebrated judgment. After describing the power claimed by the Secretary of State for issuing general search warrants, and the manner in which they were executed, Lord Camden says: 'Such is the power, and, therefore, one

[3] Note by the Court. — See May's Constitutional History of England, Vol. 3 (American ed., Vol. 2), chap. 11; Broom's Constitutional Law, 558; Cox's Institutions of the English Government, 437.

would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law. The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, &c., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass. Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society. But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen

goods. I answer that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal. The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality, 4 Inst. 176; and, therefore, if the two cases resembled each other more than they do, we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description. . . . If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy; my answer is, that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.' Then, after showing that these general warrants for search and seizure of papers originated with the Star Chamber, and never had any advocates in Westminster Hall except Chief Justice Scroggs and his associates, Lord Camden proceeds to add: 'Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for

instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.' After a few further observations his Lordship concluded thus: 'I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of opinion, that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void.'[4] The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that

[4] Note by the Court. — See further as to searches and seizures, Story on the Constitution, §§ 1901, 1902, and notes; Cooley's Constitutional Limitations, 299 (5th ed. 365); Sedgwick on Stat. and Const. Law, 2d ed. 498; Wharton Com. on Amer. Law, § 560; Robinson *v.* Richardson, 13 Gray, 454.

judgment. In this regard the Fourth and Fifth Amendments run almost into each other. Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures? Could the men who proposed those amendments, in the light of Lord Camden's opinion, have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the 5th section of the act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they have been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred."

§ 104 *b*. **Constitutional Guarantees — *Continued*.**

The duty of enforcing the rights guaranteed by this Amendment rests upon all intrusted with the administration of the Federal laws.[1] The general rule at common law was that no one can break in doors without a warrant issued by a justice of the peace upon probable cause and supported by oath.[2] All alike are protected by the Amendment, whether accused of crime or not.[3] It was adopted as a result of past experience to insure personal liberty[4] and was intended as a positive check upon the powers of Congress.[5] "It

§ 104 *b*. [1] In re Tri-State Coal & Coke Co., 253 Fed. 605; Weeks *v.* United States, 232 U. S. 383, 58 L. ed. 652, 34 S. C. 341.

[2] 2 Burns *Justice*, 348, 2 Hale, P. C. 88, 96; McLennon *v.* Richardson, 15 Gray (Mass.), 74.

[3] Weeks *v.* United States, 232 U. S. 383, 58 L. ed. 652, 34 S. C. 341.

[4] Ex Parte Milligan, 4 Wall. (U. S.) 120, 18 L. ed. 281.

[5] Luther *v.* Borden, 7 How. (U. S.) 66, 12 L. ed. 581; Greene *v.* Biddle, 8 Wheat. (U. S.) 88, 5 L. ed. 547; Weeks *v.* United States, 232 U. S. 383, 58 L. ed. 652, 34 S. C. 341; Veeder *v.* United States, 252 Fed. 414, 246 U. S. 675, 62 L. ed. 933, 38 S. C. 428; In re Tri-State Coal & Coke Co., 253 Fed. 605; Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524; Ex Parte Jackson, 96 U. S. 727, 24 L. ed. 877; Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 S. C. 370.

cannot be too often repeated," said Mr. Justice Harlan,[6] "that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of his life. . . ." A search, to be lawful, and therefore reasonable, must be confined to the place, and the seizure to the things particularly described, otherwise, the effect would be that a search warrant providing for the search of a particular place and the seizure of particular things would become a general warrant when placed in the hands of the government officers.[7] In addition to having the proper warrant, the officer must prove his identity,[8] and disclose the contents of the warrant.[9] The Amendment has no application to State process, unless the writ is in aid of a Federal statute,[10] nor to civil proceedings for the recovery of debts of which a search warrant is not made part.[11] The government can make no use of papers or books illegally seized even though it subsequently returns same. It cannot copy the papers and give notice to produce the originals; nor can an indictment be predicated on any such evidence. The constitutional amendment is applicable to corporations as well as to individuals. The essence of the constitutional provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.[12]

§ 105. **Instances of Unreasonable Search and Seizure.**

Taking of business papers from a place of business by a customs officer, without a warrant but by defendant's permission given under a promise or threat that it would be better for him if he gave them what they wanted, was held to be a violation of the Amend-

[6] Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 449, 38 L. ed. 1047, 14 S. C. 1125.

[7] United States *v.* Friedberg, 233 Fed. 313.

[8] State *v.* Green, 66 Mo. 631.

[9] 2 Hale, P. C. 116; Drennon *v.* People, 10 Mich. 169.

[10] Smith *v.* Maryland, 18 How. (U. S.) 71, 15 L. ed. 269.

[11] Den *v.* Hoboken Land and Improvement Co., 18 How. (U. S.) 272, 15 L. ed. 372.

[12] Silverthorne Lumber Co. and Silverthorne *v.* United States, decided January 26, 1920 (U. S. Supreme Court Adv. Sheets, Feb. 15, 1920, No. 7, Lawyers Co-op. Edition).

ment and the papers so seized were not admissible in evidence against the defendant in a criminal trial.[1] The taking, without a warrant, of books and papers from one's office after his arrest on a criminal charge is an unreasonable search seizure.[2] Refusal by postmaster to deliver mail addressed to a private citizen, constitutes a violation of the constitutional guarantee.[3] Although the city charter empowered the police to carefully inspect small licensed places, the court [4] held that this did not allow them to enter by force. Papers and effects taken from defendant's person or house without a search warrant as provided by law cannot be offered in evidence against the defendant, and on motion of the defendant before trial, will be ordered returned to him. Such seizure is in direct violation of the constitutional rights of the defendant, guaranteeing the right of the people to be secure in their papers against unreasonable searches and seizures except by due process of law. It is too late to make this application at the trial or after trial commenced.[5] The Court in a criminal prosecution has no right "to retain for the purpose of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises." [6] In Weeks *v.* United States,[7] the distinction is made between papers *incidentally* wrongfully seized in the execution of a legal warrant, which may be used in evidence [8] and the case where an application in the cause for their return has been made by the accused before trial. Thus, under a search warrant authorizing the search, for leaf tobacco, of the place of business of one charged with violating the internal revenue laws,

§ 105. [1] United States *v.* Abrams, 230 Fed. 313.

[2] United States *v.* Mounday, 208 Fed. 186; United States *v.* McHie, 194 Fed. 894.

[3] Hoover *v.* McChesney, 81 Fed. 472.

[4] Phelps *v.* McAdoo, 94 N. Y. Supp. 265.

[5] Weeks *v.* United States, 232 U. S. 383, 58 L. ed. 652, 34 S. C. 341; Flagg *v.* United States, 233 Fed. 481, 147 C. C. A. 367 (2d Cir.).

[6] Weeks *v.* United States, 232 U. S. 383, 393, 58 L. ed. 652, 34 S. C. 341. *See also* Silverthorne Lumber Co. and Silverthorne *v.* United States, decided January 26, 1920 (U. S. Supreme Court Adv. Sheets, Feb. 15, 1920, No. 7, Lawyers Co-op. Edition).

[7] 232 U. S. 383.

[8] Adams *v.* New York, 192 U. S. 585, 48 L. ed. 575, 24 S. C. 372.

his private papers, both at his place of business and at his residence, were examined and seized. Before the trial he demanded return of the papers. The papers were ordered to be returned, though desired for use in the prosecution, under the rule stated.[9]

§ 106. Same—When Not "Unreasonable Search and Seizure."

When a document is taken from a person while in the act of committing a crime, which document furnished proof of the *corpus delicti*, the constitutional privileges against searches and seizure do not apply.[1] The depositing of records, documents and papers of a defendant railway company with the chief clerk of its legal department for use by counsel does not make them "confidential", so as to be within the protection of the Amendment.[2] A letter taken under a duly issued search warrant will not be returned on petition alleging that use of the letter will amount to compelling the defendant to give evidence against himself. This question must be determined on the trial when the letter is offered in evidence.[3] A defendant may waive the manner and method of acquisition of his papers, and thereupon the constitutional objection is removed.[4]

§ 107. Impounding Documents.

In Perlman Rim Corporation *v.* Firestone Tire and Rubber Company [1] Judge Manton held that where a party in any action voluntarily produces in court certain papers and they are ordered impounded by the court, such action on the part of the court does not fall within the inhibition of the Sixth Amendment relating to unreasonable searches and seizures. This decision was affirmed by the United States Supreme Court. This case is reported under the title of Perlman *v.* United States.[2] The Supreme Court also held that orders denying a motion to return papers claiming to have been seized illegally are final and appealable. Where, however, documents are taken from a defendant by force, he not having

[9] United States *v.* Friedberg, 233 Fed. 313.

§ 106. [1] United States *v.* Welsh, 247 Fed. 239.

[2] United States *v.* Philadelphia & R. Ry. Co., 225 Fed. 301.

[3] United States *v.* Gouled, 253 Fed. 770.

[4] United States *v.* Gouled, 253 Fed. 770.

§ 107. [1] 244 Fed. 304.

[2] 247 U. S., 7, 62 L. ed. 950, 38 S. C. 417.

voluntarily produced or surrendered same, their use before a grand jury would constitute a compulsory production, which is prohibited by the Constitution.[3]

§ 108. Papers Illegally Seized Must Be Returned on Motion.

The Federal District Court has authority to order on motion the return of papers and effects in the possession of the United States Attorney and other officers of the court which have been obtained illegally or unconstitutionally from a defendant by government officers while acting under color of their office.[1] Acquiescence by an agent of one whose property has been illegally seized does not bar relief from the illegal seizure.[2] And documents seized on a search warrant, having a bearing upon the case in which the search warrant was issued, must be returned to the custody of the person from whom they were taken. They cannot be used as a basis for other indictments charging different crimes.[3]

§ 109. Evidence Obtained under a Search Warrant.

Where a search warrant is issued which is regular on its face directing certain premises, other than the defendant's, to be searched, and incriminating documents are found therein, same may be admitted in evidence, because said documents were not technically in the defendant's possession and consequently were not taken from him.[1] But where documents or other property are obtained

[3] Silverthorne Lumber Co. *v.* United States (Decided by U. S. Supreme Court January 26, 1920); Ballman *v.* Fagin, 200 U. S. 186, 50 L. ed. 433, 26 S. C. 212; Wilson *v.* United States, 221 U. S. 361, 55 L. ed. 771, 31 S. C. 538; Ex Parte Chapman, 153 Fed. 371; In re Kanter, 117 Fed. 356; In re Hess, 134 Fed. 109; United States *v.* Mills, 185 Fed. 318; United States *v.* Abrams, 230 Fed. 313.

§ 108. [1] Weeks *v.* United States, 232 U. S. 370, 58 L. ed. 652, 34 S. C. 341; Wise *v.* Mills, 220 U. S. 549, 55 L. ed. 579, 31 S. C. 597; Wise *v.* Henkel, 220 U. S. 556, 55 L. ed. 581; United States *v.* Mills, 185 Fed. 318; United States *v.* McHie, 194 Fed. 894; United States *v.* Abrams, 230 Fed. 313; In re Rosenwasser Bros., 254 Fed. 171; United States *v.* Friedberg, 233 Fed. 313.

[2] In re Tri-State Coal and Coke Co., 253 Fed. 605.

[3] United States *v.* Mills, 185 Fed. 318; Veeder *v.* United States, 252 Fed. 414 (C. C. A. 7th Cir.); Certiorari denied in 246 U. S. 675, 62 L. ed. 933, 38 S. C. 428.

§ 109. [1] Schenck *v.* United States, decided March 3, 1919; Adams *v.* New York, 192 U. S. 585, 48 L. ed. 575, 24 S. C. 372; Weeks *v.* United States, 242 U. S. 383, 58 L. ed. 652, 34 S. C. 341; Johnson *v.* United

illegally without a search warrant, the same cannot be introduced in evidence if the defendant seasonably applies to the court for their return to him.[2] Similarly, where the documents were procured by means of a void warrant.[3] On the other hand, it was held that the inhibition is a limitation upon the power of the government to make such searches and seizures for its own benefit, and has no reference to unauthorized acts of individuals, and therefore the government may make use of evidence obtained by an individual by an illegal search or seizure.[4]

§ 110. **Federal Legislation.**

The statute recently passed[1] dealing with the subject of search warrants is as follows[2]: "1. Authority to issue — A search warrant authorized by this title may be issued by a judge of a United States District Court or by a judge of a State or Territorial court of record, or by a United States commissioner for the district wherein the property sought is located. 2. Grounds for issue — A search warrant may be issued under this title upon either of the following grounds: (*a*) When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be. (*b*) When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any

States, 228 U. S. 457, 57 L. ed. 919, 33 S. C. 572. In the Schenck case, the Court remarked: "The notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound," *citing* Holt *v.* United States, 218 U. S. 245, 54 L. ed. 1021, 31 S. C. 2. *Note:* For a further exposition of the subject as to the competency of evidence procured by an illegal seizure, *see* SELF-INCRIMINATION.

[3] Weeks *v.* United States, 242 U. S. 383, 58 L. ed. 652, 34 S. C. 341.

[3] United States *v.* Friedberg, 233 Fed. 313.

[4] Bacon *v.* United States, 97 Fed. 35, 40, 38 C. C. A. 37 (8th Cir.), 175 U. S. 726, 44 L. ed. 339, 20 S. C. 1022.

§ 110. [1] Act of June 15th, 1917, c. 30, title XI, § 23, 40 Stat. L. 230.

[2] "An Act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States and for other purposes."

house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be. (c) When the property, or any paper, is possessed, controlled, or used in violation of section twenty-two of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed. 3. Probable cause and affidavit — A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched. 4. Examination of applicant and witnesses; affidavits and depositions — The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them. 5. Affidavits and depositions — The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. 6. Issue; contents — If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner. 7. Service — A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution. 8. Same; breaking and entering — The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. 9. Same; Breaking and entering to liberate detained person aiding in execu-

tion of warrant — He may break open any outer or inner door or window of a house for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation. 10. Same; daytime — The judge or commissioner must insert a direction in the warrant that it be served in the day time, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night. 11. Same; time for and return — A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void. 12. Same; copy and receipt for property taken to person from whom taken — When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property. 13. Return; contents — The officer must forthwith return the warrant to the judge or commissioner and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory and taken before the judge or commissioner at the time, to the following effect: 'I, R. S., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.' 14. Same; copy of inventory for person from whom property taken — The judge or commissioner must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken and to the applicant for the warrant. 15. Taking testimony — If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness. 16. Restoration of property taken; retention of custody of property by officer or other disposition — If it appears that the property or

paper taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper taken is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law. 17. Filing papers with clerk of court having jurisdiction — The judge or commissioner must annex the affidavits, search warrant, return, inventory and evidence, and if he has not power to inquire into the offense in respect to which the warrant was issued he must at once file the same, together with a copy of the record of his proceedings, with the clerk of the court having power to so inquire. 18. Obstructing service or execution — Whoever shall knowingly and willfully obstruct, resist, or oppose any such officer or person in serving or attempting to serve or execute any such search warrant, or shall assault, beat or wound any such officer or person, knowing him to be an officer or person so authorized, shall be fined not more than $1000 or imprisoned not more than two years. 19. Perjury and subornation of perjury — Sections one hundred and twenty-five and one hundred and twenty-six of the Criminal Code of the United States shall apply to and embrace all persons making oath or affirmation or procuring the same under the provisions of this title, and such persons shall be subject to all the pains and penalties of said sections. 20. Maliciously procuring issue — A person who maliciously and without probable cause procures a search warrant to be issued and executed shall be fined not more than $1000 or imprisoned not more than one year. 21. Officer exceeding authority — An officer who in executing a search warrant willfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1000 or imprisoned not more than one year. 22. Existing laws not repealed — Nothing contained in this title shall be held to repeal or impair any existing provisions of law regulating search and the issue of search warrants."

§ 111. **Judicial Construction.**

Proceedings by search warrants instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though civil in form, are in their nature criminal.[1] A search warrant cannot be issued in a case the prosecution of which is barred by the statute of limitations.[2] A search warrant cannot be issued in aid of a private right.[3] In cases arising in the State courts the claim of the accused for immunity from prosecution 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 United States Supreme Court.[4]

§ 112. **Requisites of Complaint or Information for Issuance of Search Warrant.**

The principles laid down in Chapters 4 and 7 of this book with repect to warrants generally apply equally to searches and seizures and a search warrant not issued in conformity with same will be held to be void. An affidavit and deposition for search warrants to examine "books of account, minute books, letter press copy books, ledgers, journals, cash books, day books, memorandum books, bank books, check books, and receipt books", was held insufficient for lack of particularity.[1] A search warrant issued under Act June 15, 1917 (Espionage Act), must set forth facts and not conclusions from which the court can determine whether a proper case for the issuance of the warrant has been established.[2] An affidavit for a search warrant need not set forth all the details for passing upon the *materiality* of every document which the warrant might properly produce. General allegation showing materiality to the issue was held to be sufficiently specific.[3] Not only the affi-

§ 111. [1] In re Boyd, 116 U. S. 616, 633, 29 L. ed. 746, 6 S. C. 524; In re Food Conservation Act, 254 Fed. 893, 904; Stone *v.* United States, 167 U. S. 178, 42 L. ed. 127, 17 S. C. 778; United States *v.* McKee, 4 Dill. 128.

[2] Veeder *v.* United States, 252 Fed. 414 (C. C. A. 7th Cir.), 246 U. S. 675, 62 L. ed. 933, 38 S. C. 428.

[3] Lipman *v.* People, 175 Ill. 101; Walker-Gordon Laboratory Co., 205 Ill. 503.

[4] State of New York *v.* Eno, 155 U. S. 89, 99, 39 L. ed. 80, 15 S. C. 30.

§ 112. [1] Veeder *v.* United States, 252 Fed. 414 (C. C. A. 7th Cir.), 246 U. S. 675, 62 L. ed. 933, 38 S. C. 428.

[2] In re Tri-State Coal & Coke Co., 253 Fed. 605.

[3] In re Rosenwasser Bros., 254 Fed. 171.

davit made for the issuance of a search warrant, but also the complaint and affidavit charging the crime, may be considered in determining probable cause for the issuance of a search warrant. Where these papers together make out a showing of probable cause as to the existence and place of keeping of the papers sought and as to the commission of the crime charged, the issuance of a search warrant by a commissioner is justified.[4] Construing the general search warrant statute Mr. Justice Baker, speaking for the Court of Appeals of the 7th Circuit,[5] said: "One's person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike. One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search warrant." A person who is incapable of testifying under the law cannot swear to a complaint upon which a warrant will issue.[6] The court further said: "No search warrant shall be issued unless the judge has first been furnished with facts under oath — not suspicions, beliefs or surmises — but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law. The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be

[4] In re Rosenwasser Bros., 254 Fed. 171.

[5] Veeder *v.* United States, 252 Fed. 418.

[6] Graff *v.* State, 37 Ind. 353; Woods *v.* State, 134 Ind. 35.

delegated by the judge to the accuser. No search warrant should be broader than the justifying basis of facts. For example, if a murder has been committed by means of a shot from a gun and by no other means, the search warrant should not direct the officer to enter the accused's home and seize the family register of births and deaths. And as the serving officer has no discretion in executing the search warrant in its entirety, the householder is entitled to have the search warrant quashed. . . ." The denial of a search warrant on the ground of insufficiency of the affidavit or deposition is not a bar to further proceedings.[7]

§ 113. **Right to Review Search Warrant Orders.**

An order denying a motion to quash a search warrant and for the return of the papers seized is reviewable by a writ of error.[1]

§ 113 *a*. **Subpœnas Duces Tecum and Orders to Produce.**

An order for the production of books and papers may constitute an unreasonable search and seizure within the meaning of the Fourth Amendment. The Constitution may be violated through a compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*. A *subpœna duces tecum* too general in terms cannot be upheld as reasonable. A general *subpœna duces tecum* is as indefensible as a search warrant. A showing must be first made of the materiality of the evidence sought to be elicited and the necessity for the production of same.[1]

[7] Veeder *v.* United States, 252 Fed. 414, 246 U. S. 675, 62 L. ed. 933, 38 S. C. 428.

§ 113. [1] Veeder *v.* United States, 252 Fed. 414.

§ 113 *a*. [1] Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 S. C. 370; Nelson *v.* United States, 201 U. S. 92, 50 L. ed. 673, 26 S. C. 358.

CHAPTER XIV

PRIVILEGES AND IMMUNITIES AGAINST SELF-INCRIMINATION

§ 114. Constitutional Guarantees.

The Fifth Amendment to the Constitution of the United States among other things provides: "Nor shall (any person) be compelled in any Criminal Case to be a witness against himself." The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions

or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the case with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.[1] The words "criminal case" have been construed as including such crimes the punishment for which is to be visited upon the person of the offender in the ordinary course of a criminal prosecution in contradistinction to a proceeding *in rem*.[2] Suits for penalties and forfeitures which are *quasi*-criminal in nature, are within the meaning of the above constitutional provision.[3] This constitutional safeguard, deliberately framed for the purpose of protecting the rights of the individual citizen, is of equal if not more concern than the

§ 114. [1] Brown *v.* Walker, 161 U. S. 591, 597, 40 L. ed. 819, 16 S. C. 644. The Star Chamber had an inquisitorial procedure. Upon suggestion or suspicion citizens were subpœnaed and subjected to examination under the *ex officio* oath. See preamble of Act for the Abolition of that Court. (July 5, 1641; 16 Charles 1, c. 10, 5 S. R. 110.) The theory of our government is accusatory and not inquisitorial. United States *v.* James, 60 Fed. 257 (D. C.).

[2] United States *v.* Three Tons of Coal, 6 Biss. (U. S.) 379, Fed. Cas. No. 16515.

[3] Boyd *v.* United States, 116 U. S. 616, 634, 29 L. ed. 746, 6 S. C. 524; Lees *v.* United States, 150 U. S. 476, 37 L. ed. 1150, 14 S. C. 163.

conviction of any one accused of the commission of a criminal act, no matter how guilty in fact he may be.[4] As Pollock, J.[5] so ably stated: "One wrong plus another does not make a right." A witness cannot be required to waive his constitutional privilege upon an assurance by the court that no information given by him in his answers to the questions would or could be used against him in any prosecution in any court of the United States. He has a right to stand upon his constitutional privilege notwithstanding such assurance.[6]

§ 114 *a*. Tending to Disgrace Witness.

If the answer of the witness may have a tendency to disgrace him or bring him into disrepute, and the proposed evidence be material to the issue on trial, the great weight of authority is that he may be compelled to answer, although, if the answer can have no effect upon the case, except so far as to impair the credibility of the witness, he may fall back upon his privilege.[1] But even in the latter case, if the answer of the witness will not directly show his infamy, but only tend to disgrace him, he is bound to answer.[2] The cases of Respublica *v.* Gibbs,[3] and Lessee of Galbreath *v.* Eichelberger,[4] to the contrary, are opposed to the weight of authority. The extent to which the witness is compelled to answer such questions as do not fix upon him a criminal culpability is within the control of the legislature.[5]

§ 115. Scope of Guarantee.

The constitutional provision against self-incrimination should receive a broad construction to secure immunity to the citizen from every kind of self-accusation. A literal construction would

[4] United States *v.* Mounday, 208 Fed. 186.

[5] United States *v.* Mounday, *supra*.

[6] Foot *v.* Buchanan, 113 Fed. 156, 161 (5th Cir.).

§ 114 *a*. [1] Brown *v.* Walker, 161 U. S. 591, 597, 40 L. ed. 819, 16 S. C. 644; 1 Greenl. on Ev. §§ 454, 455; People *v.* Mather, 4 Wend. 229; Lohman *v.* People, 1 N. Y. 379; Commonwealth *v.* Roberts, Brightly, 109; Weldon *v.* Burch, 12 Illinois, 374; Cundell *v.* Pratt, Moody & Malkin, 108; Ex parte Rowe, 7 California, 184.

[2] Brown *v.* Walker, 161 U. S. 591, 597, 40 L. ed. 819, 16 S. C. 644; 1 Greenl. on Ev. § 456.

[3] 3 Yeates, 429.

[4] 3 Yeates, 515.

[5] State *v.* Nowell, 58 N. H. 314, 316. Brown *v.* Walker, *supra*.

deprive it of its efficiency.[1] And this protection is extended against the use of the information received in other proceedings.[2] The prohibition of compelling a man to be witness against himself in a criminal court is the prohibition of the use of physical or moral compulsion to extort communications from him; it is not extended to an exclusion of his body as evidence when it may be material, for such an objection, in principle, would forbid a jury to look at a prisoner and compare his features with a photograph offered in proof.[3] The production of a documentary confession by a third person, into whose hands it has come *alio intuitu*, does not compel the witness to be a witness against himself in violation of the Amendment.[4] Calling on a defendant in the presence of the jury, by direction of the court, to produce a self-incriminating document, is an infraction of the clause.[5] A defendant may not object to evidence tending to incriminate him and which was obtained during a search of the premises of some one else and made under a lawful search warrant.[6] Testimony given by a defendant before a commissioner at a preliminary hearing may be admitted in evidence against him at the trial unless it affirmatively appears from the record that it was not voluntarily given.[7] This provision, however, is not binding upon the States.[8] In a recent case [9] the Supreme Court of the United States considered this question which arose in the State court of Pennsylvania, whether the schedules filed by a bankrupt, and the books and papers which he turned over to the trustee under the peremptory requirements of the bankruptcy law, could be used in a criminal trial of the bankrupt in a State court. It was decided that the Fifth Amendment to the

§ 115. [1] Wilson *v.* United States, 221 U. S. 361, 55 L. ed. 771, 31 S. C. 538; In re Nachman, 114 Fed. 995; Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524; Counselman *v.* Hitchcock, 142 U. S. 547, at 562, 35 L. ed. 1110, 12 S. C. 195; Brown *v.* Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. C. 644; McKnight *v.* United States, 115 Fed. 972, 54 C. C. A. 358 (6th Cir.).

[2] Counselman *v.* Hitchcock, 142 U. S. 562, 35 L. ed. 1110, 12 S. C. 195.

[3] Holt *v.* United States, 218 U. S. 245, 54 L. ed. 1021, 31 S. C. 2.

[4] Johnson *v.* United States, 228 U. S. 457, 57 L. ed. 919, 33 S. C. 572.

[5] McKnight *v.* United States, 115 Fed. 972, 54 C. C. A. 358 (6th Cir.).

[6] Schenk *v.* United States, 249 U. S. 47.

[7] Powers *v.* United States, 223 U. S. 303, 56 L. ed. 448, 32 S. C. 281.

[8] Ensign *v.* Pennsylvania, 227 U. S. 592, 57 L. ed. 658, 33 S. C. 321.

[9] Ensign *v.* Pennsylvania, *supra.*

Constitution of the United States is not obligatory upon the governments of the several States, or their judicial establishments, and regulates the procedure of the Federal Courts only.

§ 115 *a*. Matters Barred by Limitations and Pardon.

If a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to answer.[1] If the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offense as if it had never been committed.[2]

§ 116. Compelling Production of Papers.

Commenting on the intimate relation between the Fourth and Fifth Amendments, the Supreme Court in Boyd *v.* United States,[1] said: "They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man in a criminal case to be a witness against himself which is condemned in the Fifth Amendment, throws light on the question as to what is a 'reasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[2] Accordingly, a statute

§ 115 *a*. [1] Brown *v.* Walker, 161 U. S. 591, 597, 40 L. ed. 819, 16 S. C. 644; Parkhurst *v.* Lowten, 1 Merivale, 391, 400; Calhoun *v.* Thompson, 56 Alabama, 166; Mahanke *v.* Cleland, 76 Iowa, 401; Weldon *v.* Burch, 12 Illinois, 374; United States *v.* Smith, 4 Day, 121; Close *v.* Olney, 1 Denio, 319; People *v.* Mather, 4 Wend. 229, 252, 255; Williams *v.* Farrington, 11 Cox Ch. R. 202; Davis *v.* Reid, 5 Sim. 443; Floyd *v.* State, 7 Tex. 215; Maloney *v.* Dows, 2 Hilt. 247; Wolfe *v.* Goulard, 15 Abb. Pr. 336.

[2] Brown *v.* Walker, 161 U. S. 591, 597, 40 L. ed. 819, 16 S. C. 644; Roberts *v.* Allatt, Moody & Malkin, 192, *overruling* Rex *v.* Reading, 7 How. St. Tr. 259, 296, and Rex *v.* Earl of Shaftsbury, 8 How. St. Tr. 817; Queen *v.* Boyes, 1 B. & S. 311, 321.

§ 116. [1] 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524.

[2] In Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 48 L. ed. 860, 24 S. C. 563, the Boyd case, *supra*, was considered in connection with the Fourth and Fifth Amendments and its reasoning was approved again.

providing that a defendant in a criminal case should be compelled to produce his private books and papers in court or else, that the information filed by the district attorney be held as confessed, was held to be unconstitutional and repugnant to the Fourth and Fifth Amendments to the Constitution of the United States. It was held also that the constitutional provision against unreasonable searches and seizures may be violated even though no actual entry upon the premises is made.[3] If no authority exists to compel a man to produce his books and papers, this doctrine cannot be obviated by an order requiring his attorney to produce same.[4]

§ 117. The Old Statute.

Section 860 of the Revised Statutes of the United States provided: "That no answer or other pleading of any party and no discovery of evidence obtained by means of any judicial proceeding from any party or witness . . . shall be given in evidence or in any manner used against such party or witness . . . in any court of the United States or in any proceeding by or before any officers of the United States in respect to any crime." The Supreme Court of the United States held that it was not as broad as the Constitution.[1] It was construed as meaning that no evidence obtained from a witness by means of a judicial proceeding 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 proceeding, or for the enforcement of any penalty or forfeiture. But it has only this effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.[2]

[3] Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524.

[4] Grant *v.* United States, 227 U. S. 74, 57 L. ed. 423, 33 S. C. 190.

§ 117. [1] Counselman *v.* Hitchcock, 142 U. S. 562, 35 L. ed. 1110, 12 S. C. 195; Podolin *v.* Lesher Warner Dry Goods Co., 210 Fed. 97, 126 C. C. A. 632 (3d Cir.). This section was repealed on May 7, 1910, but was held applicable to pending causes. Cameron *v.* United States, 231 U. S. 710, 58 L. ed. 448, 34 S. C. 244.

[2] Counselman *v.* Hitchcock, 142

§ 118. **In Proceedings before the Grand Jury.**

The privilege may be exercised in proceedings before a grand jury.[1] In the leading case of Counselman *v.* Hitchcock,[2] Counselman had been subpœnaed before a Federal grand jury to testify in an investigation requested by the Interstate Commerce Commission, and then being conducted by the district attorney for that district, as to whether certain railroads engaged in interstate commerce had violated the provisions of the act in that behalf, by charging to certain shippers less than their published tariff rates for the transportation of grain, and in this manner giving tariff rates for the transportation of grain, and so giving preference to such shippers. Counselman was a large shipper of grain, with offices in Chicago, and in his examination he declined to answer such questions as the following on the ground that to answer might tend to incriminate him: "Have you during the past year, Mr. Counselman, obtained a rate for the transportation of your grain on any of the railroads coming to Chicago from points outside of this state, less than the tariff or open rate?" Other and kindred questions to the same purpose were submitted to him, all of which he declined to answer upon the same ground. Having been committed for contempt by the district court for refusal to answer these questions, a writ of *habeas corpus* was sued out in his behalf, which finally reached the Supreme Court. In discussing the scope of the constitutional provision invoked by Counselman, the Supreme Court says: "It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself. . . . Its provision is 'that no person shall be compelled in *any* criminal case to be a witness against himself'. This provision must have a broad construction in favor of the right which it was

U. S. 547, 564, 35 L. ed. 1110, 12 S. C. 195; In re O'Shea, 166 Fed. 180; La Bourgogne, 104 Fed. 823; In re Phillips, 10 Int. Rev. Rec. 107, 17 Fed. Cas. No. 11,097; Podolin *v.* Lesher Warner Dry Goods Co., 210 Fed. 97, 126 C. C. A. 632 (3d Cir.).

§ 118. [1] Counselman *v.* Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 12 S. C. 195; United States *v.* Wetmore, 218 Fed. 227; People *v.* Argo, 237 Ill. 173; Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 S. C. 370; Mason *v.* United States, 244 U. S. 362, 61 L. ed. 1198, 37 S. C. 621.

[2] 142 U. S. 547, 35 L. ed. 1110, 12 S. C. 195.

intended to secure. The matter under investigation by the grand jury in this case was a criminal matter to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer he himself was liable to criminal prosecution under the Act. The case before the grand jury was, therefore, a criminal case." The reason given by Counselman for his refusal to answer was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all) the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard. Continuing the Court said: "It is argued for the appellee that the investigation before the grand jury was not a criminal case, but was solely for the purpose of finding out whether a crime had been committed. . . . In support of this view, reference is made to Article Six of the Amendments to the Constitution of the United States, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. But this provision distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury. A criminal prosecution under Article Six of the amendments is much narrower than a 'criminal case' under Article Five of the amendments. It is entirely consistent with the language of Article Five, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury."

§ 119. Immunity — When Must Be Claimed.

The time to claim immunity from self-incrimination is when the testimony is asked for; if made later the privilege is waived.[1]

§ 120. Who May Claim Privilege — Corporations.

The provision is not confined, or even directed, to defendants. It is for the protection of witnesses, without respect to their

§ 119. [1] Burrell *v.* Montana, 194 U. S. 572, 48 L. ed. 1122, 24 S. C. 787; United States *v.* Kimball, 117 Fed. 156 (2d Cir.).

connection with the proceedings. This amendment was adopted at a time when defendants could not testify, either for or against themselves, and therefore it could not be construed as referring to defendants as such. It, of course, includes defendants if they belong to the class of competent witnesses. When the disability with reference to defendants was removed by statute, they then came within the constitutional provision, not because they were defendants, but because they were witnesses.[1] The privilege against self-incrimination does not extend to corporations, nor may it be asserted by their officers and agents in their behalf.[2] And the privileges and immunities possessed by the stockholders are not *ipso facto* those of the corporation.[3] Aliens in the United States are entitled to the protection of the clause.[4] The right is purely a personal privilege of the witness. He cannot plead the fact that some third person might be incriminated by his testimony, even though he is the third person's agent; and this rule applies to officers or agents of corporations.[5] It cannot be invoked by the witness' counsel. The witness has a right to advise with his counsel in the hearing of the court though not privately.[6] But the witness must give his own answer without aid in writing or otherwise.[7] The privilege, being personal, may be waived.[8] The privilege of refusing to testify must be claimed. Unless

§ 120. [1] United States *v.* Wetmore, 218 Fed. 227, 234; Counselman *v.* Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 12 S. C. 195; United States *v.* Kimball, 117 Fed. 156 (2d Cir.).

[2] Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 S. C. 370; Commonwealth *v.* Southern Express Co., 160 Ky. 1, 169 S. W. 517; Baltimore etc., R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 S. C. 621; American Lithographic Co. *v.* Werckmeister, 221 U. S. 603, 55 L. ed. 873, 31 S. C. 676; Orvig Dampskibselskap Actieselskabet *v.* New York & Bermudez Co. *et al.*, 229 Fed. 293.

[3] Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, 586, 10 L. ed. 274, 306; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 S. C. 370; Railroad Tax Cases, 8 Sawy. 238, 13 Fed. 722, 746 (9th Cir.).

[4] United States *v.* Wong Quong Wong, 94 Fed. 832.

[5] Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 S. C. 370; Wilson *v.* United States, 221 U. S. 361, 55 L. ed. 771, 31 S. C. 538; In re Tracy, 177 Fed. 532.

[6] In re Knickerbocker Steamboat Co., 136 Fed. 956 at 958; In re O'Shea, 166 Fed. 180.

[7] In re Knickerbocker Steamboat Co., 136 Fed. 958.

[8] In re Tracy, 177 Fed. 532.

the witness exhibit his unwillingness in some manner, it cannot be presumed to exist.[9]

§ 121. Grounds of Privilege — Unconstitutionality of Statute.

Persons other than a defendant, summoned before a grand jury or a congressional committee, are protected against self-incrimination. They can refuse to testify on that ground, and on that ground only. They have no right to base their refusal on the ground that the statute under which the proceedings are held is unconstitutional.[1]

§ 122. Basis for Claiming Privilege — Danger.

The constitutional protection against self-incrimination "is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law."[1] The authorities are numerous, and very nearly uniform, to the effect that, if the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may lead to bring the witness into disrepute, though not to incriminate him and which does entitle him to the privilege of silence, it necessarily follows that if it tends also to incriminate him, but at the same time operates as a pardon for the offense, the fact that the disgrace remains does not entitle him to immunity in this case any more than in the other.[2] Hence,

[9] United States *v.* Kimball, 117 Fed. 156, 160 (2d Cir.).

§ 121. [1] Nelson *v.* United States, 201 U. S. 92, 50 L. ed. 673, 26 S. C. 358; Ex Parte Blair, 253 Fed. 800.

§ 122. [1] Mason *v.* United States, 244 U. S. 362, 61 L. ed. 1198, 37 S. C. 621, *citing* Heike *v.* United States, 227 U. S. 131, 144, 57 L. ed. 450, 33 S. C. 226; Ex Parte Irvine, 74 Fed. 954, 960 (C. C. A. 6th Cir.); Brown *v.* Walker, 161 U. S. 591, 599, 40 L. ed. 819, 16 S. C. 644, and quoting from Reg. *v.* Boyes, 1 Best & S. 311, 329.

[2] Brown *v.* Walker, 161 U. S. 591, 605, 40 L. ed. 819, 16 S. C. 644.

where it clearly appears to the court that a witness contumaciously or mistakenly refuses to furnish evidence which cannot possibly injure him, he will not be permitted to shield himself behind the privilege,[3] especially if the witness does not swear that he believes it would.[4] It is only where the criminating effect of the question is doubtful that the motive of the witness in pleading the privilege may be considered. In such a case, his bad faith would have a tendency to show that his answer would not subject him to the danger of a criminal prosecution or help to prove him guilty of crime.[5] But if the fact appears that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question.[6] The mere statement of a witness that his answer to a question would criminate or tend to criminate him is not conclusive. It is for the judge to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish a link in the chain of evidence necessary to convict him. It must appear from the character of the question and other facts adduced, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime.[7] Although one question in a series does not call for an incriminating answer, relief is not denied. If it is one step of a series which will tend to incriminate him, the witness is not compelled to answer.[8] In the trial of Aaron Burr,[9] Chief Justice Marshall summed up the rule as follows: "It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime

[3] In re Kanter, 117 Fed. 356; United States *v.* Miller, 2 Cranch, C. C.) 247.

[4] In re Levin, 131 Fed. 388.

[5] Ex Parte Irvine, 74 Fed. 954 (C. C. A. 6th Cir.).

[6] Foot *v.* Buchanan, 113 Fed. 156, 160 (C. C. A. 5th Cir.); In re Kanter, 117 Fed. 356; In re Shera, 114 Fed. 207.

[7] Ex parte Irvine, 74 Fed. 954, 960 (C. C. A. 6th Cir.); Foot *v.* Buchanan, 113 Fed. 156, 160 (C. C. A. 5th Cir.); United States *v.* McCarthy, 18 Fed. 87 (C. C. A. 2d Cir.); Mason *v.* United States, 244 U. S. 362, 61 L. ed. 1198, 37 S. C. 621.

[8] Foot *v.* Buchanan, 113 Fed. 156, 161 (C. C. A. 5th Cir.).

[9] Fed. Cas. No. 14692 *e.*

he is not bound to answer it, so as to furnish matter for that conviction. In such a case, the witness himself must judge what his answer will be, and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer it. . . ."

§ 123. **In Bankruptcy Matters.**

Where a person is under examination before a referee in bankruptcy, he is not obliged to answer questions when he states that his answers might tend to incriminate him; and this is true notwithstanding Section 7 of the Bankruptcy Act which provides that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." [1]

§ 124. **Not Privileged When Offense Barred by Limitations.**

A witness may be compelled to testify if a prosecution against him is barred by lapse of time, a pardon, or by statutory enactment.[1] A criminality provided against is a present, not a past, criminality.[2]

§ 125. **In Case of Pardon.**

Granting that a pardon has been legally issued and is sufficient for immunity, the accused has a right to refuse it, and as it does not become effective, his constitutional right to decline to testify remains to be asserted; and his reasons for his action are personal. The differences between legislative immunity and a pardon are substantial. The latter carries an imputation of guilt. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is non-committal. It is the unobtrusive act of the law giving protection against a sinister use of his testimony, not like a pardon requiring him to confess his guilt in order to avoid a conviction of it.[1]

§ **123.** [1] In re Rosser, 96 Fed. 305; In re Feldstein, 103 Fed. 269; In re Shera, 114 Fed. 207; In re Walsh, 104 Fed. 518; In re Scott, 95 Fed. 815; Mackel *v.* Rochester, 102 Fed. 314, 42 C. C. A. 427 (9th Cir.); In re Hess, 134 Fed. 109, 113; In re Smith, 112 Fed. 509.

§ **124.** [1] Robertson *v.* Baldwin, 165 U. S. 275, 281, 41 L. ed. 715, 17 S. C. 326.

[2] Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 S. C. 370.

§ **125.** [1] Burdick *v.* United States, 236 U. S. 79, 94, 59 L. ed. 476, 35 S. C. 267, *Reversing* 211 Fed. 491.

§ 126. **May Be Dispensed With by Statute — When.**

The constitutional guaranty may be lawfully dispensed with by an act of Congress providing immunity from punishment for the commission of the offense which is established by the evidence procured from a defendant.[1] Such a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.[2] Accordingly it has been held that the act of Congress [3] exempting a witness from any prosecution resulting from testimony given before the Interstate Commerce Commission was a valid enactment.[4] No statute which leaves the party or witness subject to prosecution after he answers a criminal question put to him can have the effect of supplanting the privilege conferred by this provision. A statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.[5] There is a clear distinction between an amnesty and the constitutional protection of a party from being compelled to be a witness against himself.[6]

§ 127. **Prosecution for Perjury.**

A prosecution for perjury is not prohibited by immunity as to self-incrimination.[1] The immunity afforded by the Fifth Amendment related to the past; it is not a license to the person testifying to commit perjury either under the provisions of Revised Statute Section 860, or of the Bankruptcy Act.[2]

§ 126. [1] Brown *v.* Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. C. 644; Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 S. C. 370; Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 48 L. ed. 860, 24 S. C. 563.

[2] Counselman *v.* Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 12 S. C. 195.

[3] Act of Feb. 11th, 1893, 27 Stat. L. 443.

[4] Brown *v.* Walker, *supra;* Interstate Commerce Commission *v.* Baird, *supra.*

[5] Counselman *v.* Hitchcock, 142 U. S. 547, 585, 35 L. ed. 1110, 12 S. C. 195; Heike *v.* United States, 217 U. S. 423, 54 L. ed. 821, 30 S. C. 539; United States *v.* Bell, 81 Fed. 830, 843 (C. C. A. 6th Cir.); Glickstein *v.* United States, 222 U. S. 139, 56 L. ed. 128, 32 S. C. 71.

[6] Heike *v.* United States, 227 U. S. 131, 142, 57 L. ed. 450, 33 S. C. 226.

§ 127. [1] Glickstein *v.* United States, 222 U. S. 139, 56 L. ed. 128, 32 S. C. 71; Cameron *v.* United States, 231 U. S. 710, 58 L. ed. 448, 34 S. C. 244; United States *v.* Bell, 81 Fed. 830, 840 (C. C. A. 6th Cir.).

[2] Glickstein *v.* United States, 222 U. S. 139, 56 L. ed. 128, 32 S. C. 71.

§ 128. **Immunity under Bankruptcy Act.**

The use of testimony given by the bankrupt in a hearing before a commissioner to contradict his testimony given before the referee, in a trial on an indictment for perjury in giving the latter testimony, violates the immunity guaranteed under Revised Statute Section 860, and the use thereof is reversible error.[1] A bankrupt has a privilege against self-incrimination. However, the privilege is to suppress but not to prevent the truth; and when a bankrupt once files his schedules, he asserts not only that he has the property mentioned, but also that he has no more. This statement of fact should subject him to all legitimate cross-examination as long as it opens the way to an independent fact.[2] A bankrupt is protected from criminal prosecution by reason of any matter disclosed by him or growing out of the bankruptcy itself, provided he testifies truthfully. However, if during his examination he testified falsely in a Court of Bankruptcy as to any matter material to the issue, he may be prosecuted for perjury.[3] It is improper to introduce as evidence in a criminal case the bankrupt's schedules for the purpose of showing a concealment of assets from the trustee in bankruptcy.[4] But the privilege against self-incrimination and the immunity granted by the Bankruptcy Act does not go so far as to relieve a bankrupt from filing the schedules as required by the Bankruptcy law.[5] While the plea of constitutional privilege must prevail upon an application to compel a bankrupt to produce his books and deliver them to his trustee, yet he should be required to bring the books and papers which he alleges contained incriminating evidence before either the court or the referee in bankruptcy, and if it appears that his plea is well founded, the court can make such order as will fully protect him from discovery of such evidence, and also if possible,

§ 128. [1] Cameron *v.* United States, 231 U. S. 710, 58 L. ed. 448, 34 S. C. 244, *Reversing* 192 Fed. 548, 113 C. C. A. 20 (2d Cir.), but see § 117.

[2] In re Tobias, 215 Fed. 815; Johnson *v.* United States, 163 Fed. 30, 89 C. C. A. 508 (1st Cir.); In re Kanter, 117 Fed. 356; In re Feldstein, 103 Fed. 269.

[3] Glickstein *v.* United States, 222 U. S. 139, 56 L. ed. 128, 32 S. C. 71; Cameron *v.* United States, 231 U. S. 710, 58 L. ed. 448, 34 S. C. 244.

[4] Johnson *v.* United States, 163 Fed. 30, 89 C. C. A. 508 (1st Cir.); Cohen *v.* United States, 170 Fed. 715, 96 C. C. A. 35 (4th Cir.).

[5] Podolin *v.* Lesher Warner Dry Goods Co., 210 Fed. 97, 126 C. C. A. 632 (3d Cir.).

enable the trustee to obtain such information as is necessary and indispensable in the settlement of the estate.[6] As was said by the Supreme Court in the case of In re Harris [7] in deciding that the bankrupt's books belonged to the trustee in bankruptcy and cannot be withheld from him on the ground that they incriminate the bankrupt, "that is one of the misfortunes of bankruptcy if it follows crime." Where the bankrupt claims his constitutional privilege under the Fifth Amendment, and refuses to give the information required by the Bankruptcy Act, on the ground that it may incriminate him, it at least must appear to the court from the character of the information sought or the question propounded, that his claim is justified; or the bankrupt must produce facts on which he bases such claim, in order that the court may judge of their sufficiency to support it.[8]

§ 129. **Waiver of Privilege.**

If the witness himself elects to waive his privilege and discloses his criminal connections, he is not permitted to stop but must go on and make a full disclosure.[1] And a defendant who voluntarily takes the stand is not protected by the amendment because he was not warned and advised of his privilege.[2] But in an examination before a pension examiner it has been held that the examiner must warn a witness manifestly ignorant of his privilege.[3] Where defendants made no objection to testifying, and did not claim their privilege, it was held that an indictment subsequently found against them was not subject to a motion to quash because they testified without notice or warning that they were testiying against themselves and that they were not compelled to do so.[4]

[6] In re Hess, 134 Fed. 109; In re Harris, 164 Fed. 292; In re Hark, 136 Fed. 986.

[7] 221 U. S. 274, 55 L. ed. 732, 31 S. C. 557.

[8] Podolin *v.* Lesher Warner Dry Goods Co., 210 Fed. 97, 126 C. C. A. 632 (3d Cir.); Brown *v.* Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. C. 644.

§ 129. [1] United States *v.* Wetmore, 218 Fed. 227, 237; Brown *v.* Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. C. 644.

[2] Reagan *v.* United States, 157 U. S. 301, 39 L. ed. 709, 15 S. C. 610; Powers *v.* United States, 223 U. S. 303, 56 L. ed. 448, 32 S. C. 281; United States *v.* Skinner, 218 Fed. 870; United States *v.* Wetmore, 218 Fed. 227; In re Walsh, 104 Fed. 518.

[3] United States *v.* Bell, 81 Fed. 830, 853 (C. C. A. 6th Cir.).

[4] United States *v.* Wetmore, 218 Fed. 227.

§ 130. **Power of United States Attorney to Promise Immunity.** A United States Attorney has no authority to promise immunity to an accomplice upon his turning "state's evidence." [1] But circumstances may exist which may compel the Court to dismiss the case where the accused carried out fully his agreement with the prosecuting attorney or the trial will be adjourned to give the defendant an opportunity to apply for a pardon.[2]

§ 130. [1] Whiskey Cases, 99 U. S. 594, 25 L. ed. 399; Gladstone *v.* United States, 248 Fed. 117, 160 C. C. A. 257 (9th Cir.), *Certiorari denied*, 247 U. S. 521, 62 L. ed. 1246, 38 S. C. 582; United States *v.* Lee, 4 McLean, 103, Fed. Cas. No. 15588; United States *v.* Hinz, 35 Fed. 272.

[2] United States *v.* Hinz *et al.*, 35 Fed. 277; Gladstone *v.* United States, *supra.*

CHAPTER XV

INDICTMENTS — PART I

§ 131. Constitutional Right to Indictment.

The Fifth Amendment to the Constitution of the United States 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." Without a good and sufficient indictment there can be no valid trial consistent with the "due process of law" clause of the Constitution of the United States.[1] But where one grand jury failed to indict, the United States Attorney without leave of Court, may resubmit the case to another grand jury.[2]

§ 132. **Grand Jury Cannot Be Dispensed With.**

By the Constitution of the United States, no person can 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. No steps, therefore, can be taken, with the exceptions mentioned, for the prosecution of any crime of an infamous character — and under that designation the whole series of felonies is classed — beyond the arrest, examination and commitment of the party accused, until the grand jury have deliberated and acted upon the accusation.[1] It is not essential that the grand jury be first instructed or charged by the Court as to its duties.[2] And both grand and petit juries may be selected from a part of the district.[3]

§ 133. **Distinction between a Presentment and an Indictment.**

The Constitution speaks of a presentment or indictment by a grand jury. An indictment is a formal accusation made by the grand jury charging a party with the commission of a public offense. Formerly the public prosecutor handed an instrument of this character to the grand jury, — that is, a bill of indictment in form, with a list of the witnesses to establish the offense charged.

§ 131. [1] Fontana *v.* United States, 262 Fed. 283 (C. C. A. 8 Circ.)

[2] United States *v.* Thompson (U. S. Supreme Court decided March 1, 1920).

§ 132. [1] Frisbie *v.* United States, 157 U. S. 160, 39 L. ed. 657, 15 S. C. 586; Mr. Justice Field's charge to Jury, 2 Sawyer, 667, Fed. Cas. No. 18255.

[2] Ruthenberg *v.* United States, 245 U. S. 480, 62 L. ed. 414, 38 S. C. 168, *citing* Frisbie *v.* United States, *supra*, and Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 S. C. 370.

[3] Ruthenberg *v.* United States, *supra*.

If in such case the jury found that the evidence produced justified the finding of an indictment they indorsed on the instrument 'A true bill'; otherwise, 'Not found', or 'Not a true Bill', or the words 'Ignoramus — we know nothing of it' — from the use of which latter word the bill was sometimes said to be ignored. A presentment differs from an indictment in that it wants technical form, and is usually found by the grand jury upon their own knowledge, or upon the evidence before them, without having any bill from the public prosecutor. It is an informal accusation, which is generally regarded in the light of instructions upon which an indictment can be framed. This form of accusation has fallen in disuse since the practice has prevailed, which practice now generally obtains, for the prosecuting officer to attend the grand jury and advise them in their investigations. The government now seldom delivers bills of indictment to the grand jury in advance of their action, but generally awaits their judgment upon the matters laid before them.[1] It is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and, after determining that the evidence is sufficient to justify putting the suspected party on trial, to direct the preparation of the formal charge or indictment.[2]

§ 134. Ex Parte Character of Hearings before Grand Jury.

An investigation before a Federal Grand Jury is not a "suit" nor a prosecution.[1] A person whose conduct is being investigated by a Federal Grand Jury is not entitled as of right to present his side of the case to the Grand Jury.[2] At the foundation of our Federal Government the inquisitorial function of the Grand Jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States. By the Fifth Amendment a presentment or indictment by Grand Jury was made

§ 133. [1] Mr. Justice Field's charge to Jury, 2 Sawyer, 667, Fed. Cas. No. 18255; McKinney *v.* United States, 199 Fed. 25, 117 C. C. A. 403 (8th Cir.).

[2] Frisbie *v.* United States, 157 U. S. 160, 39 L. ed. 657, 15 S. C. 586.

§ 134. [1] Blair *v.* United States, 250 U. S. 273, 63 L. ed. —, 39 S. C. 468; Post *v.* United States, 161 U. S. 583, 40 L. ed. 816, 16 S. C. 611; Virginia *v.* Paul, 148 U. S. 107, 37 L. ed. 386, 13 S. C. 536.

[2] United States *v.* Bolles, *et al.*, 209 Fed. 682, and cases cited.

essential to hold one to answer for a capital or otherwise infamous crime, and it was declared that no person should be compelled in a criminal case to be a witness against himself; while, by the Sixth Amendment, in all criminal prosecutions the accused was given the right to a speedy and public trial, with compulsory process for obtaining witnesses in his favor.[3] By the first Judiciary Act,[4] the mode of proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized. These provisions are modified by subsequent legislation.[5] By Act of March 2, 1793,[6] it was enacted that subpœnas for witnesses required to attend a court of the United States in any district might run into any other district, with a proviso limiting the effect of this in civil causes so that witnesses living outside of the district in which the court was held need not attend beyond a limited distance from the place of their residence.[7] Witnesses required to attend any term of the district court on the part of the United States may be subpœnaed to attend to testify generally; and under such process they shall appear before the grand or petit jury or both, as required by the court or the district attorney.[8] By the same act [9] fees for the attendance and mileage of witnesses were regulated; and it was provided that where the United States was a party, the marshal, on the order of the court, should pay such fees.[10] The statutes [11] contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance.[12] In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which

[3] Blair *v.* United States, *supra.*

[4] September 24, 1789, c. 20, § 30, 1 Stat. L. 73, 88.

[5] §§ 861–865, Revised Statute. Compiled Statute 1916, §§ 1468, 1470, 1472–1474.

[6] c. 22, § 6, 1 Stat. L. 333, 335.

[7] § 876, Revised Statute. Compiled Statute 1916, § 1487.

[8] § 877, Compiled Statute 1916, § 1488, originating in Act of Feb. 26, 1853, c. 80, § 3, 10 Stat. L. 161, 169.

[9] Act of 1853, 10 Stat. L. 167, 168, c. 80.

[10] Revised Statute §§ 848, 855, Compiled Statute 1916, §§ 1452, 1461.

[11] §§ 879, 881, Rev. Stat. Compiled Statute 1916, §§ 1490, 1492.

[12] Blair *v.* United States, *supra.*

every person within the jurisdiction of the government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government,[13] is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him;[14] some confidential matters are shielded, from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.[15] But, aside from exceptions and qualifications the witness is bound not only to attend, but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry. He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his.[16] On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization. He is not entitled to set limits to the investigation that the grand jury may conduct. The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed of the same powers that pertained to its British prototype, and in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual.[17] It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by

[13] Wilson *v.* United States, 221 U. S. 361, 372, 55 L. ed. 771, 776, 31 S. C. 538, Ann. Cas. 1912D, 508, *quoting* Lord Ellenborough.

[14] Brown *v.* Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. 369, 16 S. C. 644.

[15] Blair *v.* United States, *supra*.

[16] Nelson *v.* United States, 201 U. S. 92, 115, 50 L. ed. 673, 685, 26 S. C. 358.

[17] Hale *v.* Henkel, 201 U. S. 43, 65, 50 L. ed. 652, 661, 26 S. C. 370.

doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.[18] And, for the same reasons, witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is, in the ordinary case, no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction.[19] But an indictment may be found without a preliminary examination.[20] An indictment is only evidence of its own existence.[21]

§ 135. **Prying into Personal Affairs.**

Neither branch of the legislative department, still less an administrative body, established by Congress, possesses, nor can be invested, with a general power of making inquiry into the private affairs of a citizen. It is the duty of the Court to repress such action.[1]

§ 136. **Witnesses before Grand Jury.**

A witness called before the grand jury is a witness in a "Court of the United States", and may be punished for perjury before that body.[1]

[18] Hendricks *v.* United States, 223 U. S. 178, 184, 56 L. ed. 394, 397, 32 S. C. 313; Blair *v.* United States, *supra.*

[19] Blair *v.* United States, *supra.*

[20] United States *v.* Baumert, 179 Fed. 735.

[21] United States *v.* Poage, Fed. Cas. No. 16059, 6 McLean, 89.

§ 135. [1] Hale *v.* Henkel, 201 U. S. 43, 50 L. ed. 652, 26 S. C. 370; Kilbourn *v.* Thompson, 103 U. S. 168, 26 L. ed. 377; Interstate Commerce Commission *v.* Brimson, *supra;* Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524; Re Pacific Railway Comm., 32 Fed. 241.

§ 136. [1] Hendricks *v.* United States, 223 U. S. 178, 56 L. ed. 394, 32 S. C. 313; Davey *v.* United States, 208 Fed. 237 (C. C. A. 7th Cir.); Ex parte Savin, 131 U. S. 267, 33 L. ed. 150, 9 S. C. 699. *See also* PERJURY.

§ 137. **Common Law and Statutory Definition of Infamous Crimes.**

The first question to be considered is what are infamous crimes. A crime is infamous if it is punishable by imprisonment in the penitentiary.[1] And what punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another.[2] In addition to the above definition, Congress [3] provided that: "All offenses which may be punishable by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors." In determining whether a crime is infamous, the question is whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one.[4]

§ 138. **Right to Indictment Cannot Be Waived.**

A party cannot waive his constitutional right to an indictment. If the crime is of such a nature that an indictment is required by law, the court has no jurisdiction to try without it.[1] The reason for this rule is that the public has an interest in the life and liberty of the accused. Neither of these can be taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life and liberty cannot be dispensed with or affected by the consent of the accused,

§ 137. [1] Matter of Classen, 140 U. S. 200, 35 L. ed. 409, 11 S. C. 735; Mackin *v.* United States, 117 U. S. 348, 351, 29 L. ed. 909, 6 S. C. 777; Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 S. C. 935; In re Bain, 121 U. S. 1, 30 L. ed. 849, 7 S. C. 781; Parkinson *v.* United States, 121 U. S. 281, 30 L. ed. 959, 7 S. C. 896; Ex parte Mills, 135 U. S. 263, 34 L. ed. 107, 10 S. C. 762.

[2] Mackin *v.* United States, 117 U. S. 348, 351, 29 L. ed. 909, 6 S. C. 777; Weems *v.* United States, 217 U. S. 349, 54 L. ed. 793, 30 S. C. 544.

[3] Section 335 of the Federal Penal Code.

[4] Fitzpatrick *v.* United States, 178 U. S. 304, 44 L. ed. 1078, 20 S. C. 944; Matter of Classen, 140 U. S. 200, 35 L. ed. 409, 11 S. C. 785; Weeks *v.* United States, 216 Fed. 292, 132 C. C. A. 436 (2d Cir.); Dickinson *v.* United States, 159 Fed. 801, 86 C. C. A. 625 (1st Cir.); Ex parte Wilson, 114 U. S. 417, 423, 29 L. ed. 89, 5 S. C. 935; Mackin *v.* United States, 117 U. S. 348, 351, 29 L. ed. 909, 6 S. C. 777.

§ 138. [1] Thompson *v.* Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. C. 620; Ex parte McClusky, 40 Fed. 71, 74; Cruikshank *v.* United States, 92 U. S. 542, 547, 23 L. ed. 588; Hopt *v.* Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. C. 202.

much less by his failure, when on trial and in custody, to object to unauthorized methods.[2]

§ 139. **Informing of Nature of Accusation.**

The constitutional right to be informed of the nature and cause of the accusation is a reaffirmance of the essential principles of the common law and puts it beyond the power of either Congress or the courts to abrogate them.[1] The sufficiency of an indictment must, in large part, be tested by the fact as to whether it accurately advises the defendant, as well as the Court, of the acts of which the former is accused.[2] There are two principles by which it may be determined whether the accused has been informed of the nature of the accusation within the meaning of the Constitution: first, that it must be sufficiently certain to enable him to plead jeopardy in a subsequent indictment, and, second, that it must be sufficiently certain as a pleading to enable him to make his defense.[3] Whether a particular crime is of a certain kind is a question of law. The accused, therefore, has the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea, and the Court, that it may determine whether the facts will sustain the indictment.[4] The reason for this rule is that generally in determining whether a person has been put once in jeopardy for the same offense the evidence on the trial may not be available and the indictment and judgment alone can be considered, because the

[2] Thompson *v.* Utah, *supra.*

§ 139. [1] United States *v.* Howard, 132 Fed. 325; Fontana *v.* United States, 262 Fed. 283 (C. C. A. 8th Cir.); Miller *v.* United States, 133 Fed. 337, 66 C. C. A. 399, 403 (8th Cir.); Naftzger *v.* United States, 200 Fed. 494, 118 C. C. A. 598, 604 (8th Cir.).

[2] Cochran *v.* United States, 157 U. S. 286, 290, 39 L. ed. 704, 15 S. C. 628; Fontana *v.* United States, *supra.*

[3] Burton *v.* United States, 202 U. S. 344, 50 L. ed. 1057, 26 S. C. 688; Smith *v.* United States, 157 Fed. 721, 85 C. C. A. 353 (8th Cir.); *Writ of Certiorari denied* 208 U. S. 618, 52 L. ed. 647, 28 S. C. 569; United States *v.* Aviles, 222 Fed. 474; United States *v.* Ruroede, 220 Fed. 212; United States *v.* Cruikshank, 92 U. S. 542, 547, 23 L. ed. 588; Fontana *v.* United States, *supra.*

[4] Keck *v.* United States, 172 U. S. 434, 43 L. ed. 505, 19 S. C. 254; United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. ed. 588; Fontana *v.* United States, 262 Fed. 283 (C. C. A. 8th Cir.).

evidence unless preserved by a bill of exceptions, does not become a part of the judgment.[5]

§ 140. Organization of the Grand Jury — Discretionary Power of Court.

"No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to the district judge or the senior district judge of the district that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury. And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever in its judgment it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offense, or the time during which a person so accused may be held under recognizance before indictment found."[1] A grand jury, by which presentments or indictments may be made for offenses against the United States, is a creature of statute. It cannot be impaneled by a court of the United States by virtue simply of its organization as a judicial tribunal.[2] Every step required by law to be taken in impaneling the grand jury must be taken. Whatever is essential in a criminal proceeding to deprive a person of his liberty must appear of record and nothing is taken by intendment or implication.[3] A grand jury cannot be called without an order of court. The method of summoning is by *venire facias*.[4] When it appears that the United States Marshal

[5] Fontana *v.* United States, *supra;* Floren *v.* United States, 186 Fed. 961, 108 C. C. A. 577 (8 th Cir.); Winters *v.* United States, 201 Fed. 845, 120 C. C. A. 175. And *consult* chapter ON FORMER JEOPARDY.

§ 140. [1] Federal Judicial Code, § 284.

[2] Ex parte Mills, 135 U. S. 263, 34 L. ed. 107, 10 S. C. 762.

[3] Hopt *v.* Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. C. 202; Ball *v.* United States, 140 U. S. 118, 35 L. ed. 377, 11 S. C. 761.

[4] United States *v.* Antz, 16 Fed. 119.

is not wholly disinterested, it is the duty of the Court to appoint a special officer to serve the venire.[5]

§ 141. Drawing of Jury.

"All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court or a duly qualified deputy clerk and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk or a duly qualified deputy clerk then acting may belong, the clerk or a duly qualified deputy clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein." [1] The court in its discretion may summon additional jurors.[2] A deputy clerk may substitute the clerk in drawing the jury in the event the latter is incapacitated, sick, absent or disabled, and grand jurors may be drawn by him without affecting the validity of the indictment.[3]

§ 142. Foreman to Be Appointed.

"From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury." [1]

§ 143. Number of Grand Jurors — Challenges.

"Every grand jury impaneled before any district court shall consist of not less than sixteen, nor more than twenty-three

[5] Johnson *v.* United States, 247 Fed. 92 (C. C. A. 9th Cir.).

§ 141. [1] Federal Judicial Code, § 276 as amended by the Act of February 3, 1917, c. 27, 39 Stat. L. 873.

[2] United States *v.* Nevin, 199 Fed. 831.

[3] United States *v.* Rockefeller, 221 Fed. 462.

§ 142. [1] Federal Judicial Code, § 283.

persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose." [1]

§ 144. **Challenge to Array — Exception Must Be Taken.**

But a challenge to a grand jury, based on the mere ground of irregularity in its organization, is not regarded with much favor.[1] Unless an exception is duly taken to the overruling of a motion in arrest of judgment challenging the validity of the organization of the grand jury which found the indictment against the accused, the error will not be reviewed in the Appellate Court.[2] And in the absence of proof to the contrary, the court will assume that the District Attorney and the grand jury proceeded according to the law and that the proceedings are regular in all respects.[3]

§ 145. **Discharge of Grand Juries.**

"The district courts, the district courts of the Territories, and the Supreme Court of the District of Columbia may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary." [1]

§ 146. **Indictment Cannot Be Returned by Less than Twelve Jurors.**

"No indictment shall be found, nor shall any presentment be made, without the concurrence of *at least twelve grand jurors*." [1] "If a grand jury not properly organized as such, for instance, with

§ 143. [1] Federal Judicial Code, § 282.

§ 144. [1] Wolfson *v.* United States, 101 Fed. 430, 41 C. C. A. 422 (5th Cir.); *Writ of Certiorari denied* in 180 U. S. 637, 45 L. ed. 710, 21 S. C. 919.

[2] Rodriguez *v.* United States, 198 U. S. 156, 49 L. ed. 994, 25 S. C. 617.

[3] United States *v.* Terry, 39 Fed. 355; United States *v.* Nevin, 199 Fed. 831.

§ 145. [1] Federal Judicial Code, § 285.

§ 146. [1] Revised Statutes, § 1021.

less than the number required by the statute, should present even a guilty man for trial, his rights would be invaded, and it would not be for a moment contended that such a proceeding, as against a timely plea, could have validity. . . ." [2]

§ 147. **Effect of Irregular Selection of Grand Jury.**

The courts are not unanimous upon the effect of an irregular selection of the grand jury. Thus in United States *v.* Murphy,[1] and Lewis *v.* United States,[2] it was held that the selection of a grand jury is a matter of substance and not a mere formality and the defect may be availed of by motion to quash, while the contrary was held in United States *v.* Breeding.[3] The Supreme Court of the United States, however, held that material irregularities in selecting and impaneling a grand jury, which do not relate to the competency of individual jurors, may usually be objected to by challenge to the array or motion to quash, provided, that the objection is made promptly. Five days was held to be too long a delay.[4] It also held that disqualification of grand jurors cannot be regarded as mere matters of form.[5] It was held in an early case [6] that a person convicted and sentenced to imprisonment for larceny upon an indictment found by a grand jury impaneled without authority of law would be illegally convicted and sentenced, and therefore restrained of his liberty without due process of law.[7]

§ 148. **Time to Object to Organization of Grand Jury.**

Where the whole proceeding of forming the panel is void, as where the jury is not a jury of the court or term in which the indictment is found, or has been selected by persons having no authority whatever to select them; or where they have not been sworn; or where some fundamental requisite has not been complied with, the objection may be made at any time.[1] But the

[2] Per Whitson, J., in United States *v.* Wells, 163 Fed. 313, *citing* United States *v.* Gale, 109 U. S. 71, 27 L. ed. 857, 3 S. C. 1.

§ **147.** [1] 224 Fed. 554.

[2] 192 Fed. 633.

[3] 207 Fed. 645.

[4] Agnew *v.* United States, 165 U. S. 36, 41 L. ed. 624, 17 S. C. 235.

[5] Crowley *v.* United States, 194 U. S. 461, 48 L. ed. 1075, 24 S. C. 371.

[6] Ex parte Farley, 40 Fed. 66.

[7] Ex parte Farley, 40 Fed. 66.

§ **148.** [1] United States *v.* Gale, 109 U. S. 65, 27 L. ed. 857, 3 S. C. 1.

objection that there was no *venire facias* summoning the grand jury is waived unless seasonably raised.[2]

§ 149. **Private Prosecutors Not Permitted.**

Under the Federal practice from the earliest times, and by force of the statute, the United States Attorney is the only prosecutor known to our law.[1]

§ 150. **Appointment of Special Prosecutors.**

The law of the United States does not prohibit the appointment of special prosecutors, provided the latter are paid by the government and not by private parties.[1] Congress passed the following statute on the subject: "An Act to authorize the commencement and conduct of legal proceedings under the direction of the Attorney-General.[2] The attorney-general or any officer of the Department of Justice, or any attorney or counsellor specially appointed by the attorney-general under any provision of law, may, when thereunto specifically directed by the attorney-general, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought." [3]

§ 151. **Who May Be Present in Grand Jury Room.**

It is beyond question that no person, other than a witness undergoing examination, and the attorney for the government can be present during the sessions of the grand jury. The rule is inherent in the grand jury system with all the force of a statutory enactment. The cases where bailiffs and stenographers have on

Approved in Rodriguez *v.* United States, 198 U. S. 156, 163, 49 L. ed. 994, 25 S. C. 617; *Contra*: McInerney *v.* United States, 147 Fed. 183, 77 C. C. A. 411 (1st Cir.).

[2] Powers *v.* United States, 223 U. S. 303, at 312, 56 L. ed. 448, 32 S. C. 281.

§ 149. [1] United States *v.* Stone, 8 Fed. 232; United States *v.* McAvoy, 4 Blatch. 418; United States *v.* Blaisdell, 3 Ben. 132.

§ 150. [1] Terry *v.* United States, 235 Fed. 701 (C. C. A. 6th Cir.).

[2] Act of June 30th, 1906, c. 3935, 34 Stat. L. 816.

[3] 34 Stat. L. 816.

occasions been temporarily present in the grand jury room are only apparent exceptions. The rule, in its spirit and purpose, admits of no exception.[1] The United States Attorney has no right to participate nor be present during the deliberations of the grand jury.[2]

§ 152. **Presence of Unauthorized Persons, Stenographers in Grand Jury Room — Ground for Quashing.**

The right of the citizen to an investigation by a grand jury pursuant to the law of the land is invaded by the participation of unauthorized persons in such proceedings. It is not necessary that participation should be corrupt, or that unfair means were used. If the person participating was unauthorized, it was unlawful. An indictment will therefore be quashed because of the presence of a stenographer in the grand jury room.[1] For the same reason the presence of an expert before the grand jury, under a special appointment of the Attorney-General, was held illegal, and the indictment was quashed. The procedure to reach the point that other persons than those authorized by law were present in the grand jury room during the deliberations by the jury is usually by motion supported by affidavits.[2] An affidavit charging that certain persons were "present in the grand jury room during the entire sessions" is too indefinite to have any action thereon.[3]

§ 153. **Deliberations Must Be in Secret — Exception.**

"You are also to keep your own deliberations secret; you are not at liberty even to state that you have had a matter under consideration. Great injustice and injury might be done to the good name and standing of a citizen if it were known that there had ever

§ 151. [1] United States *v.* Rubin, 218 Fed. 245; United States *v.* Edgerton, 80 Fed. 374; United States *v.* Rosenthal, 121 Fed. 862; United States *v.* Heinze, 177 Fed. 770.

[2] United States *v.* Wells, 163 Fed. 313; United States *v.* Kilpatrick, 16 Fed. 765; Charge to Jury, Fed. Cas. No. 18255, 2 Saw. 667; United States *v.* Terry, 39 Fed. 355.

§ 152. [1] United States *v.* Rubin, 218 Fed. 245; United States *v.* Philadelphia & R. Ry. Co., 221 Fed. 683; Latham *v.* United States, 226 Fed. 420, 141 C. C. A. 250 (5th Cir.).

[2] United States *v.* Terry, 39 Fed. 355.

[3] Radford *v.* United States, 129 Fed. 49, 63 C. C. A. 491 (2d Cir.).

been before you for deliberation the question of his guilt or innocence of a public offense. You will allow no one to question you as to your own action or the action of your associates on the grand jury."[1] There is, however, no impropriety on the part of a grand juror in disclosing the evidence before a grand jury after an indictment has been returned and the jury is discharged.[2]

§ 154. Motions to Quash Indictment When Based on Insufficient or Incompetent Evidence.

The first essential is that a motion to quash an indictment must be made before pleading to the merits.[1] Mr. Justice Field, in his famous charge to the jury,[2] laid down the rule that to justify the finding of an indictment, the grand jury must be convinced from the evidence submitted to it that the accused is guilty, and that the evidence is so strong that if unexplained or uncontradicted it would warrant a conviction before a petit jury. No person should be subjected to the expense, vexation and contumely of a trial for a criminal offense unless the charge has been investigated, and a reasonable foundation laid for an indictment or information.[3] "Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors — the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the government or prompted by private malice."[4] The complete protection of the rights of citizens must necessarily commence, and does commence, at the inception of any criminal proceeding. It not infrequently happens that persons are accused of crime, even though their complete innocence is ultimately satisfactorily established. An

§ 153. [1] Mr. Justice Field, 2 Sawyer, 667. *See also* United States *v.* Ambrose, 3 Fed. 283; United States *v.* Cobban, 127 Fed. 713; United States *v.* Brown, 1 Sawyer, 533; United States *v.* Farrington, 5 Fed. 343.

[2] Atwell *v.* United States, 162 Fed. 97, 89 C. C. A. 97 (4th Cir.); United States *v.* Perlman, 247 Fed. 158.

§ 154. [1] Dowdell *v.* United States, 221 U. S. 325, 35 L. ed. 753, 31 S. C. 590.

[2] 2 Sawyer, 667; Fed. Cas. No. 18255.

[3] United States *v.* Farrington, 5 Fed. 343; Radford *v.* United States, 129 Fed. 49, 63 C. C. A. 491 (2d Cir.).

[4] Per Mr. Justice Lamar, United States *v.* Morgan, 222 U. S. 282, 56 L. ed. 198, 32 S. C. 81.

unblemished reputation is a valuable asset to every individual; and experience has shown that great harm may flow to one unjustly accused, even though such person ultimately establishes his innocence. These reasons are sufficient to sustain the doctrine that the grand jury is forbidden to make an accusation against a person without legal evidence to support it.[5] An indictment will be quashed on motion of the defendant if incompetent or hearsay evidence was presented to the grand jury and on such a motion it is not necessary to show that the grand jury was influenced by such testimony.[6] An indictment can only be found upon the testimony of a competent and material witness who must be sworn and examined before the grand jury. Where the information is obtainable, a motion to dismiss the indictment based upon affidavits may be made at any time before trial or on a motion in arrest of judgment.[7] The question of insufficiency of the evidence before the grand jury cannot be taken advantage of for the first time at the opening of the trial.[8] While a grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own observation or upon the evidence of witnesses given before them.[9] The earlier authorities held rather broadly that it is proper for the trial court to go behind the indictment and inquire into the character of the evidence upon which the grand jury acted.[10] But the latter authorities seem to hold that the power should be exercised sparingly and only for the purpose of preventing a clear

[5] United States *v.* Heinze, 177 Fed. 770; United States *v.* Rosenthal, 121 Fed. 862; United States *v.* Edgerton, 80 Fed. 374; United States *v.* Rubin, 214 Fed. 507.

[6] United States *v.* Perlman, 247 Fed. 158; United States *v.* Rubin, 218 Fed. 245; United States *v.* Rubin, 214 Fed. 507; United States *v.* Rosenthal, 121 Fed. 862; United States *v.* Edgerton, 80 Fed. 374; United States *v.* Kilpatrick, 16 Fed. 765; United States *v.* Reed, Fed. Cas. No. 16134, 2 Blatch. 425.

[7] Cooper *v.* United States, 247 Fed. 45 (C. C. A. 4th Cir.); United States *v.* Bolles, 209 Fed. 682; *but see* Radford *v.* United States, 129 Fed. 49, 63 C. C. A. 491 (2d Cir.).

[8] United States *v.* McKinney, 199 Fed. 25, 117 C. C. A. 403 (8th Cir.); *but see* Hillman *v.* United States, 192 Fed. 264, where it is made discretionary.

[9] Hale *v.* Henkel, 201 U. S. 43, 65, 66, 50 L. ed. 652, 26 S. C. 370.

[10] United States *v.* Farrington, 5 Fed. 343; United States *v.* Kilpatrick, 16 Fed. 765; Royce *v.* Territory of Oklahoma, 5 Ok. 61, 47 Pac. 1083.

injustice.[11] But the court may order an inspection of the minutes of the Grand Jury.[12]

§ 155. **Returning Indictment into Court.**

It is necessary that the indictment should be produced publicly by the grand jury. That is the evidence required by law to prove that it is sanctioned by the accusing body; and until it is so presented by the grand jury, the party charged by it is not indicted, nor is he required or bound to answer any charge against him which is not so presented.[1] But it is not mandatory that it be presented by the grand jury in a body.[2] And the right to move to quash an indictment on the ground that the foreman of the jury delivered the indictment to the Judge in the absence of the other grand jurors, is waived by failure to raise the question after the term in which the indictment was returned.[3]

§ 156. **Change in Indictment.**

When the indictment of the grand jury is filed with the court no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a re-submission of the case to the grand jury. The fact that the court may consider the change immaterial, as the striking out of surplus words, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it. Upon an indictment so changed the court can proceed no further. There is nothing which the prisoner can "be held to answer." A trial on such an indictment is void. There is nothing to try.[1]

[11] McKinney *v.* United States, 199 Fed. 25, 117 C. C. A. 577 (8th Cir.); Holt *v.* United States, 218 U. S. 245, 45 L. ed. 1021, 31 S. C. 2.

[12] United States *v.* Kilpatrick, 16 Fed. 765; United States *v.* Perlman, 247 Fed. 158, and cases cited.

§ 155. [1] Renigar *v.* United States, 172 Fed. 646, 97 C. C. A. 172 (4th Cir.).

[2] Breese *v.* United States, 226 U. S. 1, 57 L. ed. 97, 33 S. C. 1.

[3] Breese *v.* United States, *supra.*

§ 156. [1] Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 S. C. 781.

CHAPTER XVI

INDICTMENTS — PART II

ESSENTIALS AND FUNDAMENTAL PRINCIPLES OF AN INDICTMENT

§ 157. All Federal Crimes Are Statutory.

It is well settled that there are no common law offenses against the United States. The Federal Courts cannot resort to the common law as a source of criminal jurisdiction; all crimes and offenses, cognizable under the authority of the United States, are such, and only such, as are expressly designated by law. Before a man can be punished, his case must be plainly within the

statute.[1] It is for Congress and not the court to define a crime and ordain its punishment.[2] It would be exceedingly wrong that a man should, by a long train of conclusions, be reasoned into a penalty when the express words of the statute do not authorize it.[3]

§ 158. **When Court May Resort to Common Law Definitions.** The Courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws or treaties of the United States, but they may resort to the common law for the definition of terms by which offenses are designated.[1] But no statute is to be construed as altering the common law further than *its words import.* It is not to be construed as making any innovation upon the common law which it does not *fairly express* and whenever a departure from common law rules and definitions is claimed, the purpose to make such departure should be clearly shown.[2]

§ 159. **No Federal Constructive Offenses.** It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful,

§ 157. [1] United States *v.* George, 228 U. S. 14, 57 L. ed. 712, 33 S. C. 412; United States *v.* Biggs, 211 U. S. 507, 53 L. ed. 305, 29 S. C. 181; United States *v.* Van Wert, 195 Fed. 974; United States *v.* Birdsdall, 195 Fed. 980; United States *v.* Brewer, 139 U. S. 278, 35 L. ed. 190, 11 S. C. 538; United States *v.* Eaton, 144 U. S. 677, 36 L. ed. 591, 12 S. C. 764; United States *v.* Keitel, 211 U. S. 370, 53 L. ed. 230, 29 S. C. 123; Caha *v.* United States, 152 U. S. 211, 38 L. ed. 415, 14 S. C. 513; United States *v.* Britton, 108 U. S. 199, 206, 27 L. ed. 698, 2 S. C. 531; In re Greene, 52 Fed. 104, 111 (C. C. A. 6th Cir.); Morrill *v.* Jones, 106 U. S. 423, 27 L. ed. 267, 1 S. C. 70; Dwyer *v.* United States, 170 Fed. 160, 95 C. C. A. 416 (9th Cir.).

[2] United States *v.* Wiltberger, 5 Wheat. (U. S.) 76, 5 L. ed. 37; Hackfeld & Co. *v.* United States, 197 U. S. 442, 49 L. ed. 826, 25 S. C. 456; Burton *v.* United States, 202 U. S. 344, 50 L. ed. 1057, 26 S. C. 688. *Note:* For the definition of the particular offenses and the requisites of the indictments and informations under them, consult the specific section governing same in Penal Code and editorial notes under each section.

[3] Rex *v.* Bond, 1 B. & Ald. 392; Snitkin *v.* United States, decided by U. S. Circuit Court of Appeals of 7th Circuit, March 30, 1920.

§ 158. [1] Pettibone *v.* United States, 148 U. S. 197, 203, 37 L. ed. 419, 13 S. C. 542; Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. ed. 892.

[2] Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. ed. 679, 24 S. C. 436.

can be punished under a statute unless clearly within its terms. There can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statute.[1]

§ 160. Indictment Must Bring the Defendant within the Precise Terms of the Statute.

Where the crime is a statutory one, it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth; and that even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged.[1]

§ 161. Indictment in Separate Counts.

Each count in an indictment is in fact and theory a separate indictment.[1]

§ 162. Intent Should Be Charged.

Intent is, in a certain sense, essential to the commission of any crime, particularly where the act must be knowingly and wilfully done.[1] Intent may make an act criminal which other-

§ 159. [1] Todd *v.* United States, 158 U. S. 278, 282, 39 L. ed. 982, 15 S. C. 889; United States *v.* Bathgate, 246 U. S. 220, 62 L. ed. 676, 38 S. C. 269; United States *v.* Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 S. C. 625.

§ 160. [1] Evans *v.* United States, 153 U. S. 584, 38 L. ed. 830, 14 S. C. 936; Ledbetter *v.* United States, 170 U. S. 606, 609, 610, 42 L. ed. 1162, 18 S. C. 774; Martin *v.* United States, 168 Fed. 198, 93 C. C. A. 484 (8th Cir.); Peters *v.* United States, 94 Fed. 127, 131, 36 C. C. A. 105 (9th Cir.); *Writ of Certiorari denied* in 176 U. S. 684, 44 L. ed. 638, 20 S. C. 1026; United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. ed. 588; United States *v.* Carll, 105 U. S. 611, 26 L. ed. 1135; United States *v.* Simmons, 96 U. S. 360, 24 L. ed. 819; Pettibone *v.* United States, 148 U. S. 197, 37 L. ed. 419, 13 S. C. 542; Evans *v.* United States, 153 U. S. 584, 38 L. ed. 830, 14 S. C. 934; United States *v.* Todd, 158 U. S. 278, 282, 39 L. ed. 982, 15 S. C. 889; Demolli *v.* United States, 144 Fed. 363, 75 C. C. A. 365 (8th Cir.); France *v.* United States, 164 U. S. 676, 41 L. ed. 595, 17 S. C. 219; United States *v.* Hess, 124 U. S. 483, 31 L. ed. 516, 8 S. C. 571; United States *v.* Mann, 95 U. S. 580, 24 L. ed. 531.

§ 161. [1] Selvester *v.* United States, 170 U. S. 262, 42 L. ed. 1029, 18 S. C. 580.

§ 162. [1] Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. ed. 681, 28 S. C. 428.

wise would be innocent, as if it is a step in a plot.[2] In such cases it is essential to charge that a defendant willfully violated the law.[3] Thus, for instance, under Section 8 of the Food and Drugs Act of June 30, 1906, for shipping misbranded drugs in interstate commerce, the misbranding must be done either with an intent to deceive or in reckless disregard of truth or falsity.[4] It is however unnecessary to allege that a statutory felony was "feloniously" committed.[5] An indictment for violation of the Reed Amendment (Act March 3, 1917) was held not to be defective merely because it states incorrectly the point from which the transportation of the liquor started.[6] And information, as against a motion in arrest of judgment, need only be sufficiently specific to fairly inform the defendant of the crime alleged, and to support a plea of former acquittal or conviction in a subsequent prosecution for the same offense.[7]

§ 163. **Time and Place.**

Good pleading, undoubtedly, requires an allegation that the offense was committed on a particular day, month and year; but it does not necessarily follow that the omission to state a particular *day* is fatal upon a motion in arrest of judgment. Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient.[1] The exact date of the commission of offense

[2] Badders *v.* United States, 240 U. S. 391, 60 L. ed. 706.

[3] Potter *v.* United States, 155 U. S. 438, 39 L. ed. 214, 15 S. C. 144; Felton *v.* United States, 96 U. S. 699, 24 L. ed. 875; Gallagher *v.* United States, 144 Fed. 87, 75 C. C. A. 245 (1st Cir.).

[4] M'Lean Medicine Co. *v.* United States, 253 Fed. 694 (C. C. A. 8th Cir.).

[5] Wood *v.* United States, 204 Fed. 55, 122 C. C. A. 369 (4th Cir.).

[6] Malcolm *v.* United States, 256 Fed. 363 (C. C. A. 4th Cir.).

[7] M'Lean Medicine Co. *v.* United States, 253 Fed. 694 (C. C. A. 8th Cir.). On the question on interest under the Espionage Act *see* Bentall *v.* United States, 262 Fed. 744 (C. C. A. 8th Cir.).

§ 163. [1] Ledbetter *v.* United States, 170 U. S. 606, 42 L. ed. 1162, 18 S. C. 774; Matthews *v.* United States, 161 U. S. 500, 40 L. ed. 786, 16 S. C. 640.

is not essential.[2] An indictment for murder failing to aver either time or place is defective.[3]

§ 164. **Indorsements on Back of Indictment.**

Entries on the back, margin or caption of an indictment, showing the statute under which the indictment is drawn, are useful and convenient means of reference, and in case of doubt might possibly be of some assistance in determining what statute was alleged to have been violated. But these entries form no part of the indictment and neither add nor detract from the legal effect of the charge.[1] An indictment must set out the facts and not the law.[2] And the foreman's indorsement "A True Bill" on the back of the indictment is not essential,[3] although it was at early common law.[4]

§ 165. **Indictments for Perjury.**

"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." [1]

§ 166. **Same; Subornation of Perjury.**

"In every presentment or indictment for subornation of perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of

[2] Brown *v.* Elliott, 225 U. S. 392, 56 L. ed. 1136, 32 S. C. 748.

[3] Ball *v.* United States, 140 U. S. 118, 35 L. ed. 377, 11 S. C. 761.

§ 164. [1] United States *v.* Nixon, 235 U. S. 231, 59 L. ed. 207, 35 S. C. 49; Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92.

[2] United States *v.* Nixon, *supra.*

[3] Frisbie *v.* United States, 157 U. S. 160, 39 L. ed. 657, 15 S. C. 586.

[4] Rex *v.* Ford, Yelv. 99.

§ 165. [1] Rev. Stat. § 5396. For annotations *see* Penal Code, PERJURY.

any record or proceeding either in law or equity, or any affidavit, deposition, or certificate, and without setting forth the commission or authority of the court or person before whom the perjury was committed, or was agreed or promised to be committed." [1]

§ 167. **Perjury before Naval Court-Martial.**

"In prosecutions for perjury, committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offense charged on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court." [1]

§ 168. **Duplicity.**

Two offenses cannot be joined in one count.[1] An indictment charging "the embezzlement, as well as the wilful misapplication of the 'funds and credits' of a national bank;" without setting forth any particular description of either and without any separate statements as to the amount either of the "funds" or the "credits" which had thus been embezzled or misapplied is defective, because of duplicity, as well as insufficient description of the offense.[2] The question of duplicity of an indictment can only be raised by special demurrer; it is too late after verdict.[3] It is not duplicitous and it is permissible for sake of brevity to refer one count of an indictment to another for facts constituting the scheme or plan, provided the reference is certain and the defendant cannot be misled by same.[4] The general rule is that a felony and a misdemeanor, both the result of the same transaction, cannot be united in one count.[5]

§ 166. [1] Rev. Stat. § 5397.

§ 167. [1] Rev. Stat. § 1023.

§ 168. [1] Blitz *v.* United States, 153 U. S. 308, 38 L. ed. 725, 14 S. C. 924; Ammerman *v.* United States, 216 Fed. 326, 132 C. C. A. 464 (8th Cir.); Price *v.* United States, 218 Fed. 149 (C. C. A. 8th Cir.).

[2] Grand Brewing Co. *v.* United States, 204 Fed. 17, 122 C. C. A. 331, 206 Fed. 386; Allison *v.* United States, 216 Fed. 329.

[3] Connors *v.* United States, 158 U. S. 408, 39 L. ed. 1033, 15 S. C. 951.

[4] Blitz *v.* United States, 153 U. S. 308, 38 L. ed. 725, 14 S. C. 924; United States *v.* Peters, 87 Fed. 984, s. c. 94 Fed. 127, 36 C. C. A. 105 (9th Cir.). *Certiorari denied* in 176 U. S. 684, 44 L. ed. 638, 20 S. C. 1026.

[5] Commonwealth *v.* Thompson, 116 Mass. 348.

§ 169. **Designation of Defendant.**

An indictment charging a defendant whose true name is unknown to the grand jurors, with a fictitious name, as "John Doe", is void for insufficient description.[1] An indictment is not invalid merely because of a misspelling of the name of the defendant, provided it comes within the rule of *idem sonas*.[2]

§ 170. **Corporations.**

It is now well settled that corporations may be indicted, prosecuted and tried like natural persons.[1] The fact that a statute prescribed the penalty to be both a fine and imprisonment will not relieve the corporation from all punishment, and a fine may be assessed against it.[2]

§ 171. **General Rule Governing Indictments for Conspiracy.**[1]

The rule is inflexible that the purpose of the conspiracy and *alleged agreement* to do an unlawful thing must be clearly set out in the indictment, and that the same cannot be aided by averments of what preceded or what was done in pursuance of the conspiracy.[2]

§ 172. **Setting Forth the Language of Statute — When Insufficient.**

In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of them-

§ **169.** [1] United States *v.* Doe, 127 Fed. 982.

[2] Faust *v.* United States, 163 U. S. 452, 41 L. ed. 224, 16 S. C. 1112.

§ **170.** [1] United States *v.* Pacific A. R. & Nav. Co., 228 U. S. 87, 57 L. ed. 742, 33 S. C. 443; United States *v.* Union Supply Co., 215 U. S. 50, 54 L. ed. 87, 30 S. C. 15; New York Central R. R. Co. *v.* United States, 212 U. S. 481, 53 L. ed. 613, 29 S. C. 304.

[2] United States *v.* Union Supply Co., 215 U. S. 50, 54 L. ed. 87, 30 S. C. 15.

§ **171.** [1] See also article under § 37 of Penal Code.

[2] United States *v.* Watson, 17 Fed. 145; United States *v.* Reichert, 32 Fed. 142; Joplin *v.* United States, 235 U. S. 699, 59 L. ed. 431, 35 S. C. 291; Commonwealth *v.* Hunt, 4 Metc. (Mass.) 111 (Labor indictment). *Approved* Pettibone *v.* United States, 148 U. S. 197, 214, 37 L. ed. 419, 13 S. C. 542, also a labor case. Nelson *v.* United States, 52 Fed. 646; United States *v.* Patterson, 55 Fed. 605 (C. C. A. 1st Cir.); United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. ed. 588; United States *v.* Hess, 124 U. S. 483, 31 L. ed. 516, 8 S. C. 571; United States *v.* Britton, 108 U. S. 193, 27 L. ed. 701, 2 S. C. 526; United States *v.* Reardon & Sons, etc., 191 Fed. 454 (C. C. A. 1st Cir.); Blitz *v.* United States, 153 U. S. 308, 38 L. ed. 725, 14 S. C. 924.

selves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.[1] An indictment in the language of the statute claimed to be violated is demurrable where the statute is open to two constructions, one a crime and the other not. There must be a further allegation showing the commission of an offense denounced by the statute.[2]

§ 173. Rule of Pleading When Language of Statute Has No Technical Meaning.

Where the language used in a criminal statute has no settled technical meaning, it is indispensable for the pleader to set forth fully and clearly the facts sought to be charged against the defendant in order that the defendant may be informed of the nature of the accusation against him, and that the court, from the face of the indictment, may be enabled to see that the facts therein set forth constitute an offense intended to be punished by such statute.[1]

§ 174. Facts and Circumstances Must Be Stated.

The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital.[1] It is an elementary principle

§ 172. [1] Keck *v.* United States, 172 U. S. 434, 43 L. ed. 505, 19 S. C. 254; United States *v.* Carll, 105 U. S. 611, 26 L. ed. 1135; United States *v.* Hess, 124 U. S. 483, 31 L. ed. 516, 8 S. C. 571; Evans *v.* United States, 153 U. S. 584, 38 L. ed. 830, 14 S. C. 934; Morris *v.* United States, 161 Fed. 672, 88 C. C. A. 532 (8th Cir.); United States *v.* Gooding, 12 Wheat. 460, 6 L. ed. 693.

[2] United States *v.* Metzdorf, 252 Fed. 933.

§ 173. [1] Batchelor *v.* United States, 156 U. S. 426, 429, 39 L. ed. 478, 15 S. C. 446; United States *v.* Carll, 105 U. S. 611, 26 L. ed. 1135; United States *v.* Hess, 124 U. S. 483, 31 L. ed. 516, 8 S. C. 571; Pettibone *v.* United States, 148 U. S. 197, 37 L. ed. 419, 13 S. C. 542; United States *v.* Cruikshank, 92 U. S. 542, 558, 23 L. ed. 588.

§ 174. [1] Fontana *v.* United States, 262 Fed. 283 (C. C. A. 8th Cir.); Moore *v.* United States, 160 U. S. 268, 270, 40 L. ed. 422, 16 S. C. 294; Kovoloff *v.* United States, 202 Fed. C. C. A. 605 (7th Cir.); Pettibone *v.* United States, 148 U. S. 197, 203, 475, 120 37 L. ed. 419, 13 S. C. 542; United States *v.* Mann, 95 U. S. 580,

of criminal pleading that where the definition of an offense, whether at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species; it must descend to particulars.[2] Thus, for instance, it was held that an indictment for receiving stolen postal stamps from the United States with knowledge that they were stolen must recite the number and denominations of the stamps and the names of the post offices from which the stamps were stolen, and that a variance between the place of theft set forth in the indictment and the one proved on trial is fatal.[3] When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges.[4]

§ 175. Ex Post Facto Construction of New Offenses.

The United States Circuit Court of Appeals, speaking through Sanborn, J., in First National Bank *v.* United States,[1] denounces *ex post facto* construction of new penal statutes in no uncertain terms, using the following language: "The statute creates and denounces a new offense. A penal statute which creates a new crime and prescribes its punishment must clearly state the persons and acts denounced. A person who, or an act which, is not by the expressed terms of the law clearly within the class of persons, or within the class of acts, it denounces will not sustain a conviction thereunder. One ought not to be punished for a new offense unless he and his act fall plainly within the class of persons or the class of acts condemned by the statute. An act which is not clearly an offense by the expressed will of the legislative

24 L. ed. 531; Miller *v.* United States, 133 Fed. 337, 66 C. C. A. 399 (8th Cir.); Naftzger *v.* United States, 200 Fed. 494, 118 C. C. A. 598 (8th Cir.).

[2] United States *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; Morris *v.* United States, 161 Fed. 672, 88 C. C. A. 532 (8th Cir.); Keck *v.* United States, 172 U. S. 434, 43 L. ed. 505, 19 S. C. 254; Kovoloff *v.* United States, 202 Fed. 475, 120 C. C. A. 605 (7th Cir.); Fontana *v.* United States, *supra*.

[3] Naftzger *v.* United States, 200 Fed. 494, 118 C. C. A. 598 (8th Cir.).

[4] Fontana *v.* United States, 262 Fed. 283 (C. C. A. 8th Cir.); Miller *v.* United States, 133 Fed. 337, 66 C. C. A. 399 (8th Cir.).

§ 175. [1] 206 Fed. 374, 124 C. C. A. 356 (8th Cir.).

department before it was done may not be lawfully or justly made so by construction after it is committed, either by the interpolation of expressions or by the expunging of some of its words by the judiciary. *Ex post facto* construction is as vicious as *ex post facto* legislation. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of unkind character, with those which are enumerated. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words in search of an intention which the words themselves did not suggest." [2] Congress may, however, by statute, declare the construction of previous statutes, so as to bind courts in reference to subsequent transactions as well as to past transactions, so long as no constitutional right is violated.[3] If it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning; and will govern the construction of the first statute.[4] The several acts of Congress dealing with the same subject matter should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones.[5]

§ 176. **Finding More than One Indictment for Same Offense.** The practice of finding two or more indictments for different degrees of the same offense or for different offenses founded on

[2] United States *v.* Wiltberger, 18 U. S. (5 Wheat.) 76, 96, 5 L. ed. 37; United States *v.* Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12 (8th Cir.), 2 L. R. A. (N. S.) 185, and cases there cited.

[3] Stockdale *v.* Ins. Co., 20 Wall. (U. S.) 323, 331, 22 L. ed. 348; Cope *v.* Cope, 137 U. S. 688, 33 L. ed. 1064, 10 S. C. 708.

[4] United States *v.* Freeman, 3 How. (U. S.) 556, 565, 11 L. ed. 724.

[5] Cope *v.* Cope, *supra;* United States *v.* Freeman, 3 How. (U. S.) 556, 11 L. ed. 548; Stockdale *v.* Atlantic Ins. Co. of New Orleans, 20 Wall. (U. S.) 323, 22 L. ed. 348.

the same matter has been disapproved.[1] "In civil cases, says Drake, J.,[2] *the law abhors a multiplicity of suits; it is yet more watchful in criminal cases* that the Crown shall not oppress the subject, or the Government the citizen, by unreasonable prosecutions." And in the McElroy Case,[3] the Supreme Court of the United States strongly condemned it in the following language: "In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, as to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, and the distraction of the attention of the jury, or otherwise, that it is the settled rule in England, and in many of our states, to confine the indictment to one distinct offense or *restrict the evidence to one transaction. . . .*" Where two crimes are of the same nature and necessarily so connected that they may, and when both are committed they must, constitute but one legal offense, they should be included in one charge. Familiar examples of these are assault and battery, and burglary.[4] An assault and battery is really but one crime. The latter includes the former. They must be charged as one offense. So in burglary, where the indictment charges a breaking and entry with an intent to steal, and an actual stealing (which is the common form), the jury may acquit of the burglary, and convict of the larceny, but cannot convict of the burglary and larceny as two distinct offenses. The latter is merged in the former and they constitute but one offense.[5]

§ 177. Motion to Quash Where More than One Indictment Is Found for Same Offense.

The appropriate remedy is by a motion to the court to quash the indictment, or to confine the prosecution to some one of the

§ 176. [1] Chitty, Crim. Law, 316; McElroy *v.* United States, 164 U. S. 76, 41 L. ed. 355, 17 S. C. 31; People *v.* Van Horne, 8 Barb. 158; State *v.* Cooper, 1 Green (N. J.), 361, 375; Commonwealth *v.* Tuck, 20 Pick. (Mass.) 356.

[2] State *v.* Cooper, 1 Green (N. J.), 361, 375, *approved* in Ex parte Lang, 18 Wall. (U. S.) 163, 21 L. ed. 872.

[3] 164 U. S. 76, 41 L. ed. 355, 17 S. C. 31.

[4] 1 Starkie Crim. Pl. (2d ed.), 29.

[5] Rex *v.* Withal, 1 Leach, 88; Commonwealth *v.* Tuck, 20 Pick. (Mass.) 356.

charges.[1] Where a multiplicity of indictments exists, the practice is to move the court to quash such indictments, whenever the orderly procedure or the interest of the defendants requires that it be done. Upon such a motion, the court may quash the whole indictment or certain counts or direct the Government to elect upon which indictment it will proceed; or direct separate trials, and thereupon a conviction or an acquittal upon the first trial will be a bar to the others, if in fact the remaining indictments are for the same cause of action or offense. This rule is particularly stringent if a defendant had been arraigned and ordered to plead.[2]

§ 177. [1] Arch. Crim. Pl. 3.

[2] United States *v.* Maloney, Fed. Cas. No. 15713.

CHAPTER XVII

INDICTMENTS IN SEVERAL COUNTS — PART III

JOINDER OF CHARGES

§ 178. The Statute.

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."[1] This statute has received extensive consideration in the Federal Courts. It is now settled that, where several separate indictments are consolidated by order of court, they thereby become separate counts in a single indictment.[2] When so consolidated, a party can exercise only the number of peremptory challenges provided by law for a trial under a single indictment.[3] An indictment in several counts, charging different acts or transactions of the *same class of crimes* may be joined properly in one

§ 178. [1] Rev. Stat. § 1024.

[2] McElroy *v.* United States, 164 U. S. 76, 41 L. ed. 355, 17 S. C. 31; Porter *v.* United States, 91 Fed. 494, 33 C. C. A. 652 (5th Cir.); Turners *v.* United States, 66 Fed. 280, 13 C. C. A. 436 (5th Cir.).

[3] Kraus *v.* United States, 147 Fed. 442, 78 C. C. A. 642 (8th Cir.); Kharas *v.* United States, 192 Fed. 503, 113 C. C. A. 109 (8th Cir.); Walsh *v.* United States, 174 Fed. 615, 98 C. C. A. 461 (7th Cir.); Ryan *v.* United States, 216 Fed. 13 (C. C. A. 7th Cir.).

indictment without embarrassing the defendant or confounding him in his defense.[4] The phrase in the statute "which may be properly joined" does not limit the joinder to merely such matters as were permitted by the rules of common law, but the Court is vested with discretion to refuse or to permit a consolidation of indictments or counts where it would be injurious or oppressive to the interest of the defendant.[5] It is proper to consolidate when the different counts relate to the same transaction and are provable by the same evidence.[6]

§ 179. **When Consolidation Improper.**

But counts in an indictment against several defendants, for offenses charged to have been committed by all of them at one time, cannot be joined with another and distinct offense committed by part of them at a different time.[1] The general rule is that counts for several felonies requiring the same punishment and mode of trial may be joined in the same indictment subject to the power of the court to compel an election; such power cannot be sustained where the parties are not the same in all the counts or indictments or when the offenses are in nowise part of the same transaction and must depend upon evidence of a different state of facts as to each or some of them.[2] Separate counts of an indictment, which are interdependent and are provable by the same evidence, may be consolidated even though the evidence introduced in support of one charge may well serve as evidence tending to support

[4] Ingraham *v.* United States, 155 U. S. 434, 38 L. ed. 213, 14 S. C. 410; Pointer *v.* United States, 151 U. S. 396, 39 L. ed. 208, 15 S. C. 149; Motes *v.* United States, 178 U. S. 458, 44 L. ed. 1150, 20 S. C. 993; Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92; Logan *v.* United States, 144 U. S. 263, 296, 36 L. ed. 429, 12 S. C. 617; Ryan *v.* United States, 216 Fed. 13, 16, 132 C. C. A. 452 (7th Cir;.) Allison *v.* United States, 216 Fed. 329, 132 C. C. A. 473 (8th Cir.); Anderson *v.* Moyer, Warden, 193 Fed. 449; Hartman *v.* United States, 168 Fed. 30, 94 C. C. A. 124 (6th Cir.).

[5] Dolan *v.* United States, 133 Fed. 440, 69 C. C. A. 274 (8th Cir.).

[6] United States *v.* Greene, 146 Fed. 781; Dillard *v.* United States, 141 Fed. 303, 72 C. C. A. 451 (9th Cir.).

§ 179. [1] McElroy *v.* United States, 164 U. S. 76, 41 L. ed. 355, 17 S. C. 31.

[2] McElroy *v.* United States, 164 U. S. 76, 41 L. ed. 355, 17 S. C. 31; Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92; United States *v.* Dietrich, 126 Fed. 664 (8th Cir.).

the other charge or count.[3] But where there are distinct offenses which are punishable differently and require evidence of a different character to base a conviction, an indictment charging the violation of both these offenses in one count is bad for duplicity.[4] Accordingly, it has been held that two indictments against several defendants for assault with intent to kill, with another indictment against only part of them for arson committed on the same day, and with another indictment against all of them for arson committed two weeks later, cannot be consolidated;[5] also an indictment under Section 1 of the Sherman Act may be consolidated with an indictment charging a conspiracy to violate Section 13 of the Penal Law if the issues and parties are the same and they all relate to the same transactions.[6]

§ 180. Severance and Separate Trial.

The rule is that it is within the discretion of the trial judge to grant the defendants separate trials and an exception can only be taken if this discretion is abused.[1] Where the indictment shows the joint participation of the defendants in the offense charged, a motion for separate trials will be denied.[2] Directors elected after the discontinuance by the Attorney-General of an action against the corporation are entitled to a severance in another

[3] Ryan *v.* United States, 216 Fed. 13, 132 C. C. A. 245 (7th Cir.); Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92; Gund Brewing Co. *v.* United States, 204 Fed. 17; Allison *v.* United States, 216 Fed. 329, 132 C. C. A. 473 (8th Cir.); Olson *v.* United States, 133 Fed. 849; Pointer *v.* United States, 151 U. S. 396, 38 L. ed. 208, 14 S. C. 410; Crain *v.* United States, 162 U. S. 625, 40 L. ed. 1097, 16 S. C. 952.

[4] Ammerman *v.* United States, 216 Fed. 326, 132 C. C. A. 470 (8th Cir.).

[5] McElroy *v.* United States, 164 U. S. 76, 41 L. ed. 355, 17 S. C. 31.

[6] United States *v.* Bopp, 237 Fed. 283.

§ 180. [1] Heike *v.* United States, 227 U. S. 131, 57 L. ed. 450, 33 S. C. 226; United States *v.* Ball, 163 U. S. 662, 672, 41 L. ed. 300, 16 S. C. 1192; United States *v.* Marchant and Cokson, 12 Wheat. (U. S.) 481, 6 L. ed. 700; Lee Dock *v.* United States, 224 Fed. 431, 140 C. C. A. 125 (2d Cir.); Wood *v.* United States, 204 Fed. 55, 122 C. C. A. 369 (4th Cir.); Talbott *v.* United States, 208 Fed. 144, 125 C. C. A. 360 (5th Cir.); Richards *v.* United States, 175 Fed. 911, 99 C. C. A. 401 (8th Cir.); Krause *v.* United States, 147 Fed. 442, 78 C. C. A. 642 (8th Cir.).

[2] Belden *v.* United States, 223 Fed. 726, 139 C. C. A. 256 (9th Cir.).

prosecution against the board of directors,[3] but if in the course of the trial it should affirmatively appear that the offense committed was several and not joint and that there was no confederation or conspiracy between the defendants, each of the defendants is entitled to be discharged because of a material variance between the proof and the indictment.[4] An unlawful joinder is prejudicial error.[5] The case of State of Missouri *v.* Daubert,[6] cited with approval by the Supreme Court of the United States, in the McElroy case,[7] showed the following facts: Henry Daubert and Louisa Daubert were arraigned on an indictment in the St. Louis Criminal Court. The indictment contained two counts. The first count charged the defendants jointly with larceny, in taking and carrying away certain goods, the property of one Charles E. Barney. The second count charged the defendants with receiving the same goods, knowing them to be stolen. When the case was called for trial, the counsel for the defendants moved the court to compel the attorney prosecuting for the State to elect on which count he would proceed. This motion was by the court overruled, and the defendants excepted. The defendants were jointly put upon their trial, and, after all the testimony was delivered to the jury, the prosecuting attorney entered a *nolle prosequi* as to Henry Daubert on the first count, and as to Louisa Daubert on the second count. The counsel for the defendants then moved to quash the indictment, but the motion was overruled. The cause was then submitted to the jury, and they failed to agree on a verdict in the case of Louisa Daubert, but found Henry guilty, and assessed his punishment at two years' imprisonment in the pentitentiary. In deciding the case, the Supreme Court of Missouri said: "The proceeding is anomalous, and no precedent has been found supporting the action of the Criminal Court. As a general rule, where the offenses are several, distinct, and independent, there can be no joinder. The action of the Circuit attorney, in entering of record a *nolle prosequi* against Louisa on the second count, and Henry on the first count, changed the whole scope, tenor and

[3] United States *v.* Rockefeller, 222 Fed. 534.

[4] Johnson *v.* State, 44 Ala. 414; McGhee *v.* State, 58 Ala. 360.

[5] McElroy *v.* United States, 164 U. S. 76, 41 L. ed. 355, 17 S. C. 31.

[6] 42 Missouri, 242.

[7] 164 U. S. 79, 41 L. ed. 355, 17 S. C. 31.

meaning of the indictment. It then, in effect, amounted to an indictment charging two several offenses against distinct defendants, who had no necessary connection with each other. The count against Louisa, for larceny, was a substantive charge; the count against Henry, for receiving stolen goods, was another distinct charge or offense. It may, with entire propriety, be said that they really constituted two indictments, requiring different kinds of proof and separate and independent verdicts. Such a course of procedure, besides being wrong in itself, is calculated to confuse the minds of the jurors, divert their attention from one issue to another, and prevent the observance of those rules which the law has assiduously built up for the protection of the innocent. A striking illustration of the dangerous character of the manner in which the proceeding was conducted is manifested in the present case, where the jury failed to agree as to whether the goods were stolen, and yet they bring in a verdict of guilty against Henry Daubert for receiving the very identical goods, knowing them to be stolen. The multiplying of issues and the joinder of defendants in criminal cases met the decided disapprobation of this court in a case less strong than the one at bar. . . . As this case will be remanded for another trial, or further proceedings, we deem it only necessary to glance at one or two remaining points. The court erred palpably in admitting testimony of different acts of larceny, when they were entirely disconnected with the offense charged in the indictment and had no real tendency to prove the same. Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. (State *v.* Goetz, 34 Mo. 85.) . . . To admit the evidence, there must be a connection or blending which renders it necessary that the whole matter should be disclosed, in order to show its bearing on the issue before the court. The error in admitting the evidence was not cured by the instruction of the court in withdrawing and excluding it from the consideration of the jury. They had heard it detailed; it had poisoned their minds, and its effects could not be erased from their memories. This rule is so well established, and the matter has been so repeatedly decided by this court, that it is surprising that the courts below will still persist in the practice. . . ."

§ 181. **Copy of Indictment and List of Jurors and Witnesses for Prisoner.**

"When any person is indicted for treason, a copy of the indictment and a list of the jury and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial."[1] This section is not merely directory, but mandatory to the government.[2] And it is error to allow a witness to testify whose name has not been given to the defendant, where the defendant seasonably asserted his right.[3] There is no general obligation on the part of the prosecution to furnish the accused with a copy of the indictment. The court would no doubt have power to order a copy to be furnished on the request of the accused, and at the government's expense.[4] If a Federal prisoner is not indicted for a capital offense, he is not entitled as of right to a list of jurors or witnesses.[5] Nor will the Court, in advance of the trial of a case not capital, require the United States' Attorney to give the defendant a list of witnesses examined by the grand jury.[6] The United States Attorney cannot be required to give the accused a list of witnesses examined by the grand jury finding the indictment. In a conspiracy case, the court making this ruling intimated that it ought to be done, especially in such a case, and that the accused should also have a list of the witnesses the prosecution expects to call on the trial. As an alternative, the court said that when the case came to be

§ 181. [1] Rev. Stat. § 1033.

[2] Logan *v.* United States, 144 U. S. 263, 36 L. ed. 429, 12 S. C. 617; Johnson *v.* United States, 225 U. S. 405, 56 L. ed. 1142, 32 S. C. 748.

[3] Hickory *v.* United States, 151 U. S. 303, 38 L. ed. 170, 14 S. C. 334.

[4] United States *v.* Van Duzee, 140 U. S. 173, 35 L. ed. 399, 11 S. C. 758.

[5] United States *v.* Pierce, 245 Fed. 888; Hendrickson *v.* United States, 249 Fed. 34, 161 C. C. A. 91 (4th Cir.); Jones *v.* United States, 162 Fed. 417, 89 C. C. A. 303; *Writ of Certiorari denied* in 212 U. S. 576, 53 L. ed. 657, 29 S. C. 685; Shelp *v.* United States, 81 Fed. 694, 26 C. C. A. 570 (9th Cir.); United States *v.* Van Duzee, 140 U. S. 173, 35 L. ed. 399, 11 S. C. 758.

[6] United States *v.* Aviles, 222 Fed. 474, 477.

set down for trial, and the trial was imminent, if the defendant should apply for a continuance on the ground that he had not had an opportunity sufficiently to prepare for trial because he did not know what witnesses the prosecution intended to produce, it would then be the duty of the court to exercise his discretion, and continue the case, or require a list of the witnesses to be given, if he thought the facts were sufficient to justify such action.[7]

[7] United States *v.* Aviles, 222 Fed. 474.

CHAPTER XVIII

CONSTRUCTION AND REPEAL OF PENAL STATUTES

§ 182. Rule of Reasonable Doubt.

Criminal statutes must be construed strictly; and in the event of doubt, such doubt should be resolved in favor of the accused. The rule of reasonable doubt is applicable to the law as well as to the facts of the case.[1] But it is equally well settled that penal

§ 182. [1] Joplin Mercantile Co. *v.* United States, 236 U. S. 531, 59 L. ed. 705, 35 S. C. 291; Bolles *v.* Outing Co. 175 U. S., 262, 44 L. ed. 156, 20 S. C. 94; United States *v.* Morris, 14 Peters, 464, 10 L. ed. 543; Todd *v.* United States, 158 U. S. 278, 39 L. ed. 982; United States *v.* Biggs, 157 Fed. 264, *affirmed* in 211 U. S. 507, 53 L. ed. 305, 29 S. C. 181; United States *v.* Wiltberger, 5 Wheat. (U. S.) 76, 5 L. ed. 37; Burton *v.* United States, 202 U. S. 344, 50 L. ed. 1057, 26 S. C. 688; Keppel *v.* Tiffin Savings Bank, 197 U. S. 356, 49 L. ed. 790, 25 S. C. 443; Smith *v.* Townsend, 148 U. S. 490, 37 L. ed. 533, 13 S. C. 634; Johnson *v.* Southern Pacific Co., 196 U. S. 1, 19, 41 L. ed. 363, 25 S. C. 158; Rex *v.* Robinson, 2 Burr. 799, 803; Helwig *v.* United States, 188 U. S. 605, 47 L. ed. 614, 23 S. C. 427; France *v.* United States, 164 U. S. 676, 41 L. ed. 595, 17 S. C. 219; United States *v.* Chase, 135 U. S. 255, 261, 34 L. ed. 117, 10 S. C. 756; United States *v.* Steffens, 100 U. S. 82, 25 L. ed. 550; United States *v.* Booker, 98 Fed. 291, 294; Tiffany *v.* National Bank of Missouri, 18 Wall. 409, 21 L. ed. 862; United

laws are not to be construed so strictly as to defeat the obvious intentions of the Legislature.[2] And this rule specially applies when the statute is enacted for the public good, and to suppress a public wrong.[3] All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.[4] Doubtful words in a penal statute should not be extended beyond their natural meaning in the connection with which they are used.[5] And while a penal statute is to be construed strictly it should not be so narrowly construed as to defeat the very purpose of its enactment.[6] A penal law cannot be construed "by equity", so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law.[7] Mr. Justice Brown stated the rule as follows:[8] "The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in

States *v.* Sheldon, 2 Wheat. (U. S.) 119, 4 L. ed. 199; United States *v.* Reese, 92 U. S. 214, 23 L. ed. 563; United States *v.* Clayton, 2 Dill. (U. S.) 219; United States *v.* Commerford, 25 Fed. 902; United States *v.* Williams, 3 Fed. 484, 491.

[2] United States *v.* Lacher, 134 U. S. 624, 628, 33 L. ed. 1080, 10 S. C. 625; United States *v.* Corbett, 215 U. S. 233, 242, 54 L. ed. 173, 30 S. C. 81; United States *v.* Union Supply Co., 215 U. S. 50, 55, 54 L. ed. 87, 30 S. C. 15.

[3] Taylor *v.* United States, 3 How. (U. S.) 197, 210, 11 L. ed. 559; United States *v.* Stowell, 133 U. S. 1, 12, 33 L. ed. 555, 10 S. C. 244; Johnson *v.* Southern Pacific Co., 196 U. S. 1, 16, 49 L. ed. 363, 25 S. C. 158.

[4] United States *v.* Kirby, 7 Wall. (U. S.) 482, 19 L. ed. 278.

[5] United States *v.* Stone, 188 Fed. 386.

[6] United States *v.* Ash Sheep Co., 250 Fed. 592 (C. C. A. 9th Cir.); Johnson *v.* Southern Pacific Co., 196 U. S. 1, 18, 49 L. ed. 363, 25 S. C. 158; United States *v.* Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 S. C. 625; United States *v.* Kambetz, 256 Fed. 25; Williamson *v.* United States, 207 U. S. 425, 52 L. ed. 278, 28 S. C. 163; United States *v.* Schlierholz, 137 Fed. 616; Hamilton *v.* United States, 26 D. C. 382.

[7] United States *v.* Sheldon, 2 Wheat. (U. S.) 119, 4 L. ed. 199.

[8] Bolles *v.* Outing Co., 175 U. S. 262, 44 L. ed. 156, *citing* United States *v.* Hartwell, 6 Wall. (U. S.) 385, 18 L. ed. 830; United States *v.* Wiltberger, 5 Wheat. (U. S.) 76, 95, 5 L. ed. 37, 42; American Fur Co. *v.* United States, 2 Pet. (U. S.) 358, 7 L. ed. 450; United States *v.* Reese, 92 U. S. 214, 23 L. ed. 563.

favor of the defendant than it would if the statute were remedial. In both cases it will endeavor to effect substantial justice." Chief Justice Marshall commented on the rule of strict construction in criminal cases as follows:[9] "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. . . . The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of the statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

§ 183. Congressional Debates — Committee Reports as Aids in Interpretation of Statutes.

Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation.[1] The Supreme Court of the United States has held repeatedly that debates of Congressional Committees are unreliable to discover the source

[9] United States *v.* Wiltberger, 5 Wheat. (U. S.) 76, 5 L. ed. 37.

§ 183. [1] Blake *v.* National City Bank, 23 Wall. (U. S.) 307, 319, 23 L. ed. 119, 120; Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1, 42, 39 L. ed. 601, 613, 15 S. C. 508; Chesapeake & P. Teleph. Co. *v.* Manning, 186 U. S. 238, 246, 46 L. ed. 1144, 1147, 22 S. C. 881; Binns *v.* United States, 194 U. S. 486, 495, 48 L. ed. 1087, 1090, 24 S. C. 816.

of the meaning of the language employed in an act of Congress.[2] And the Court is not disposed to go beyond the reports of Congressional Committees.[3] It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law making body which passed it, the sole function of the courts is to enforce it according to its terms.[4] Where the language is plain and admits of but one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.[5]

§ 184. Construction of Earlier and Later Statutes on Same Subject.

"Where there are two statutes, the earlier special and the later general — the terms of the general broad enough to include the matter provided for in the special — the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

[2] Lapina *v.* Williams, 232 U. S. 78, 58 L. ed. 515, 34 S. C. 196; United States *v.* Trans-Mo. Freight Ass'n, 166 U. S. 290, 41 L. ed. 1007, 17 S. C. 540.

[3] Lapina *v.* Williams, *supra;* Binns *v.* United States, 194 U. S. 486, 48 L. ed. 1087, 24 S. C. 816; Johnson *v.* Southern Pacific Co., 196 U. S. 1, 49 L. ed. 363, 25 S. C. 158; Church of Holy Trinity *v.* United States, 143 U. S. 457, 463, 36 L. ed. 226, 12 S. C. 511.

[4] Lake County *v.* Rollins, 130 U. S. 662, 670, 671, 32 L. ed. 1060, 1063, 1064, 9 S. C. 651; Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1, 33, 39 L. ed. 601, 610, 15 S. C. 508; United States *v.* Lexington Mill & Elevator Co., 232 U. S. 399, 409, 58 L. ed. 658, 661, L. R. A. 1915B, 774, 34 S. C. 337; United States *v.* First National Bank, 234 U. S. 245, 258, 58 L. ed. 1298, 1303, 34 S. C. 846.

[5] Hamilton *v.* Rathbone, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 S. C. 155; Swarts *v.* Siegel, 117 Fed. 13, 54 C. C. A. 399 (8th Cir.); State *v.* Duggan, 15 R. I. 403, 6 Atl. 787; United States *v.* Hartwell, 6 Wall. (U. S.) 385, 396, 18 L. ed. 830, 832; Lake County *v.* Rollins, 130 U. S. 662, 670, 671, 32 L. ed. 1060, 1063, 1064, 9 S. C. 651; Yerke *v.* United States, 173 U. S. 439, 442, 43 L. ed. 760, 761, 19 S. C. 441, 20 S. C. 155; Webber *v.* St. Paul City R. Co., 97 Fed. 140, 38 C. C. A. 79; Johnson *v.* Southern Pacific Co., 117 Fed. 462, 54 C. C. A. 508 (8th Cir.); United States *v.* Fisher, 2 Cranch (U. S.), 358, 399, 2 L. ed. 304, 318; United States *v.* Wiltberger, 5 Wheat. (U. S.) 76, 96, 5 L. ed. 37, 42.

Per Justice Brown, in Rodgers *v.* United States,[1] *citing* Ex parte Crow Dog,[2] where the court said: "The rule is, *generalia specialibus no derogant.* 'The general principle to be applied,' said Bovill, C. J. in Thorpe *v.* Adams, L. R. 6 C. P. 135, 'to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C. in Firtgerald *v.* Champneys, 2 Johns. & H. 54, 30 L. J. Ch. 782, 'that the Legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'"

§ 185. **Construction and Application of Two Similar Statutes.** Where the language of two statutes relating to kindred subjects and having similar objects is not alike, and the state of facts to which they apply is different, each must be construed according to its own terms.[1] Where two statutes cover in whole, or in part, the same subject, and are not wholly irreconcilable, and no intent to repeal the earlier is clearly expressed or indicated by the latter, they must stand together and effect must be given to each. The earlier is not repealed by the later.[2]

§ 186. **Construction of a General Statute with Proviso.** Where there is in the same statute a particular enactment, and also a general one, which in its most comprehensive sense would

§ 184. [1] 185 U. S. 83, 46 L. ed. 816, 22 S. C. 582; Stoneberg, *et al. v.* Morgan, Warden, 246 Fed. 98, — C. C. A. — (8th Cir.); Ex parte United States, 226 U. S. 420, 57 L. ed. 281, 33 S. C. 170.

[2] 109 U. S. 556, 27 L. ed. 1030, 3 S. C. 396. And *see also* Snitkin *v.* United States (C. C. A. 7th Cir.) decided March 30, 1920, fully sustaining doctrine announced in text.

§ 185. [1] Warner *v.* Boyer, 74 Fed. 873.

[2] Frost *v.* Wenie, 157 U. S. 46, 58, 39 L. ed. 614, 15 S. C. 532; United States *v.* Healey, 160 U. S. 136, 147, 40 L. ed. 369, 16 S. C. 247; Board of Commissioners *v.* Ætna Life Ins. Co., 90 Fed. 222, 227, 32 C. C. A. 585, 590 (8th Cir.); City Realty Co. *v.* Robinson Contracting Co., 183 Fed. 176, 181.

include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.[1]

§ 187. Statutes Creating New Offenses.

When a statute creates a new offense by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offenses, not unlawful previously, by a particular sanction and particular method of proceeding, that particular method must be pursued and no other.[1] When a statute creates a new offense and fixes the penalty or provides a specific punishment, only that punishment can be inflicted which the statute prescribes.[2]

§ 188. Offenses against the United States and the State.

Acts in violation of both State and national Penal Codes may be prosecuted in either of these courts.[1]

§ 189. Rules of Pleading.

In the interest of orderly procedure and for the full protection of the defendant's rights, an indictment must sufficiently set forth a definite crime under penalty of being declared invalid if an essential element be lacking.[1]

§ 186. [1] United States *v.* Chase, 135 U. S. 255, 34 L. ed. 117, 10 S. C. 756.

§ 187. [1] Rex *v.* Robinson, 2 Burr. 799, 803. Snitkin *v.* United States (C. C. A. 7th Cir.). Decided Mar. 30, 1920.

[2] In re Food Conservation Act, 254 Fed. 893, 902; Farmers' and Mechanics' National Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196; McBroom *v.* Scottish Mortgage & Land Investment Co., 153 U. S. 318, 325, 38 L. ed. 729, 14 S. C. 852; Oates *v.* National Bank, 100 U. S. 239, 25 L. ed. 580.

§ 188. [1] Morris *v.* United States, 229 Fed. 516, 143 C. C. A. 584 (8th Cir.), *citing* Houston *v.* Moore, 5 Wheat. (U. S.) 1, 5 L. ed. 19; Fox *v.* Ohio, 5 How. (U. S.) 410, 12 L. ed. 213; United States *v.* Marigold, 9 How. (U. S.) 560, 13 L. ed. 257; United States *v.* Arjona, 120 U. S. 479, 30 L. ed. 728, 7 S. C. 628; Cross *v.* North Carolina, 132 U. S. 131, 33 L. ed. 287, 10 S. C. 47.

§ 189. [1] Ulmer *v.* United States, 219 Fed. 641, 134 C. C. A. 127 (6th Cir.); Daniels *v.* United States, 196 Fed. 459, 465, 116 C. C. A. 233 (6th Cir.); United States *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; Bennett *v.* United States, 194 Fed. 630, 114 C. C. A. 402 (6th Cir.); United States *v.* Biggs, 211 U. S. 507, 53 L. ed. 305, 29 S. C. 181.

§ 190. **Repeal of Statutes without a Saving Clause — Effect on Pending Cases.**

The repeal of the law imposing the penalty is of itself a remission of same.[1] There can be no legal connection nor any valid judgment pronounced upon conviction unless the law creating the offense be in existence at the time.[2] When, during the pendency of an action in an appellate court for a penalty, civil or criminal, the statute prescribing the penalty is repealed without any saving clause, the appellate court must dispose of the case under the law in force when its decision is given even though to do so requires the reversal of a judgment which was right when rendered.[3] If pending the appeal of a criminal case, the penal statute, which the defendant is charged with violating, is repealed without a saving clause, it will prevent affirmance of conviction by the higher court. The higher court will be obliged to reverse the judgment and the prosecution will be dismissed. Of course, the effect of repeal upon incomplete proceedings may be avoided by a saving clause inserted in the repeal statute.[5] The general rule has always been that the repeal of a statute imposing a penalty will prevent further prosecution for any violation of that statute, unless the contrary is provided in the repealing statute. Chief Justice Marshall, in the leading case of Yeaton *v.* United States,[6] said, "If no sentence has been pronounced, it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."[7] There is, however, a general saving

§ 190. [1] United States *v.* Tynen, 11 Wall. (U. S.) 88, 20 L. ed. 153; Moore *v.* United States, 85 Fed. 465, 29 C. C. A. 269 (8th Cir.); Maryland *v.* B. & Ohio R. R. Co., 3 How. (U. S.) 534, 11 L. ed. 714.

[2] United States *v.* Tynen, 11 Wallace (U. S.), 88, 20 L. ed. 153.

[3] United States *v.* Peggy, 1 Cranch (U. S.), 103, 110, 2 L. ed. 49; Gulf. Col. & S. F. Ry. *v.* Dennis, 224 U. S. 503, 506, 56 L. ed. 860, 32 S. C. 542; Yeaton *v.* United States, 5 Cranch (U. S.), 281, 3 L. ed. 101; The Rachel *v.* United States, 6 Cranch (U. S.), 329, 3 L. ed. 239; Vance *v.* Rankin, 194 Ill. 625; Pacific Mail S. S. Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805.

[4] Vance *v.* Rankin, 194 Ill. 625; Gulf. Col. & S. F. Ry. *v.* Dennis, 224 U. S. 503, 56 L. ed. 860, 32 S. C. 542; Keller *v.* The State, 12 Maryland, 322; State *v.* Daley, 29 Conn. 272.

[5] State *v.* Coley, 114 N. C. 879.

[6] Yeaton *v.* United States, 5 Cranch (U. S.), 281, 3 L. ed. 101.

[7] The Irresistible, 7 Wheat. (U.

statute.[8] Section 13 Revised Statute, 1871,[9] provides as follows: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability, incurred under such statute unless repealing act shall expressly so provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." [10]

§ 191. **Effect of an Unconstitutional Law.**

An unconstitutional law is void, and is as no law. The offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.[1] When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; it constitutes a protection to no one who has acted under it. An unconstitutional statute is to be regarded as having at no time been possessed of any legal force.[2]

S.) 551, 5 L. ed. 520; Dyer *v.* Ellington, 126 N. C. 941; United States *v.* Schooner Peggy, 1 Cranch (U. S.), 103, 2 L. ed. 49; Bank *v.* State, 12 Ga. 475.

[8] United States *v.* Reisinger, 128 U. S. 398, 32 L. ed. 480, 9 S. C. 99.

[9] Act Feb. 25th, 1871, c. 71, 16 Stat. 432, U. S. Compiled Stat. 1901, ¶ 6.

[10] Great Northern Ry. Co. *v.* United States, 208 U. S. 452, 52 L. ed. 567, 28 S. C. 313; Hertz *v.* Woodman, 218 U. S. 205, 54 L. ed. 1001, 30 S. C. 621; United States *v.* Lair, 195 Fed. 47, 115 C. C. A. 49 (8th Cir.).

§ 191. [1] Ex parte Siebold, 100 U. S. 371, 376, 25 L. ed. 717; Ex parte Royal, 117. U. S. 241, 29 L. ed. 868, 6 S. C. 734; Ex parte Yarborough, 110 U. S. 651, 654, 28 L. ed. 274, 4 S. C. 152; United States *v.* Hand, *et al.*, 6 McLean, 274; Chicago etc., Coal Co. *v.* People, 214 Ill. 421; Norton *v.* Shelby County, 118 U. S. 425, 442, 30 L. ed. 178, 6 S. C. 1121; In re Wong Yung Quy, 47 Fed. 717; Wyandott *v.* Kansas City, etc., Co., 56 Kansas, 577, 47 Pac. 326; Woolsey *v.* Dodge, 6 McLean, 142; United States *v.* Sauer, 73 Fed. 671.

[2] Cooley on Const. Limitations, Star, p. 188; Astrom *v.* Hammond, 3 McLean (Fed.), 107; Strong *v.* Daniels, 5 Porter (Ind.), 348; State *v.* Hunter, 106 N. C. 796, 11 S. E. 366.

CHAPTER XIX

EX POST FACTO AND BILLS OF ATTAINDER

§ 192. Ex Post Facto Legislation.

The Constitution of the United States prohibits Congress from passing any *ex post facto* laws. Article 1, Section 9, Clause 3, reads: "No *ex post facto* law shall be passed." A similar restriction is imposed on the various States. — "No State shall pass . . . any *ex post facto* Law." [1] The purpose of this restriction was to restrain legislative bodies from making an act criminal which was innocent at the time of its commission.[2] The generally adopted definition of an *ex post facto* law is one which in relation to the offense or its consequences alters the situation of a party to his disadvantage.[3] For this reason laws passed to ameliorate the condition of persons accused of crime and which are to their advantage are not *ex post facto* laws.[4] In Calder *v.* Bull, *supra,*

§ 192. [1] Article 1, Section 10, Clause 1.

[2] Calder *v.* Bull, 3 Dallas (U. S.), 386, 1 L. ed. 648.

[3] Calder *v.* Bull, 3 Dallas (U. S.), 386, 1 L. ed. 648; United States *v.* Hall, 2 Wash. (C. C.) 366; Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 333, 18 L. ed. 356; Fletcher *v.* Peck, 6 Cranch (U. S.), 87, 3 L. ed. 162; Thompson *v.* Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. C. 620; In re Medley, 134 U. S. 160, 33 L. ed. 835, 10 S. C. 384.

[4] Rooney *v.* North Dakota, 196 U. S. 319, 49 L. ed. 494, 25 S. C. 264; Calder *v.* Bull, *supra;* Gibson *v.* Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 S. C. 904; Mallett *v.* North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. C. 730; Kring *v.* Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. C.

Mr. Justice Chase laid down certain rules by which to test *ex post facto* legislation. They are as follows: "(1) Every law that makes an action done before the passage of the law and which was innocent when done criminal and punishes such action. (2) Every law that aggravates a crime or makes it greater than it was when committed. (3) Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. (4) Every law that alters the legal rule of evidence and receives less or different testimony than the law required at the time of the commission of the crime in order to convict the offender." [5]

§ 193. Limited to Criminal and Penal Laws.

The words *ex post facto* when applied to a law have a technical meaning and refer to criminal penal proceedings only and not to any civil proceedings.[1]

§ 194. Changes of the Law as to Juries.

A statute requiring members of the grand jury to be persons of good intelligence, as well as qualified voters and able to read and write, in its application to offenses occurring before enactment

443; Hopt *v.* Utah, 110 U. S. 574, 590, 28 L. ed. 262, 4 S. C. 202; Duncan *v.* Missouri, 152 U. S. 377, 382, 38 L. ed. 485, 14 S. C. 570; Thompson *v.* Utah, 170 U. S. 343, 351, 42 L. ed. 1061, 18 S. C. 620.

[5] This decision has since been cited with approval and referred to in Kring *v.* Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. C. 443; Duncan *v.* Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. C. 570; Gibson *v.* Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 S. C. 904; Mallett *v.* North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. C. 730; Malloy *v.* South Carolina, 237 U. S. 180, 59 L. ed. 905, 35 S. C. 507.

§ 193. [1] Calder *v.* Bull, 3 Dallas (U. S.), 386, 1 L. ed. 648; Fletcher *v.* Peck, 6 Cranch (U. S.), 87, 138, 3 L. ed. 162; Watson *v.* Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 266, 6 L. ed. 606; Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458; Briscoe *v.* Bank, 11 Pet. (U. S.) 257, 328, 9 L. ed. 709; Carpenter *v.* Pennsylvania, 17 How. (U. S.) 456, 463, 15 L. ed. 127; Locke *v.* New Orleans, 4 Wall. (U. S.) 172, 18 L. ed. 334; Walker *v.* Whitehead, 16 Wall. (U. S.) 314, 317, 21 L. ed. 357; Mallett *v.* North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. C. 730; Kring *v.* Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. C. 443; Ex parte Medley, 134 U. S. 160, 33 L. ed. 835, 10 S. C. 384; Orr *v.* Gilman, 183 U. S. 278, 46 L. ed. 196, 22 S. C. 213; Johannessen *v.* United States, 225 U. S. 227, 56 L. ed. 1066, 32 S. C. 613.

is not void as an *ex post facto* law.[1] But where the law, as it exists at the time of the commission of an offense, permits the trial and conviction of the accused upon the unanimous verdict of a jury of twelve, a subsequent change, applicable to the case and permitting him to be tried by a jury of only eight men, is as to this case *ex post facto*.[2]

§ 195. **Changing Place of Trial.**

Changing place of trial from one county to another, or from one district to a different district from which the offense was committed or the indictment found is not an *ex post facto* law within the constitutional prohibition, though subsequent to the commission of the offense or the finding of the indictment.[1]

§ 196. **Changing Rules of Evidence.**

Every statute that alters the legal rules of evidence, which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed is an *ex post facto* law.[1] Statutes shifting the burden of proof subsequent to the commission of the offense are *ex post facto* as applied to persons on trial for such offense.[2] But statutes which do not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but leave untouched the nature of the crime and the amount or degree of proof essential to conviction, relate to modes of procedure only, in which no one can be said to have a vested right and which the State upon grounds of public policy may regulate at pleasure.[3]

§ 197. **Bills of Attainder — Definition.**

A bill of attainder has been defined as a legislative act which inflicts punishment without a judicial trial.[1] If the punishment

§ 194. [1] Gibson *v.* Missouri, 162 U. S. 565, 40 L. ed. 1075, 16 S. C. 904.

[2] Thompson *v.* Utah, 170 U. S. 343, 352, 42 L. ed. 1061, 18 S. C. 620.

§ 195. [1] Gut *v.* Minnesota, 9 Wall. (U. S.) 35, 39, 19 L. ed. 573; Cook *v.* United States, 138 U. S. 157, 183, 34 L. ed. 906, 11 S. C. 268.

§ 196. [1] Mallett *v.* North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. C. 730; Hopt *v.* Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. C. 202; Kring *v.* Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. C. 443.

[2] Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356.

[3] Hopt *v.* Utah, 110 U. S. 574, 590, 28 L. ed. 262, 4 S. C. 202; Thompson *v.* Missouri, 171 U. S. 380, 43 L. ed. 204, 18 S. C. 922.

§ 197. [1] In re Giacomo, 12 Blatch. 391, Fed. Cas. No. 3747; Cummings

be less than death, the act is termed a bill of pains and penalties. By constitutional use bills of attainder include bills of pains and penalties.[2]

§ 198. **History — Other Instances.**

Bills of Attainder first arose in England during the "Wars of the Roses", when rival families of the nobility contended for the supremacy of the landed estates of the realm. Immediately upon the rise to power of one faction, the followers of the defeated nobles would be declared to be attainted, their "blood corrupted", so as to bar hereditability. In other words, the ancestor being declared guilty of treason, the heirs would be deprived of the lands which would naturally come to them by virtue of heredity. The framers of the Constitution felt that visiting the iniquities of the fathers upon the children comes within the province of God. That accounts for the sharp disapproval of bills of attainder which is evident in the Constitution. Article 1, Section 9 of the Constitution denies Congress the right to pass bills of attainder. Article 1, Section 10 places a similar restriction on the States. By Article 3, Section 3, however, attainder of treason may work corruption of blood and forfeiture during the life of the person attainted.[1] The effect of this reservation has led to some queer results. On July 17, 1862, a bill was passed to suppress insurrection, to punish treason and rebellion and to seize and confiscate the property of rebels and for other purposes. President Lincoln had refused to sign this act until Congress had passed a joint resolution to the effect that this Act shall not be construed "to work a forfeiture of the real estate of the offender beyond his natural life." Because of this resolution which must be construed as part of the Act of July 17, 1862, the Supreme Court of the United States was obliged to hold that a condemnation sale of the property of an offender under this Act could only pass to the purchaser an estate for the life of the offender, even though such an offender had a fee simple interest in the property and the

v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Davis *v.* Berry, 216 Fed. 413.

[2] In re Yung Sing Hee, 36 Fed. 437; Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 323, 18 L. ed. 356; Drehman *v.* Stifle, 8 Wall. (U. S.) 595, 601, 19 L. ed. 508.

§ 198. [1] Fletcher *v.* Peck, 6 Cranch (U. S.), 87, 138, 3 L. ed. 328.

libel was against all the rights, title, interest and estate of such person.[2] In Wallace *v.* Riswick,[3] a case also arising under the Act of July 17, 1862, the Court held that an offender whose land was condemned for his life did not retain an estate expectant upon his death which he might sell, convey or mortgage. The offender himself lost all interest in the land. During his life it belonged to the United States and he is deprived of all rights which go with property. In other words, the Act of July 17, 1862, and Article 3, Section 3 of the Constitution were designed for the protection of the heirs of a person attainted and not for the offender himself. The constitutional inhibition of *ex post facto* laws was intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alterations in conditions deemed necessary for the orderly infliction of human punishment.[4] Accordingly it has been held that a statute which will merely change the mode of carrying out a death sentence, which is inherently not inhuman, is not *ex post facto*.[5]

[2] Day *v.* Micou, 18 Wall. (U. S.) 156, 21 L. ed. 860; Bigelow *v.* Forrest, 9 Wall. (U. S.) 339, 19 L. ed. 696.

[3] 92 U. S. 202, 23 L. ed. 473.

[4] Malloy *v.* South Carolina, 237 U. S. 180, 59 L. ed. 905, 35 S. C. 507.

[5] Malloy *v.* South Carolina, 237 U. S. 180, 59 L. ed. 905, 35 S. C. 507.

CHAPTER XX

STATUTES OF LIMITATIONS

§ 199. **Capital Offenses.**

The statute provides: "No person shall be prosecuted, tried, or punished for treason or other capital offense, wilful murder excepted, unless the indictment is found within three years next after such treason or capital offense is done or committed." [1]

§ 200. **Offenses Not Capital.**

The statute provides: "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-six, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense, barred by the provisions of existing laws." [1] This section applies to all misdemeanors which are constituted offenses against the United States and added by Congress to the list of statutory crimes.[2] A defendant indicted for an offense, other than capital,

§ 199. [1] Revised Statute § 1043.

§ 200. [1] Revised Statute § 1044, amended April 13th, 1876, c. 56, 19 Stat. L. 32.

[2] United States *v.* Central Vermont R. Co., 157 Fed. 291.

against the United States, cannot avail himself of the defense of the three year limitation by demurrer, where the indictment does not show on its face that the defendant is not within the exception of persons fleeing from justice. The proper practice is for the defendant to file special plea in abatement.[3] The running of the three year statute prescribed by this section for criminal prosecutions to punish crimes within this section, such as criminal contempt of an injunction against a boycott, begins, as to each specific act charged from the date of the commission of such act.[4]

§ 201. **Contempts — Polygamy — Conspiracy.**

Contempts of courts are crimes which are governed by the three year statute of limitations.[1] The offense of bigamy or polygamy consists in the fact of unlawful marriage, and a prosecution against the offender is barred by the lapse of three years,[2] and is extended to cases coming under the white slave laws.[3] A conspiracy runs from the commission of the overt act.[4] If there is a continuing series of overt acts, the statute runs from the last overt act,[5] and not from the date of the conspiracy.[6]

§ 202. **Fleeing from Justice.**

By express provision of the Statute it is provided: "Nothing in the two preceding sections shall extend to any person fleeing from justice." [1] It is not necessary to constitute one a "person fleeing from justice" that he should have left the United States, but it is sufficient that he had left the district in which the offense was committed when it was sought to apprehend him therefor, and was found in another district, in which he did not reside, under circumstances indicating a purpose to evade the authority of the courts having jurisdiction.[2] An intent to avoid the justice of the

[3] United States *v.* Brace, 143 Fed. 703.

[4] Gompers *v.* United States, 233 U. S. 604, 58 L. ed. 1115, 34 S. C. 693.

§ 201. [1] Gompers *v.* United States, 233 U. S. 604, 58 L. ed. 1115, 34 S. C. 693.

[2] Murphy *v.* Ramsey, 114 U. S. 15, 29 L. ed. 47, 55 S. C. 747.

[3] United States *v.* Lair, 195 Fed. 47, 115 C. C. A. 49 (8th Cir.).

[4] United States *v.* Owens, 32 Fed. 534.

[5] Hedderly *v.* United States, 193 Fed. 561, 114 C. C. A. 227 (9th Cir.).

[6] Mitchell *v.* United States, 196 Fed. 874, 116 C. C. A. 436 (9th Cir.).

§ 202. [1] Revised Statute § 1045.

[2] Greene *v.* United States, 154 Fed. 401, 85 C. C. A. 251 (5th Cir.).

state having jurisdiction, and not only the intent to avoid justice of the United States, brings the defendant under this section.[3]

§ 203. **Crimes under Internal Revenue Laws.**

The statute further provides: "No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases: Provided, That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings; Provided further that the provisions of this act shall not apply to offenses committed prior to its passage: And provided further that where a complaint shall be instituted before a Commissioner of the United States within the period above limited, the time shall be extended until the discharge of the Grand Jury at its next session within the district: And provided further that this act shall not apply to offenses committed by officers of the United States." [1] This section supersedes Revised Statutes § 1046 to the extent of making a limitation of three years for offenses of this character.

§ 204. **Crimes under Revenue or Slave Trade Laws.**

The procedure is provided for by the statute as follows: "No person shall be prosecuted, tried or punished for any crime arising under the revenue laws, or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime." [1] Under this section, a prosecution by information is expressly recognized by Congress.[2] An indictment under "An Act to provide internal revenue to support the government" charging the defendant with not having paid the special tax imposed by law is

[3] Streep *v.* United States, 160 U. S. 128, 40 L. ed. 365, 16 S. C. 244.

§ 203. [1] Act of July 5th, 1884, c. 225, § 1, 23 Stat. L. 122.

§ 204. [1] Revised Statute § 1046.

[2] In re Wilson, 18 Fed. 33; Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89.

an offense under the revenue law.[3] This section does not extend to conspiracies to defraud the government of duties in imports.[4]

§ 205. **Penalties and Forfeitures; under Laws of United States.**

Congress provided further: "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: Provided, That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property." [1] This section refers to fines, penalties, and forfeitures, and provides for a five year statute of limitations, but does not apply to customs revenue cases which are subject to the three year limitation for similar proceedings and provided for in section 22.[2] This section refers to suits by the government against carriers for violation of the laws against discrimination.[3] A waiver of the statutory defense as to causes in a second amended declaration does not extend to an entirely different statement of offense.[4] This limitation does not apply to the action for threefold damages for injury to "business or property" authorized by the Anti-Trust Act.[5]

§ 206. **Under Customs Revenue Laws.**

A similar rule is provided for by statute under the revenue laws: "No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or

[3] United States *v.* Wright, 14 Fed. Cas. No. 16770.

[4] United States *v.* Hirsch, 100 U. S. 33, 25 L. ed. 539.

§ 205. [1] Revised Statute § 1047.

[2] United States *v.* Wittemann, 152 Fed. 377, 81 C. C. A. 503 (2d Cir.). Carter *v.* New Orleans & N. E. R. Co., 143 Fed. 99, 74 C. C. A. 293 (5th Cir.).

[4] United States *v.* Dwight Mfg. Co., 210 Fed. 79.

[5] Chattanooga Foundry & Pipe Works *v.* Atlanta, 203 U. S. 390, 51 L. ed. 241, 27 S. C. 65; United States *v.* Joles, 251 Fed. 417.

forfeiture shall have accrued: Provided, That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation." [1] The limitation under this section runs whether the holder of the property or the customs officials have knowledge or not.[2]

§ 207. **Procedure.**

Where the facts showing the bar of the prosecution by the statute of limitations appear from the face of the indictment, they may be taken advantage of by demurrer; if it does not so appear from the face of the indictment, the proper remedy is by a special plea in the nature of abatement of the action.[1] The statute of limitations cannot be set up as a defense by way of demurrer where the act which defines the offense contains no exception or proviso of any kind.[2] A plea of the statute of limitations is a plea to the merits.[3] A motion to quash an indictment on the ground that the offense was barred by the statute of limitations is in substance a plea in bar.[4] A special plea in bar based on the statute of limitations to an indictment for conspiracy containing allegations of conspiracy to the date of filing, is not permissible; that defense must be made under the general issue.[5]

§ 206. [1] Act of June 22, 1874, c. 391, § 22, 18 Stat. L. 190.

[2] United States *v.* One Dark Bay Horse, 130 Fed. 240.

§ 207. [1] United States *v.* Brace, 143 Fed. 703.

[2] United States *v.* Cook, 17 Wall. (U. S.) 168, 21 L. ed. 538.

[3] United States *v.* Oppenheimer, 242 U. S. 85, 61 L. ed. 161, 37 S. C. 68.

[4] United States *v.* Barber, 219 U. S. 72, 55 L. ed. 99, 31 S. C. 209; United States *v.* Oppenheimer, *supra.*

[5] United States *v.* Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 S. C. 124; United States *v.* Barber, 219 U. S. 72, 55 L. ed. 99, 31 S. C. 209.

CHAPTER XXI

CHANGE OF VENUE

§ 208. For Prejudice of Judge.

Section 21 of Federal Judicial Code provides: "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less *than ten days* before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action." [1] It was held that this section does not apply to the Appellate Federal Courts.[2]

208. [1] 36 Stat. L. 1090.
[2] Kinney *v.* Plymouth Rock Squab Co., 213 Fed. 449, 130 C. C. A. 586 (1st. Cir.).

§ 209. **Procedure.**

It gives the right to a litigant in the Federal Courts to object to a judge because of bias, providing the objections are set forth in an affidavit filed ten days before the opening of the term. The law is retroactive.[1] There is one exception to the rule. When there is to be a second trial during the same term, the affidavit must be filed immediately after the decision of the appellate court has been entered.[2] Judge Jones held[3] that the affidavit for change of venue must contain facts upon which the affiant bases his belief that the judge is prejudiced against him, and that literal construction of the statute would render it unconstitutional. The bias referred to in Section 21 must be the personal bias of the judge towards the party seeking the change of venue.[4] It was held also that the judge could not be disqualified because of bias, simply because he had preconceived ideas as to a party's right to recover.[5]

§ 210. **Certificate of Counsel.**

It is to be regretted that Congress has seen fit to require a certificate of counsel as a prerequisite to granting a change of venue. An attorney is an officer of the court; he appears before the court in his professional capacity and harmonious relations between the two are most desirable. Such a charge on the part of counsel that his superior officer, the judge, is unfair and unfit to sit in the case will, most likely, prejudice the future standing of the attorney with that judge. Consequently the situation tends to intimidate the lawyer in the discharge of his duty to his client. Moreover, this statute is in conflict with Section 272 of the Federal Judicial Code, providing " in all courts of the United States the parties may plead and manage their own causes personally, *or* by the *assistance* of such counsel or attorneys at law as, by the rules of the said court, respectively, are permitted to manage and con-

§ 209. [1]Henry *v.* Speer, 201 Fed. 869, 120 C. C. A. 207 (5th Cir.), *Reversing* 191 Fed. 868.

[2] Shea *v.* United States, 251 Fed. 433 (C. C. A. 6th Cir.). Petition for *writ of certiorari denied* in 63 L. ed. 172, 39 S. C. 132.

[3] Ex parte Fairbanks Co., 194 Fed. 978.

[4] In re M. K. Fairbanks Co., 194 Fed. 978; Pacific Coal Co. *v.* Pioneer Mining Co., 205 Fed. 577 (C. C. A. 9th Cir.).

[5] Henry *v.* Speer, 201 Fed. 869, 120 C. C. A. 207 (5th Cir.).

duct causes therein." And the Supreme Court of the United States,[1] before this statute was enacted, distinctly held that "natural persons may appear in person or by attorney. . . ." It would seem that the certificate of counsel must be made by an attorney admitted to practice in the district where the cause is pending.[2]

§ 211. Duty of Counsel and Court.

If counsel for the defense at the time the defendant is arraigned for pleading is of the opinion that his client "would not be treated fairly and impartially, it is not only his privilege, but his bounden duty to his client to have availed himself of this statute." When the conditions of the statute are complied with it is the duty of the presiding judge to grant the petition for change of venue.[1]

§ 212. Object of Statute.

This section was enacted for the purpose of enabling one who in good faith feels that he could not obtain a fair and impartial trial before a particular judge to have his case transferred for trial before another.[1] Section 21 was not intended to enable a discontented litigant to oust a judge because of previous adverse rulings made by him. Neither was it intended to paralyze the action of a judge who heard the case, or a question in it. If the rulings are erroneous, they must be corrected by appeal or error.[2]

§ 213. The Statute Should Be Liberally Construed.

Thus far the statute has received a very narrow and technical construction. The judiciary should bear in mind that the statute was passed in derogation of the common law. It is remedial in nature, and for that reason it should be liberally construed with

§ 210. [1] Osborn *v.* United States Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

[2] Ex parte Fairbank Co., 194 Fed. 978.

§ 211. [1] Wierse *v.* United States, 252 Fed. 435 (C. C. A. 4th Cir.). Petition for *certiorari denied*, — U. S. —, 63 L. ed. 15, 39 S. C. 10.

§ 212. [1] Wierse *v.* United States, 252 Fed. 435 (C. C. A. 4th Cir.). Petition for *writ of certiorari denied*, 248 U. S. 568, 63 L. ed. 15, 39 S. C. 10.

[2] Ex parte American Steel Barrel Co., 230 U. S. 35, 57 L. ed. 1379, 33 S. C. 1007; *Mandamus* will not lie to compel a change of venue. Ex parte American Steel Barrel Co., 230 U. S. 35, 57 L. ed. 1379, 33 S. C. 1007.

a view towards correcting the mischief.[1] When a judge is accused of bias and prejudice it should not be left to his discretion, or his sense of decency, to decide whether he shall act or not.[2] At common law there were but two objections that could be raised to disqualify a judge, — interest in the cause litigated, or kin to one of the litigants. No amount of general bias would disqualify a judge.[3] Accordingly, it is settled that partiality and bias are presumed from the relationship or consanguinity of a judge to the party.[4] Appellate Courts gradually came to recognize the narrowness of the common law rule; they felt that a litigant should be accorded the privilege of objecting to a judge who was actually biased, provided the objection was made in good faith.[5] The right to disqualify a judge because of bias has not been made statutory in some jurisdictions. It is merely a privilege granted by the courts. Of course a judge in such a jurisdiction has the right to try the case unless one of the parties objects. The decision of such a judge is not void, but voidable. If a litigant knows that the judge is biased, he should make his objection in the form required by the courts of that particular state. No appellate court will permit a litigant to raise this objection for the first time on appeal.[6] There is only one exception to this rule. That is when the injured party was ignorant of the judge's bias until the cause had been adjudicated. The proper remedy in such a case is by writ of error.[7] When the power to object to a judge because of bias is made a right by statute, instead of a mere privilege granted by the court, then the judge is disqualified by law, and any decision rendered by him in such a case is void.[8] In some states where there has been such legislative enactment, the courts hold that the mere allegation that the judge is biased or prejudiced against

§ 213. [1] Henry *v.* Harris, 191 Fed. 868.

[2] Oakley *v.* Aspinwall, 3 N. Y. 547.

[3] Conn *v.* Chadwick & Co., 17 Florida, 439; In re Davis' Estate, 11 Montana, 1; Cooley Const. Limitations (5th Ed.), 115.

[4] Oakley *v.* Aspinwall, 3 N. Y. 547.

[5] Le Hane *v.* Nebraska, 48 Neb. 105; Ex parte Gold T. Curtis, 3 Minn. 274; Tjosevig *v.* United States, 255 Fed. 5 (C. C. A. 9th Cir.); *Contra:* Johnson *v.* State, 87 Ark. 45.

[6] Findley *v.* Smith, 42 W. Va. 299.

[7] Ex parte Glasgow, 195 Fed. 780, 783; Findley *v.* Smith, 42 W. Va. 299.

[8] Oakley *v.* Aspinwall, 3 N. Y. 547; Moses *v.* Julian, 45 N. H. 52.

the defendant is sufficient ground for a change of venue.[9] In re Washoe Cooper Co. *v.* Hickey,[10] the court said: "To disqualify a judge the litigant is not required to state any facts upon which his claim of the judge's bias or prejudice is founded, and in this aspect of the case the proceeding is analogous to that invoked in the exercise of a peremptory challenge to a juror. It is not the bias or prejudice which works his disqualification, but the mere filing of an affidavit in time even though the judge against whom it is aimed be entirely free from either charge." Next in importance to the duty of rendering a righteous judgment is that of doing it in such manner as will beget no suspicion of fairness and integrity of the judge.[11] This statute should be revised at an early date by Congress. As it stands now it is of little benefit to the public and is productive of much mischief.

[9] McGoon *v.* Little, *et al.*, 7 Ill. 42; Vogel *v.* Milwaukee, 47 Wis. 435.

[10] 46 Montana, 363, 128 Pac. 584.

[11] People *v.* Suffolk, Common Pleas, 18 Wend. (N. Y.) 550; Oakley *v.* Aspinwall, 3 N. Y. 547.

CHAPTER XXII

ARRAIGNMENT AND PLEA

§ 214. Standing Mute.

"When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form of ceremony, be tried by a jury." [1] "To arraign," says Blackstone, "is nothing else, but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment, after which it is to be demanded of him whether he is guilty of the crime, whereof he stands indicted, or not guilty." [2] The object of the arraignment is to acquaint the defendant with the accusation and obtain his plea.[3] There can be no valid trial without a plea.[4] When a defendant is called to the bar, and

§ 214. [1] Revised Statute, § 1032.
[2] 4 Bl. Com. 322, 323–334.
[3] Harris *v.* United States, 4 Oklahoma Criminal Appeals, 377.
[4] Crain *v.* United States, 162 U. S. 625, 40 L. ed. 1097, 16 S. C. 952; Shelp *v.* United States, 81 Fed. 694, 26 C. C. A. 570 (9th Cir.).

stands mute, or refuses to plead, it is the duty of the court to enter a plea of 'Not Guilty' in his behalf, in the same way as if he had pleaded not guilty.[5] This statute proceeds upon the principle that before a trial can be legally commenced, there must be an issue to try, and that a plea by or for the accused is essential to the formation of the issue.[6] There is no explicit provision in the laws of the United States describing what shall constitute an arraignment, but so far as it is expressed it has a definite meaning. It is sufficient if the record showing the arraignment follows the language of the statute.[7] At early common law, an arraignment was not complete without a plea.[8] Whether the prisoner was properly arraigned originally was held to be a matter of substance and not of form,[9] but later decisions hold that it is a matter of form.[10] It was held in the Crain case, *supra*, that it must appear from the record as a prerequisite to due process of law that the defendant was duly arraigned. But a later case[11] overruled the Crain case and laid down the rule that it was not necessary that the record should show the arraignment but that it must appear that the accused had sufficient notice of the accusation and charge against him and an adequate opportunity to defend himself. But it will be noted that the later decisions do not go so far as to hold that the formality of an arraignment can be dispensed with entirely.

§ 215. Effect of the Plea of Not Guilty.

Pleas of not guilty put in issue every material allegation in the indictment.[1] Under the general issue all defenses, including the plea of statute of limitations, are open to the defendant.[2]

[5] Revised Statute § 1032.

[6] Crain *v.* United States, *Supra.*

[7] Johnson *v.* United States, 225 U. S. 405, 56 L. ed. 1142, 32 S. C. 748.

[8] 4 Bl. Com. 323–341; 1 Chitty's Crim. Law 419.

[9] Crain *v.* United States, *supra;* Johnson *v.* United States, *supra.*

[10] Garland *v.* Washington, 232 U. S. 642, 58 L. ed. 772, 34 S. C. 456, *overruling* the Crain case, *supra,* and Abbott Bros. Co. *v.* United States, 242 Fed. 751 (C. C. A. 7th Cir.).

[11] Garland *v.* Washington, *supra.*

§ 215. [1] Prettyman *v.* United States, 180 Fed. 30, 103 C. C. A. 384 (6th Cir.); Smith *v.* United States, 208 Fed. 131, 125 C. C. A. 353 (8th Cir.).

[2] United States *v.* Kissel, 218 U. S. 61, 54 L. ed. 1168, — S. C. —; United States *v.* Barber, 219 U. S. 72, 55 L. ed. 99, — S. C. —.

The plea of not guilty not only raises an issue as to every fact and inference which may tend to support the specific charge upon which the defendant is being tried, but also contests the existence or legal efficacy of every fact which may tend to convict him of any minor offense which may be included in the offense laid in the accusation.[3] Matters subsequent to the arrest or indictment are for the consideration of the jury and are admissible under the plea of not guilty.[4]

§ 216. **Demurrer — Defects in Indictment.**

The statute provides: "In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be *respondeat ouster;* and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require." [1] In order to quash an indictment, a demurrer must be filed, or a motion to quash made, or objections to the indictment effectively taken, before the judgment is entered. Nothing less than substantial failure in a matter of substance in the indictment can avail defendant after judgment is entered.[2] But the insufficiency of an indictment, if it utterly fails to charge an offense against the United States, may be questioned for the first time in a court of appeals on a writ of error.[3] The defendant cannot object to the insufficiency of the indictment at the trial. It is, however, within the discretion of the trial judge to vary this rule.[4]

[3] Jones *v.* The State, 12 Ga. App. 133, 62 S. E. 239.

[4] Stern *v.* United States, 223 Fed. 762, 139 C. C. A. 292 (2d Cir.); Moffatt *v.* United States, 232 Fed. 522, 533, 146 C. C. A. 480 (8th Cir.); Bettman *v.* United States, 224 Fed. 819, 140 C. C. A. 265 (6th Cir.); Hair *v.* United States, 240 Fed. 333, 153 C. C. A. 259 (7th Cir.).

§ 216. [1] Revised Statute § 1026.

[2] Ulmer *v.* United States, 219 Fed. 641, 134 C. C. A. 127 (6th Cir.); Dunbar *v.* United States, 156 U. S. 185, 39 L. ed. 390, 15 S. C. 325; Rosen *v.* United States, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434.

[3] Rosen *v.* United States, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434.

[4] United States *v.* Gooding, 12 Wheat. (U. S.) 460, 8 L. ed. 693; Estes *v.* United States, 227 Fed. 818, 142 C. C. A. 342 (8th Cir.); M'Knight *v.* United States, 252 Fed. 687 (C. C. A. 8th Cir.)

§ 217. **Defects in Indictment.**

The statute provides "No indictment found and presented by a grand jury in any district [or circuit] or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant."[1] In view of this statute, it may be laid down as a general rule that a mere irregularity or defect in the form of the proceedings which did not tend to the prejudice of the defendant should not be ground for a new trial.[2] It has been held that questions of duplicity of an indictment must be raised by special demurrer and that it is too late to raise such a question after verdict, unless it clearly appears that the rights of the defendant were prejudiced thereby.[3]

§ 218. **Election of Counts.**

It is within the discretion of the trial court to compel an election on the part of the government when it appears from the indictment or from the evidence that not to do so will embarrass the accused in his defense.[1] Where the same evidence is applicable to all the counts, the trial judge may refuse to order an election of counts.[2] It is in the discretion of the court on motion by the defendant, to compel the prosecutor to choose any one of the offenses charged in the indictment and proceed against the accused only on that offense. But such an objection, if not made until

§ 217. [1] Revised Statute § 1025.

[2] Baskin *v.* United States, 209 Fed. 740, 126 C. C. A. 464 (7th Cir.); Connors *v.* United States, 158 U. S. 408, 39 L. ed. 1033, 15 S. C. 951; Dunbar *v.* United States, 156 U. S. 185, 39 L. ed. 390, 15 S. C. 325; United States *v.* Rhodes, 30 Fed. 431; Hume *v.* United States, 118 Fed. 689, 55 C. C. A. 407 (5th Cir.), *Affirmed* 189 U. S. 510, 47 L. ed. 923, 23 S. C. 850; Brown *v.* United States, 143 Fed. 60, 74 C. C. A. 214 (8th Cir.), *Affirmed* 202 U. S. 620, 50 L. ed. 1174, 26 S. C. 765; United States *v.* Malloy, 31 Fed. 19.

[3] Connors *v.* United States, 158 U. S. 408, 39 L. ed. 1033, 15 S. C. 951; United States *v.* Norton, 188 Fed. 256; Morgan *v.* United States, 148 Fed. 189, 78 C. C. A. 323 (8th Cir.), *Affirmed* 203 U. S. 595, 51 L. ed. 333, 27 S. C. 784.

§ 218. [1] Pointer *v.* United States, 151 U. S. 396, 38 L. ed. 208, 14 S. C. 410; Sidebotham *v.* United States, 253 Fed. 417 (C. C. A. 9th Cir.).

[2] McGregor *v.* United States, 134 Fed. 187, 69 C. C. A. 477 (4th Cir.); Hartman *v.* United States, 168 Fed. 30, 94 C. C. A. 124 (6th Cir.).

after the verdict, would not justify an arrest of judgment, and is not available on writ of error unless it appears that the substantial rights of the accused were prejudiced by the refusal of the court to require a more restricted or specific statement of the particular mode in which the offense charged was committed.[3] However, if it should appear that the offense was several and not joint, or if it should appear at the conclusion of the evidence that the defendants were connected together as to some of the counts and not as to others, it is the duty of the Court to put the prosecution upon its election and to strike out such evidence given upon the counts in which no confederation was established, for it is well settled that upon the trial of a party for one offense growing out of a specific transaction, you cannot prove a similar substantive offense founded upon another and separate transaction, but in such case the prosecution will be put to its election.[4]

§ 219. **Separate Trials.**

Where two or more persons are jointly charged in the same indictment with the same offense, such persons have not a positive right to be tried separately, but a separate trial may be granted by the court in its discretion.[1] The discretion to be exercised by the court must not be arbitrary; it must be fair and sound, and the ruling of the court is subject to review in an appellate tribunal,[2] and when the parties have been improperly joined, the judgment will be reversed.[3] A separate trial may be had to try

[3] United States *v.* Norton, 188 Fed. 256; Connors *v.* United States, 158 U. S. 408, 39 L. ed. 1033, 15 S. C. 951; Pooler *v.* United States, 127 Fed. 509, 62 C. C. A. 307 (1st Cir.); Morgan *v.* United States, 148 Fed. 189, 78 C. C. A. 323 (8th Cir.), *Affirmed* 203 U. S. 595, 51 L. ed. 333, 27 S. C. 784; Evans *v.* United States, 153 U. S. 584, 38 L. ed. 830, 14 S. C. 934; Crain *v.* United States, 162 U. S. 625, 40 L. ed. 1097, 16 S. C. 952.

[4] Baker *v.* People, 105 Ill. 452.

§ 219. [1] Oppenheimer *v.* United States, 241 Fed. 625, 154 C. C. A. 383 (2d Cir.); Talbott *v.* United States, 208 Fed. 144; Ball *v.* United States, 163 U. S. 662, 41 L. ed. 300, 16 S. C. 1192; Wood *v.* United States, 204 Fed. 55, 122 C. C. A. 369 (4th Cir.); Richards *v.* United States, 175 Fed. 911, 99 C. C. A. 401 (8th Cir.); Cochran *v.* United States, 147 Fed. 206, 77 C. C. A. 432 (8th Cir.); Heike *v.* United States, 227 U. S. 131, 57 L. ed. 450, 33 S. C. 226.

[2] Krause *v.* United States, 147 Fed. 442, 78 C. C. A. 642 (8th Cir.); Heike *v.* United States, 227 U. S. 131, 57 L. ed. 450, 33 S. C. 226.

[3] Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92; United States *v.* Dietrich, 126 Fed. 664. And see § 180, *supra*.

the issue as to whether the accused is sufficiently sane to consult with counsel regarding a defense.[4]

§ 220. **Accepting and Withdrawing Pleas — Plea of Guilty.**

Courts should be very reluctant to accept pleas of guilt and it is their duty to advise the prisoner to retract it and plead not guilty.[1] Once the plea of guilty is entered, the prisoner being warned of the consequences, permission to withdraw that plea and substitute one of not guilty is within the sound discretion of the court, and being a matter of judicial discretion, relief will not be granted on error except where it is clearly an abuse of discretion.[2] When, by permission of the court, the plea of guilty is withdrawn, and a plea of not guilty is entered, the defendant stands in the same position as if he had never pleaded guilty before and his plea of guilty cannot be introduced in evidence against him upon his trial.[3]

§ 221. **Withdrawing Plea of Not Guilty.**

It is also within the discretion of the trial court to allow the defendant to withdraw his plea of not guilty and file a demurrer to the indictment.[1]

§ 222. **Plea of Nolo Contendere.**

The plea of *nolo contendere* is a declaration on the part of the defendant that he will not contend with the prosecution.[1] Under the common law rule, which governs in our Federal Courts, the plea of *nolo contendere* was in the nature of a motion to submit to a small fine and was taken only in cases of slight misdemeanors.[2] Hence, imprisonment cannot be imposed upon a plea of *nolo contendere*.[3] The plea is in the nature of a compromise between

[4] United States *v.* Chisolm, 149 Fed. 284; Ex parte Charlton, 185 Fed. 880.

§ 220. [1] 1 Bl. Comm. 330, Chapter 25.

[2] United States *v.* Bayaud, 21 Blatch. (U. S. Cir. Ct.) 217; United States *v.* London, 176 Fed. 976; United States *v.* Lewis, 192 Fed. 633; Waller *v.* United States, 179 Fed. 810; United States *v.* Billingsley, 249 Fed. 331, 161 C. C. A. 339 (9th Cir.).

[3] Heim *v.* United States, 47 App. (D. C.) 485.

§ 221. [1] Phillips *v.* United States, 201 Fed. 259 (C. C. A. 8th Cir.).

§ 222. [1] Hale's Pleas of the Crown, Vol. II, c. 29, p. 225.

[2] Queen *v.* Templeman, 1 Salkeld (English Reports), 55; Tucker *v.* United States, 196 Fed. 260, 116 C. C. A. 62 (7th Cir.).

[3] Tucker *v.* United States, 196 Fed. 260, 116 C. C. A. 62 (7th Cir.).

the government and the defendant. It is not a plea as of right and can only be entered with the consent of the United States Attorney and the court.[4] When accepted by the prosecuting attorney and court, it becomes an implied confession of guilt; and for the purposes of the case only is equivalent to a plea of guilty; but distinguishable from such plea in that it cannot be used against the defendant as an admission in any civil suit for the same act.[5] There is no difference in legal effect between the plea of *nolo contendere* and the plea of guilty with regard to all proceedings in the indictment.[6] Although the plea of *nolo contendere* is considered as an implied confession of guilt, it must be kept in mind that cases often arise where an accused person might find himself without witnesses to establish his innocence because of their death, absence or other causes.[7]

§ 223. **An Escaped Defendant Has No Standing in Court.**

An escaped defendant, not being within the control of the court, either actually or constructively, has no standing in court for any purpose nor can he sue out a writ of error until he surrenders himself to the proper authorities.[1]

§ 224. **Death of the Accused — Abatement of Crime.**

Upon the death of a defendant convicted of a crime in the Federal Court, the penalty is abated with death. In the case of sentence to corporal punishment this is self-evident. It also holds in cases of fines.[1] The reason, as explained by Judge Holt,[2] is that upon the death of the accused, there is no justice in punishing his family (who would suffer the loss of the fine) for his offense.

[4] Tucker *v.* United States, *supra.*

[5] Tucker *v.* United States, 196 Fed. 262, 116 C. C. A. 62 (7th Cir.).

[6] United States *v.* Hartwell, 26 Fed. Cas. 196, 199; Tucker *v.* United States, *supra.*

[7] Doughty *v.* De Amared, 46 Atl. 838.

§ 223. [1] United States *v.* Billingsley, 242 Fed. 330; Smith *v.* United States, 94 U. S. 97, 24 L. ed. 32; Bohanan *v.* Nebraska, 125 U. S. 692, 31 L. ed. 854, 8 S. C. 1390.

§ 224. [1] United States *v.* Pomeroy, 152 Fed. 279; Dyar *v.* United States, 186 Fed. 614, 108 C. C. A. 478 (5th Cir.).

[2] United States *v.* Pomeroy, 152 Fed. 279.

CHAPTER XXIII

FORMER JEOPARDY

§ 225. **Constitutional Provision.**

The Fifth Amendment to the Constitution of the United States, among other things, provides: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

§ 226. **Method of Pleading Former Jeopardy.**

The orderly method is by a plea in bar.[1] But pleas of former jeopardy are also entertained by motion supported by affidavits

§ 226. [1] United States *v.* Wilson, 7 Pet. (U. S.) 150, 8 L. ed. 640; United States *v.* Ball, 163 U. S. 662, 41 L. ed. 300, 16 S. C. 1192; Ex parte Glenn, 111 Fed. 257.

without formal pleading.[2] The plea of former jeopardy is not inconsistent with the plea of not guilty.[3] The plea of *puis darrein* continuance and that of former jeopardy are not inconsistent with each other and they may stand together. It is, however, necessary that the issue under the first plea should be disposed of under the plea of not guilty.[4]

§ 227. **Evidence.**

The nature of the offense and the issues tried on the prior conviction or acquittal may be proved by parol, where the record in the case does not disclose all the facts.[1] In the case of Hans Nielsen, Petitioner,[2] the court said: "It is true that, in the case of Snow, we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment, *or anywhere else in the record* (of which judgment is only a part), it is sufficient."

§ 228. **Relief by Habeas Corpus.**

The Supreme Court of the United States has entertained jurisdiction on a petition for *habeas corpus* on the ground of former jeopardy.[1]

§ 229. **Extent of Review by Habeas Corpus.**

In Ex parte Parks,[1] the Supreme Court said: "The writ ought not to be issued, or, if issued, the prisoner should at once be remanded, if the court below had jurisdiction of the offense, and did not act beyond the powers conferred upon it. The court will look into the proceedings so far as to determine this question. If it finds that the court below has transcended its powers, it will grant the writ and discharge the prisoner, even after judg-

[2] Peter *v.* United States, 94 Fed. 126 (C. C. A. 9th Cir.).

[3] Thompson *v.* United States, 155 U. S. 271, 39 L. ed. 146, 15 S. C. 73.

[4] Thompson *v.* United States, *supra.*

§ **227.** [1] Bartell *v.* United States, 227 U. S. 427, 57 L. ed. 583, 33 S. C. 383; Durland *v.* United States, 161 U. S. 306, 40 L. ed. 709, 16 S. C. 508.

[2] 131 U. S. 176, 183, 33 L. ed. 118, 9 S. C. 672, 674.

§ **228.** [1] Ex parte Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 S. C. 672, 674.

§ **229.** [1] 93 U. S. 18, 23, 23 L. ed. 787.

ment." The Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice, in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time.[2] The clause applies to misdemeanors as well as to treason and felony.[3] This amendment is not binding on the states,[4] although the question was regarded as still open in Shelvin Carpenter Co. *v.* Minnesota.[5] Necessarily, there must be a first jeopardy before there can be a second, and only when a second is sought is the constitutional immunity from double punishment threatened to be taken away.

§ 230. Offenses in Two Forms.

Where a person commits two crimes by doing the same act, one against the State laws and the other against those of the United States, the conviction or acquittal of the one crime in one court will be no bar in the other.[1]

§ 231. When Jeopardy Attaches — After Swearing Jury.

The weight of authority is to the effect that the moment the jury is sworn and is dismissed without the consent of the defendant and without necessity, the defendant cannot be again placed on trial before another jury for the same offense.[1] The rule in general is that when an indictment is sufficient in substance and form and a jury has been impaneled to try the defendant, it cannot be discharged without the consent of the defendant. If so discharged

[2] United States *v.* Oppenheimer, 242 U. S. 85, 61 L. ed. 161, 37 S. C. 68.

[3] Berkowitz *v.* United States, 93 Fed. 452, 35 C. C. A. 379 (3d Cir.).

[4] Twining *v.* New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. C. 14; In re Boggs, 45 Fed. 475; United States *v.* Barnhart, 22 Fed. 285; Fox *v.* Ohio, 5 How. (U. S.) 410, 12 L. ed. 213; Moore *v.* Illinois, 14 How. (U. S.) 12, 14 L. ed. 306.

[5] 218 U. S. 57, 54 L. ed. 930, 30 S. C. 663.

§ 230. [1] Grafton *v.* United States, 206 U. S. 333, 51 L. ed. 1084, 27 S. C. 749; Fox *v.* Ohio, 5 How. (U. S.) 410, 12 L. ed. 213; Moore *v.* Illinois, 14 How. (U. S.) 12, 14 L. ed. 213; United States *v.* Barnhart, 22 Fed. 285; United States *v.* Coombs, 12 Peters (U. S.), 72, 9 L. ed. 1004; United States *v.* Mason, 213 U. S. 115, 53 L. ed. 725, 29 S. C. 480; Coleman *v.* Tennessee, 97 U. S. 509, 24 L. ed. 1118.

§ 231. [1] United States *v.* Ball, 163 U. S. 662, 41 L. ed. 300, 16 S. C. 1192; Ex parte Glenn, 111 Fed. 257; Ex parte Ulrich, 42 Fed. 587; United States *v.* Shoemaker, 2 McLean, 114, 27 Fed. Cas. No. 1067. United States *v.* Watson, 3 Ben. 1; United States *v.* Perez, 9 Wheat. (U. S.) 579, 6 L. ed. 165.

without his consent he may plead former jeopardy.[2] But an acquittal before a court having no jurisdiction is like all proceedings of such a case, void, and no bar to a second indictment.[3] And if the facts averred in the second indictment are sufficient, of themselves, to constitute a crime, of which the first court has not jurisdiction, neither conviction nor acquittal on the first indictment will be a bar to the second.[4] But it was likewise held that courts of justice are invested with authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and the defendant is not thereby twice put in jeopardy within the meaning of the Fifth Amendment to the Constitution of the United States.[5] Thus, for instance, where after a jury has been sworn it was discovered that certain jurors had preconceived notions about the case and were so biased that they would not render a fair and impartial verdict or that outside influences have reached the jury, the court may discharge the jury and place the defendant on trial before another jury, and such discharge will not operate as a "former jeopardy."[6]

§ 232. After Verdict.

It is not necessary in order to claim former jeopardy, that there should have been a judgment entered upon the plea. The second jeopardy is not against the peril of a second jeopardy but against being tried again for the same offense.[1] And the rule is

[2] Hilando *v.* Commonwealth, 111 Pa. State, 1.

[3] Kepner *v.* United States, 195 U. S. 100, 129, 49 L. ed. 114, 124, 24 S. C. 797.

[4] United States *v.* Houston, 4 Cranch (C. C.), 261, 26 Fed. Cas. 379.

[5] Lovato *v.* New Mexico, 242 U. S. 199, 61 L. ed. 244, 37 S. C. 107; Thompson *v.* United States, 155 U. S. 271, 39 L. ed. 146, 15 S. C. 73; United States *v.* Perez, 9 Wheat. (U. S.) 578, 6 L. ed. 165; Logan *v.* United States, 144 U. S. 263, 36 L. ed. 429, 441, 12 S. C. 617; Simmons *v.* United States, 142 U. S. 148, 35 L. ed. 968, 12 S. C. 171.

[6] Simmons *v.* United States, 142 U. S. 148, 35 L. ed. 968, 12 S. C. 171.

§ 232. [1] United States *v.* Sanges, 144 U. S. 310, 36 L. ed. 445, 12 S. C. 609; Kepner *v.* United States, 195 U. S. 100, 129, 49 L. ed. 114, 24 S. C. 797; Krug *v.* Missouri, 107 U. S. 221, 27 L. ed. 506, 28 S. C. 443; Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872.

the same although the verdict of acquittal was based on a defective indictment provided the court had jurisdiction over the subject matter and parties.[2] Where the verdict of a jury finds the defendant guilty on some of the counts of the indictment and is silent as to others and the jury is discharged without the consent of the accused, any further attempt to try the defendant again upon such counts amounts to placing the defendant twice in jeopardy in violation of the Constitution of the United States.[3]

§ 233. **Effect of Nolle Prosequi.**

A *Nolle Prosequi* as to some of the counts in an indictment is not equivalent to an acquittal, but leaves the indictment in a position, as if such counts were never contained in the indictment.[1]

§ 234. **After Judgment.**

When a court has imposed a fine and imprisonment where the statute only conferred power to punish by fine or imprisonment and the *fine has been paid*, it cannot even, during the same term, modify the judgment by imposing imprisonment instead of the former sentence.[1] And a person convicted of a criminal offense and sentenced to one punishment, to which he has been subjected, cannot properly thereafter be sentenced on the same conviction to another and different punishment.[2] Thus, where a defendant at the same time, to the same person and as a single act, issued falsely six money orders and has pleaded guilty to the offense of issuing a single money order, which was part of the same transaction, he cannot be placed on trial again for issuing the other five orders.[3] On the other hand it has been held that when the subsequent indictment is for a distinct offense from that on which

[2] United States *v.* Ball, 163 U. S. 662, 666, 41 L. ed. 300, 16 S. C. 1192; Simpson *v.* United States, 229 Fed. 940, 944 (C. C. A. 9th Cir.); Kepner *v.* United States, 195 U. S. 100, 49 L. ed. 114, 24 S. C. 797; United States *v.* Sanges, 144 U. S. 310, 36 L. ed. 445, 12 S. C. 609.

[3] Silvester *v.* United States, 170 U. S. 262, 42 L. ed. 1029, 18 S. C. 580; Dolan *v.* United States, 133 Fed. 440, 69 C. C. A. 274 (8th Cir.).

§ 233. [1] Dealey *v.* United States, 152 U. S. 539, 38 L. ed. 545, 14 S. C. 680.

§ 234. [1] Ex parte Lange, 18 Wall. (U. S.) 163, 176, 21 L. ed. 872; Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; Moss *v.* United States, 23 App. (D. C.) 475.

[2] Blackman *v.* United States, 250 Fed. 449 (C. C. A. 5th Cir.).

[3] United States *v.* Komie, 194 Fed. 567.

the verdict in the first trial was found, the plea will not be sustained. The counterfeiting of notes at different times, though all apparently printed from the same plate, are distinct offenses. And on the indictment for passing a counterfeit note, the accused cannot plead that the note had been previously given in evidence on the trial on a former indictment against him for passing another counterfeit note.[4] An acquittal by military court-martial is a bar to another prosecution for the same crime in any other court.[5] A judgment for the defendant upon the ground that the prosecution is barred by the statute of limitations goes to his liability as a matter of substantive law and one judgment that he is free as a matter of substantive law is as good as another. He, therefore, cannot be tried again.[6] A judgment of acquittal being conclusive proof of innocence in favor of the person acquitted is *res adjudicata* and a bar to a subsequent suit in *rem* as to the same act or fact.[7] But when a defendant has been punished for the commission of a criminal act, though he cannot again be put in jeopardy for the same offense by an action in *rem*, that, however, does not bar the United States from seizing the *res* when it is unlawful for it to be harbored in this country.[8]

§ 235. Test of Identity of Offenses.

A plea of former acquittal must be upon a prosecution for the identical offense.[1] The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction *does not make a single offense where two are defined by the statutes.*[2] But the test is not whether the criminal intent is one and the same

[4] United States *v.* Randenbush, 8 Pet. (U. S.) 288, 8 L. ed. 948; Bliss *v.* United States, 105 Fed. 508, 44 C. C. A. 324 (5th Cir.).

[5] Grafton *v.* United States, 206 U. S. 333, 51 L. ed. 1084, 27 S. C. 749.

[6] United States *v.* Oppenheimer, 242 U. S. 85, 61 L. ed. 161, 37 S. C. 68.

[7] Coffey *v.* United States, 116 U. S. 436, 29 L. ed. 684, 6 S. C. 437.

[8] In re Food Conservation Act, 254 Fed. 893.

§ 235. [1] United States *v.* Houston, 4 Cranch (C. C.), 261, 26 Fed. Cas. 379; Burton *v.* United States, 202 U. S. 344, 50 L. ed. 1057, 26 S. C. 688.

[2] Carter *v.* McClaughry, 183 U. S. 365, 46 L. ed. 236, 22 S. C. 181; Burton *v.* United States, 202 U. S. 344, 377, 50 L. ed. 1057, 1069, 26 S. C. 688, 6 Ann. Cas. 362; Gavieres *v.* United States, 220 U. S. 338, 55 L. ed. 489, 31 S. C. 421; Morgan *v.* Devine, 237 U. S. 632, 59 L. ed. 1153, 35 S. C. 712.

and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress.[3] In the case of Kepner *v.* United States,[4] in discussing a plea of former jeopardy, the Court cites extensively with approval the case of Wemyss *v.* Hopkins,[5] holding that, while a defendant, where the offense grows out of the same state of facts, may be prosecuted under either of two statutes and might have been punished under *either* of such statutes, nevertheless a conviction under one is a bar to the further prosecution under the other. It has been said that a person who has been convicted of a crime having various incidents included in it cannot be tried a second time for one of those incidents.[6] For this reason a conviction of theft of a pocketbook was held to be a conviction of theft of all its contents belonging to its owner.[7] And in Ex parte Lange,[8] the Supreme Court of the United States, speaking through Mr. Justice Miller, approved the case of Grenshaw *v.* Tenn [9] where it was held by the Supreme Court of that State that the common law principle went still further, namely, that an indictment, conviction and punishment of a case of felony, not capital, committed, *was a bar to a prosecution for all other felonies not capital* committed before such conviction, judgment and execution. The proper tests as to whether the plea of a former conviction or a former acquittal is good or bad is whether the defendants could, under the earlier indictment, have been convicted of the offense embraced in the later one, and whether the evidence necessary to support the later indictment has been sufficient to produce a legal conviction upon the earlier one.[10]

§ 236. When a New Event Supervenes.

The great weight of authority is in support of the principle that when, after the first prosecution, a new fact supervenes, for

[3] Morgan *v.* Devine, 237 U. S. 632, 59 L. ed. 1153, 35 S. C. 712; Eberling *v.* Morgan, 237 U. S. 625, 59 L. ed. 1151, 35 S. C. 710.

[4] 195 U. S. 100, 49 L. ed. 114, 24 S. C. 797.

[5] L. R. 10 Q. B. 378.

[6] Ex parte Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 S. C. 672.

[7] United States *v.* Negro John, 4 Cranch (C. C.), 336.

[8] 18 Wall. (U. S.) 163, 21 L. ed. 872.

[9] 1 Mart. & Yerg. 122.

[10] United States *v.* Fleeke, 2 Ben. (U. S.) 456.

which the accused is responsible, which changes the character of the offense, and together with the facts existing at the time constitutes a new and distinct crime, an acquittal or conviction of the first offense is not a bar to an indictment for the other distinct crime. So, one who has been convicted and sentenced on a charge of assault and battery may be subsequently tried and convicted of murder if the person assaulted dies subsequent to the first conviction.[1]

§ 237. Instances Where the Plea of Jeopardy Was Not Sustained.

An acquittal on an indictment for forging an order with intent to defraud John Lang is held no bar to an indictment for forging the same order with intent to defraud William Lang.[1] In Burton *v.* United States,[2] the Court held that the plea of former jeopardy was not maintainable where the defendant at the former trial was acquitted of receiving a bribe from one W. D. Mahoney, whereas in the later case, he was convicted for taking a bribe from the Realto Grain & Securities Company; that the charges were not identical and that each charge is supportable by different evidence and that acquittal or conviction of one is not conclusive of the other. An acquittal of a conspiracy to induce a railroad company to give rebates is not a bar to a prosecution for inducing shippers to receive them, notwithstanding the similarity of the evidence.[3] The acquittal of a defendant who is a stockholder or officer of a corporation on a charge of defrauding the United States of a tax was held not to be a bar to a subsequent proceeding for the forfeiture of the goods upon which the tax had to be paid.[4] The acquittal of the defendant upon counts charging the aiding and abetting others to import opium is not a bar to a conspiracy indictment for importing the same opium.[5] The conviction for a conspiracy to transport dynamite over passenger trains was held

§ 236. [1] Hopkins *v.* United States, 4 App. Cas. (D. C.) 430.

§ 237. [1] United States *v.* Book, 2 Cranch (C. C.), 294.

[2] 202 U. S. 344, 370, 50 L. ed. 1057, 26 S. C. 688.

[3] Thomas *v.* United States, 156 Fed. 897, 84 C. C. A. 167 (8th Cir.), 17 L. R. A. (N. S.) 720.

[4] United States *v.* Manufacturing Apparatus, 240 Fed. 235.

[5] Louie *v.* United States, 218 Fed. 36 (C. C. A. 9th Cir.).

to be no bar for a prosecution under an indictment charging the transportation of the same dynamite over passenger trains.[6] An acquittal on a charge of conspiracy to smuggle in opium is not a bar to a prosecution for aiding in and abetting to smuggle in the same opium.[7] Nor will an acquittal upon an indictment for failure to pay a special tax bar proceedings for perjury in swearing falsely at the preliminary examination.[8] Defendants had been indicted under one section of an Internal Revenue Act for knowingly carrying on the business of a distiller on a certain date without having paid the special tax. On this indictment they were tried and acquitted on the ground that they were not the principals who were bound to pay the tax. They were afterwards indicted under another section of the same act for knowingly using a still for the purpose of distilling, in a certain dwelling house on the same date. The evidence on the trial of the first indictment showed that the place of the offense charged was the same dwelling house. It was held that a plea of *autrefois acquit*, founded on the acquittal under the first indictment, could not be sustained.[9]

§ 238. **Contempt.**

An act which is a contempt of court and also a crime may be punished both by the summary provision and by indictment, and neither will bar the other.[1] In other words, the provision protecting a person against being twice put in jeopardy for the same offense is no protection against punishment both for contempt and by indictment for the same act. In view of these facts and others, it is not to be wondered that the Supreme Court has characterized contempt proceedings as *sui generis*.[2]

[6] Ryan *v.* United States, 216 Fed. 19 (C. C. A. 7th Cir.).

[7] Louie *v.* United States, 218 Fed. 36 (C. C. A. 9th Cir.).

[8] United States *v.* Butler, 38 Fed. 498.

[9] United States *v.* Flecke, 2 Ben. (U. S.) 456.

§ 238. [1] Merchants Stock & Grain Co. *v.* Board of Trade, 201 Fed. 20, 120 C. C. A. 582 (8th Cir.); Chicago Directory Co. *v.* United States Directory Co., 123 Fed. 194; O'Neil *v.* People, 113 Ill. App. 195.

[2] Merchants Stock & Grain Co. *v.* Board of Trade, 201 Fed. 20, 120 C. C. A. 582 (8th Cir.); O'Neal *v.* United States, 190 U. S. 36, 47 L. ed. 945, 23 S. C. 776; Bessette *v.* W. B. Conkey Co., 194 U. S. 324, 48 L. ed. 997, 24 S. C. 665.

§ 239. **Excessive Sentence.**

A prisoner is entitled to a writ of *habeas corpus* when he is held under an excessive sentence beyond the limit prescribed by law, but such writ will lie only as to the excess of the sentence, and will not affect the operation of so much of the judgment for which the prisoner could have been properly sentenced.[1] The excess of a sentence beyond the jurisdiction of the court which renders it, in a case in which it has ample jurisdiction of the case and of the parties, is as void as a judgment in a case in which the court has no jurisdiction, and a prisoner held under such excess alone is entitled to his relief by writ of *habeas corpus*.[2]

§ 240. **Resentence.**

It is not double jeopardy to resentence a prisoner who had his first sentence vacated by writ of error nor to retry him on a new indictment after a prior indictment has been dismissed at the instance of the defendant.[1] When the defect in a sentence does not inhere in the trial or verdict and relates only to the sentence, and where the sentence is attacked in an application for *habeas corpus*, the court instead of discharging the prisoner should return the prisoner to the trial court for a correction of the sentence.[2]

§ 241. **Deferring Sentence.**

Where sentence is postponed from time to time unconditionally and for a definite period as an incident to the administration of

§ **239.** [1] Stoneberg *v.* Morgan, 246 Fed. 98 (C. C. A. 8th Cir.); Ex parte Lange, 18 Wall. (U. S.) 163, 176, 178, 21 L. ed. 872; Munson *v.* McClaughry, 198 Fed. 72, 77, 117 C. C. A. 180, 185 (8th Cir.), 42 L. R. A. (N. S.) 302, and the cases there cited; O'Brien *v.* McClaughry, 209 Fed. 816, 820, 126 C. C. A. 540, 547 (8th Cir.).

[2] Ex parte Lange, 18 Wall. (U. S.) 163, 176, 178, 21 L. ed. 872; Munson *v.* McClaughry, 198 Fed. 72, 77, 117 C. C. A. 180, 185 (8th Cir.), 42 L. R. A. (N. S.) 302, and the cases cited; O'Brien *v.* McClaughry, 209 Fed. 816, 820, 126 C. C. A. 540, 544 (8th Cir.); Ex parte Reed, 100 U. S. 13, 25 L. ed. 538.

§ **240.** [1] Bryant *v.* United States, 214 Fed. 51 (C. C. A. 8th Cir.); Murphy *v.* Massachusetts, 177 U. S. 155, 44 L. ed. 711, 20 S. C. 639; Ball *v.* United States, 163 U. S. 662, 41 L. ed. 300, 16 S. C. 1192.

[2] Bryant *v.* United States, 214 Fed. 51 (C. C. A. 8th Cir.); In re Bonner, 151 U. S. 242, 38 L. ed. 149, 14 S. C. 323; United States *v.* Carpenter, 151 Fed. 214, 81 C. C. A. 194 (9th Cir.).

justice, the court retains jurisdiction to impose sentence at a term after the trial term has expired.[1]

§ 242. **Suspending Sentence — Power of Court.**

The trial court does not possess any power to indefinitely suspend sentence nor to pardon or parole. There are cases holding that where a verdict or plea of guilty is final, a court has no discretion, as a disciplinary measure, to suspend the imposition of sentence, and that the legal effect of the exercise of such discretion by suspending the imposition of a sentence indefinitely or unconditionally, is to deprive the court of jurisdiction to impose sentence at a later term. Other cases hold that such orders being illegal are absolutely void, and that sentence may be pronounced at any time.[1]

§ 243. **When First Judgment Set Aside on Motion of Defendant.**

The constitutional rights of a defendant are not violated when put on trial a second time where the jury failed to agree at the first trial, or the verdict is set aside on motion of the accused, or on a writ of error prosecuted by him, or the indictment was found to describe no offense known to the law.[1]

§ **241.** [1] Miner *v.* United States, 244 Fed. 422, 157 C. C. A. 48 (3d Cir.); Ex parte United States, 242 U. S. 27, 61 L. ed. 129, 37 S. C. 72.

§ **242.** [1] See cases *pro* and *con* collected in Miner *v.* United States, 244 Fed. 422, 157 C. C. A. 48 (3d Cir.).

§ **243.** [1] United States *v.* Ball, 163 U. S. 662, 41 L. ed. 300, 16 S. C. 1192; Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872. But a number of respectable authorities dissent from that view. See dissenting opinion of Holmes, J. in Kepner *v.* United States, 195 U. S. 100, 49 L. ed. 114, 24 S. C. 797; Woodruff *v.* United States, 168 Fed. 535 and Kring *v.* Missouri, 107 U. S. 221, 234, 27 L. ed. 506, 2 S. C. 443, where the rule as to waiver was materially relaxed.

CHAPTER XXIV

PARDON

§ 244. Pleading Pardon.

The court will take judicial notice of an amnesty or a general pardon by proclamation of the President or an act of Congress.[1] In all other cases the pardon must be brought to the notice of the court in some manner, either by pleading it on arraignment, or in arrest of judgment, or in bar of execution of sentence.[2] The pardon itself or a certified copy is the best evidence.[3]

§ 245. Pardon Defined.

"A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempt the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." [1] A pardon is said by Lord Coke, to be a work of mercy, whereby the King, either before attainder, sentence or conviction, or after, forgiveth any crime, offense,

§ 244. [1] Armstrong *v.* United States, 13 Wall. (U. S.) 154, 20 L. ed. 614; Muir *v.* Louisville & N. R. Co., 247 Fed. 888.

[2] United States *v.* Wilson, 7 Peters (U. S.), 150, 8 L. ed. 640; Ex parte Wells, 18 How. (U. S.) 307, 329, 15 L. ed. 421.

[3] United States *v.* Wilson, *supra.*

§ 245. [1] Marshall, Ch. J. in United States *v.* Wilson, 7 Peters (U. S.), 150, 8 L. ed. 640; Ex parte Wells, 18 How. (U. S.) 307, 10 L. ed. 421; Knote *v.* United States, 95 U. S. 149, 24 L. ed. 442; Burdick *v.* United States, 236 U. S. 79, 59 L. ed. 476, 35 S. C. 267.

punishment, execution, right, title, debt or duty, temporal or ecclesiastical.[2] Pardons are of particular denominations. They are general, special or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course.[3]

§ 246. **Distinguished from Reprieve and Amnesty.**

A reprieve is a postponement or stay of the sentence.[1] Pardon includes amnesty.[2] Amnesty is "employed where pardon is extended to whole classes or communities, instead of individuals. The distinction between them is one rather of philological interest than of legal importance." [3] But there are incidental differences of importance, they being of different purposes and character. Amnesty overlooks offenses and is usually addressed to crimes against the sovereignty of the State and political officers; and is generally addressed to classes or communities. Pardon condones infractions of the peace of the State; it remits punishment.[4] The difference between legislative immunity and a pardon is substantial. The latter carries an imputation of guilt; acceptance a confession of it. It is tantamount to the silence of the witness.[5]

§ 247. **Pardoning Power.**

The President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." [1] This power is construed according to the similar power exercised in England prior to the Revolution.[2] The President alone has this power of pardon.[3] Congress can pass no acts limiting or interfering with the pardoning power of the President.[4] This pardoning power of the President includes the

[2] 3 Inst. 233; Ex parte Wells, *supra*.

[3] Ex parte Wells, 18 How. (U. S.) 307, 15 L. ed. 421.

§ 246. [1] Ex parte Wells, 18 How. (U. S.) 307, 10 L. ed. 421.

[2] United States *v.* Klein, 13 Wall. (U. S.) 128, 20 L. ed. 519.

[3] Knote *v.* United States, 95 U. S. 149, 24 L. ed. 442.

[4] Burdick *v.* United States, 236 U. S. 79, 59 L. ed. 476, 35 S. C. 267.

[5] Burdick *v.* United States, *supra*.

§ 247. [1] Article 2, § 2, United States Constitution.

[2] United States *v.* Wilson, 7 Peters (U. S.) 150, 8 L. ed. 640.

[3] United States *v.* Wilson, *supra;* Brown *v.* Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. C. 644; Harlan *v.* McGourin, 218 U. S. 442, 54 L. ed. 1101, 31 S. C. 44.

[4] In re Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Burdick *v.* United States, 236 U. S. 79, 59 L. ed. 476, 35 S. C. 267.

power of commutation of sentences.[5] The governor of a State derives no pardoning power from the United States Constitution, but can only exercise it where the State constitution so provides.[6] The general power of the President, limited only to cases of impeachment, "extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." [7] Congress only has the power to pass acts of general amnesty.[8] Civil liabilities and private wrongs are in the nature of property rights and cannot be affected in any way.[9] The power to pardon offenses includes, "as an incident, the power to release penalties and forfeitures which accrue from the offenses."[10] The President has no power to pardon for civil contempt.[11]

§ 248. **Requisites and Construction.**

If the residence of the person intended to be benefited is incorrectly designated, the effect of the pardon is doubtful.[1] The validity of a pardon necessitates delivery to, and acceptance by, the person intended to be benefited. If he rejects the pardon, the court has no power to force it on him.[2] A pardon is construed strictly against the State.[3]

§ 249. **Effect of Pardon.**

A pardon releases the punishment and blots the guilt out of existence, so that in the eyes of the law the offender is as innocent as if he had never committed the offense.[1] "The pardon does

[5] Ex parte Wells, *supra;* In re Ross, 140 U. S. 453, 35 L. ed. 581, 11 S. C. 897.

[6] Ex parte Wells, 18 How. (U. S.) 307, 10 L. ed. 421; Schwab *v.* Berggren, 143 U. S. 442, 36 L. ed. 218, 12 S. C. 525.

[7] Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Brown *v.* Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. C. 644.

[8] Brown *v.* Walker, *supra.*

[9] Angle *v.* Chicago, St. Paul, etc. R. Co., 151 U. S. 1, 38 L. ed. 55, 14 S. C. 240.

[10] Osborn *v.* United States, 91 U. S. 474, 23 L. ed. 388.

[11] In re Nevitt, 117 Fed. 448, 54 C. C. A. 622 (8th Cir.).

§ 248. [1] Respublica *v.* Buffington, 1 Dall. (U. S.) 60, 1 L. ed. 37.

[2] United States *v.* Wilson, *supra;* Burdick *v.* United States, 236 U. S. 79, 59 L. ed. 476, 35 S. C. 267.

[3] Osborn *v.* United States, 91 U. S. 474, 23 L. ed. 388.

§ 249. [1] Ex parte Garland, *supra;* United States *v.* Klein, 13 Wall. (U. S.) 128, 20 L. ed. 519; Young *v.* United States, 97 U. S. 39, 24 L. ed. 992; Knote *v.* United States, 95 U. S. 149, 24 L. ed. 442; United States *v.* Commanding Officer, 252 Fed. 314.

not affect any rights which have vested in others directly by the execution of the judgment for the offense, or which have been acquired by others whilst that judgment was in force." [2] Where an additional punishment is prescribed for a second offense, a pardon of the first offense takes away the right to inflict said additional punishment.[3] The eyes of the court are closed forever to the perception of the actual fact of the crime which has been pardoned.[4] The pardon extends far beyond the mere discharge of the prisoner from further imprisonment. It is a purging of the offense. Hence, it has been held that the disability of a defendant who has been convicted of a felony was removed by the pardon [5] and that a pardon not only absolves one from punishment but from all penal consequences, such as the disqualification from following his occupation. Therefore, the right to cast a vote in an election is restored,[6] the felony which has been pardoned cannot be the basis of a disbarment proceeding against an attorney,[7] and the statutory disability to act as an executor is removed.[8] The effect of the pardon is to relieve the petitioner from all penalties and disabilities attached to the offense. He cannot be excluded, because of that offense, from continuing in the enjoyment of any previously acquired rights, otherwise a punishment is being enforced against him notwithstanding the pardon.[9] Although a pardon restores all civil rights [10] and removes all penalties, and disabilities from attaching,[11] it does not

[2] Knote *v.* United States, 95 U. S. 149, 24 L. ed. 442; The Confiscation Cases, 20 Wall. (U. S.) 92, 22 L. ed. 320; Semmes *v.* United States, 91 U. S. 21, 23 L. ed. 193; Osborn *v.* United States, 91 U. S. 474, 23 L. ed. 388.

[3] Edwards *v.* Commonwealth, 78 Va. 39.

[4] Carlisle *v.* United States, 16 Wall. (U. S.) 147, 21 L. ed. 426.

[5] Hay *v.* Justice, 24 L. R. (Q. B. D.) 561.

[6] Riser *v.* Farr, 24 Ark. 161; Jones *v.* Board, 56 Miss. 766.

[7] Scott *v.* State, 6 Texas Civ. App. 343.

[8] In re Raynor, 96 N. Y. Supp. 895.

[9] Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366.

[10] Austin *v.* United States, 155; U. S. 417, 39 L. ed. 206, 15 S. C. 167; Illinois Cent. R. R. Co. *v.* Bosworth, 133 U. S. 92, 33 L. ed. 550, 10 S. C. 231; Knote *v.* United States, 95 U. S. 149, 24 L. ed. 442; United States *v.* Commanding Officer, 252 Fed. 314; Wood *v.* Fitzgerald, 3 Oregon, 568.

[11] Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Osborn *v.* United States, 91 U. S. 474, 23 L. ed. 388.

restore offices which have been forfeited.[12] And it was said[13] that a pardon by the President will restore an army officer who has been reduced in rank to his former rank, but will not reinstate him if he has been dismissed. A murderer who has been pardoned is a competent witness, and it is immaterial that the pardon states that it is issued at the request of the district attorney for the purpose of making the pardoned person competent to testify.[14] A pardon granted by the governor of a State after the term of imprisonment has been served, restores competency as a witness.[15] The privilege of a witness against self incrimination is not affected by a tender of a pardon from the President, and if the pardon is refused, he may refuse to testify on the ground of incrimination.[16]

§ 250. **Conditional Pardons.**

A conditional pardon can be granted by the President[1] and acceptance of it makes the condition binding on the pardoned person[2] who cannot question the condition[3] or maintain that the pardon is an absolute one.[4] When the condition is performed, the pardon takes full effect and becomes absolute.[5] If the condition is not performed, it becomes void and the offender may be brought before the court and sentenced to serve the rest of the sentence.[6]

[12] Illinois Cent. R. R. Co. *v.* Bosworth, *supra;* Ex parte Garland, *supra.*

[13] 12 Opinions of Attorney-General, 547.

[14] Boyd *v.* United States, 142 U. S. 450, 35 L. ed. 1077, 12 S. C. 292.

[15] Logan *v.* United States, 144 U. S. 263, 36 L. ed. 429, 12 S. C. 617.

[16] Burdick *v.* United States, 236 U. S. 79, 59 L. ed. 476, 35 S. C. 267; Curtin *v.* United States, 236 U. S. 96, 59 L. ed. 482, 35 S. C. 271.

§ 250. [1] Ex parte Wells, 18 How. (U. S.) 301, 15 L. ed. 421; Semmes *v.* United States, 91 U. S. 21, 23 L. ed. 193; United States *v.* Klein, 13 Wall. (U. S.) 128, 20 L. ed. 519.

[2] In re Ross, 140 U. S. 453, 35 L. ed. 581; Ex parte Wells, *supra.*

[3] Ex parte Wells, *supra.*

[4] Ex parte Wells, *supra.*

[5] United States *v.* Klein, 13 Wall. (U. S.) 128, 20 L. ed. 519.

[6] Ex parte Wells, *supra.*

CHAPTER XXV

PERSONAL PRESENCE OF ACCUSED

§ 251. Accused Must Be Present Personally at Every Stage of the Case.

The rule now is definitely settled that after indictment found, nothing shall be done in the absence of the prisoner. While at times and in the cases of misdemeanors, this rule has been relaxed somewhat, yet it is not in the power of a prisoner charged with a felony, to waive the right to be present personally during the trial. And the fact that he was present personally in court during the trial must appear from the face of the record.[1] The reason for this rule is stated thus by Harlan, J.[2]: "The argument to the contrary necessarily proceeds upon the ground that he (the prisoner) alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot be legally disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow crea-

§ 251. [1] Diaz *v.* United States, 223 U. S. 442, 56 L. ed. 500, 32 S. C. 250; Dowdell *v.* United States, 221 U. S. 325, 55 L. ed. 753, 31 S. C. 590; Lewis *v.* United States, 146 U. S. 370, 36 L. ed. 1011, 13 S. C. 136; Ball *v.* United States, 140 U. S. 118, 35 L. ed. 377, 11 S. C. 761; Hopt *v.* Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. C. 202.

[2] Hopt *v.* Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. C. 202.

tures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

§ 252. **Must Be Present in Court While Jury Is Impaneled.**

It is the right of any one when prosecuted on a capital or criminal charge to be confronted with the accusers and witnesses, and it is within the scope of this right that he be present, not only when the jury is hearing his case but at any subsequent stage when anything, by which he is to be affected, may be done by the prosecution.[1] Accordingly, it has been held that it is essential that the accused be present while the jury is being selected and challenges are made, and a failure to observe this rule will be a ground for the reversal of the judgment.[2]

§ 253. **Must Be Present When Judgment Is Pronounced.**

The record in a homicide case must show affirmatively that the defendant was present in court when sentence was pronounced against him and that the court asked the prisoner if he had anything to say why sentence should not be pronounced against him. These facts cannot be supplied by intendment or implication.[1]

§ 252. [1] Lewis *v.* United States, 146 U. S. 370, 36 L. ed. 1011, 13 S. C. 136.

[2] Lewis *v.* United States, *supra.*

§ 253. [1] Ball *v.* United States, 140 U. S. 118, 35 L. ed. 377, 11 S. C. 761.

Accordingly it was held that an entry on the record that the defendant excepted in open court to the sentence is not equivalent to a recital that he was present personally in court, as the entry is subject to the construction that the exception was taken by the attorney for the accused.[2]

§ 254. View of Premises.

A recent case [1] puts a discordant note to the trend of judicial decisions on the subject of the personal presence of the accused during every step of the trial. It was held that the right of the accused to be present during the inspection of the scene of the murder may be waived by his counsel, but, even when the right is not waived, his absence will not warrant a reversal if no prejudice resulted. The Supreme Court of the United States justified this action on the ground that when the judge, who tried the case without a jury, inspected the premises, he was not addressed improperly by any one and that he did no more than visualize the testimony of the witnesses. The fallacy of this reasoning lies in the fact that the prisoner, if present, might have called attention to certain physical facts and so cleared up whatever doubts or suspicions may have been lodged in the mind of the court at the time of such inspection. It will also be noted that Mr. Justice Clarke vigorously dissented from the decision of the majority of the court. The weight of authority is in favor of the rule that the facts ascertained by a view of the premises are to be considered as in evidence and given due weight in reaching a conclusion.[2] It is to be hoped that *nisi prius* judges, out of an abundance of precaution and because of regard for the rights of the accused, will never undertake the inspection of premises without the personal presence of the accused. In a recent case,[3] the United States Circuit Court of Appeals for the Second Circuit condemned the practice of private communications between the trial court and jury, but under the facts of the particular case

[2] Ball *v.* United States, *supra.*

§ 254. [1] Valdez *v.* United States, 244 U. S. 432, 61 L. ed. 1242, 37 S. C. 725, *Affirming* 30 Phil. Rep. 293.

[2] See authorities collected by Marshall, J. in Wall *v.* United States Mining Co., 232 Fed. 613.

[3] Dodge *v.* United States, 258 Fed. 300 (C. C. A. 2d Cir.); Opinion per Rogers, J. *Certiorari denied.* — U. S. —, — L. ed. —, — S. C. —.

the court held the conduct of the trial judge to be harmless error. The point was not made nor decided that under the Constitution of the United States the personal presence of the accused is required during every stage of the case.

§ 255. **Personal Presence Not Required in Appellate Tribunal.** The requirements of the Constitution as to the personal presence of the accused in court when his case is being considered, do not apply to courts of review on writ of error or certiorari. In such case the presence of the accused is unnecessary.[1]

§ 256. **Method of Bringing Accused into Court When in Custody.** No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal.[1]

§ 255. [1] Dowdell *v.* United States, 221 U. S. 325, 55 L. ed. 753, 31 S. C. 590; Schwab *v.* Berggren, 143 U. S. 442, 36 L. ed. 218, 12 S. C. 525.

§ 256. [1] Revised Statute § 1030.

CHAPTER XXVI

BILL OF PARTICULARS

§ 257. The Right to a Bill of Particulars.

The Sixth Amendment to the Constitution of the United States provides that a defendant shall be informed of the nature and cause of the accusation against him. The Fifth Amendment to the Constitution of the United States provides that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." It will therefore be seen that the Constitution speaks of two separate and distinct things. A defendant charged with an infamous crime must be first indicted in the manner provided by law. Next, he must be informed of the nature of the accusation against him. Consequently, where the indictment itself is general in its nature or merely uses the language of the statute, a person charged with a criminal offense in the United States courts is entitled to a bill of particulars as a matter of right, a right which no one should dispute, in view of the positive language of the Constitution of the United States. Unfortunately, of late years, the tendency in the lower Federal Courts has been rather to restrict instead of enlarging the right of an accused person to a bill of particulars. There are few cases in the reports where the right of a

defendant to a bill of particulars has been defined or directly passed upon. There are a number of cases [1] holding that the defendant should have applied for a bill of particulars instead of demurring to the indictment, but the right to the bill itself was not directly passed upon and can only be gathered by inference. In a comparatively recent case,[2] Judge Ward, of the United States Circuit Court of Appeals for the Second Circuit, said: "Bills of particulars have grown from very small and technical beginnings into most important instruments of justice. . . . While they are not entitled to advise a party of his adversary's evidence, or theory, they will be required, even if that is the effect, in cases where justice necessitates it." The clearest expression on the subject of bills of particulars was recently stated by District Judge Julius M. Mayer, of the Southern District of New York.[3] In granting the bill of particulars, Judge Mayer, among other things, said: "There are situations where a clear and frank statement will reduce to its proper and simplest limits what might otherwise be a confused controversy and thus in the ultimate best interest of the government, as well as out of fairness, to a defendant, a prompt solution may be invited of what are more likely to be questions of law than of fact. . . ." And again the learned Judge said: "If, in a case of this kind, fundamental issues are not clearly defined, at the outset, the trial Judge may well be confronted with great difficulty in passing upon the admissibility of testimony; and the familiar promise to connect, although made in perfect good faith, may not be fulfilled with resultant embarrassment to the jury in the endeavor to exclude from its official mind that which its ears have heard." There can be no doubt that a defendant is entitled to a bill of particulars where the averments follow the language of the statute and are general in terms.[4] A defendant has a right to demand a bill of particulars to show him

§ 257. [1] Dunlop *v.* United States, 165 U. S. 486, 491, 41 L. ed. 799, 17 S. C. 375; Rosen *v.* United States, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434; Durland *v.* United States, 161 U. S. 306, 40 L. ed. 709, 16 S. C. 508.

[2] Locker *v.* American Tobacco Co., 200 Fed. 973, 975.

[3] United States *v.* Sumatra Purchasing Co. (still unreported), where the defendants were indicted for a violation of the Sherman Act.

[4] Rosen *v.* United States, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434; Durland *v.* United States, 161 U. S. 306, 40 L. ed. 709, 16 S. C. 508; Tubbs *v.* United States, 105 Fed. 59, 44 C. C. A. 357 (8th Cir.).

under what statute he is being prosecuted.[5] Upon a careful review of the authorities, the rule is deducible that when the indictment is general in its language or ambiguous, although not demurrable, the defendant is entitled as of right to a bill of particulars.[6] In the case of Coffin *v.* United States,[7] the court said: "It is always open to the defendant to move the judge before whom the trial is had to order the prosecuting attorney to give a more particular description, in the nature of a specification or bill of particulars, of the acts on which he intends to rely, and to suspend the trial until this can be done; and such an order will be made whenever it appears to be necessary to enable the defendant to meet the charge against him, or to avoid danger of injustice. . . ."

§ 258. Bills of Particulars in Postal Crimes.

In cases arising under Revised Statute Section 3893 for depositing in the post office obscene literature, defendants have maintained by way of demurrer that the lascivious literature ought to be set forth in the indictments.[1] They contend that otherwise they will be ignorant of the facts which they will be obliged to meet at the trial.[2] Demurrers on this ground have been constantly overruled.[3] The appellate courts hold that under the circumstances, the defendant should apply for a bill of particulars.[4]

§ 259. When It Should Be Granted.

It has been pointed out repeatedly that in indictments for statutory offenses, where the averments following the language of the statute are general in terms, or where non-essential aver-

[5] Vedin *v.* United States, 257 Fed. 550 (C. C. A. 9th Cir.).

[6] Rinker *v.* United States, 151 Fed. 755, 759, 81 C. C. A. 379 (8th Cir.), and cases there cited; Rimmerman *v.* United States, 186 Fed. 307, 108 C. C. A. 385 (8th Cir.); *Writ of Certiorari denied* in 223 U. S. 721, 56 L. ed. 630, 32 S. C. 523; Morris *v.* United States, 161 Fed. 672, 681, 88 C. C. A. 532 (8th Cir.); Connors *v.* United States, 158 U. S. 408, 411, 39 L. ed. 1033, 15 S. C. 951; Armour Packing Co. *v.* United States, 209 U. S. 84, 52 L. ed. 681, 28 S. C. 428.

[7] 156 U. S. 452, 39 L. ed. 490, 15 S. C. 394.

§ 258. [1] Rosen *v.* United States, 161 U. S. 29, 40, 40 L. ed. 606, 16 S. C. 434.

[2] Durland *v.* United States, 161 U. S. 306, 40 L. ed. 709, 16 S. C. 508.

[3] Dunlop *v.* United States, 165 U. S. 486, 41 L. ed. 606, 17 S. C. 375.

[4] Tubbs *v.* United States, 105 Fed. 59, 44 C. C. A. 357 (8th Cir.).

ments are under the *videlicet*, the defendant may apply for a bill of particulars.[1]

§ 260. **The Rule at Common Law.**

At common law the indictment was very general in description and the prosecution was often ordered to furnish the defendant with a bill of particulars.[1] This system has not met with approval in this country and it is generally held that the indictment must contain all essential allegations and that the failure to so allege will not be cured by a bill of particulars.[2]

§ 261. **Office of the Bill.**

The office of a bill of particulars is to advise the court, or more particularly the defendant, of what facts he will be required to meet, and the court will limit the Government in its evidence to those facts set forth in the bill of particulars.[1]

§ 262. **Bill Cannot Validate or Invalidate Indictment.**

A bill of particulars cannot make an indictment valid which fails to state an essential element of the offense, especially so when objection is made at the proper time and place.[1] Likewise an indictment not demurrable on its face does not become so by the addition of a bill of particulars because the bill of particulars is no part of the record.[2]

§ 263. **Practice.**

The defendant should apply in advance of the trial for the particulars; otherwise it may properly be assumed that he is fully in-

§ **259.** [1] Rosen *v.* United States, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434; Durland *v.* United States, 161 U. S. 306, 40 L. ed. 709, 16 S. C. 508; Tubbs *v.* United States, 105 Fed. 59, 44 C. C. A. 357 (8th Cir.).

§ **260.** [1] Rex *v.* Hamilton, 7 Carr. & P. 448; Rex *v.* Gill, 2 B. & Ald. 204.

[2] United States *v.* Bayaud, 16 Fed. 376; May *v.* United States, 199 Fed. 60; Bannon *v.* United States, 156 U. S. 464, 39 L. ed. 494, 15 S. C. 467.

§ **261.** [1] Dunlop *v.* United States, 165 U. S. 486, 491, 41 L. ed. 799, 17 S. C. 375; United States *v.* Adams Express Co., 119 Fed. 240; Breese *v.* United States, 106 Fed. 680, 682, 45 C. C. A. 535 (4th Cir.).

§ **262.** [1] United States *v.* Bayaud, 16 Fed. 376; May *v.* United States, 199 Fed. 60.

[2] Dunlop *v.* United States, 165 U. S. 486, 41 L. ed. 799; Coomer *v.* United States, 213 Fed. 1 (C. C. A. 8th Cir.).

formed of the precise case pending against him.[1] When he does so and the motion is overruled, it ought not to be regarded as a formal matter curable by verdict and may be assigned as error.[2] A defendant waives his right to object to the form of the indictment after verdict has once been entered.[3] If, however, it should become apparent in the course of the trial that the language in the indictment is equivocal, the court has the power even at that late hour to order the prosecuting attorney to furnish the defendant with a bill of particulars of the case.[4] As a rule the granting or refusal of the bill of particulars rests in the sound discretion of the court.[5]

§ 264. **Effect.**

When the order for bill of particulars is once made it concludes the rights of all parties who are affected by it; and he who has furnished a bill of particulars under it must be confined to the particulars he has specified as closely and effectually as if they constituted essential allegations in a special declaration.[1] The general rule is that where in the course of the suit from any cause a party is placed in such a situation that justice cannot be done in the trial without the aid of the information to be obtained by means of a specification or bill of particulars, the court by virtue of the general authority to regulate the conduct of trials has power to direct such information to be seasonably furnished and in an authentic form; and that such an order may be effectual and accomplish the purpose intended by it, the party required to fur-

§ **263.** [1] Rosen *v.* United States, 161 U. S. 29; Rinker *v.* United States, 151 Fed. 755, 759; Rimmerman *v.* United States, 186 Fed. 307.

[2] Moore *v.* United States, 160 U. S. 268.

[3] Dunbar *v.* United States, 156 U. S. 185, 192, 39 L. ed. 390, 15 S. C. 325; Tingle *v.* United States, 87 Fed. 320 (5th Cir.).

[4] Kirby *v.* United States, 174 U. S. 47.

[5] Coffin *v.* United States, 156 U. S. 432, 452, 39 L. ed. 481, 15 S. C. 394; Breese *v.* United States, 106 Fed. 680, 45 C. C. A. 535 (4th Cir.); Rosen *v.* United States, 161 U. S. 29, 35, 40 L. ed. 606, 16 S. C. 434, 480; Kettenbach *v.* United States, 202 Fed. 377, 382, 120 C. C. A. 505 (9th Cir.); McKnight *v.* United States, 97 Fed. 208, 38 C. C. A. 115 (6th Cir.).

§ **264.** [1] Commonwealth *v.* Giles, 1 Gray, 466, 469 (an indictment for selling liquor); Williams *v.* Commonwealth, 91 Pa. State, 493, 502; Regina *v.* Esdaile, 1 Fost. & F. 213, 228.

nish a bill of particulars must be restricted and confined to the particulars specified.[2]

§ 265. **Granting or Refusing of a Continuance.**

The granting or refusing of a continuance, like the granting or refusal of a new trial,[1] is a matter left entirely to the discretion of the court and is not subject to review by an Appellate Court unless the discretion was abused.[2]

[2] Commonwealth *v.* Snelling, 15 Pick. (Mass.) 321, 331 (an indictment for libel).

§ **265.** [1] Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917, 13 S. C. 50; Harless *v.* United States, 92 Fed. 353 (C. C. A. 8th Cir.).

[2] Spear *v.* United States, 246 Fed. 250, — C. C. A. — (8th Cir.).

CHAPTER XXVII

JURY TRIAL — PART I

§ 266. Cannot Be Waived — When.

One accused of an infamous crime or felony cannot waive a trial by jury nor any substantial right affecting his life or liberty.[1] A Federal judge has no authority to hear a case without a plea of not guilty and without a jury, even though the United States and the defendant consent thereto.[2] But a defendant charged with a petty misdemeanor may waive a trial by jury.[3]

§ 267. Who Are Entitled to a Jury Trial.

Every person, except those who are attached to the army and navy or militia in actual service, is entitled to a jury trial where

§ 266. [1] Hopt *v.* Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. C. 202; Thompson *v.* Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. C. 620; Lewis *v.* United States, 146 U. S. 370, 36 L. ed. 1011, 13 S. C. 136; Ex parte McClusky, 40 Fed. 71; Low *v.* United States, 169 Fed. 86, 94 C. C. A. 1 (6th Cir.).

[2] Low *v.* United States, 169 Fed. 86, 94 C. C. A. 1 (6th Cir.); Rogers *v.* United States, 141 U. S. 548, 35 L. ed. 853, 12 S. C. 91; Callan *v.* Wilson, 127 U. S. 540, 32 L. ed. 223, 8 S. C. 1301; Schick *v.* United States, 195 U. S. 65, 49 L. ed. 99, 24 S. C. 826.

[3] Schick *v.* United States, 195 U. S. 65, 49 L. ed. 99, 24 S. C. 826; Callan *v.* Wilson, 127 U. S. 540, 32 L. ed. 223, 8 S. C. 1301.

charged with a criminal offense.[1] Proceedings according to the rules of common law for contempt of court are not subject to the right of trial by jury and are "due process of law" within the meaning of the Constitution of the United States.[2] A proceeding to strike an attorney's name from the roll is one within the proper jurisdiction of the court of which he is an attorney, and does not violate the constitutional provision which requires an indictment and trial by jury in criminal cases. The reason for this is that this is not a criminal proceeding, but an action to protect the court from the official ministration of persons unfit to practice as attorneys therein.[3]

§ 268. **What Is Meant by "Trial."**

A trial is the final examination and decision of matters of law as well as facts in issue for which every antecedent step is a preparation.[1] A trial in accordance with due process of law usually means that the trial must be had and conducted according to the forms prescribed by the law of the land.[2]

§ 269. **Organization of Court.**

The trial must commence with a constitutional tribunal, that is, a court organized under the Constitution and laws of the United States, with authority to try the offense of which the defendant is charged and a judge of that court duly appointed and commissioned and authorized to preside at the trial and a constitutional jury.[1]

§ 270. **Constitutional Provisions.**

The Third Article of the Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes

§ 267. [1] Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281; Low *v.* United States, 169 Fed. 86, 94 C. C. A. 1 (6th Cir.).

[2] Eilenbecker *v.* District Court of Plymouth Co., 134 U. S. 31, 33 L. ed. 801, 10 S. C. 424.

[3] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. C. 569.

§ 268. [1] Carpenter *v.* Winn, 221 U. S. 533, 55 L. ed. 842, 31 S. C. 683.

[2] Callan *v.* Wilson, 127 U. S. 540, 32 L. ed. 223, 8 S. C. 1301; Hagar *v.* Reclamation Distr., 111 U. S. 701, 28 L. ed. 569, 4 S. C. 663; Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. C. 110; Den, *ex rel.* Murray *v.* Hoboken Land Co., 18 How. (U. S.) 272, 15 L. ed. 372.

§ 269. [1] Freeman *v.* United States, 227 Fed. 732, 142 C. C. A. 256 (2d Cir.).

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." The Fifth Amendment provides that no person shall ". . . be deprived of life, liberty or property without due process of law." By the Sixth Amendment it is declared that "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 to 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 defence." The above provisions of the Constitution are mandatory in all trials of criminal cases irrespective of whether the charge is for felony or petty misdemeanor.[1] The guaranty of trial by jury contained in the Constitution was intended for a state of war as well as a state of peace. Military commissions organized during the Civil War, in a State not invaded and not engaged in rebellion, in which the Federal Courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict or sentence for any criminal offense, a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. The fact that the privilege of the writ of *habeas corpus* had been suspended did not affect the right to a trial by jury.[2] Our forefathers regarded the recognition and exercise of the right to trial by jury as vital to the protection of liberty against arbitrary power.[3] It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy.[4]

§ 271. Constitutional Guarantees to Trial by Jury Are Not Applicable in Foreign Possessions.

The constitutional provisions referred to in the Third Article and Sixth Amendment of the Constitution of the United States

§ 270. [1] Callan *v.* Wilson, 127 U. S. 540, 32 L. ed. 223, 8 S. C. 1301.

[2] Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281.

[3] 1 Story Const. § 165.

[4] Parsons *v.* Bedford, 3 Pet. (U. S.) 433, 7 L. ed. 732.

are applicable only within the territorial limits of the United States and are not operative in Consular Courts sitting in a foreign country or in foreign possessions.[1] While it would seem that the intention of Congress in providing a form of civil government for the Philippine Islands was to extend to a certain extent the benefits of the Constitution of the United States,[2] it was nevertheless held, that the requirement of the Fifth Amendment to the Constitution of the United States, that infamous crimes must be prosecuted by indictment, is not applicable to the Philippine Islands.[3] In other respects the rights in the Philippine Islands which are governed by the "Philippine Bill of Rights" correspond in a great measure to the Constitution of the United States.[4]

§ 272. **Applies to Territories and Aliens.**

The provisions relating to trial by jury apply to territories within the United States and to the District of Columbia.[1] The provisions of the Constitution relating to trial by jury apply to resident aliens as well as to all citizens residing in the United States.[2]

§ 273. **Cases Previously Tried in State Court and Subsequently Removed to the Federal Court.**

The Seventh Amendment to the Constitution of the United States and the common law relating to jury trials secured by that Amendment apply to cases which were tried by a jury in the State court and afterwards transferred to the Federal court,[1] but the privileges granted by said Amendment are not conferred upon

§ **271.** [1] Ross *v.* McIntyre, 140 U. S. 453, 35 L. ed. 581, 11 S. C. 897; Dorr *v.* United States, 195 U. S. 138, 49 L. ed. 128, 24 S. C. 808.

[2] Weems *v.* United States, 217 U. S. 349, 54 L. ed. 793, 30 S. C. 544.

[3] Dowdell *v.* United States, 221 U. S. 325, 55 L. ed. 753, 31 S. C. 590.

[4] Diaz *v.* United States, 223 U. S. 442, 56 L. ed. 500, 32 S. C. 250; Dowdell *v.* United States, 221 U. S. 325, 55 L. ed. 753, 31 S. C. 590; Gavieres *v.* United States, 220 U. S. 338, 55 L. ed. 489, 31 S. C. 421; Carino *v.* Insular Government, 212 U. S. 449, 53 L. ed. 594, 29 S. C. 334; Serra *v.* Mortiga, 204 U. S. 470, 51 L. ed. 571, 27 S. C. 343; Kepner *v.* United States, 195 U. S. 100, 49 L. ed. 114, 24 S. C. 797.

§ **272.** [1] Callan *v.* Wilson, 127 U. S. 540, 32 L. ed. 223, 8 S. C. 1301; Thompson *v.* Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. C. 620.

[2] Wong Wing *v.* United States, 163 U. S. 228, 41 L. ed. 140, 16 S. C. 977.

§ **273.** [1] The Justices of New York *v.* United States, *ex rel.* Murray, 9 Wall. (U. S.) 274, 19 L. ed. 658.

litigants in a State court, where the State court has jurisdiction to enforce or construe a Federal statute. The State has power to prescribe the number of jurors to be less than twelve and may also provide that a verdict may be reached by a vote less than a unanimous vote.[2]

§ 274. Number of Jurors.

A jury under the Seventh Amendment to the Constitution of the United States must consist of not less nor more than twelve men.[1] The word "jury" means a tribunal of twelve men presided over by a court and hearing the allegations, evidence and argument of the parties.[2] And as the constitutional right to a trial by jury requires the continuous presence of the court and the jury during every step of the trial, it was held that another judge cannot be lawfully substituted for the one before whom the trial was commenced regardless of the emergency existing for so doing. In a recent case [3] the trial was commenced before Judge Hough who was taken ill suddenly and resumed before Judge Julius Mayer, and, although the defendant did not object to such substitution, the conviction was reversed, the court holding that a defendant charged with an infamous offense was incapable of such waiver.

§ 275. Jury of Less than Twelve in Misdemeanor Cases Is Prohibited.

While a defendant charged with a misdemeanor may waive a jury, nevertheless, if he goes to trial before a jury, he cannot consent to have his case tried by a jury of less than twelve men.[1]

[2] Minneapolis & St. L. R. R. Co. *v.* Bombolis, 241 U. S. 211, 60 L. ed. 961, 36 S. C. 545.

§ 274. [1] Minneapolis & St. L. R. R. Co. *v.* Bombolis, 241 U. S. 211, 60 L. ed. 961, 36 S. C. 545; Thompson *v.* United States, 170 U. S. 343, 42 L. ed. 1061, 18 S. C. 620; Low *v.* United States, 169 Fed. 86, 94 C. C. A. 1 (6th Cir.); Capital Traction Co. *v.* Hof, 174 U. S. 1, 43 L. ed. 873, 19 S. C. 580; Walker *v.* New Mexico & S. P. R. R. Co., 165 U. S. 593, 41 L. ed. 837, 17 S. C. 421; American Publishing Co. *v.* Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 S. C. 618.

[2] Lamb *v.* Lane, 4 Oh. St. 167, *Approved* in Freeman *v.* United States, 227 Fed. 732, 146 C. C. A. 256 (2d Cir.).

[3] Freeman *v.* United States, 227 Fed. 732, 146 C. C. A. 256 (2d Cir.).

§ 275. [1] Dickinson *v.* United States, 159 Fed. 801, 86 C. C. A. 625 (1st Cir.).

CHAPTER XXVIII

JURY TRIAL — PART II

IMPANELING AND SELECTING PETIT JURORS

§ 276. Writs — Statutory Provisions and Decisions Thereunder.

"Writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ. Any person named in such writ who resides elsewhere than at the place at which the court is held, shall be served by the marshal mailing a copy thereof to such person commanding him to attend as a juror at a time and place designated therein, which copy shall be registered and deposited in the post office addressed to such person at his usual post office address. And the receipt of the person so addressed for such registered copy shall be regarded as personal service of such writ upon such person, and no mileage shall be allowed for the service of such person. The postage and registry fee shall be paid by the marshal and allowed him in the settlement of his accounts."[1] A *venire facias* must be properly addressed;

§ 276. [1] Federal Judicial Code, § 279.

hence a *venire facias* addressed to the "Marshal of the district of Louisiana" in place of the proper designation of "Marshal of the eastern district of Louisiana", was held void.[2] A second *venire* may be ordered during the term of the court in case of a deficiency of jurors.[3] The United States Court can empower the State authorities to draw its jurors, if it finds this method convenient and safe.[4] The mode of impaneling juries is within the discretion of the court subject only to the general restrictions laid down by Congress.[5] If the United States Marshal is considered by the court not to be an indifferent person, a special officer may be appointed by the court to serve the *venire*.[6] Jurors shall be returned from such parts of the district from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.[7] This section is in no way contrary to the provisions of the Sixth Amendment to the Constitution of the United States, the purpose of which was to define the maximum limit within which a person accused of a crime could be tried.[8] Jurors must be drawn from the territory embraced within the district where the court is sitting.[9] Although this is a discretionary power, the court must make reasonable use of it. Hence, in a criminal suit involving transportation charges against a defendant corporation in a district made up in the greater part of the city of Chicago, a panel of the jury composed largely of farmers was set aside as not able to return a fair, impartial and intelligent verdict, and a new panel from the entire district secured.[10] The court can substitute a jury

[2] United States *v.* Antz, 16 Fed. 119.

[3] United States *v.* Matthews, 26 Fed. Cas. No. 15741 b; Clawson *v.* United States, 114 U. S. 477, 29 L. ed. 179, 5 S. C. 949; Campbell *v.* United States, 221 Fed. 186 (C. C. A. 9th Cir.).

[4] United States *v.* Richardson, 28 Fed. 61.

[5] United States *v.* Shackelford, 18 How. (U. S.) 588, 15 L. ed. 495.

[6] Johnson *v.* United States, 247 Fed. 92 (C. C. A. 9th Cir.).

[7] Federal Judicial Code, § 277.

[8] United States *v.* Ayres, 46 Fed. 651; Spencer *v.* United States, 169 Fed. 562, 95 C. C. A. 60 (9th Cir.); United States *v.* Peuschel, 116 Fed. 642; United States *v.* Merchants' Transportation Co., 187 Fed. 355; Ruthenberg *v.* United States, 245 U. S. 480, 62 L. ed. 414, 38 S. C. 168.

[9] May *v.* United States, 199 Fed. 53, 117 C. C. A. 431 (8th Cir.).

[10] United States *v.* Standard Oil Co., 170 Fed. 988.

commissioner to draw the names of the jurors who were residents of the district out of a box in which the names had been placed.[11] However, the calling of jurors from any part of the country is discretionary with the court. Application that the court direct such a summoning of the jury can be made by the defendant.[12] The duty of selecting a panel of jurors cannot be delegated.[13] The word "jurors" is interpreted to include grand and petit jurors.[14] This section is not to be construed to mean that a defendant is entitled to a grand or petit jury composed of representatives from every section of the district.[15] When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several States.[16] Where the clerk, acting as jury commissioner, followed a plan to apportion the jurors approximately among the various counties, rejecting the names in excess of a predetermined number of names from each particular county, it was held that this was at most an irregularity, and overruling a motion to quash based thereon is not such error as to be taken cognizance of by the Circuit Court of Appeals in the absence of any assignment.[17]

§ 277. **Jury of Bystanders.**

"When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section."[1] This section has been held to be in no way repealed by § 276 of the Judicial Code, Act of

[11] United States *v.* Merchants' Transportation Co., *supra.*

[12] United States *v.* Price, 30 Fed. Cas. No. 16088; United States *v.* Chaires, 40 Fed. 820.

[13] Dunn *v.* United States, 238 Fed. 508 (C. C. A. 5th Cir.).

[14] Agnew *v.* United States, 165 U. S. 36, 41 L. ed. 624, 17 S. C. 235; Spencer *v.* United States, 169 Fed. 562, 95 C. C. A. 860 (9th Cir.).

[15] United States *v.* Peuschel, 116 Fed. 642.

[16] Federal Judicial Code, § 281.

[17] Steers *v.* United States, 192 Fed. 1, 112 C. C. A. 423 (6th Cir.).

§ **277.** [1] Federal Judicial Code, § 280.

June 30th, 1879, which has no reference to the calling of talesmen from by-standers.[2] When a person who is summoned in pursuance of a court order is not in court when the order is made, but was present when the marshal returned him as present, and when his name was placed on the panel, and the ballot placed in the wheel, it was held that this satisfied the statutory construction of "by-standers."[3] Special officers may be appointed by the court when the marshal is not a disinterested person.[4] If the marshal, by the order of the court, summons members of the grand jury without the drawing of names, or if the court directs the summoning of additional grand jurors although a sufficient number were impaneled to constitute a legal grand jury, the indictment is valid and the panel is legal.[5]

§ 278. **Challenge to the Array.**

Under the common law, a challenge to the array could be interposed only for partiality of the sheriff summoning the jury.[1]

§ 279. **Qualifications of Jurors.**

"No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge."[1] Section 286 must be read with Section 275 inasmuch as the latter reads "Subject to the provisions hereinafter contained."[2] This section prescribed the rules of procedure in the Federal courts notwithstanding provisions of the State court, and the challenge will not be entertained unless the juror served within one year in the

[2] Lovejoy *v.* United States, 128 U. S. 171, 32 L. ed. 389, 9 S. C. 57; St. Clair *v.* United States, 154 U. S. 134, 28 L. ed. 936, 14 S. C. 1002; United States *v.* Rose, 6 Fed. 136; United States *v.* Munford, 16 Fed. 164; United States *v.* Eagan, 30 Fed. 608.

[3] United States *v.* Loughrey, 13 Blatch. 267, 26 Fed. Cas. No. 15 631.

[4] Johnson *v.* United States, 247 Fed. 92 (C. C. A. 9th Cir.).

[5] United States *v.* Nevin, 199 Fed. 831.

§ 278. [1] 3 Bl. Comm. 359; Co. Litt. 156.

§ 279. [1] Federal Judicial Code, § 286.

[2] Papernow *v.* Standard Oil Co., 228 Fed. 399.

same court.[3] The section expressly refers to petit jurors and hence no other service such as a grand juror will be sufficient.[4] If a juror should serve again during the prohibited term, this is only a ground for challenge and is not a disqualification; hence, an indictment will not be quashed because one of the grand jurors which found it was acting as a juror a second time.[5] Nor is it a ground of challenge that the juror has served as talesman in another cause at the same term of the same court.[6] The time is computed from the term in which the juror is summoned; hence, a juror summoned in the November Term and not impaneled or sworn until the December Term, cannot be sworn on the next November Term.[7] As this section is silent as to the disabilities of grand jurors to serve, it may be presumed that Congress would have made suitable provision had it so intended.[8] This section has no applicability to the District of Columbia.[9] "Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions herein contained, and be entitled to the same exemptions, as jurors to the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."[10] The practical purpose of this section is to have conformity of regulations with reference to jurors of United States Courts to those in the courts of the particular State.[11] Consequently, any subsequent change in the State regulations would be followed in the United States Courts.[12] The United States Courts must follow the State rules and have no discretion.[13] But if no State rule exists, "The mode of designating and empaneling jurors for the trial of cases in the courts of the

[3] Morris *v.* United States, 161 Fed. 672, 80 C. C. A. 532 (8th Cir.). *Reversed* on other grounds in 168 Fed. 682, 94 C. C. A. 168 (8th Cir.).

[4] National Bank *v.* Schufelt, 145 Fed. 509, 76 C. C. A. 187 (8th Cir.); United States *v.* Reeves, 3 Woods, 199, 27 Fed. Cas. No. 16 139.

[5] United States *v.* Reeves, *supra.*

[6] Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642 (8th Cir.).

[7] United States *v.* Reeves, *supra.*

[8] United States *v.* Clark, 46 Fed. 640.

[9] United States *v.* Nardello, 4 Mackey (D. C.), 503.

[10] Federal Judicial Code, § 275.

[11] United States *v.* Douglass, 2 Blatch. 207, Fed. Cas. No. 14 989.

[12] United States *v.* Douglass, *supra;* United States *v.* Reed, 2 Blatch. 435, Fed. Cas. No. 16 134.

[13] United States *v.* Reed, *supra;* United States *v.* Clark, 46 Fed. 633.

United States is within the control of those courts subject only to the restrictions Congress has prescribed, and also to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for trial of offenses."[14] This section refers only to the qualifications and exemptions of the jurors, but not to the number of jurors to be summoned.[15] Although the Federal Courts follow the State regulations as to the qualifications and character of witnesses, and enforce similar challenges and objections, it is still their bounden duty to enforce any other well-founded objections to witnesses.[16] The word " qualifications " refers and is interpreted to mean general qualifications, such as to age, citizenship, etc., and has no reference to objections that would preclude the person acting on the jury, but refers to those objections directed to the juror as one of the panel.[17] The presumption that every juror is of good moral character exists.[18] If a grand juror is competent when summoned, but loses his property qualifications later, he will be allowed to complete his duties as a grand juror. Qualifications refer to one's eligibility as a juror but not to one's continuing capacity to serve.[19] A statutory misdemeanor which is not listed among the laws of the State as a disqualification will not disqualify one as a Federal grand juror.[20] This section is limited by the phrase " Subject to the provisions hereinafter contained "; hence, § 286 must be so read.[21] Where one is qualified to act as a juror in his own State he is eligible to act on the Federal juries, although he still was under the disabilities imposed on him by the laws of the United States for having entered the service of the Confederate States as an

[14] St. Clair *v.* United States, 154 U. S. 134, 38 L. ed. 936, 14 S. C. 1002. *Quoting* the above from the opinion rendered in Pointer *v.* United States, 151 U. S. 396, 38 L. ed. 208, 14 S. C. 410; Hendrickson *v.* United States, 249 Fed. 34 (C. C. A. 4th Cir.).

[15] United States *v.* Reed, *supra;* United States *v.* Tallman, 10 Blatch. 21, 28 Fed. Cas. No. 16 429; United States *v.* Breeding, 207 Fed. 645.

[16] United States *v.* Benson, 31 Fed. 896.

[17] United States *v.* Greene, 113 Fed. 683; United States *v.* Williams, 1 Dill. 485, 28 Fed. Cas. No. 16 716.

[18] Christopoulo *v* United States, 230 Fed. 788, 144 C. C. A. 98 (4th Cir.).

[19] United States *v.* Gradwell, 227 Fed. 243.

[20] Christopoulo *v.* United States, *supra;* United States *v.* Scott, 230 Fed. 192.

[21] Papernow *v.* Standard Oil Company of New York, 228 Fed. 399.

officer.[22] The personal disqualifications of grand jurors may be made the basis for objection by a plea in abatement if made prior to arraignment and when the facts are ascertained.[23] The Federal court can impanel a jury *de medietate* if the State court has such power.[24] "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude."[25] A similar provision in the Act of March 1st, 1875, was held to be authorized by the Constitution.[26] Citizens of the African race who are denied participation as jurors in the administration of justice because of their color, although coming in other respects within the requirements, are held to be discriminated against contrary to the amendments and within the legislative power of Congress to prevent.[27] But such discrimination in the State courts is not sufficient cause for a removal of the case to the Federal courts.[28] The State can make regulations such as requiring good moral character in the selection of qualified grand jurors.[29]

§ 280. **Number of Peremptory Challenges Permitted.**

"When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges,

[22] In re Carnes, 31 Fed. 397.

[23] Crowley *v.* United States, 194 U. S. 461, 48 L. ed. 1075, 24 S. C. 731; Christopoulo *v.* United States, *supra;* Dunn *v.* United States, 238 Fed. 508 (C. C. A. 5th Cir.).

[24] Kentucky *v.* Wendling, 182 Fed. 140.

[25] Federal Judicial Code, § 278.

[26] Ex parte Virginia, 100 U. S. 239, 25 L. ed. 676; Buchanan *v.* Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. C. 16.

[27] Neal *v.* Delaware, 103 U. S. 370, 26 L. ed. 567; Gibson *v.* Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 S. C. 904.

[28] Neal *v.* Delaware, *supra;* Gibson *v.* Mississippi, *supra.*

[29] Franklin *v.* South Carolina, 218 U. S. 161, 54 L. ed. 980.

whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers."[1] The defendant has ten peremptory challenges where the offense is declared to be a felony either expressly or impliedly, or where Congress punishes an offense by its common law name.[2] Until Congress passed legislation on the point, the matter of peremptory challenges was unsettled, although the Supreme Court has stated that the Federal Courts could adopt the State rule.[3] But when Congress acted through this section, the number of peremptory challenges was determined finally, and the State statutes no longer recognized.[4] Where several indictments against one person are charged and a request for consolidation is granted, only three peremptory challenges are allowed.[5] Where two defendants were indicted under the National Bank Act, and their request for consolidation was granted, they were entitled to ten peremptory challenges, as the result of the consolidation was to make an indictment with two counts.[6] If several persons are indicted for a joint felony, it has been held that they are entitled to twenty peremptory challenges, they being for this purpose considered as one person.[7] Where fourteen defendants refuse to act together in making peremptory challenges, the court has it within its discretion to allow but one challenge to each defendant.[8] But if three indictments against the same person are tried together before the same jury, three peremptory challenges are allowed for each indictment.[9] But if two or more actions against several defendants are consolidated, they are entitled to three peremptory challenges.[10] If there is a consolidation of separate causes, but requiring separate verdicts, each party will be entitled to the same

§ 280. [1] Federal Judicial Code, § 287.

[2] United States *v.* Coppersmith, 4 Fed. 198.

[3] United States *v.* Shackelford, 18 How. (U. S.) 588, 15 L. ed. 495.

[4] Detroit, etc. Ry. *v.* Kimball, 211 Fed. 633, 128 C. C. A. 565 (6th Cir.).

[5] Kharos *v.* United States, 192 Fed. 503, 113 C. C. A. 109 (8th Cir.).

[6] Kettenbach *v.* United States, 202 Fed. 377, 120 C. C. A. 505 (9th Cir.).

[7] United States *v.* Hall, 44 Fed. 883.

[8] Schwartzberg *v.* United States, 241 Fed. 348 (C. C. A. 2d Cir.).

[9] Betts *v.* United States, 132 Fed. 228, 65 C. C. A. 452 (1st Cir.); Krause *v.* United States, 147 Fed. 442, 78 C. C. A. 642 (8th Cir.).

[10] Mutual Life Ins. Co. *v.* Hillmon, 145 U. S. 285, 36 L. ed. 707, 12 S. C. 909.

number of challenges as if the causes had been tried separately.[11] Where the same plaintiff consolidates several actions against different defendants, he is entitled to no greater number of challenges, and each defendant is entitled to three peremptory challenges as if no consolidation had existed.[12] The meaning to be attributed to the words " any other felony " is to be determined by the common law. Generally, it may be stated to mean offenses other than capital.[13] Robbing a mail carrier is a felony both under the statutes and the common law.[14] Statutes may define the gravity of an offense; hence, smuggling is made a misdemeanor by statute.[15] Forcibly breaking or attempting to break into a post office is a misdemeanor.[16] Challenges to favor are tried by the court, and on appeal the findings of fact by the trial judge as to the juror will not be set aside except for manifest error.[17] On challenging a juror because he had formed an opinion as to the issues, it must appear beyond doubt that the trial judge was in error in finding otherwise.[18] This section was held not to be *ex post facto* where the defendant is allowed less challenges on his trial which came up after the admission of Oklahoma, although the offense was committed while it was still a territory.[19] A prisoner has the right to face the jury before he can be compelled to exercise his right to a peremptory challenge.[20] Although the court in its discretion [21] may order a consolidation of indictments, " no defendant could be deprived without its consent of any right material to its defense, whether by way of challenge of jurors or

[11] Butler *v.* Evening Post Co., 148 Fed. 821, 78 C. C. A. 511 (4th Cir.). Petition for a writ of *certiorari* denied in 204 U. S. 670, 51 L. ed. 672, 27 S. C. 785.

[12] Mutual Life Ins. Co. *v.* Hillmon, *supra*.

[13] United States *v.* Coppersmith, *supra;* Dolan *v.* United States, 133 Fed. 440, 69 C. C. A. 274 (8th Cir.).

[14] Harrison *v.* United States, 163 U. S. 140, 41 L. ed. 104, 16 S. C. 961.

[15] Revised Statutes § 2865; Reagan *v.* United States, 157 U. S. 301, 39 L. ed. 709, 15 S. C. 610.

[16] Considine *v.* United States, 112 Fed. 342, 50 C. C. A. 272 (6th Cir.).

[17] Press Publishing Co. *v.* McDonald, 73 Fed. 440, 19 C. C. A. 516 (2d Cir.).

[18] Reynolds *v.* United States, 98 U. S. 145, 25 L. ed. 244; Press Publishing Co. *v.* McDonald, *supra*.

[19] Hallock *v.* United States, 185 Fed. 417, 107 C. C. A. 487 (8th Cir.).

[20] Pointer *v.* United States, 151 U. S. 396, 38 L. ed. 208, 14 S. C. 410.

[21] Columbia-Knickerbocker Trust Co. *v.* Abbot, 247 Fed. 833, 160 C. C. A. 55 (1st Cir.).

otherwise." [22] Where a defendant is placed on trial under three indictments which have been consolidated, the test as to whether he is entitled to three peremptory challenges on each indictment is whether the indictment might have been stated as separate counts in one indictment. If they could have been alleged in one indictment, he is entitled to but three peremptory challenges; if that could not have been done, he is entitled to three separate challenges on each indictment.[23] Hence, if several indictments against the same defendant are tried before the same jury, his right to three peremptory challenges still exists.[24] But if the indictments are consolidated into a single cause, the plaintiff is deemed a single party for the purposes of challenging.[25] Where fourteen defendants refuse to join in making peremptory challenges, the trial court does not abuse its discretion in granting each defendant but one peremptory challenge, although the Judicial Code § 287 authorized the courts to consider the defendant to be a single party and allowed ten peremptory challenges.[26] Before error may be assigned, however, the defense must actually use up all its challenges and preserve its rights on the trial.[27]

§ 281. Order of Peremptory Challenges.

The order in which peremptory challenges shall be exercised is a matter within the discretion of the court, and the practice varies in the several circuits.[1] The court [2] suggested that an effective order of peremptory challenges would be to have the prosecutor challenge first, and if he did not challenge that juror, then the defendant must state whether or not he challenges; if either challenge, then the same order of challenges would be directed to the new juror.

[22] Mutual Ins. Co. *v.* Hillmon, 145 U. S. 285, 36 L. ed. 706, 12 S. C. 909.

[23] Krause *v.* United States, 147 Fed. 442, 78 C. C. A. 642 (8th Cir.); Mutual Ins. Co. *v.* Hillmon, *supra;* Betts *v.* United States, 132 Fed. 228, 65 C. C. A. 452 (1st Cir.).

[24] Betts *v.* United States, *supra.*

[25] Emanuel *v.* United States, 196 Fed. 317, 116 C. C. A. 137 (2d Cir.).

[26] Schwartzberg *v.* United States, 241 Fed. 348 (C. C. A. 2d Cir.).

[27] Krause *v.* United States, *supra;* Mutual Life Ins. Co. *v.* Hillmon, 188 U. S. 208, 47 L. ed. 446, 23 S. C. 294.

§ 281. [1] Pointer *v.* United States, 151 U. S. 396, 38 L. ed. 208, 14 S. C. 410; Radford *v.* United States, 129 Fed. 49, 63 C. C. A. 491 (2d Cir.); Emanuel *v.* United States, 196 Fed. 317, 116 C. C. A. 137 (2d Cir.).

[2] Radford *v.* United States, *supra.*

The same court [3] stated that the order of peremptory challenges varied in the different districts, the rule being for the defendant to begin in the Southern District of New York, and for the other side to begin in the Northern District of New York, and in the District of Vermont. The court can lay down a rule to the effect that each juror, on *voir dire*, will be immediately sworn to try the case unless challenged by the United States or the defendant. It was also held that the defendant cannot examine all the jurors before exercising his peremptory challenges.[4]

§ 282. **Peremptory Challenges Exceeding Number Allowed.**

If, in the trial of a capital offense, the party indicted peremptorily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made.[1]

[3] Emanuel *v.* United States, *supra*.

[4] St. Clair *v.* United States (California), 154 U. S. 134, 38 L. ed. 936, 14 S. C. 1002.

§ 282. [1] Revised Statute § 1031.

CHAPTER XXIX

JURY TRIAL — PART III

CHALLENGE FOR CAUSE

§ 283. Challenge For Cause — Bias.

By the Constitution of the United States (Amend. VI) the accused is entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, "be indifferent as he stands unsworn." [1] Lord Coke also says that a principal cause of challenge is "so called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triers" [2] or, as stated in Bacon's Abr., "It is grounded on such a manifest presumption of partiality, that, if found to be true, it unquestionably sets aside the . . . juror." [3] "If the truth of the matter alleged is admitted, the law pronounces the judgment; but if denied, it must be made out by proof to the satisfaction of the court or the triers." [4] To make out the existence of the fact, the juror who is challenged may be examined on his *voir dire*, and asked any questions that do not tend to his infamy or disgrace. All of the challenges by the accused were for principal cause. It is good ground for such a challenge

§ 283. [1] Co. Litt. 155 b., *approved* in Reynolds *v.* United States, 98 U. S. 145, 25 L. ed. 244.

[2] Co. Litt. 156 b., *approved* in Reynolds *v.* United States, 98 U. S. 145, 25 L. ed. 244.

[3] Bac. Abr. tit. Juries, E. 1. *Approved* in Reynolds *v.* United States, 98 U. S. 145, 25 L. ed. 244.

[4] Bac. Abr. tit. Juries, E. 12. *Approved* in Reynolds *v.* United States, 98 U. S. 145, 25 L. ed. 244.

that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive.[5] Chief Justice Marshall, in Burr's Trial,[6] states the rule to be that, "Light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such

[5] Reynolds *v.* United States, 98 U. S. 145, 25 L. ed. 244.

[6] 1 Burr Trial, 416.

an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.[7] The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury. As was said by Blackstone, and repeated by Mr. Justice Story: "In criminal cases, or at least in capital ones, there is *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons: 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside." [8] Perhaps the clearest statement of the law on the subject of the qualification of a juror is found in a New York case,[9] the text of which was approved by the United States Circuit Court of Appeals, for the Ninth Circuit,[10] which is as follows: "There has

[7] Reynolds *v.* United States, 98 U. S. 145, 25 L. ed. 244; Thiede *v.* Utah Territory, 159 U. S. 516, 40 L. ed. 241, 16 S. C. 64; Gallott *v.* United States, 87 Fed. 446, 450, 31 C. C. A. 44 (5th Cir.), *but see* Williams *v.* United States, 93 Fed. 396, 398, 35 C. C. A. 369 (9th Cir.).

[8] 4 Bl. Com. 353; United States *v.* Marchant, 4 Mason, 160, 162, 25 U. S. (12 Wheat.) 480, 482, 6 L. ed. 700. *See also* Co. Litt. 156 b; Termes de la Ley, *voc.* Challenge, 2 Hawk. chap. 43, § 4; Reg. *v.* Frost, 9 Car. & P. 129, 137; Hartzell *v.* Com., 40 Pa. 462, 466; State *v.* Price, 10 Rich. L. 351, 357, *approved* in Lewis *v.* United States, 146 U. S. 370, 376, 36 L. ed. 1014, 13 S. C. 136.

[9] People *v.* McQuade, 110 N. Y. 300.

[10] Williams *v.* United States, 93 Fed. 396, 400, 35 C. C. A. 369 (9th Cir.).

been no change of the fundamental rule that an accused person is to be tried by a fair and impartial jury. Formerly the fact that a juror had formed and expressed an opinion touching the guilt or innocence of a person accused of crime was in law a disqualification; and, although he expressed an opinion that he could hear and decide the case upon the evidence produced, this did not render him competent. . . . Now, as formerly, an existing opinion, by a person called as a juror, of the guilt or innocence of a defendant charged with crime, is prima facie a disqualification; but it is not now, as before, a conclusive objection, provided the juror makes the declaration specified (that he believes that such opinion or impression will not influence his verdict, and he can render an impartial verdict according to the evidence), and the court as judge of the fact, is satisfied that such opinion will not influence his action. But the declaration must be unequivocal. It does not satisfy the requirement, if the declaration is qualified or conditional. It is not enough to be able to point to detached language, which, alone construed, would seem to meet the statutory requirement, if, on construing the whole declaration together, it is apparent the juror is not able to express an absolute belief that his opinion will not influence his verdict." And the Supreme Court of Nevada [11] states the rule in the following language: "When not regulated by statutory provisions, we think that whenever the opinion of the juror has been formed upon hearing the evidence at a former trial, or at the preliminary examination before a committing magistrate, or for any cause has been so deliberately entertained that it has become a fixed and settled belief of the prisoner's guilt or innocence, it would be wrong to receive him. In either event, in deciding these questions, courts should ever remember that the infirmities of human nature are such that opinions once deliberately formed and expressed cannot easily be erased, and that prejudices openly avowed cannot readily be eradicated from the mind. Hence, whenever it appears to the satisfaction of the court that the bias of the juror, actual or

[11] State *v.* McClear, 11 Nev. 39, 67, *approved* in Williams *v.* United States, 93 Fed. 396, 400, 35 C. C. A. 369 (9th Cir.). *See also* People *v.* Wells, 100 Cal. 227, 34 Pac. 718; People *v.* Casey, 96 N. Y. 122; Stephens *v.* People, 38 Mich. 739; Smith *v.* Eames, 36 Am. Dec. 515, and cases cited in note thereto.

implied, is so strong that it cannot easily be shaken off, neither the prisoner nor the State ought to be subjected to the chance of conviction or acquittal it necessarily begets. But whenever the court is satisfied that the opinions of the juror were founded on newspaper reports and casual conversations, which the juror feels conscious he can readily dismiss, and where he has no deliberate and fixed opinion, or personal prejudice or bias, in favor of or against the defendant, he ought not to be excluded. The sum and substance of this whole question is that a juror must come to the trial with a mind uncommitted, and be prepared to weigh the evidence in impartial scales, and a true verdict render according to the law and the evidence." An allowance of a challenge to a juror for cause and the selection of another competent and unbiased juror in his place, works no prejudice to the other party.[12]

§ 284. **Challenges for Cause, When Available.**

In order to take advantage of an error in denying a challenge for cause, it must appear that the peremptory challenges have been exhausted.[1]

§ 285. **By Whom Tried.**

In the Federal courts, challenges because of bias or favor are tried by the judge as an issue of fact without a jury,[1] and the decision of the court in the absence of an abuse of discretion, will not be set aside by the reviewing court.[2]

§ 286. **Instances.**

Where a juror admits bias or discloses facts from which bias may be presumed, a challenge for cause should be sustained.[1] A juror must be indifferent as he stands unsworn.[2] It is sufficient

[12] Northern Pac. R. R. Co. *v.* Herbert, 116 U. S. 642, 29 L. ed. 755, 6 S. C. 590.

§ 284. [1] Hawkins *v.* United States, 116 Fed. 569, 53 C. C. A. 663 (9th Cir.).

§ 285. [1] Federal Judicial Code, § 287.

[2] Press Publishing Co. *v.* McDonald, 73 Fed. 440, 19 C. C. A. 516 (2d Cir.); Petition for a *writ of certiorari denied* in 163 U. S. 700, 41 L. ed. 320, 16 S. C. 1205.

§ 286. [1] Dolan *v.* United States, 123 Fed. 52, 59 C. C. A. 176 (9th Cir.).

[2] People *v.* Brown, 72 Calif. 390, 14 Pac. 90.

cause for challenging a juror for bias if he entertains a fixed opinion as to the guilt or innocence of the defendant.[3] A juror who has formed a belief as to the guilt of the accused, which requires proof to change, is incompetent to serve on the jury.[4] But prejudice of a juror against the business or occupation of a defendant, where the juror is not acquainted with the defendant and has no prejudice against him personally, is not sufficient ground for a challenge of the juror for cause.[5] It is not error to refuse the interrogation of the jury whether they distinguished between Socialists and Anarchists.[6] In Ex parte Spies,[7] a juror testified to a decided prejudice against socialists and communists, as the defendants were said to be, but as the charge to be tried was murder, and there was no prejudice against the defendants as individuals, he was accepted and sworn as a juror. It is essential to the administration of justice that jurors should enter upon their duties with minds entirely free from every prejudice; yet it often happens that on general and public questions and where a private right depends on such a question the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed is undoubtedly considerable.[8] An accused person cannot of right demand a mixed jury, some of which shall be of his race, nor is a jury of that kind guaranteed by the Constitution to any race. The accused is merely guaranteed that no discrimination because of race or color shall be made in the impaneling of the jury. Mere absence of jurors of his race is not sufficient proof of such discrimination.[9] A government employee is disqualified from sitting on a jury in a Federal criminal case.[10]

[3] Cancemi *v.* People, 16 N. Y. 501; Reynolds *v.* United States, 98 U. S. 145, 25 L. ed. 244.

[4] Blackman *v.* State, 80 Ga. 785, 7 S. E. 626; People *v.* McQuade, 110 N. Y. 284; People *v.* Shufelt, 61 Mich. 237, 28 N. W. 79; Washington *v.* Commonwealth, 86 Va. 405, 10 S. E. 419.

[5] Thieda *v.* Utah, 159 U. S. 510, 40 L. ed. 237, 16 S. C. 62.

[6] Ruthenberg *v.* United States, 245 U. S. 480, 38 S. C. 168, 62 L. ed. 414.

[7] 123 U. S. 131, 31 L. ed. 80, 8 S. C. 22.

[8] Mima Queen *v.* Hepburn, 7 Cranch (U. S.), 290, 3 L. ed. 348; Connors *v.* United States, 158 U. S. 408, 39 L. ed. 1033, 15 S. C. 951.

[9] Martin *v.* Texas, 200 U. S. 316, 50 L. ed. 497, 26 S. C. 338.

[10] Crawford *v.* United States, 212 U. S. 183, 53 L. ed. 465, 29 S. C. 260.

§ 287. **Challenges in Bigamy Cases.**

"In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman — First, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable either by sections one or three of an act entitled 'An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes', approved March twenty-second, eighteen hundred and eighty-two, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the Act of July first, eighteen hundred and sixty-two entitled 'An Act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah'; or Second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman. Any person appearing, or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge; and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense above named; but if he declines to answer on any ground, he shall be rejected as incompetent." [1] Grand jurors are within the scope of this section.[2] A juror who had been pardoned by the President for past polygamous practices does not come within the prohibition of the statute.[3]

§ 287. [1] Federal Judicial Code, § 288.

[2] Clawson *v.* United States, 114 U. S. 477, 29 L. ed. 179, 5 S. C. 949.

[3] United States *v.* Bassett, 5 Utah, 131, 13 Pac. 237.

CHAPTER XXX

CONDUCT OF TRIAL JUDGE

§ 288. The Duties of the Trial Judge.

It is the duty of the trial judge to regulate the procedure at the trial in a fair and impartial manner in accordance with the rules of evidence and to facilitate its orderly progress.[1] A trial judge should not show any partiality. He should not make any remarks to embarrass the defendant, belittle counsel, or hinder the jury in the performance of its duty. Neither should he directly or indirectly show a leaning toward one side or the other.[2] In ruling on exceptions the court should not display undue irri-

§ 288. [1] Rudd *v.* United States, 173 Fed. 912, 97 C. C. A. 462 (8th Cir.); Adler *v.* United States, 182 Fed. 464, 104 C. C. A. 608 (5th Cir.); Kettenbach *v.* United States, 202 Fed. 377, 120 C. C. A. 505 (9th Cir.).

[2] Rudd *v.* United States, 173 Fed. 912, 97 C. C. A. 462 (8th Cir.); Adler *v.* United States, 182 Fed. 464, 104 C. C. A. 608 (5th Cir.); Chicago City Ry. Co. *v.* Cooney, 95 Ill. App. 471, *affirmed* 196 Illinois, 466, 63 N. E. 1029; Mullen *v.* United States, 106 Fed. 892, 46 C. C. A. 22 (6th Cir.); McDuff *v.* Detroit Evening Journal Co., 84 Michigan, 1, 47 N. W. 671; Shakman *v.* Potter, 98 Ia. 61, 66 N. W. 1045; McIntosh *v.* McIntosh, 79 Michigan, 198; 44 N. W. 592; Tuchfeld *v.* Plattner, 116 N. Y. Sup. 693; People *v.* Leonzo, 181 Michigan, 41, 147 N. W. 543; People *v.* Ruef, 14 California App. 576, 114 Pac. 54; Oppenheim *v.* United States, 241 Fed. 625, 154 C. C. A. 378 (2 Cir.); Allison *v.* United States, 160 U. S. 203, 40 L. ed. 395, 16 S. C. 252.

tation.[3] The trial judge may, in the exercise of his sound discretion, propound questions to the witnesses when he deems it essential to the development of the facts of the case.[4] However, this must not be construed to mean that the trial judge can take upon himself the burden of cross-examining the defendant's witnesses when the government is represented by counsel.[5] Private communications between court and jury are improper, not having been made in open court.[6] A learned Judge said: "One of the greatest difficulties of a *nisi prius* judge is to keep his mouth shut. I had twenty-five years of it myself." [7]

§ 289. Public Sessions.

A most unusual opinion was handed down recently in the Eighth Circuit. Toward the close of a long trial, — the defendants being charged with robbing a train, it was agreed that a session should be held that evening. Until this time the sessions were absolutely public; the time had approached for the arguments to the jury. There was great ill-feeling between the defendants' relatives and the witnesses for the prosecution, so much so, that the witnesses had to be placed in the care of an officer. The same evening one of the witnesses was struck in the face by a relative of one of the defendants while the former was at a restaurant. In view of these facts, the trial judge ordered the court room cleared of all spectators except relatives of the defendants, newspaper men, and members of the bar. Notwithstanding the judge's order, the bailiff admitted some twenty-five of his friends but refused admission to others though there were many vacant seats remaining. The Circuit Court of Appeals held that the defendant was deprived of a public trial as guaranteed by the Sixth Amendment and therefore implied that the rights of the defendants were prejudiced by the actions of the trial judge.[1]

[3] State *v.* Cross, 53 Oregon, 462, 101 Pac. 193.

[4] Adler *v.* United States, 182 Fed. 464, 104 C. C. A. 608 (5th Cir.); Kettenbach *v.* United States, 202 Fed. 377, 120 C. C. A. 505 (9th Cir.); State *v.* Pagels, 92 Mo. 300, 4 S. W. 931.

[5] Adler *v.* United States, 182 Fed. 464, 104 C. C. A. 608 (5th Cir.).

[6] Dodge *v.* United States, 258 Fed. 300 (C. C. A. 2d Cir.).

[7] Gary, J., in Kane *v.* Kinnare, 69 Ill. App. 81.

§ 289. [1] Davis *v.* United States, 247 Fed. 394, 159 C. C. A. 448 (8th Cir.).

§ 290. **Shackling a Prisoner in Court.**

The rule in the United States has always been that a prisoner must be brought into court without shackles regardless of the nature of the crime. This rule is founded on broad humanitarian principles and is invoked to avoid the attendant pain and embarrassment which would prejudice the accused when he is on trial for his life and liberty. There is but one exception to this rule, namely, when it is evident that the prisoner is attempting or contemplating escape, "then he may be brought with irons." [1] In the case of Rex *v.* Rogers, et al.,[2] tried before the King's Bench, the defendants were indicted for murder and found guilty. At the end of the decision there is a memorandum: "These desperate fellows remained chained together during this whole proceeding." All of the American appellate tribunals disapprove the practice of shackling prisoners and quote Blackstone, Hale and Coke to support their opinion. They evince an anxiety to do complete justice to the prisoner, but as yet have not decided whether shackling a prisoner in the presence of the jury is reversible error. Some courts have held that whether a prisoner should be shackled or not at the trial is a matter resting in the sound discretion of the trial court, and is not reviewable.[3] On the other hand, other courts have held that shackling a prisoner without sufficient cause is reversible error.[4] It was held not to be reversible error to shackle a prisoner at the arraignment,[5] or while he was in the presence of his attorney after court had adjourned,[6] or in the presence of some jurymen before the court convened.[7]

§ 291. **Excluding Witnesses from Court Room.**

It is discretionary with the court to exclude witnesses from the court room while another witness is testifying.[1]

§ 290. [1] Blackstone's Commentaries, Book 4, Chapter 30, p. 322; 3 Coke's Institutes 34; 2 Hale Pleas of the Crown, 219.

[2] 3 Burrows, 1809.

[3] Lee *v.* State, 51 Mississippi, 566; Faire *v.* State, 58 Alabama, 74.

[4] State *v.* Williams, 18 Washington, 47, 50 Pac. 580; Harrington *v.* Minor, 42 California, 165; State *v.* Kring, 64 Mo. 591.

[5] Parker *v.* Territory, 5 Arizona, 283, 52 Pac. 361.

[6] State *v.* Craft, 164 Mo. 631, 65 S. W. 280.

[7] Hauser *v.* People, 210 Ill. 253, 71 N. E. 416.

§ 291. [1] Bromberger *v.* United States, 128 Fed. 346, 63 C. C. A. 76 (2d Cir.).

§ 292. Excluding Jury during Argument on Admissibility of Evidence.

The prudent course is to exclude the jury during discussions, such for instance as the questions of admissibility of a confession, but the conduct of the trial on such matters is largely within the discretion of the trial court.[1]

§ 293. The Trial Judge Should Abstain from Making Prejudicial Remarks during the Course of the Trial.[1]

The defendant is entitled to the presumption of innocence by both judge and jury until his guilt is proved. If the jury is inadvertently led to believe that the judge does not regard that presumption, they must be told to disregard it.[2] Thus, a remark by the court that the accused "could not hide behind their (the directors') skirts" was held to be reversible error. So, when counsel for the defendant asked a juror under examination whether he had any opinion as to the guilt or innocence of the defendant, who was charged jointly with another defendant, the court interjected the statement, "That is one of the things that is an established fact in the community"; the Circuit Court of Appeals held the remark uncalled for and reversed the judgment of conviction.[3] It was held to be proper for the trial judge to explain to the witness that there was no reason why she should be afraid to testify and to call the defendant's paramour who was testifying for the government, "Little girl."[4] In a prosecution for falsifying reports to the Comptroller of the Currency, the district attorney submitted the report in evidence. One space on the report which called for an answer was left unfilled by the defendant. The court remarked, "The report shows blank and that is reporting nothing as a matter of fact." This remark was held not to be objectionable.[5] Likewise, it was held to be proper for the trial judge to

§ 292. [1] Holt *v.* United States, 218 U. S. 245, 54 L. ed. 1021, 31 S. C. 2.

§ 293. [1] *See also* CHARGE OF THE COURT. Sandals *v.* United States, 213 Fed. 569, 130 C. C. A. 149 (6th Cir.); McDuff *v.* Detroit Evening Journal, 84 Michigan, 1, 47 N. W. 671; Allen *v.* Kidd, 197 Mass. 256, 84 N. E. 122.

[2] Adler *v.* United States, 182 Fed. 464, 104 C. C. A. 608 (5th Cir.).

[3] Hawkins *v.* United States, 116 Fed. 569, 53 C. C. A. 663 (9th Cir.).

[4] Wong Goon Let *v.* United States, 245 Fed. 745, 158 C. C. A. 147 (9th Cir.).

[5] Kettenbach *v.* United States, 202 Fed. 377, 120 C. C. A. 505 (9th Cir.).

say to the jury after denying their request to be discharged without having agreed upon a verdict, "I regard the testimony as convincing." [6] And it has also been held that a court of the United States in submitting a case to the jury may, in its discretion, express its opinion upon the facts and that such an opinion is not reviewable upon error so long as no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury. The court may do this both during the trial and in its final charge.[7] In a recent case [8] the United States Circuit Court of Appeals for the Fourth Circuit overstepped all boundaries and held that the comment of the court before the jury that in his opinion the defendant was absolutely guilty was not improper, when qualified with the statement that the jurors are the sole judges of the facts, but the court reversed the judgment because the trial judge refused to permit the defendant's attorney to advise the jury that they are not bound by the court's opinion. On the other hand, the same court in an earlier case [9] held it to be reversible error for the court to remark when the jury reported that it could not agree upon a verdict, "I believe the defendant is guilty but the jury is not bound by this opinion." While considerable latitude is allowed trial judges in the matter of commenting on the facts, they must not assume the functions of prosecuting attorneys. Thus, when the court remarked, "The defendant says that it is not his handwriting; no expert evidence has been introduced here on behalf of the defendant for the purpose of showing that the address on the letter was not in his handwriting as he might have done. Failure to do so justifies a presumption that experts would not have so testified."

[6] Simmons *v.* United States, 142 U. S. 148, 35 L. ed. 968, 12 S. C. 171. *But compare,* Reynold *v.* United States, 98 U. S. 145, 25 L. ed. 244; Starr *v.* United States, 153 U. S. 614, 38 L. ed. 841, 14 S. C. 919; Lynon *v.* People, 188 Ill. 625; Cunningham *v.* People, 195 Ill. 550.

[7] United States *v.* Philadelphia & Reading R. R. Co., 123 U. S. 113, 31 L. ed. 138, 8 S. C. 77; Lovejoy *v.* United States, 128 U. S. 171, 32 L. ed. 389, 9 S. C. 57; Simmons *v.* United States, 142 U. S. 148, 35 L. ed. 968, 12 S. C. 171; Shea *v.* United States, 251 Fed. 440, 163 C. C. A. 458 (6th Cir.); Jelke *v.* United States, 255 Fed. 264, — C. C. A. — (7th Cir.).

[8] Morse *v.* United States, 255 Fed. 681, — C. C. A. — (4th Cir.). *See also* CHARGE TO JURY.

[9] Foster *v.* United States, 188 Fed. 305, 111 C. C. A. 37 (4th Cir.).

The Circuit Court of Appeals for the Eighth Circuit held such comment to be very objectionable and sufficient for reversing judgment although the court told the jury that the burden of proving the defendant guilty rested on the prosecution.[10] It was held to be reversible error for the court to say to the jury: "If the jury convicts the defendant, the judge himself comes in as a supplementary jury, you might call it, and can set it aside, because he did not agree with it; but if you acquit him and an error is made in the verdict, that is an end of the possibility of the judge correcting any errors."[11] In a prosecution for murder, the district attorney commented on the absence of the defendant's wife. Since a wife cannot testify for or against her husband in the Federal courts, the United States Supreme Court held that failure by the trial judge to make this known to the jury was equal to a charge that it was a circumstance against the defendant that he had failed to produce his wife in court.[12] In an indictment under Section 215 of the Penal Code, it was held to be error for the court to comment upon the nonproduction of letters, as this was in derogation of the constitutional right of the accused to furnish no evidence in aid of the prosecution.[13]

§ 294. Withdrawal of Objectionable Remarks.

All comments by the court should be judicial and dispassionate, and a mere withdrawal of the remarks is not always sufficient to remove the effect. Where the remarks of the court were of such an emphatic nature that the jury may have believed that a finding for the defendant would subject them to ridicule, a mere withdrawal of such language, and a direction that the question is for them, may be of doubtful sufficiency to correct the impression and in such cases the remedy is a new trial.[1]

[10] Perara *v.* United States, 221 Fed. 213, 136 C. C. A. 623 (8th Cir.).

[11] Adler *v.* United States, 182 Fed. 464, 104 C. C. A. 608 (5th Cir.).

[12] Graves *v.* United States, 150 U. S. 118, 37 L. ed. 1021, 14 S. C. 40.

[13] Hibbard *v.* United States, 172 Fed. 66, 96 C. C. A. 554 (7th Cir.).

§ 294. [1] Sandals *v.* United States, 213 Fed. 569, 130 C. C. A. 149 (6th Cir.); Rudd *v.* United States, 173 Fed. 914; Vicksburg & Meridan Railroad Co. *v.* Putnam, 118 U. S. 545, 30 L. ed. 257, 7 S. C. 1; Haupt *v.* Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. C. 202; Foster *v.* United States, 188 Fed. 305, 111 C. C. A. 37 (4th Cir.); Adler *v.* United States, 182 Fed. 464, 104 C. C. A. 505 (9th Cir.).

§ 295. Calling on the Defendant to Produce Documents.

It is reversible error for the trial court to permit the defendant to be called upon, in the presence of the jury, to produce an alleged original document of an incriminating character. Such conduct is equal to compelling a defendant to give evidence against himself, which is prohibited under the Fifth Amendment.[1] It is not, however, error for the court to stop counsel in the midst of his argument, in a criminal case, for the purpose of pointing out to him that his argument is based on an assumption of fact which does not in fact exist.[2]

§ 296. Organization of Court.

The acts and rulings of a *de facto* judge cannot be inquired into collaterally.[1] The Court will not stop to inquire whether the jury was actually influenced by the conduct of the judge. All the authorities hold that if they were exposed to improper influences, which might have produced the verdict, the presumption of law is against its purity.[2]

§ 295. [1] McKnight *v.* United States, 115 Fed. 972, 54 C. C. A. 358 (6th Cir.), S. C.; 122 Fed. 926, 61 C. C. A. 112 (6th Cir.).

[2] United States *v.* Heath, 19 Wash. Law Rep. 818, 9 Mackey (20 D. C.), 272.

§ 296. [1] Ball *v.* United States, 140 U. S. 118, 35 L. ed. 377, 11 S. C. 761.

[2] Green *v.* State, 97 Miss. 834, 838, 53 So. 415.

CHAPTER XXXI

CONDUCT OF DISTRICT ATTORNEY

§ 297. Conduct of Prosecuting Attorney.

The prosecuting attorney is a *quasi* judicial officer and not a mere prosecutor.[1] It is his duty to be fair to the defendant and not to make any remarks which are not borne out by the testimony; in every criminal case the crime must be proved as laid in the indictment.[2] The Government seeks only equal and impartial justice. For this reason the prosecuting attorney must act impartially.[3]

§ 298. Remarks by District Attorney.

It is improper for the district attorney to inject irrelevant oratorical phrases in the course of the trial which lend dramatic effect to his cause, but which in nowise sustain the prosecution. The United States Supreme Court in a prosecution for extortion from Chinese women reversed a conviction because the district attorney, during a discussion between the court and the defendant's attorney as to the relevancy of certain evidence, interjected

§ 297. [1] People *v.* Bemis, 51 Mich. 422, 16 N. W. 794; People *v.* Fielding, 158 N. Y. 542, 547, 53 N. E. 497; People *v.* Davenport, 13 Cal. 632, 110 Pac., 318; State *v.* Blackman, 108 La. 121, 32 So. 334; State *v.* Warford, 106 Mo. 55, 16 S. W. 886; State *v.* Osborn, 54 Oregon, 289, 103 Pac. 627; Fitter *v.* United States, 258 Fed. 567, — C. C. A. — (2d Cir.).

[2] Rabens *v.* United States, 146 Fed. 978, 77 C. C. A. 224 (4th Cir.); Lancaster *v.* United States, 44 Fed. 896; Marrin *v.* United States, 167 Fed. 951, 93 C. C. A. 351 (3d Cir.), 223 U. S. 719, 56 L. ed. 629, 32 S. C. 523; Hall *v.* United States, 150 U. S. 76, 37 L. ed. 1003, 14 S. C. 22.

[3] Commonwealth *v.* Nicely, 130 Pa. 261, 270; Commonwealth *v.* Shoemaker, 240 Pa. St. 255.

the remark, "No doubt every Chinese woman, who did not pay Williams (defendant) was sent back."[1] If the prosecuting attorney indulges in statements prejudicial to the defendant, which in the course of the trial he finds that he cannot substantiate, it is his paramount duty to retract them before the close of the trial;[2] nor may the district attorney make inferences of fact or of law from premises which are uncertain.[3] This rule is grounded on the presumption that any reference to matters collateral to the issue might influence the jury against the defendant; whereas, it is the jury's duty to determine questions in issue upon the facts presented at the trial without bias against either of the contending parties. It was therefore held to be error for the prosecuting attorney on cross-examination of the defendant in a prosecution for using the mails to defraud, to question the defendant about property that he owned at the time of the alleged offense.[4] It is improper for the district attorney in the course of the second trial to refer to the former conviction of a defendant; papers showing this fact should not be sent to the jury room.[5] But a prosecuting attorney is privileged to mention that a codefendant pleaded guilty when the latter's testimony was received without any objection.[6] Accordingly, a remark by the United States attorney that no friend of the defendant or citizen appeared to testify as to the defendant's patriotism was held to be reversible error.[7] It is improper for the district attorney to comment on the defendant's failure to testify,[8] or at any stage of the case to tell the jury what other juries have done in similar cases.[9] While the propriety of asking leading questions lies within the sound

§ 298. [1] Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92.

[2] Johnson *v.* United States, 215 Fed. 679, 131 C. C. A. 613 (7th Cir.).

[3] Richard *v.* United States, 175 Fed. 911, 99 C. C. A. 401 (8th Cir.); United States *v.* Rose, 92 U. S. 281, 23 L. ed. 707.

[4] Culver *v.* United States, 257 Fed. 163, — C. C. A. — (8th Cir.).

[5] Holmgren *v.* United States, 217 U. S. 509, 520, 34 L. ed. 30, 30 S. C. 588; Ogden *v.* United States, 112 Fed. 523, 50 C. C. A. 380 (3d Cir.).

[6] Cooper *v.* United States, 232 Fed. 81, 146 C. C. A. 273 (2d Cir.); *Writ of Certiorari denied* in 241 U. S. 675, 60 L. ed. 1232, 36 S. C. 725.

[7] Hall *v.* United States, 256 Fed. 748, — C. C. A. — (4th Cir.).

[8] Stout *v.* United States, 227 Fed. 799, 142 C. C. A. 323 (8th Cir.).

[9] McKibben *v.* Philadelphia R. R. Co., 251 Fed. 577, 163 C. C. A. 571 (3d Cir.).

discretion of the trial judge, it is prejudicial error for the district attorney to ask leading questions of his own witnesses which suggest the answers and of themselves call merely for a conclusion of the witness.[10]

§ 299. **Objection to the District Attorney's Misconduct.**

The defendant should object to any misconduct on the part of the district attorney and if his objection is not sustained, he should take exception to the court's ruling,[1] because improper remarks by the district attorney may often be cured by a definitive instruction to the jury to disregard them.[2] Under some decisions the defendant could not as of right take advantage of the district attorney's misconduct on a motion for a new trial.[3] The better practice is to object to misconduct of the district attorney at the trial; nevertheless, when the defense inadvertently omits to do so, it becomes the duty of the trial judge, under a recent statute,[4] on a motion for a new trial to consider the propriety of the argument of the district attorney without regard to objection or exceptions.[5]

[10] Nurnberger *v.* United States, 156 Fed. 721, 84 C. C. A. 377 (8th Cir.).

§ 299. [1] Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765.

[2] United States *v.* Snyder, 14 Fed. 554; Warren *v.* United States, 250 Fed. 89, 162 C. C. A. 261 (8th Cir.).

[3] Smith *v.* United States, 231 Fed. 25, 145 C. C. A. 213 (9th Cir.); Chadwick *v.* United States, 141 Fed. 225, 72 C. C. A. 343 (6th Cir.); Crumpton *v.* United States, 138 U. S. 361, 34 L. ed. 954, 11 S. C. 355.

[4] Act of Feb. 26, 1919, ch. 48, amending § 269 of the Judicial Code.

[5] August *v.* United States, 257 Fed. 388, — C. C. A. — (8th Cir.).

CHAPTER XXXII

EVIDENCE

IN GENERAL

JUDICIAL NOTICE

MATERIALITY AND COMPETENCY

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CONFESSIONS

RES GESTÆ

CIRCUMSTANTIAL EVIDENCE

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ACCOMPLICES' TESTIMONY

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IN GENERAL

§ 300. Rules of Evidence in United States Courts in Criminal Cases — Competency.

The competency of witnesses to testify in criminal cases in courts of the United States is determined by the common law, except where Congress in special cases may otherwise provide.[1] The principle that, until Federal legislation is had to modify the practice, "the rules of evidence in criminal cases" in the Federal Courts "are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed, was announced by Chief Justice Taney in United States *v.* Reid,[2] but the Reid case was expressly overruled in a recent case [3] and it was there held that the common law rule disqualifying witnesses convicted of crime will no longer be followed and that all persons of competent understanding will be permitted to testify to relevant facts within their knowledge, leaving the weight and credibility of such evidence to the jury. Section 858 of the Revised Statutes of the United States, providing 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 equity and admiralty", has no application to criminal trials.[4] It is perfectly clear, from the decisions of the Supreme Court of the United States, that State statutes regulating the admission of testimony in criminal cases have no application in the trial of such

§ 300. [1] Logan *v.* United States, 144 U. S. 263, 36 L. ed. 429, 12 S. C. 617; Maxey *v.* United States, 207 Fed. 327, 125 C. C. A. 77 (8th Cir.); Bandy *v.* United States, 245 Fed. 98, 157 C. C. A. 394 (8th Cir.); Brown *v.* United States, 233 Fed. 353, 147 C. C. A. 289 (6th Cir.); Pooler *v.* United States, 127 Fed. 509, 62 C. C. A. 307 (1st Cir.); United States *v.* Miller, 236 Fed. 798; Cohen *v.* United States, 214 Fed. 23, 28, 130 C. C. A. 417 (9th Cir.); *See also* the dissenting opinion in Rosen *v.* United States, 237 Fed. 810, 151 C. C. A., 52 (2d Cir.). Many rules of evidence in criminal cases not contained in this chapter have been prescribed by Congress and are found in the Act creating the offense or the Penal Code; therefore, it is advisable to consult the general index to this work, which will contain a reference to the Act or Penal Code, Volume II of this work.

[2] 12 How. (U. S.) 364, 365, 13 L. ed. 1023.

[3] Rosen *v.* United States, 245 U. S. 467, 469, 62 L. ed. 406, 38 S. C. 148.

[4] Logan *v.* United States, 144 U. S. 263, 36 L. ed. 429, 12 S. C. 617.

cases in Federal Courts.[5] As to States whose territories were not within the boundaries of the Union as they were in 1789, the rule is that the law of the State *when it was admitted governs*.[6] But no law of a State, made since 1789, can affect the mode of proceeding or the rules of evidence in criminal cases.[7] The test in such cases is what local law obtained at the time of the creation of the State, rather than that which obtained at the time of the enactment of the Judiciary Act.[8]

§ 301. **Definitions.**

"Evidence", as defined by Blackstone, "signifies that which demonstrates, makes clear, or ascertains the truth of the very point in issue, either on the one side or on the other." Briefly, it is the means by which facts are proved.[1] Evidence, as part of procedure, signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.[2] The term "evidence", in a criminal case, of course, includes not only that offered on the part of the government, but that also offered for the defense.[3]

JUDICIAL NOTICE

§ 302. **In General.**

The law as to judicial notice is similar in civil and criminal cases. In the following sections, therefore, only those cases are

[5] Denning *v.* United States, 247 Fed. 463, 159 C. C. A. 517 (5th Cir.), *citing* United States *v.* Logan, *supra*, and United States *v.* Reid, 12 How. (U. S.) 361, 13 L. ed. 1023; Hays *v.* United States, 231 Fed. 106, 110, 145 C. C. A. 294 (8th Cir.); Lung *v.* United States, 218 Fed. 817, 134 C. C. A. 505 (9th Cir.).

[6] Brown *v.* United States, 233 Fed. 353, 147 C. C. A. 289 (6th Cir.); Logan *v.* United States, 144 U. S. 263, 303, 36 L. ed. 429, 12 S. C. 617.

[7] United States *v.* Hughes, 175 Fed. 238, —.

[8] Louie Ding *v.* United States, 247 Fed. 12, 15, 159 C. C. A. 230 (9th Cir.), *citing* Knoell *v.* United States, 239 Fed. 16, 152 C. C. A. 66 (3d Cir.); Withaup *v.* United States, 127 Fed. 530, 62 C. C. A. 328 (8th Cir.); United States *v.* Reid, 12 How. (U. S.) 361, 13 L. ed. 1023. *But see* Rosen *v.* United States, 245 U. S. 467, 469, 62 L. ed. 406, 38 S. C. 148.

§ 301. [1] Board of Education *v.* Alliance Assur. Co., 159 Fed. 994, 998.

[2] Kring *v.* Missouri, 107 U. S. 221, 232, 27 L. ed. 506, 2 S. C. 443, *quoting* Bishop Crim. Proc.

[3] United States *v.* Greene, 146 Fed. 803, 824.

noticed which contain points peculiarly applicable to criminal law, or where points regarding judicial notice have been decided in criminal proceedings. In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy.[1]

§ 303. **Public Laws — Federal Laws.**

The Federal Courts take judicial notice of the Federal public laws.[1] A treaty to which the United States is a party is a law of the land, of which all courts must take judicial notice.[2] In a prosecution for conspiracy to defraud the customs revenue the court will take judicial notice of the laws of the United States (tariff act of 1897) and the fact that the imports concerned were dutiable.[3] The courts are bound to take judicial notice of the government's recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although their acts are not formally put in evidence, nor in accord with the pleadings.[4] The President's proclamation of December 25th, 1868, granting amnesty, is a public act, of which all courts of the United States are bound to take notice.[5] But the courts will not take judicial notice of a pardon unless it is granted by a public law.[6] The Federal Courts are bound judicially to notice the prior laws of territories subsequently ceded to the United States, as much so as the laws of a State of the Union.[7]

§ **302.** [1] Jones *v.* United States, 137 U. S. 202, 34 L. ed. 691, 11 S. C. 80.

§ **303.** [1] United States *v.* Randall, Deady 524, Fed. Cas. No. 16,118; 406, Matter of Dunn, 212 U. S. 374, 53 L. ed. 558, 29 S. C. 299; Missouri, Kansas & Texas Ry. Co. *v.* Wulf, 226 U. S. 570, 57 L. ed. 355, 33 S. C. 135.

[2] United States *v.* Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 S. C. 234, where an extradition treaty with Great Britain was judicially noticed.

[3] Marrash *v.* United States, 168 Fed. 225, 93 C. C. A. 511 (2d Cir.).

[4] Jones *v.* United States, 137 U. S. 202, 34 L. ed. 691, 11 S. C. 80; Oetjen *v.* Central Leather Co., 246 U. S. 297, 301, 62 L. ed. 726, 38 S. C. 309; Ricaud *v.* American Metal Co., 246 U. S. 304, 307, 62 L. ed. 726, 38 S. C. 309.

[5] Armstrong *v.* United States, 13 Wall. (U. S.) 154, 20 L. ed. 614.

[6] United States *v.* Wilson, 7 Pet. (U. S.) 150, 163, 8 L. ed. 640.

[7] United States *v.* Chaves, 159 U. S. 452, 458, 40 L. ed. 215, 16 sc. 57; Fremont *v.* United States, 17 How. (U. S.) 542, 557, 15 L. ed.

§ 304. State Laws.

Federal Courts will take judicial notice of State laws so far as these are involved in the issue.[1] On the trial for an offense against the United States election laws, judicial notice will be taken that at the election in question State officers were to be elected and that, by the laws of that State, the names of all candidates voted for, both for State and national offices, were required to be on one ballot.[2]

§ 305. Foreign Laws.

The existence of a foreign law, especially when unwritten, is a fact to be proved like any other fact, by appropriate evidence.[1]

§ 306. Departmental Regulations.

Regulations made by an executive department, in pursuance of authority, delegated by Congress, have the force of law, and the courts take judicial notice of their existence and provisions. It is therefore unnecessary to set out in pleadings the rule alleged to be violated, either in terms or by number.[1] It is sufficient if the indictment avers that an act done in pursuance of such regulation was done under the requirements of law.[2] Federal Courts will take judicial notice of the statutes conferring on the Postmaster General authority to promulgate regulations and of the regulations adopted and promulgated in pursuance thereof.[3] In a prosecution for shipping meat in interstate commerce improperly packed the

241; United States *v.* Perot, 98 U. S. 428, 25 L. ed. 251; Crespin *v.* United States, 168 U. S. 208, 212, 42 L. ed. 438, 18 S. C. 53; Sandoval *v.* Priest, 210 Fed. 814, 816, 127 C. C. A. 364 (5th Cir.).

§ 304. [1] Gerling *v.* Baltimore, 151 U. S. 673, 38 L. ed. 311, 14 S. C. 533; Furman *v.* Nichol, 8 Wall. (U. S.) 44, 19 L. ed. 370; United States *v.* Johnson County, 6 Wall. (U. S.) 166, 18 L. ed. 768; Marbury *v.* Madison, 1 Cranch (U. S.), 137, 2 L. ed. 60; Barry *v.* Snowden, 106 Fed. 571; New York Mutual Life Ins. Co. *v.* Hill, 97 Fed. 263, 38 C. C. A. 159 (9th Cir.).

[2] United States *v.* Morrissey, 32 Fed. 147.

§ 305. [1] United States *v.* Wiggins, 14 Pet. (U. S.) 334, 10 L. ed. 481; Dainese *v.* Hale, 91 U. S. 13, 23 L. ed. 190. And this applies to foreign usages and customs. Rossmann *v.* Garnier, 211 Fed. 401, 408, 128 C. C. A. 73 (8th Cir.).

§ 306. [1] United States *v.* Moody, 164 Fed. 269, 275.

[2] Wilkins *v.* United States, 96 Fed. 837, 37 C. C. A. 588 (3d Cir.).

[3] Bruce *v.* United States, 202 Fed. 98, 120 C. C. A. 370 (8th Cir.).

court will take judicial notice of the regulations of the Secretary of Agriculture, but not of those of the Bureau of Animal Industry.[4] The court will take judicial notice of the regulations of the Secretary of War promulgated under Section 13 of the Selective Service Act.[5] A general regulation of the General Land Office respecting homestead entries for the government of the officers of local land offices, promulgated pursuant to Revised Statutes Section 2478, becomes a part of the body of public laws, of which the courts will take judicial notice.[6] Other departmental rules and regulations which have been judicially noticed are: rules and regulations of the Commissioner of Internal Revenue;[7] rules and regulations of the Interior Department,[8] and general regulations of the Treasury and War Departments.[9] On the other hand it has been held that a Federal appellate court should not be asked to take judicial notice of departmental regulations, as in this case, the post office department.[10] And it has also been held that regulations of the land office, whether prescribed by the Secretary of the Interior or by the Commissioner, are not judicially known, and must be pleaded.[11]

§ 307. Acts of Public Officers.

Federal Courts will take judicial notice of the acts of public officers only so far as that is justified by the circumstances. So, the court will take judicial notice of the President's signature on a trust patent of an Indian allotment.[1] But such acts as the duties of navy pursers will not usually be judicially noticed.[2]

§ 308. Proceedings and Records of Federal Courts.

Federal Courts will take judicial notice of facts concerning the organization, duties and proceedings of the Federal Courts. Espe-

[4] United States *v.* Rohe & Bro., 218 Fed. 182.

[5] United States *v.* Casey, 247 Fed. 362.

[6] Nurnberger *v.* United States, 156 Fed. 721, 84 C. C. A. 377 (8th Cir.).

[7] Sprinkle *v.* United States, 141 Fed. 811, 820, 73 C. C. A. 285 (4th Cir.).

[8] Caha *v.* United States, 152 U. S. 211, 38 L. ed. 415, 14 S. C. 513.

[9] Dominici *v.* United States, 72 Fed. 46; United States *v.* Casey, 247 Fed. 362.

[10] Nagle *v.* United States, 145 Fed. 302, 306, 76 C. C. A. 181 (2d Cir.).

[11] United States *v.* Bedgood, 49 Fed. 54.

§ 307. [1] Estes *v.* United States, 225 Fed. 980, 141 C. C. A. 102 (8th Cir.).

[2] United States *v.* Tingey, 5 Pet. U. S.) 115, 8 L. ed. 66.

cially, they will judicially notice the records of proceedings in the same litigation or one related thereto. A Federal district court will take judicial notice of its records relative to the duties of its officers when it is claimed that they have failed to perform them.[1] Since a proceeding for criminal contempt growing out of a civil suit is collateral to it, a Federal Court will take judicial notice in the trial of the contempt proceedings of all orders made in the civil cause.[2] The court may take judicial notice of the fact that a witness had testified in his own behalf at a former trial contrary to the Government's contention.[3] A court does not, in the trial of one case, take judicial notice of proceedings had in other cases, even though shown by its own records.[4] In passing upon a plea in abatement for an omission of the clerk in drawing the grand jury, the district court will take judicial notice of its own record relative to the duty which it is said the clerk failed to perform (placing the names of grand jurors in the box).[5] On an application for allowance of a writ of error on the ground that the court deprived the defendant of a trial by jury, Judge Ray, to whom the application was made, took judicial notice of the records of his own Court that the defendant voluntarily pleaded guilty and thereby dispensed with a trial by jury and denied the application. But this is of doubtful propriety. There may be no merits in a defendant's contention, nevertheless, he has a statutory right to a writ of error.[6] The Federal circuit courts will, in a collateral proceeding, take judicial notice of the affirmance of its judgment by the Supreme Court of the United States, when the fact is one of general notoriety in the State and has been telegraphed to and published in the leading newspapers.[7] But it has been said that, while it is well settled that Federal Courts can take judicial notice of their own records, it is not at all clear that they are always required to do so; therefore, the proper and safe way of proceed-

§ 308. [1] United States *v.* Lewis, 192 Fed. 633.

[2] Schwartz *v.* United States, 217 Fed. 866, 870, 133 C. C. A. 576 (4th Cir.).

[3] Gallagher *v.* United States, 144 Fed. 87, 89, 75 C. C. A. 245 (1st Cir.).

[4] Withaup *v.* United States, 127 Fed. 530, 535, 62 C. C. A. 328 (8th Cir.).

[5] United States *v.* Greene, 113 Fed. 683, 691.

[6] United States *v.* Harris, 224 Fed. 285.

[7] In re Durrant, 84 Fed. 314.

ing, even with reference to the tribunal in which the prior record remains, is by plea and proof.[8] They will also take judicial notice of the incumbents and the regularity of the proceedings. So, a Federal district court will take judicial notice that the grand jury was publicly drawn in the United States court house of the district in the presence of all the officers who were by law required to be present.[9] The United States Circuit Court of Appeals will take judicial notice as to whether, at the time a grand jury was impaneled and returned bills of indictment, as specified in the transcript of a writ of error, both the district and circuit courts were in session, and as to who were the presiding judge and clerk thereof.[10]

§ 309. **Facts of General Knowledge.**

Facts may be judicially noticed which, as matters of history, geographical importance, commercial and industrial statutes, scientific import, language, art or other universally known human activity, are so notorious that the introduction of evidence thereof is unnecessary and superfluous.[1] And the United States Courts will take judicial notice of the territorial extent of the government, the local divisions of the country, its geography, its natural water courses, and their boundaries, and the ports and waters of the United States in which the tide ebbs and flows, and of the boundaries of the several States and judicial districts.[2] So, it has been judicially noticed that Iditarod is in a remote and very sparsely settled portion of Alaska, and that in the latter part of September transportation to and from that point is about to close for the season,[3] that all railroads in the United States are mail routes, and that all passenger trains ordinarily carry mail.[4]

[8] In re Osborne, 115 Fed. 1, 52 C. C. A. 595 (1st Cir.).

[9] United States *v.* Greene, 113 Fed. 683, 694.

[10] Ledbetter *v.* United States, 108 Fed. 52, 47 C. C. A. 191 (5th Cir.).

§ 309. [1] Louisville & Nashville R. R. Co. *v.* Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 S. C. 714; Gulf Co. & Santa Fe Ry. Co. *et al. v.* The State of Texas, 72 Texas, 404; Hafer *v.* The Cincinnati, Hamilton & Dayton R. R. Co., 4 Ohio D. C. P. & P. (Laning) 487.

[2] Ex parte Lair, 177 Fed. 789; Jones *v.* United States, 137 U. S. 202, 34 L. ed. 691, 11 S. C. 80; Brown *v.* United States, 257 Fed. 46 (C. C. A. 5th Cir.).

[3] Campbell *v.* United States, 221 Fed. 186, 136 C. C. A. 602 (9th Cir.).

[4] United States *v.* Hall, 206 Fed. 484.

On a trial of an indictment for violating the neutrality laws by shipping arms to the State of Sonora in Mexico, the court will take judicial notice that such state is a large country and not a "place" in Mexico.[5] It has been held that courts will take judicial notice that morphine, heroin and cocaine are derivatives of opium and coca leaves;[6] that crude glycerine is a product derived from animal fats;[7] that salad oil as defined by standard lexicographers is olive oil;[8] that opium is not commercially a domestic product;[9] that vaccination is commonly believed to be a safe and valuable means of preventing the spread of smallpox, and that this belief is supported by high medical authority.[10] On the other hand it has been held that the court will not take judicial notice that cocaine, morphine sulphate and morphine are derivatives of opium and coca leaves, and indictments under the Harrison Narcotic Act were held defective for failing to allege this fact.[11] The date of making the drawing under the Selective Draft Act is a historical fact, of which the court will take judicial notice without proof.[12] Beer is judicially known to be a fermented liquor, chiefly made of malt,[13] and judicial notice has been taken that whiskey is an intoxicating liquor and that a "whiskey cocktail" is an intoxicating drink,[14] that gin and beer are intoxicants,[15] that okolihoa, a Hawaiian product, is intoxicating,[16] that tobacco and liquor affect different men differently.[17] But it appears that courts cannot take judicial notice of the fact that tobacco in the form of cigarettes is more noxious than in any other form.[18] In a prosecution for receiving stolen stamps, the court will judicially notice certain facts of general knowledge concerning the purchase

[5] United States *v.* Albert Steinfeld & Co., 209 Fed. 904.

[6] Hughes *v.* United States, 253 Fed. 543 (C. C. A. 8th Cir.).

[7] Illinois Cudahy Packing Co. *v.* Kansas City Soap Co., 247 Fed. 556.

[8] Von Bremen *v.* United States, 192 Fed. 904, 113 C. C. A. 296 (2d Cir.).

[9] United States *v.* Yee Fing, 222 Fed. 154.

[10] Jacobson *v.* Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. C. 358.

[11] United States *v.* Hammers, 241 Fed. 542.

[12] United States *v.* Sugarman, 245 Fed. 604.

[13] United States *v.* Ducournan, 54 Fed. 138.

[14] United States *v.* Ash, 75 Fed. 651.

[15] Hoagland *v.* Canfield, 160 Fed. 146, 160.

[16] The Kawailani, 128 Fed. 879, 63 C. C. A. 347 (9th Cir.).

[17] Hoagland *v.* Canfield, 160 Fed. 146, 160.

[18] Austin *v.* Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 S. C. 132.

and use of stamps.[19] The word "certify" as applied to bank checks and as used in Revised Statutes, § 5208, and Act of Congress July 12, 1882, c. 290, No. 13, has become a term of art, and the court is bound to take judicial notice of its meaning.[20] Judicial notice also has been taken of the following facts: the locality of the River St. John's, Florida,[21] the national coinage,[22] the Civil War,[23] and the existence of national banks.[24] The courts will take judicial knowledge of the facts of chemistry contained in the United States Pharmacopœia.[25]

§ 309 *a*. **Evidence of Marriage.**

"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 subjects 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

[19] Naftzger *v.* United States, 200 Fed. 494, 118 C. C. A. 598 (8th Cir.).

[20] United States *v.* Heinze, 161 Fed. 425.

[21] United States *v.* Lawton, 5 How. (U. S.) 10, 12 L. ed. 27.

[22] United States *v.* Burns, 5 McLean 23, Fed. Cas. No. 14,691.

[23] Prize Cases, 2 Black (U. S.), 635, 669, 17 L. ed. 459.

[24] United States *v.* Williams, 4 Biss. 302, Fed. Cas. No. 16,706.

[25] Melanson *v.* United States, 256 Fed. 783 (C. C. A. 5th Cir.).

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." [1]

§ 309 *b*. **Records of Governmental Departments.**

Records kept by the several governmental departments pursuant to a constitutional or statutory requirement [1] are public records, and are admissible in evidence.[2] Such books and records are presumptively correct and the absence of an entry in such books or records is proper subject for the consideration of the jury.[3]

MATERIALITY AND COMPETENCY

§ 310. **Evidence Admitted.**

Evidence should be admitted, if competent and relevant on any issue or any phase of a case. The party offering it need not explain the point or matter to which it is addressed unless required to do so by the court.[1] The exclusion of material evidence offered on behalf of a defendant is *prima facie* prejudicial error.[2] There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence in a trial before a jury. It is only in cases where the absence of harm is clearly shown from the record that the

§ 309 *a*. [1] Act of March 3, 1887, c. 397, §§ 9, 10, 24 Stat. L. 636; March 4, 1909, c. 321, § 319, 35 Stat. L. 1149.

§ 309 *b*. [1] Constitution of the United States, Article 1, § 9, clause 7; Act of Congress September 2, 1789, c. 12, § 2, 1 Stat. L. 386; Act of September 30, 1890, 26 Stat. L. 504, 511, c. 1126; Act of July 31, 1894, c. 174, § 15, 28 Stat. L. 210.

[2] Chesapeake & Delaware Canal Co. *v.* United States, decided June 19, 1919; Gaines *v.* Relf, 12 How. (U. S.) 472, 13 L. ed. 107; Bryan *v.* Forsyth, 19 How. (U. S.) 334, 15 L. ed. 674; Post *v.* Kendal County, 105 U. S. 667, 26 L. ed. 1204; Oakes *v.* United States, 174 U. S. 778, 43 L. ed. 1169, 19 S. C. 864; Holt *v.* United States, 218 U. S. 245, 54 L. ed. 1021, 31 S. C. 2.

[3] Chesapeake & Delaware Canal Co. *v.* United States, decided June 19, 1919.

§ 310. [1] Moffatt *v.* United States, 232 Fed. 522, 533, 146 C. C. A. 480 (8th Cir.); Moore *v.* United States, 150 U. S. 57, 37 L. ed. 996, 14 S. C. 26.

[2] Crawford *v.* United States, 212 U. S. 183, 53 L. ed. 465, 29 S. C. 260.

commission of such an error is not cause for reversal.[3] Testimony with reference to "course of business" is admissible in criminal cases as well as in civil cases.[4] The period of time within which matters offered to establish purpose must have occurred to permit of their admission is largely discretionary with the court.[5] Where the case rests in part upon circumstantial evidence, much discretion is left to the trial court, and its rulings will be sustained if the testimony which is admitted tends even remotely to establish the ultimate facts.[6] Where part of a document or statement is used against a party, he is entitled to have the whole of it laid before the jury, who may consider the weight of the self-serving portions of it.[7] Therefore, a defendant charged with depositing an obscene book in the mails is entitled to have the whole book introduced in evidence, to be considered by the jury under proper instructions from the court.[8]

§ 311. Evidence Which Should Be Excluded — Testimony before Congressional Committees.

Evidence which is clearly incompetent and immaterial will be excluded.[1] It is prejudicial error to allow the government to introduce evidence of a third person's conviction calculated to induce the jury to believe, contrary to the fact, that, but for the conviction, he would have been called as a witness.[2] If matters in a document, though relevant, are of little evidential value, and inseparably mingled with matters inadmissible and highly prejudicial, the materiality is merged in the prejudice, and the document cannot be received.[3] Corroborating evidence of the testi-

[3] Crawford *v.* United States, 212 U. S. 183, 203, 53 L. ed. 465, 29 S. C. 260.

[4] Kerrch *v.* United States, 171 Fed. 366, 96 C. C. A. 258 (1st Cir.); Watlington *v.* United States, 233 Fed. 247, 147 C. C. A. 253 (8th Cir.).

[5] Kettenbach *v.* United States, 202 Fed. 377, 384, 120 C. C. A. 505 (9th Cir.); Williamson *v.* United States, 207 U. S. 425, 52 L. ed. 278, 28 S. C. 163.

[6] Louie *v.* United States, 218 Fed. 36, 41, 134 C. C. A. 58 (9th Cir.).

[7] Perrin *v.* United States, 169 Fed. 17, 26, 94 C. C. A. 385 (9th Cir.).

[8] Clark *v.* United States, 211 Fed. 916, 922, 128 C. C. A. 294 (8th Cir.).

§ 311. [1] Booth *v.* United States, 139 Fed. 252, 71 C. C. A. 378 (2d Cir.).

[2] Gallagher *v.* United States, 144 Fed. 87, 75 C. C. A. 245 (1st Cir.).

[3] Harrison *v.* United States, 200 Fed. 662, 674, 119 C. C. A. 78 (6th Cir.).

mony of a witness who is shown to be infamous should not be extended to such acts in the witness' narrative as are generally known, but should be confined to those matters which, whether in themselves material to conviction or not, are seen to be well calculated to strengthen and confirm the truth of his story.[4] By express mandate of the statute no testimony given by a witness before either House, or before any Committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court except in prosecutions for perjury, committed in giving such testimony. But an official paper or record produced by him is not within said privilege.[5]

§ 312. Motive of Accused.

The rule long settled in this country, almost without exception, is that, whenever the motive or intent of an act or the conduct of a person accused is material, he may testify directly as to what it was.[1] He may also give the grounds of the belief upon which his motive or intent proceeded, including the statements of third persons to him.[2] But other witnesses will not be allowed to testify as to the intent of the accused. They may testify as to the circumstances, leaving the jury to decide as to the intent of the accused.[3]

BURDEN OF PROOF

§ 313. Generally.

It is elementary law that the burden of proof to establish the commission of a crime, and every essential element thereof, and the guilt of the accused, rests upon the prosecution and does not shift.[1] In other words, the law does not cast on the accused the

[4] United States *v.* Biebusch, 1 Fed. 213, 216.

[5] Revised Statute, § 859.

§ 312. [1] Cummins *v.* United States, 232 Fed. 844, 845, 147 C. C. A. 38 (8th Cir.); Buchanan *v.* United States, 233 Fed. 257, 259, 147 C. C. A. 263 (8th Cir.); Crawford *v.* United States, 212 U. S. 183, 53 L. ed. 465, 29 S. C. 260; United States *v.* Stone, 8 Fed. 232.

[2] Buchanan *v.* United States, 233 Fed. 257, 259, 147 C. C. A. 263 (8th Cir.).

[3] Cooper *v.* United States, 232 Fed. 81, 146 C. C. A. 273 (2d Cir.).

§ 313. [1] Wilson *v.* United States, 232 U. S. 563, 570, 58 L. ed. 728, 34 S. C. 347; Coffin *v.* United States, 156 U. S. 432, 39 L. ed. 481, 15 S. C. 394; Melton *v.* United States, 120 Fed. 504, 57 C. C. A. 134 (5th Cir.); United States *v.* Praeger, 149 Fed. 474, 485; Davis *v.* United States,

burden of satisfying the jury as to his innocence.[2] Pleas of not guilty put in issue every allegation in the count, and place upon the government in the amplest way the burden of proving every essential element of the offense charged.[3] Each item must be proved as if the whole issue rested upon it,[4] unless a statute provides otherwise.[5] 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 part of the indictment, and the Court is without power to charge as a matter of law that any such allegation is proven, even when the evidence is clear and uncontradicted.[6]

§ 314. Matters of Defense.

But, while the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial, the presumption of innocence remains with the defendant only until such time in the progress of the trial that the jury is satisfied from the evidence of the guilt of the defendant beyond a reasonable doubt.[1] Contrary to the trend of the authorities, it has been held that a dealer in narcotic drugs has the burden of showing registry and payment of the special tax under the Harrison Act.[2] And where the accused files a plea in bar and by it brings upon the record a new issue whereby he asserts that there exist certain facts which,

160 U. S. 469, 487, 40 L. ed. 499, 16 S. C. 353; Post *v.* United States, 135 Fed. 1, 10, 67 C. C. A. 569 (5th Cir.); Stuart *v.* Reynolds, 204 Fed. 709, 715, 123 C. C. A. 13 (5th Cir.); Glover *v.* United States, 147 Fed. 426, 432, 77 C. C. A. 450 (8th Cir.); Agnew *v.* United States, 165 U. S. 36, 41 L. ed. 624, 17 S. C. 235; United States *v.* Wright, 16 Fed. 112; Chaffee & Co. *v.* United States, 18 Wall. (U. S.) 516, 21 L. ed. 908; United States *v.* Babcock, 3 Dill. 581, Fed. Cas. No. 14,487.

[2] Davis *v.* United States, 160 U. S. 469, 40 L. ed. 499, 16 S. C. 353.

[3] Konda *v.* United States, 166 Fed. 91 (C. C. A. 7th Cir.); Prettyman *v.* United States, 180 Fed. 30, 42, 103 C. C. A. 384 (6th Cir.); United States *v.* Gooding, 12 Wheat. (U. S.) 460, 6 L. ed. 693; United States *v.* Woods, 4 Cr. C. C. 484, Fed. Cas. No. 16,760.

[4] Smith *v.* United States, 208 Fed. 131, 125 C. C. A. 353 (8th Cir.).

[5] United States *v.* Gooding, 12 Wheat. (U. S.) 460, 6 L. ed. 693.

[6] Konda *v.* United States, 166 Fed. 91 (C. C. A. 7th Cir.).

§ 314. [1] Agnew *v.* United States, 165 U. S. 36, 49, 41 L. ed. 624, 17 S. C. 235; United States *v.* German, 115 Fed. 987; United States *v.* Heike, 175 Fed. 852.

[2] Gee Woe *v.* United States, 250 Fed. 428, 431, 162 C. C. A. 498 (5th Cir.).

though he may be guilty of all that is charged in the indictment, he cannot be prosecuted or punished for, as to that issue the burden of introducing evidence, if not the burden of proof, is on the accused.[3]

§ 315. Corpus Delicti.

In all trials for crime the prosecution must prove beyond a reasonable doubt that a crime has been committed, before the jury proceed to inquire as to who is the criminal. This elementary and conservative principle has always been regarded as very important in cases involving the life and liberty of the citizen, and it has generally been strictly observed in the courts.[1]

§ 316. Reasonable Doubt.

In criminal causes, not only is the burden upon the prosecution to establish the guilt of the accused, but in order to justify a verdict of guilty, the jury must be satisfied, beyond a reasonable doubt, that every fact material for the conviction has been established. The proof must exclude reasonable doubt, not all doubt.[1] In the definitions of " reasonable doubt " there is hopeless confusion in the adjudicated cases. Definitions approved in some courts have been held reversible in others. The difficulty lies in explaining words which perhaps define themselves better than can be done by any paraphrase or elucidation. As Mr. Justice Woods said in Miles *v.* United States:[2] " Attempts to explain the term reasonable doubt do not usually result in making it any clearer to the jury." [3]

LEGAL PRESUMPTIONS

§ 317. In General — Definition.

A presumption is a probable inference, which common sense, enlightened by human knowledge and experience, draws from the

[3] United States *v.* Heike, 175 Fed. 852, *affirmed* 227 U. S. 131, 57 L. ed. 450, 33 S. C. 226.

§ 315. [1] United States *v.* Searcey, 26 Fed. 435; Flower *v.* United States, 116 Fed. 241, 53 C. C. A. 271 (5th Cir.). *See also* CIRCUMSTANTIAL EVIDENCE. Corroboration as to *Corpus Delicti*, *see* § 331 *infra*.

§ 316. [1] NG. Choy Fong *v.* United States, 245 Fed. 305, 307, 157 C. C. A. 497 (9th Cir.); United States *v.* Wright, 16 Fed. 112.

[2] 103 U. S. 304, 312, 26 L. ed. 481.

[3] Griggs *v.* United States, 158 Fed. 572, 578, 85 C. C. A. 596 (9th Cir.). For a further exposition of this subject, *see* CHARGE TO JURY.

connection, relation and incidence of facts and circumstances with each other. When a fact shown in evidence necessarily accompanies the fact in issue, it gives rise to a strong presumption as to the existence of the fact to be proved. If the fact in evidence usually accompanies the fact in issue, it gives rise to a probable presumption of the existence of the fact to be proved. If the fact shown in evidence only occasionally accompanies the fact in issue, it gives rise only to a slight and insufficient presumption; but even this fact may, in connection with other relevant and consistent facts and circumstances, constitute an element in circumstantial evidence. There is a difference between the legal doctrine of presumptions and evidence which is purely circumstantial. There are presumptions of law and presumptions of fact. Presumptions of law are usually founded upon reasons of public policy, and social convenience and safety, which are warranted by the legal experience of courts in administering justice. Some of these presumptions have become established and conclusive rules of law, while others are only *prima facie* evidence, and may be rebutted. The court may always instruct a jury as to the force and effect of legal presumptions. Presumptions of fact must always be drawn by a jury; and every fact and circumstance which tends to prove any fact which is evidence of guilt is admissible in evidence on the trial of a case. Presumptions of fact result from the proof of a fact, or a number of facts and circumstances, which human experience has shown are usually associated with the matter under investigation.[1] A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth.[2] A presumption on a presumption cannot be indulged in.[3]

§ 318. Presumption as to Innocence.

There is a legal presumption that an accused is innocent until he is proved to be guilty beyond a reasonable doubt. The

§ 317. [1] United States *v.* Searcey, 26 Fed. 435.

[2] Greer *v.* United States, 245 U. S. 559, 561, 62 L. ed. 469, 38 S. C. 209.

[3] United States *v.* Ross, 92 U. S. 281, 23 L. ed. 707; Manning *v.* John Hancock Mutual Life Ins. Co., 100 U. S. 693, 25 L. ed. 761; United States *v.* Carr, 132 U. S. 644, 33 L. ed. 483, 10 S. C. 182.

burden is upon the Government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.[1] And therefore, where a circumstantial incident was made the basis of a hypothesis of criminality, which was equally referable to an innocent act, it was error for the trial court not so to declare as matter of law. This for the reason that: "No inference of fact or of law is reliably drawn from premises which are uncertain." [2] The presumption of innocence of an accused attends him throughout the trial, and has relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt. This presumption is an instrument of proof created by law in favor of one accused whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created,[3] and this is not overcome by evidence merely of facts which are not plainly inconsistent with innocence.[4] It is the

§ 318. [1] Union Pacific Coal Co. *v.* United States, 173 Fed. 737, 97 C. C. A. 578 (8th Cir.); Vernon *v.* United States, 146 Fed. 121, 123, 124, 76 C. C. A. 547, 549, 550 (8th Cir.); United States *v.* Richards, 149 Fed. 443, 454; Hayes *v.* United States, 169 Fed. 101, 103, 94 C. C. A. 449 (8th Cir.); United States *v.* Hart, 78 Fed. 868, 873, *affirmed*, 84 Fed. 799, 28 C. C. A. 612 (3d Cir.); United States *v.* McKenzie, 35 Fed. 826, 827, 828; United States *v.* Martin, 2 McLean, 256, Fed. Cas. No. 15,731; Wright *v.* United States, 227 Fed. 855, 857, 142 C. C. A. 379 (8th Cir.); United States *v.* Amedy, 11 Wheat. (U. S.) 392, 6 L. ed. 502; United States *v.* Wilson, 176 Fed. 806; United States *v.* Guthrie, 171 Fed. 528; United States *v.* Cole, 153 Fed. 801; United States *v.* Kenney, 90 Fed. 257; United States *v.* Gooding, 12 Wheat. (U. S.) 460, 6 L. ed. 693; Garrigan *v.* United States, 163 Fed. 16, 89 C. C. A. 494 (7th Cir.); Poetter *v.* United States, 155 U. S. 438, 39 L. ed. 214, 15 S. C. 144; Pettine *v.* New Mexico, 201 Fed. 489, 119 C. C. A. 581 (8th Cir.); Hibbard *v.* United States, 172 Fed. 66, 72, 96 C. C. A. 554 (7th Cir.); United States *v.* King, 34 Fed. 302, 313.

[2] Richards *v.* United States, 175 Fed. 911, 99 C. C. A. 401 (8th Cir.); United States *v.* Ross, 92 U. S. 281, 283, 23 L. ed. 707.

[3] Kirby *v.* United States, 174 U. S. 47–64, 43 L. ed. 890, 19 S. C. 574; Coffin *v.* United States, 156 U. S. 432, 39 L. ed. 481, 493, 15 S. C. 394.

[4] Wolf *v.* United States, 238 Fed. 902, 906, 152 C. C. A. 36 (4th Cir.);

settled law in criminal procedure that the burden of proof never shifts from the prosecution to the defendant. It remains throughout the trial with the Government. The plea of not guilty is unlike a special plea in civil actions which, admitting the case averred, seeks to establish substantive grounds of defense. It is a plea that puts in contestation every fact essential to constitute the offense charged. And the benefit of a reasonable doubt in favor of the accused extends to every matter offered in evidence for as well as against him.[5] The burden is upon the prosecution to furnish to the jury by the evidence it produces sound reasons for the conviction of the defendant, reasons that shall produce and maintain in their minds an abiding conviction of his guilt to a moral certainty. A juror should not be required to give reasons for his doubts as to the guilt or innocence of the accused.[6] Following Coffin *v.* United States,[7] it was held that defendants are entitled to an instruction referring to the presumption of innocence which attends an accused at every stage of the proceeding, if requested.[8] A defendant starts into a trial with the presumption of his innocence; that stays with him until it is driven out of the case by the evidence beyond a reasonable doubt.[9] But whenever the proof shows the accused's guilt beyond a reasonable doubt, then the presumption of innocence is removed from the case.[10] The presumption of the accused's innocence remains with the defendant until such time in the progress of the case that the jury are satisfied of his guilt beyond a reasonable doubt.[11] In a comparatively recent case[12] it was held, that an

Coffin *v.* United States, 156 U. S. 432, 458, 39 L. ed. 481, 15 S. C. 394; Allen *v.* United States, 164 U. S. 492, 500, 41 L. ed. 528, 17 S. C. 154.

[5] Williams *v.* United States, 158 Fed. 30, 88 C. C. A. 296 (8th Cir.); Glover *v.* United States, 147 Fed. 426, 77 C. C. A. 450 (8th Cir.); Coffin *v.* United States, 156 U. S. 432, 39 L. ed. 481, 15 S. C. 394; Kirby *v.* United States, 174 U. S. 47, 43 L. ed. 890, 19 S. C. 574.

[6] Pettine *v.* New Mexico, 201 Fed. 489, 119 C. C. A. 581 (8th Cir.).

[7] 156 U. S. 432.

[8] Cochran & Sayre *v.* United States, 157 U. S. 286, 39 L. ed. 704, 15 S. C. 628.

[9] Shepard *v.* United States, 236 Fed. 73, 80, 149 C. C. A. 283 (9th Cir.).

[10] Shepard *v.* United States, 236 Fed. 73, 80, 149 C. C. A. 283 (9th Cir.); Allen *v.* United States, 164 U. S. 492, 500, 41 L. ed. 528, 17 S. C. 154.

[11] Agnew *v.* United States, 165 U. S. 36, 51, 41 L. ed. 624, 17 S. C. 235.

[12] Kirby *v.* United States, 174 U. S. 47, 43 L. ed. 890, 19 S. C. 574.

Act of Congress which made the judgment of conviction against a thief conclusive evidence against the receiver of the stolen property, that the property described in the judgment had been stolen, was unconstitutional and void for the reason that the defendant in any criminal case had the right to be confronted with the witnesses. It was held in that case that the judgment of conviction of the thief was only evidence of the conviction and nothing more and was not evidence against the accused charged with the receiving of the stolen property from the thief. Under the rule that an accused will be presumed innocent until he is proved guilty, it was held that the presumption that an accused would not remain a party to a scheme to defraud after his co-conspirators had adopted a criminal course under Section 5480 by using the United States mails in furtherance of their scheme, overcame the inference of fact that he was still a party to such conspiracy arising from proof of his former connection with the scheme.[13] The position of the defendant in this connection is that the presumption of the defendant's innocence in a criminal case is stronger than any presumption except the presumption of the defendant's sanity and the presumption of knowledge of the law, and that he was entitled to a direct charge that the presumption of the defendant's innocence was stronger than the presumption that the messengers, who deposited these papers in their proper boxes, took them from the mails. If it were broadly true that the presumption of innocence overrides every other presumption, except those of sanity and knowledge of the law, it would be impossible to convict in any case upon circumstantial evidence, since the gist of such evidence is that certain facts may be inferred or presumed from proof of other facts. Thus, if property recently stolen be found in the possession of a certain person, it may be presumed that he stole it, and such presumption is sufficient to authorize the jury to convict, notwithstanding the presumption of his innocence. So, if a person be stabbed to death, and another, who was last seen in his company, were arrested near the spot with a bloody dagger in his possession, it would raise, in the absence of explanatory evidence, a presumption of fact that he had killed him. So, if it were shown that the shoes of an accused person were of

[13] Dalton *v.* United States, 154 Fed. 461, 83 C. C. A. 317 (7th Cir.).

peculiar size or shape, that footmarks were found in the mud or snow of corresponding size or shape, it would raise a presumption more or less strong, according to the circumstances, that those marks had been made by the feet of the accused person.[14]

§ 319. **Presumption as to Character.**

It has been held by some of the Federal Courts that where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor.[1] But the doctrine was denied in Price *v.* United States,[2] which, reviewing the authorities, holds that unless the defendant puts his character in issue by producing evidence himself, it is wholly outside the case. On the other hand, there is no presumption in regard to his character being either good or bad; for the reason that neither the court nor counsel can properly refer to the defendant's character as an element to be considered by the jury. Other courts have taken the same view.[3] The point was finally settled by the United States Supreme Court in Greer *v.* United States.[4] That court said, of the judgment affirmed: "This judgment was in accordance with a carefully reasoned earlier decision in the same circuit (Price *v.* United States, L. R. A. 1915, D, 1070, 132 C. C. A. 1, 218 Fed. 149) with an acute statement in United States *v.* Smith, 217 Fed. 839, and with numerous State cases and textbooks. But as other circuit courts of appeal had taken a different view (Mullen *v.* United States, 46 C. C. A. 22, 106 Fed. 892, Garst *v.* United States, 103 C. C. A. 469, 180 Fed. 339, 344, 345), also taken by other cases and textbooks, it becomes necessary for this court to settle the doubt. Obviously the character of the defendant was a matter of fact, which, if investigated, might turn out either way. It is not established as matter of law,

[14] Dunlop *v.* United States, 165 U. S. 486, 502, 41 L. ed. 799, 17 S. C. 375.

§ 319. [1] Mullen *v.* United States, 106 Fed. 892, 46 C. C. A. 22 (6th Cir.); United States *v.* Guthrie, 171 Fed. 528; Garst *v.* United States, 180 Fed. 339, 344, 103 C. C. A. 469 (4th Cir.).

[2] 218 Fed. 149, 152, 132 C. C. A. 1 (8th Cir.).

[3] United States *v.* Smith, 217 Fed. 839; Chambliss *v.* United States, 218 Fed. 154, 132 C. C. A. 112 (8th Cir.); Greer *v.* United States, 240 Fed. 320, 153 C. C. A. 246 (8th Cir.).

[4] 245 U. S. 559, 62 L. ed. 469, 38 S. C. 209, *Affirming*, 240 Fed. 320, 153 C. C. A. 246 (8th Cir.).

that all persons indicted are men of good character. If it were a fact regarded as necessarily material to the main issues it would be itself issuable, and the government would be entitled to put in evidence whether the prisoner did so or not. As the government cannot put in evidence except to answer evidence introduced by the defense, the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth, but that the choice whether to raise that issue rests with him. The rule that if he prefers not to go into the matter the government cannot argue from it would be meaningless if there were a presumption in his favor that could not be attacked. For the failure to put on witnesses, instead of suggesting unfavorable comment, would only show the astuteness of the prisoner's counsel. The meaning must be that character is not an issue in the case unless the prisoner chooses to make it one; otherwise he would be foolish to open the door to contradiction by going into evidence when without it good character would be incontrovertibly presumed. Addison *v.* People, 193 Ill. 405, 419, 62 N. E. 235." [5]

§ 319 *a*. **Good Character, How Proven.**

Good character of the defendant may be established either by positive evidence, the witness testifying of his personal knowledge that the character of the defendant was good,[1] or by negative testimony, the witness testifying that he knew the defendant for many years in a particular locality and that he never heard anything against the character or reputation of the defendant or that he never heard the matter discussed. Negative evidence is the most cogent evidence of a man's good character and reputation, because a man's character is not talked about until there is some fault to be found with it.[2] The right to introduce any competent evidence of his good character and have it impartially submitted to the jury is a substantial right which should not be impaired by the trial Judge.[3]

[5] *See also* De Moss *v.* United States, 250 Fed. 87, 162 C. C. A. 259 (8th Cir.).

§ 319 *a*. [1] Edgington *v.* United States, 164 U. S. 361, 41 L. ed. 467, 17 S. C. 72.

[2] 10 Rul. C. L. p. 954; Sinclair *v.* State, 87 Miss. 330, 39 So. 522; People *v.* Davis, 21 Wend. (N. Y.) 309; Gandolfo *v.* State, 11 Ohio St. 114; State *v.* Lee, 22 Minn. 407; People *v.* Woods, 172 N. W. (Mich.) 383.

[3] People *v.* Woods, 172, N. W. (Mich.) 384.

§ 320. **Presumption of Continuation.**

From the existence at one time of a certain condition of things the same state or condition of things is presumed to continue until the contrary is shown. But this rule is limited in its application to the continuance of such conditions as are of a continuing nature.[1] So, the fact that an accused had charge of the mailing of letters and literature for a fraudulent securities company in November, 1902, was held insufficient to justify a presumption that he continued indefinitely thereafter in the same employment.[2] And it has been held there was no presumption of the accused's continuance for eight years as a member of the National Guard.[3] Where the presumption of continuance is a weak one, it is overcome by the presumption of innocence.[4]

§ 321. **Presumptions of Knowledge.**

Every one is presumed to know the law of the land, both common law and statutory law.[1] It has been held that in criminal as well as in civil affairs every one is presumed to know whatever he can learn upon inquiry, when he has facts in his possession which suggest the inquiry. But this knowledge of the defendant must be affirmatively shown by the government.[2] A corporation president's knowledge of the falsity of a financial statement which he signed has been presumed;[3] and an accused's knowledge that all railroads in the United States are mail routes has been presumed.[4]

§ 322. **Presumptions — Regularity of Public Courts, Officers' Acts, Etc.**

The proceedings of courts of record and of their officers acting within their jurisdiction are presumed to have been regular.

§ **320.** [1] Brooks *v.* United States, 146 Fed. 223, 229, 76 C. C. A. 581 (8th Cir.); Steers *v.* United States, 192 Fed. 1, 112 C. C. A. 423 (6th Cir.); Davis *v.* United States, 37 App. D. C. 126.

[2] Brooks *v.* United States, 146 Fed. 223, 76 C. C. A. 581 (8th Cir.).

[3] Breitmayer *v.* United States, 249 Fed. 929, 162 C. C. A. 127 (6th Cir.).

[4] Dalton *v.* United States, 154 Fed. 461, 83 C. C. A. 317 (7th Cir.).

§ **321.** [1] Hamburg-American Steam Packet Co. *v.* United States, 250 Fed. 747, 758, 163 C. C. A. 79 (2d Cir.).

[2] United States *v.* Houghton, 14 Fed. 544, 547.

[3] Bettman *v.* United States, 224 Fed. 819, 140 C. C. A. 265 (6th Cir.).

[4] United States *v.* Hall, 206 Fed. 484.

In all cases where it appears that it was possible and competent for a court to have been in session on a certain day, and there is nothing in the record to show that the terms and conditions authorizing a session have not been fully answered, it must be presumed that what was done by the court below was properly and legally done, and that the requisite steps necessary to constitute a legal court were taken.[1] If no evidence has been offered or presented to the court that either improper or illegal evidence was used before the grand jury to secure the indictment, the presumption is that the proceedings before the grand jury were in all respects regular,[2] that the indictment was based on sufficient evidence, and that the required number of jurors concurred.[3] Where an indictment has been regularly returned in open court, the presumption is that the grand jury, the court officials, and the court properly discharged their respective duties.[4] The presumption of legality and regularity of official acts applies in criminal cases.[5] The officers and employees of the postal service are presumed to have done their duty and made delivery of all properly addressed mail matter intrusted to their care; and the officials of the immigration department are presumed to have kept what they received.[6] The mailing of letters postage paid raises a presumption of their receipt by the addressee.[7]

§ 323. Presumptions from Failure to Produce Evidence or to Testify One's Self.[1]

There can be no presumption against a defendant merely because he has not taken the stand as a witness in his own favor.[2]

§ 322. [1] Stockslager *v.* United States, 116 Fed. 590, 595, 54 C. C. A. 46 (9th Cir.).

[2] United States *v.* Coyle, 229 Fed. 256.

[3] United States *v.* Wilson, 6 McLean, 604, Fed. Cas. No. 16,737.

[4] Carlisle *v.* United States, 194 Fed. 827, 829, 114 C. C. A. 531 (4th Cir.).

[5] May *v.* United States, 236 Fed. 495, 149 C. C. A. 547 (8th Cir.); United States *v.* Elton, 222 Fed. 428; Norddeutschen Lloyd *v.* United States, 213 Fed. 10, 130 C. C. A. 85 (2d Cir.).

[6] United States *v.* Feldman, 247 Fed. 482, 159 C. C. A. 536 (2d Cir.).

[7] Watlington *v.* United States, 233 Fed. 247, 147 C. C. A. 253 (8th Cir.); Kimberly *v.* Arms, 129 U. S. 512, 32 L. ed. 764, 9 S. C. 355.

§ 323. [1] *See also* CHARGE TO JURY enlarging upon this subject and the statute in relation to same.

[2] United States *v.* Pendergast, 32 Fed. 198; United States *v.* Kimball, 117 Fed. 156.

No presumption is raised against the defendant by reason of his failure to call witnesses or introduce evidence which is equally accessible to the prosecution and the defense.[3] No presumption arises against a defendant from his failure to call his accomplice as a witness.[4] It is sometimes said that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transactions, the fact that he does not do it creates a presumption that the testimony, if produced, would be unfavorable.[5] But this presumption does not apply to every fact in the case which it may be in the power of the defendant to prove. He is not bound to anticipate every fact which the government may wish to show in the course of the trial, and produce evidence of that fact. So, where a wife was not a competent witness, either for or against her husband, and he was under no obligation to bring her into court for identification, no inference could be drawn from his failure to do so.[6] A defendant need not introduce expert testimony to prove that an envelope addressed to his wife, containing the matter alleged to be stolen, was not in his handwriting. Especially is this so when the defendant takes the stand and denies the genuineness of the writing. The court may not, in its charge, comment on the defendant's failure to produce such expert testimony, and to do so is reversible error.[7] It is improper for the court to comment upon the failure of the defendant to produce certain letters which witnesses had testified were written to him. Such conduct on the part of the court constitutes an infringement of the constitutional rights of the accused not to furnish evidence against himself.[8]

[3] Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765.

[4] State *v.* Cousins, 58 Iowa, 250.

[5] Graves *v.* United States, 150 U. S. 118, 37 L. ed. 1021, 14 S. C. 40; *see also*, Spear *v.* United States, 246 Fed. 250, 158 C. C. A. 410 (8th Cir.); The Bolton Castle, 250 Fed. 403, 162 C. C. A. 473 (1st Cir.).

[6] Graves *v.* United States, 150 U. S. 118, 37 L. ed. 1021, 14 S. C. 40.

[7] Perera *v.* United States, 221 Fed. 213, 136 C. C. A. 623 (8th Cir.).

[8] Hibbard *v.* United States, 172 Fed. 66, 96 C. C. A. 554 (7th Cir.); McKnight *v.* United States, 115 Fed. 972, 54 C. C. A. 358 (6th Cir.); Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524; Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765, *but see* Hamburg-American Steam Packet Co. *v.* United States, 250 Fed. 747, 768, 163 C. C. A. 79 (2d Cir.).

§ 324. **Presumptions from Possession of Property.**

Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence.[1] If there is nothing on the face of the article that negatives the presumption of ownership arising out of possession, the proper rule is held to be that the jury is authorized, if they see fit, to infer ownership from the fact of possession unexplained. The explanation, when given, and its reasonableness, is a question for the jury, and does not affect the admissibility of the evidence unless it shows without conflict that the ownership was elsewhere than in the possession. Voluntary surrender of an article like a pocketbook or diary without denial of ownership would strengthen the inference.[2] Presumptions of this and the like kind, rebuttable, and explainable by the accused, are within the competency of Congress to create. There is a statutory presumption of guilt under the Importation of Smoking Opium Act, 1914, from the possession of the drug.[3] But to raise the presumption of guilt from possession of the fruits or the instruments of crime they must have been found in the accused's exclusive possession. A constructive possession is not sufficient to hold a person responsible on a criminal charge.[4]

CONFESSIONS

§ 325. **Definition and Classification — Voluntary Statements.**

A confession, in criminal law, is the voluntary admission or declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same.[1] Judicial confessions are those made before a

§ **324.** [1] Wilson *v.* United States, 162 U. S. 613, 40 L. ed. 1090, 16 S. C. 895; McNamara *v.* Henkel, 226 U. S. 520, 57 L. ed. 330, 33 S. C. 146.

[2] Dean *v.* United States, 246 Fed. 568, 575 (a check raising case), 158 C. C. A. 538 (5th Cir.).

[3] Gee Woe *v.* United States, 250 Fed. 428, 162 C. C. A. 498 (5th Cir.); Luria *v.* United States, 231 U. S. 9, 58 L. ed. 101, 34 S. C. 10; United States *v.* Yee Fing, 222 Fed. 154.

[4] Sorenson *v.* United States, 168 Fed. 785, 798, 94 C. C. A. 181 (8th Cir.).

§ **325.** [1] Bouvier, Law Dict. People *v.* Parton, 49 Cal. 632.

magistrate or in open court. Extrajudicial confessions are those made elsewhere. A mere statement to a third person which has no tendency to establish the accused's guilt or to operate to his prejudice is not a confession; confessions are only admitted as being statements against the interest of the party by whom they are claimed to have been made.[2] A confession is, of course, always admissible when made without inducement.[3] Evidence of confessions should never be admitted before a grand jury except under the direction of the court, or unless the prosecuting officer of the government is present and carefully makes the preliminary inquiries necessary to render the evidence admissible.[4] In the absence of statutory regulations on the subject, testimony and written statements, voluntarily given or made by a party or witness in a judicial proceeding, are, as admissions and confessions, competent against him on the trial of any issue in a criminal case to which they are pertinent; and statements made by a party in a judicial inquiry are considered voluntary if he might have objected to answering on the ground of self-incrimination, and failed to do so.[5] Conversations, not induced by duress, intimidation or other improper influences, but perfectly voluntary, between a deputy marshal and the defendant have been held properly admitted.[6] Statements made by the defendant to a witness relating to the transaction charged as a crime, are not subject to the rules governing the admission of confessions where the defendant, in such statements, while admitting the commission of the acts charged, denied their criminality and justified them.[7]

§ 326. Involuntary Statements.

It is well settled that confessions not voluntarily made are inadmissible against an accused, and the courts are astute, and

[2] Ballew *v.* United States, 160 U. S. 187, 193, 40 L. ed. 388, 16 S. C. 263.

[3] Bram *v.* United States, 168 U. S. 532, 42 L. ed. 568, 18 S. C. 183; Harrold *v.* Oklahoma, 169 Fed. 47, 94 C. C. A. 415 (8th Cir.); United States *v.* Negro Charles, 2 Cr. C. C. 76, Fed. Cas. No. 14,786.

[4] United States *v.* Kilpatrick, 16 Fed. 765, 773.

[5] Ensign *v.* Pennsylvania, 227 U. S. 592, 57 L. ed. 658, 33 S. C. 321; In re Kanter, 117 Fed. 356; Tucker *v.* United States, 151 U. S. 164, 38 L. ed. 112, 14 S. C. 299.

[6] Perovich *v.* United States, 205 U. S. 86, 91, 51 L. ed. 722, 27 S. C. 456.

[7] Dimmick *v.* United States, 116 Fed. 825, 54 C. C. A. 329 (9th Cir.).

properly so, in protecting the rights of accused persons against confessions obtained by duress or through hope or fear.[1] To entitle the Government to introduce in evidence the statement or confession of the accused, whether oral or written, it must appear that it was made voluntarily and without compulsion or inducement of any sort. Confessions of a defendant are inadmissible if made under any threat, promise or encouragement of any hope or favor.[2] The burden of proof that no improper inducements or threats were made when the confession was made is with the prosecution.[3] An involuntary confession of an accused person, incompetent to prove the case of the prosecution in chief, is incompetent to impeach the accused after he has testified in his own behalf upon other subjects only; (first) because such a confession is unworthy of belief; and (second) because its introduction would violate the constitutional guaranty that the accused shall not be compelled to testify against himself.[4] In a prosecution for concealment of assets from a bankrupt's trustee, filed schedules are not admissible.[5] But where a party or witness is indicted for perjury, the immunity granted by Section 860 is not operative.[6] In criminal trials in the United States Courts, where a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment of the Constitution of the United States, commanding that no person "shall be compelled, in any criminal case, to be a witness against himself."[7]

§ 326. [1] Shaw *v.* United States, 180 Fed. 348, 355, 103 C. C. A. 494 (6th Cir.); Bram *v.* United States, 168 U. S. 532, 42 L. ed. 568, 18 S. C. 183; Hopt *v.* Utah, 110 U. S. 574, 584, 28 L. ed. 262, 4 S. C. 202; United States *v.* James, 60 Fed. 257, 26 L. R. A. 418; United States *v.* Maunier, 1 Hughes 412, Fed. Cas. No. 15,746 (threats; confessions excluded); Sorensen *v.* United States, 143 Fed. 820, 74 C. C. A. 468 (8th Cir.); (inducements by officers; confessions excluded); United States *v.* Hunter, 1 Cr. C. C. 317, Fed. Cas. No. 15,424; United States *v.* Pumphreys, 1 Cr. C. C. 74, Fed. Cas. No. 16,097; United States *v.* Pocklington, 2 Cr. C. C. 293, Fed. Cas. No. 16,060; (promises; confessions excluded).

[2] Wilson *v.* United States, 162 U. S. 613, 40 L. ed. 1090, 16 S. C. 895.

[3] Hopt *v.* Utah, 110 U. S. 574, 587, 28 L. ed. 262, 4 S. C. 202; Harrold *v.* Oklahoma, 169 Fed. 47, 94 C. C. A. 415 (8th Cir.).

[4] Harrold *v.* Oklahoma, 169 Fed. 47, 54, 94 C. C. A. 415 (8th Cir.).

[5] Revised Statutes, § 860; Cohen *v.* United States, 170 Fed. 715, 96 C. C. A. 35 (4th Cir.).

[6] United States *v.* Brod, 176 Fed. 165, 170.

[7] Bram *v.* United States, 168 U. S. 532, 545, 42 L. ed. 568, 18 S. C. 183.

§ 327. **Confessions under Arrest, under Suspicion — Warning.**

The fact that a confession is made by an accused person, while under arrest for the offense or when drawn out by the questions of an officer, does not necessarily render the confession involuntary,[1] provided, of course, it is not extorted by inducements or threats.[2] Admissions by one under arrest, charged with a crime, to a committee of citizens met to investigate the charge, at a time when there was no public excitement or danger of violence to him, and not induced by threats and promises, were held voluntary and admissible.[3] The mere presence of an officer, without more, will not invalidate a confession. He must be in authority over the prosecution and prisoner, and sanction the threat or promise held out by others.[4]

§ 328. **Preliminary Inquiry by the Court.**

The elements entering into the preliminary inquiry by the judge, where he is called on to determine the competency of the evidence, are these: (1) Has the person to whom, or in whose presence, or by whose sanction, the alleged confession was made, any authority? (2) Were the threats or promises of that character that should exclude the confession as one made involuntarily? Both these questions being answered in the affirmative, the evidence is excluded as a matter of law, the judge trying the facts as in other cases of mixed questions of law and fact; but, either being answered in the negative, the evidence goes to the jury, and thereupon they try this as they do all the other facts of the case, giving such weight to the confession as they see fit. All evidence of confessions does not pass through this ordeal of trial by the judge, except to determine whether it belongs to the one class or

§ 327. [1] Shaw *v.* United States, 180 Fed. 348, 355, 103 C. C. A. 494 (6th Cir.); Sparf *v.* United States, 156 U. S. 51, 55, 39 L. ed. 343, 15 S. C. 273; Perovich *v.* United States, 205 U. S. 86, 91, 51 L. ed. 722, 27 S. C. 456; Hardy *v.* United States, 186 U. S. 224, 46 L. ed. 1137, 22 S. C. 889; United States *v.* Kimball, 117 Fed. 156; Burrell *v.* Montana, 194 U. S. 572, 48 L. ed. 1122, 24 S. C. 787; Wilson *v.* United States, 162 U. S. 613, 633, 40 L. ed. 1090, 16 S. C. 895.

[2] Pierce *v.* United States, 160 U. S. 355, 40 L. ed. 454, 16 S. C. 321.

[3] Jackson *v.* United States, 102 Fed. 473, 483, 42 C. C. A. 452 (9th Cir.).

[4] United States *v.* Stone, 8 Fed. 232, 262.

the other; for, if they have been made to persons not in authority, whether voluntarily or involuntarily, they go to the jury, to be by them discarded if they find that they have been extorted by threats or induced by promises of that kind that "the prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise." [1] It is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, if the confession was voluntary.[2] The fact that a confession is made under suspicion does not of itself render it involuntary.[3]

§ 329. Whether Voluntary or Involuntary — For Court or Jury?

Where there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant.[1] The question whether or not an accused made an alleged confession, or any part of it, asked him on cross-examination, to lay the foundation for impeachment by proof of contradictory statements in the confession, is not competent cross-examination where the accused has not testified regarding it, because it is not germane to the subjects of his direct examination, and because the prosecutor could not prove the statements in the confession as a part of his case in chief. It is the court's duty to determine whether an alleged confession was voluntary or involuntary and it is error to permit the introduction of the evidence on that question to the jury.[2] The weight of the confession is for the determination of the

§ 328. [1] United States *v.* Stone, 8 Fed. 232, 256, 257.

[2] Powers *v.* United States, 223 U. S. 303, 313, 56 L. ed. 448, 32 S. C. 281; Wilson *v.* United States, 162 U. S. 613, 623, 40 L. ed. 1090, 16 S. C. 895.

[3] United States *v.* Graff, 14 Blatchf, 381,386, Fed. Cas. No. 15,244.

§ 329. [1] Wilson *v.* United States, 162 U. S. 613, 40 L. ed. 1090, 16 S. C. 895; Hardy *v.* United States, 3 App. D. C. 35; Podolin *v.* Lesher Warner Dry Goods Co., 210 Fed. 97, 126 C. C. A. 611 (3d Cir.).

[2] Harrold *v.* Oklahoma, 169 Fed. 47, 54, 94 C. C. A. 415 (8th Cir.). *See also* United States *v.* Stone, 8 Fed. 232, 256.

jury.[3] They are not bound to accept a confession in its entirety as true.[4]

§ 330. **Offer in Entirety.**

The confession must be offered in its entirety.[1] If the prosecution relies on a confession alone, the prisoner is entitled to the full effect of that portion of the confession which goes in his favor. In other words, if the confession is used, the whole of it must be taken together. But, of course, the prosecution is at liberty to contradict any part of the confession, if it can do so.[2]

§ 331. **Necessity for Corroboration.**

The general consensus of judicial opinion in the courts of the United States is that some sort of corroboration of a confession is necessary to a conviction.[1] A conviction cannot be had on the extrajudicial confession of the defendant, unless corroborated by proof *aliunde* of the *corpus delicti*. Full, direct and positive evidence, however, of the *corpus delicti* is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances as will, when taken in connection with the confession, establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt.[2] But the *corpus delicti* may be proven

[3] United States *v.* Stone, 8 Fed. 232.

[4] United States *v.* Prior, 5 Cr. C. C. 37, Fed. Cas. No. 16,092; United States *v.* Smith, Fed. Cas. No. 16,342 a; *Contra:* United States *v.* Barlow, 1 Cr. C. C. 94, Fed. Cas. No. 14,521, where the confession of a prisoner being given in evidence, the court instructed the jury that they must believe or reject the whole.

§ 330. [1] United States *v.* Prior, 5 Cr. C. C. 37, Fed. Cas. No. 16,092; United States *v.* Smith, Fed. Cas. No. 16,342 a; United States *v.* Long, 30 Fed. 678.

[2] United States *v.* Long, 30 Fed. 678.

§ 331. [1] Daeche *v.* United States, 250 Fed. 566, 162 C. C. A. 582 (2d Cir.); United States *v.* Williams, 1 Cliff. 5, Fed. Cas. No. 16,707; United States *v.* Boese, 46 Fed. 917; United States *v.* Mayfield, 59 Fed. 118; Flower *v.* United States, 116 Fed. 241, 52 C. C. A. 271 (5th Cir.); Naftzger *v.* United States, 200 Fed. 494, 118 C. C. A. 598 (8th Cir.); Rosenfeld *v.* United States, 202 Fed. 469, 120 C. C. A. 599 (7th Cir.).

[2] Vreitmayer *v.* United States, 249 Fed. 929, 933, 162 C. C. A. 127 (6th Cir.); Rosenfeld *v.* United States, 202 Fed. 469, 120 C. C. A. 599 (7th Cir.); Flower *v.* United States, 116 Fed. 241, 52 C. C. A. 271 (5th Cir.); Naftzger *v.* United States, 200 Fed. 494, 499, 118 C. C. A. 598 (8th Cir.); Isaacs *v.* United States, 159 U. S. 487, 490, 40 L. ed. 229, 16 S. C. 51; Goff *v.* United States, 257 Fed 294. — C. C. A. — (8th Cir.).

by the confessions of the defendant followed by corroborating circumstances which in the judge's opinion will go to fortify the truth of the confession.[3] An indictment charged the defendant with knowingly receiving in pledge from a soldier certain property of the United States, to-wit: a Colt automatic pistol. There was evidence that the pistol was found in the defendant's store near a government reservation; that the pistol was government property and had been issued to a named soldier and that the defendant confessed extrajudicially to receiving it in pledge from a soldier. The accused contended that the *corpus delicti* had not been established by evidence independent of his extrajudicial confession. It was held that although some of the facts were merely circumstantial, they tended to corroborate the accused's confession, and the evidence was such as to warrant the jury in inferring that the accused knew the person he received the pistol from was a soldier, and also that the pistol was government property.[4]

§ 332. **Subsequent Confessions.**

Subsequent confessions, after having confessed under influence of hope or fear, cannot be admitted.[1] A person having once been induced, by improper influences, to make a confession, no other confessions of a like character, though made at a subsequent time and to different persons, are admissible, even when voluntarily made, unless it be shown that the prior improper influence has been removed, either by an explicit and distinct warning, or some other equally cogent means.[2] A confession of arson freely and voluntarily made before the mayor of a city was received, though previous threats and inducements had been made by visitors to the prisoner and inspectors of the prison, when he made no confession.[3] A prisoner, arrested for larceny, confessed to the officer as to that larceny, under the officer's promise to do what he could for him if he would tell where the stolen goods were. He after-

[3] Daeche *v.* United States, 250 Fed. 566, 571, 162 C. C. A. 582 (2d Cir.); United States *v.* Williams, 1 Cliff. 5, Fed. Cas. No. 16,707.

[4] Bolland *v.* United States, 238 Fed. 529, 151 C. C. A. 465 (4th Cir.).

§ 332. [1] United States *v.* Negro Charles, 2 Cr. C. C. 76, Fed. Cas. No. 14,786.

[2] United States *v.* Cooper, Fed. Cas. No. 14,864.

[3] Commonwealth *v.* Dillon, 4 Dall. 116.

wards made a confession of a different larceny before a magistrate without any new promise or threat or question. The first confession was not receivable against him, but the second was admitted.[4]

§ 333. **Confessions Made under Oath.**

There is a conflict of opinion as to whether a confession made under oath is admissible.[1] A confession given voluntarily on examination before a magistrate has been held admissible.[2] It has been held that a confession of an accused prisoner, taken on oath, cannot be used against him.[3] On the other hand, confessions made under oath have been held admissible.[4] The testimony of the accused voluntarily given at a preliminary hearing before a magistrate may be introduced as evidence at the trial.[5] The fact that the confession is made under oath will not be effectual to exclude it, power to administer the oath being conferred by Revised Statute § 183.[6] Evidence given on oath before grand jury without compulsion has been used on witness's subsequent indictment.[7] A sworn statement made long anterior to any prosecution was admitted.[8] Voluntary statements to a magistrate who conducted a preliminary examination made before and after the examination, have been admitted.[9]

§ 334. **Confessions of Third Parties.**

The rule in the Federal Courts is that confessions of third parties made out of court and tending to exonerate the accused, are not admissible in evidence in favor of the accused.[1] Justice

[4] United States *v.* Kurtz, 4 Cr. C. C. 682, Fed. Cas. No. 15,547.

§ **333.** [1] Wilson *v.* United States, 162 U. S. 613, 40 L. ed. 1090, 16 S. C. 895.

[2] Fries Case, Wharton's St. Tr. 482, 595.

[3] United States *v.* Bascadore, 2 Cr. C. C. 30, Fed. Cas. No. 14,536; United States *v.* Duffy, 1 Cr. C. C. 164, Fed. Cas. No. 14,998.

[4] Burrell *v.* Montana, 194 U. S. 572, 48 L. ed. 1122, 24 S. C. 787.

[5] Powers *v.* United States, 223 U. S. 303, 56 L. ed. 448, 32 S. C. 281.

[6] United States *v.* Graff, 14 Blatchf. 381, 387, Fed. Cas. No. 15,244.

[7] United States *v.* Kimball, 117 Fed. 156.

[8] United States *v.* Brown, 40 Fed. 457.

[9] Hardy *v.* United States, 186 U. S. 224, 46 L. ed. 1137, 22 S. C. 889.

§ **334.** [1] Donnelly *v.* United States, 228 U. S. 243, 278, 57 L. ed. 820, 33 S. C. 449. But see the dissenting opinion of Justice Holmes, with whom concur Justices Lurton and Hughes.

Holmes says:[2] "There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man." A confession of one or two joint defendants, made in the absence of the other, was held inadmissible against the other.[3]

§ 335. **Matters of Procedure.**

The fact that an accused's confession was not objected to by him when offered as not being voluntary warrants disregard of an objection on appeal on that ground.[1] The defendant does not, by failing to cross-examine as to the voluntary nature of the alleged confession, waive the right to further question the character of the confession by motion to strike it out.[2] If requested by the defendant, the court should specially instruct the jury upon the subject of the necessity that the confession be found to have been voluntarily made before it could be considered by the jury.[3] If confessions are improperly admitted the defendant will be entitled to a new trial.[4]

§ 336. **Value as Evidence.**

The courts have differed as to the value of confessions as evidence. On one hand it has been held that a confession, if freely and voluntarily made, is evidence of the most satisfactory character.[1] On the other hand it has been said that evidence by confessions, especially where it goes to the whole merits of the case, is certainly open to much objection.[2] Confessions, it has

[2] Donnelly *v.* United States, *supra.*

[3] Sorensen *v.* United States, 143 Fed. 820, 74 C. C. A. 468 (8th Cir.); Sparf *v.* United States, 156 U. S. 51, 39 L. ed. 343, 15 S. C. 273.

§ 335. [1] Shaw *v.* United States, 180 Fed. 348, 355, 103, C. C. A. 494 (6th Cir.).

[2] Shaw *v.* United States, *supra.*

[3] *Ibid.*

[4] United States *v.* Stone, 8 Fed. 232, 262; United States *v.* De Quilfeldt, 5 Fed. 276.

§ 336. [1] Wilson *v.* United States, 162 U. S. 613, 622, 40 L. ed. 1090, 16 S. C. 895; Hopt *v.* Utah, 110 U. S. 574, 584, 28 L. ed. 262, 4 S. C. 202.

[2] Smith *v.* Burnham, 3 Sumn. 435, Fed. Cas. No. 13,019.

been said, should be received with great caution, for experience has shown that they often mislead, and sometimes convict an innocent person. Under a charge of a highly criminal offense the mind must always be agitated, and may be influenced by hopes or apprehensions which it is difficult, if not impossible, sometimes to comprehend.[3] Again, it has been said that oral admissions or statements claimed to have been made by a defendant should always be viewed with caution. The imperfection of the medium through which such admissions are transmitted should be considered. The infirmities of memory and desire to detect an offender are subjects which it is proper to keep in view in weighing this character of testimony.[4] Where a defendant was under arrest for 24 hours without having the privilege of communicating with his friends or counsel, having been taken in charge by five post office inspectors and compelled to occupy the same room with one of the inspectors, a written confession obtained under such circumstances was held to be not voluntary and not admissible in evidence.[5]

§ 337. Insanity as a Defense — Drunkenness — Delirium Tremens.

Insanity, to be available as a defense, must reach the degree of failure to understand the difference between right and wrong. Drunkenness is not an excuse for crime; the long continued use of alcohol or other drugs, even though voluntary, may produce *delirium tremens* or other mental derangement violent enough to amount to insanity, and make its victim not responsible under the law. Intoxication, or *delirium*, from a drug used with knowledge that it is likely to produce intoxication or *delirium* obviously stands on the same footing as intoxication from alcohol. A patient is not presumed to know that a physician's prescription may produce a dangerous frenzy. But he is bound to take notice of the warning appearing on a prescription, and this obligation is,

[3] United States *v.* Nott, 1 McLean, 499, 501, Fed. Cas. No. 15,900.

[4] United States *v.* McKenzie, 35 Fed. 826, 829.

[5] Purpura *v.* United States, 262 Fed. 473 (C. C. A. 4th Cir.). *See also* Sorenson *v.* United States, 143 Fed. 820–824, 74 C. C. A. 468; 3 Russel on Crimes, (6 ed.) 478; Bram *v.* United States, 168 U. S. 532, 42 L. ed. 568, 18 S. C. 183.

of course, stronger if he reads the prescription. If, for example, the prescription itself, or the realized effect of the first dose of the chloral, or both together, warned the defendant before he had lost control of himself that he might be thrown into an uncontrollable frenzy, then he would be guilty of murder or manslaughter according to the view the jury might take of the circumstances. If, on the other hand, the defendant had good reason to infer from the terms of the prescription or the oral instructions of the physician, or from the effect of the first dose, or from all these together, that he would fall into unconsciousness from a larger dose, then he would not be legally responsible for acts committed in a violent frenzy which he had no reason to anticipate. If he was so frenzied by a portion of the medicine innocently taken under the direction of a physician that he was thrown into a mental state which placed him beyond his own control and beyond the realization of what might be the ill effect of an overdose, he would not be legally responsible.[1] Whether the insanity be general or partial, whether continuous or periodical, the degree of it must have been sufficiently great to have controlled the will of the accused at the time of the commission of the act. Where reason ceases to have dominion over the mind, proven to be diseased, the person reaches a degree of insanity where criminal responsibility ceases, and accountability to the law for the purpose of punishment no longer exists.[2]

§ 338. **Insanity, Burden of Proof.**

Ordinarily every person charged with crime is presumed to be sane.[1] Where the defendant pleads insanity as a defense in a criminal action and evidence is introduced tending to support that defense, the burden of proving his sanity beyond a reasonable doubt is on the prosecution and not on the defendant, and the

§ 337. [1] Perkins *v.* United States, 228 Fed. 408, 142 C. C. A. 638 (4th Cir.); Tucker *v.* United States, 151 U. S. 164, 38 L. ed. 112, 14 S. C. 299; Davis *v.* United States, 160 U. S. 469, 40 L. ed. 499, 16 S. C. 353; Davis *v.* United States, 165 U. S. 373, 41 L. ed. 750, 17 S. C. 360; United States *v.* Drew, 5 Mason, 28, Fed. Cas. No. 14,993; 1 Hale, P. C. 32; 3 Greenleaf, Ev. § 6; United States *v.* King, 34 Fed. 302; United States *v.* Faulkner, 35 Fed. 730.

[2] United States *v.* Chisholm, 153 Fed. 808, 810.

§ 338. [1] United States *v.* Chisholm, 153 Fed. 808.

jury is not bound by the legal presumption of his sanity.[2] A charge imposing upon the defendant the burden of proving by a preponderance of the evidence that when he committed the offense, if he did so at all, he was of unsound mind was held erroneous.[3] If it appears in a murder case, that, if upon the whole evidence, by whomsoever adduced, the jury have a reasonable doubt whether, at the time of the killing, the accused was mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing, they cannot properly return a verdict of guilty.[4] The opinions of witnesses as to the sanity of a human being are admissible evidence, and a layman, as well as a physician, is competent to give one, although the jury will judge as to the value and weight of such opinions, considering them with reference to the experience and capacity of those who give them.[5]

RES GESTÆ

§ 339. General Principles.

The *res gestæ* are the undesigned incidents of the act in issue, which are always admissible in evidence when illustrative of the act. They may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the act in issue, and not produced by the calculating policy of the actors. They must stand in immediate causal relation to the act — a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become

[2] Davis *v.* United States, 160 U. S. 469, 40 L. ed. 499, 16 S. C. 353; Hotema *v.* United States, 186 U. S. 413, 418, 46 L. ed. 1225, 22 S. C. 895. *See also* Matheson *v.* United States, 227 U. S. 540, 57 L. ed. 631, 33 S. C. 355; United States *v.* Lancaster, 7 Biss. 440, Fed. Cas. No. 15,555.

[3] German *v.* United States, 120 Fed. 666, 57 C. C. A. 128 (6th Cir.).

[4] Davis *v.* United States, 160 U. S. 469, 40 L. ed. 499, 16 S. C. 353.

[5] United States *v.* German, 115 Fed. 987. *See also* this Chapter, § 395 EXPERT AND OPINION EVIDENCE.

in this way evidence of the character of the act.[1] The rules as to what constitutes *res gestæ* and to admissibility generally, are the same in criminal as in civil cases. The question of what constitutes *res gestæ* depends greatly on the circumstances of the case, particularly with regard to the question of time, and a certain degree of discretion rests with the trial court in the admission of acts and declarations as part of the *res gestæ*.[2] Their admissibility is determined by the judge according to the degree of their relation to the principal fact and in the exercise of his sound judgment, it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.[3] The rule is that circumstances, acts and declarations which are so interwoven or connected with a transaction which is the subject of judicial inquiry as to be necessary to a just understanding of it, should be received in evidence; but they should appear to be its undesigned accompaniments, free from any calculating purpose of those concerned. In other words, they should fit and have an immediate and natural relation to the principal fact.[4] The tendency of modern adjudications is to extend, rather than to narrow, the rule as to the admission of declarations as part of the *res gestæ*, and to admit and leave their weight to the jury. The fact that the defendant is now allowed to testify has greatly tended to liberalize the rule.[5] Declarations accompanying and explaining the *res gestae* may undoubtedly be proved. But

§ 339. [1] St. Clair *v.* United States, 154 U. S. 134, 149, 38 L. ed. 936, 14 S. C. 1002, *quoting* Wharton on Evidence, § 259, quoted in Sprinkle *v.* United States, 141 Fed. 811, 816, 73 C. C. A. 285 (4th Cir.), and Jones *v.* United States, 179 Fed. 584, 602, 103 C. C. A. 142 (9th Cir.); Blanton *v.* United States, 213 Fed. 320, 325, 130 C. C. A. 22 (8th Cir.); Chicago, Milwaukee & St. Paul Ry. Co. *v.* Chamberlain, 253 Fed. 429, — C. C. A. — (9th Cir.).

[2] Alexander *v.* United States, 138 U. S. 353, 34 L. ed. 954, 11 S. C. 350; Moore *v.* United States, 150 U. S. 57, 60, 37 L. ed. 996, 14 S. C. 26.

[3] Chicago, Milwaukee & St. Paul Ry. Co. *v.* Chamberlain, 253 Fed. 429, — C. C. A. — (9th Cir.), *quoting* 1 Greenl. (12th Ed. ¶ 108) and St. Clair *v.* United States, *supra*.

[4] Huntington *v.* United States, 175 Fed. 950, 99 C. C. A. 440 (8th Cir.); Ætna Life Ins. Co. *v.* Ryan, 255 Fed. 483, 485, — C. C. A. — (2d Cir.).

[5] Jack *v.* Mutual Reserve Fund Life Ass'n, 113 Fed. 49, 56, 51 C. C. A. 36 (5th Cir.); Travelers' Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397, 19 L. ed. 437; Sprinkle *v.* United States, 141 Fed. 811, 73 C. C. A. 285 (4th Cir.).

such declarations are not admissible as part of the *res gestæ* unless they in some way elucidate or tend to characterize the act which they accompany, or may derive a degree of credit from the fact itself.[6] Acts and declarations not so connected with the crime as to form part of the *res gestæ* or to have any legitimate tendency to justify, excuse or mitigate it are not admissible for the defendant.[7]

§ 340. Time.

The jury must give no weight to a declaration of the accused which has been admitted in evidence, unless they are satisfied that it was made at a time when it was forced out as the utterance of a truth by the particular event itself, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for him to say.[1] In proceedings for conspiracy to conceal assets, evidence of acts of concealment by the bankrupt before the bankruptcy, as well as those subsequent thereto, are admissible as part of the *res gestæ*.[2] In larceny cases declarations of the defendant at the time of receiving the property will be admitted to rebut the presumption arising from its possession.[3] In a larceny case it was held that anything said and done by the accused and the prosecuting witness at the time of the larceny was directly connected with the transaction and not in any sense collateral to the issue. The evidence was intended to impeach the prosecuting witness and to explain the motives and intent of the accused; and ought to have been submitted to the jury, who were the proper judges of its credit and weight.[4] In a prosecution for rape on a girl under the age of consent, a statement of the prosecution made to a confidential friend shortly after leaving the place of the alleged act, not as a complaint, nor as an expression of outraged feeling, nor under excitement produced by an external shock, but purely as a matter of interesting information

[6] United States *v.* Angell, 11 Fed. 34, 41.

[7] Andersen *v.* United States, 170 U. S. 481, 42 L. ed. 1116, 18 S. C. 689.

§ 340. [1] United States *v.* King, 34 Fed. 302, 314.

[2] United States *v.* Rhodes, 212 Fed. 513, 516.

[3] Rex *v.* Abraham, 2 Car. & K. 550, 3 Cox C. C. 430.

[4] Turner *v.* United States, 2 Hayw. & H. 343, Fed. Cas. No. 14262 a.

in a casual conversation was held inadmissible.[5] The declarations of the prisoner in the room where counterfeited notes were found were held admissible to repel any unfavorable conclusion from silence on his part.[6] Although a defendant charged with embezzlement, who relied upon the defense of insanity, admitted the taking of the money, it was competent for the Government to prove all the facts in its possession relative to the taking, and the defendant's conduct before and after, both as a basis for a hypothetical question to medical experts and for the consideration of the jury on the question of sanity *vel non*.[7]

§ 341. **Feelings, Demeanor, Business Relations and Circumstances.**

Wherever the bodily or mental feelings of an accused are material to be proved, the usual expressions of such feelings are original and competent evidence. They are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is for the jury. So, on a trial for homicide on shipboard, where the defense was insanity caused by excessive drinking, and an overdose of chloral, the testimony of a physician as to the description the accused gave of his symptoms just before going on the ship was held competent on the issue of his mental and physical condition at that time.[1] A person's demeanor when arrested or suddenly charged with crime has always been held competent evidence as bearing on the question of the defendant's consciousness of guilt. With a proper explanation of all the circumstances, it may be safely left to the jury. The same is true as to a defendant's demeanor in the court room while undergoing a trial for crime. His demeanor, standing alone, and unexplained, might be a wholly untrustworthy source of information; but when taken in connection with all the circumstances developed upon such a trial, it affords a valuable element in passing upon the question of guilt or innocence.[2]

[5] Callahan *v.* United States, 240 Fed. 683, 153 C. C. A. 481 (9th Cir.).

[6] United States *v.* Craig, 4 Wash. C. C. 729, Fed. Cas. No. 14883.

[7] United States *v.* Chisholm, 153 Fed. 808, 813.

§ 341. [1] Perkins *v.* United States, 228 Fed. 408, 420, 142 C. C. A. 638 (4th Cir.).

[2] Waller *v.* United States, 179 Fed. 810, 812, 103 C. C. A. 302 (8th Cir.).

Circumstances showing the situation and relations of one accused of passing counterfeit bills with persons in whose possession similar bills had been found and his facilities for the commission of the offense have been held admissible for or against the defendant as part of the *res gestæ*, in the same way as proof of the defendant's business, his tools, his knowledge, or his training.[3] Evidence as to the defendant's knowledge of and expertness in financial schemes, and as to previous attacks made on the honesty of the scheme (to obtain subscription to bonds offering large profits) was held material as bearing on the question whether the defendant was himself deceived respecting it.[4] In a prosecution for using the mails to defraud it was held that the defendant might show circumstances in the course of the business tending to prove its real nature as carried on, so far as such circumstances are fairly contemporaneous with the proof offered to establish fraudulent device and execution, these being part of the *res gestæ*.[5] The builder of a vessel on which a crime was alleged to have taken place was properly permitted to testify as to its general character and situation.[6] Where the evidence against an accused was purely circumstantial, it was held proper for the Government to establish, as a circumstance in the case, the fact that another person who was present in the vicinity at the time of the killing, could not have committed the offense.[7] A post office clerk charged with stealing from the mails, who denied doing acts testified to by witnesses which were consistent only with guilt, should have been allowed to prove that immediately preceding the time in question it had been a common practice in that post office for mail to come in bad condition and with ends and edges so broken or worn out that solid substances might readily fall from them, as such fact would be a circumstance tending to prove his theory. Its value as evidence was for the jury.[8]

[3] United States *v.* Taranto, 74 Fed. 219.

[4] United States *v.* Durland, 65 Fed. 408.

[5] Hibbard *v.* United States, 172 Fed. 66, 70, 96 C. C. A. 554 (7th Cir.).

[6] Andersen *v.* United States, 170 U. S. 481, 42 L. ed. 1116, 18 S. C. 689.

[7] Bram *v.* United States, 168 U. S. 532, 568, 42 L. ed. 568, 18 S. C. 183.

[8] Chitwood *v.* United States, 153 Fed. 551, 82 C. C. A. 505 (8th Cir.).

§ 342. Letters and Other Documents.

Letters in answer to a circular letter to district managers of a company written three years before an indictment was found, stating that the policy outlined in the circular had been pursued in their districts, are properly admitted in evidence as part of the *res gestæ*.[1] Letters coming to the attention of the defendants before the time of the alleged offense reasonably capable of creating faith in the *bona fides* of the product traded in are admissible on the question whether the representations charged were made in good faith.[2] Papers inclosed in the same envelope with the writing set forth in the indictment as put into the mail are competent evidence as part of the *res gestæ*.[3] In a prosecution for altering a money order, the application on which it was issued is admissible as part of the *res gestæ*.[4] A letter written by a defendant in a prosecution for misusing the mails before he knew prosecution was contemplated, tending to show his good faith, was held admissible as *res gestæ*.[5] Proof of a conversation directly bearing upon a claimed agreement is not hearsay, but the best evidence of the arrangement.[6] In a conspiracy case correspondence of the defendant of a self serving character is not competent.[7]

§ 343. Statements of Third Person.

Statements of third persons are admissible where they are so closely connected with the crime as to be illustrative of the act in issue and so part of the *res gestæ*.[1] On the separate trial of one indicted jointly with others for murder, though not charged as co-conspirators, the acts, appearance and declarations of either,

§ 342. [1] Patterson *v.* United States, 222 Fed. 599, 649, 138 C. C. A. 123 (6th Cir.); Hibbard *v.* United States, 172 Fed. 66, 96 C. C. A. 554 (7th Cir.); Harrison *v.* United States, 200 Fed. 662, 674, 119 C. C. A. 78 (6th Cir.); Gould *v.* United States, 209 Fed. 730, 126 C. C. A. 454 (8th Cir.).

[2] Hair *v.* United States, 240 Fed. 333, 336, 153 C. C. A. 259 (7th Cir.).

[3] United States *v.* Noelke, 1 Fed. 426, 436.

[4] Dean *v.* United States, 246 Fed. 568, 575, 158 C. C. A. 538 (5th Cir.).

[5] Gould *v.* United States, 209 Fed. 730, 737, 126 C. C. A. 454 (8th Cir.) (reviewing the authorities).

[6] Sparks *v.* United States, 241 Fed. 777, 154 C. C. A. 479 (6th Cir.).

[7] Holsman *v.* United States, 248 Fed. 193, 160 C. C. A. 271 (9th Cir.).

§ 343. [1] Alexander *v.* United States, 138 U. S. 353, 34 L. ed. 954, 11 S. C. 350; Barnard *v.* United States, 162 Fed. 618, 89 C. C. A. 376 (9th Cir.).

if part of the *res gestæ*, are admissible, for the purpose of presenting the situation at the time of the alleged murder.[2] When two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the other.[3] While the act of one conspirator in the prosecution of the enterprise is, after proof of the conspiracy, evidence against all, his admissions in his narration of past events after the conspiracy has come to an end, either by success or failure, are inadmissible in evidence against his co-conspirators.[4]

CIRCUMSTANTIAL EVIDENCE

§ 344. Definition.

"Indirect" or "circumstantial" evidence is that which tends to establish the issue only by proof of facts sustaining by their consistency the hypothesis claimed and from which the jury may infer the fact. Direct and circumstantial evidence differ merely in their logical relations to the fact in issue. Evidence as to the existence of the fact is direct. Circumstantial evidence is composed of facts which raise a logical inference as to the existence of the fact in issue.[1] Circumstantial evidence, strictly speaking, consists of a number of disconnected and independent facts, which converge towards the fact in issue as a common center. These concurrent and coincident facts are arranged in combination by a mental process of reasoning and inference, enlightened by common observation, experience, and knowledge. Where presumptions arise from a number of connected and dependent facts, every fact essential to the series must be proved. Such evidence is like a chain, in which no link must be missing or broken which

[2] St. Clair *v.* United States, 154 U. S. 134, 38 L. ed. 936, 14 S. C. 1002.

[3] Wiborg *v.* United States, 163 U. S. 632, 41 L. ed. 289, 16 S. C. 1127, 1197; Fitzpatrick *v.* United States, 178 U. S. 304, 44 L. ed. 1078, 20 S. C. 944.

[4] Fain *v.* United States, 209 Fed. 525, 126 C. C. A. 347 (8th Cir.); Logan *v.* United States, 144 U. S. 263, 309, 36 L. ed. 429, 12 S. C. 617; Brown *v.* United States, 150 U. S. 93, 98, 37 L. ed. 1010, 14 S. C. 37; Lonabaugh *v.* United States, 179 Fed. 476, 481, 103 C. C. A. 56, 61 (8th Cir.).

§ 344. [1] United States *v.* Greene, 146 Fed. 803, 824.

destroys its continuity. Circumstantial evidence is, like a wire cable, composed of many small associated but independent wires. Wire cables are often used to sustain ponderous bridges over rivers. The strength of the cable depends upon the number of wires which are combined, but some of the wires may be broken, and yet the cable be sufficiently strong to uphold the structure. As no chain is stronger than its weakest link, a chain is less reliable when it has a great number of links, but a wire cable is strengthened by an increase in the number of its wires. This combination of attenuated wires may be stronger than a solid rod of iron of the same size which may have flaws affecting its strength. When circumstantial evidence consists of a number of independent circumstances, coming from several witnesses and different sources, each of which is consistent and tends to the same conclusion, the probability of the truth of the fact in issue is increased in proportion to the number of such circumstances.[2]

§ 345. Reception.

A wide latitude is allowed in the reception of circumstantial evidence.[1] But the recognized rule of evidence in the investigation of criminal cases dependent upon circumstantial evidence that a wide range of inquiry may be indulged in does not imply that mere suspicion is the equivalent of proof, or that mere hearsay testimony may be resorted to, or that unrelated incompetent incidents and circumstances may become admissible because of their number,[2] though circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.[3] Where a proposition is sought to be established by circumstantial evidence, the individual circumstances standing independently are immaterial and must necessarily be admitted piecemeal and, if the necessary connection

[2] United States *v.* Searcey, 26 Fed. 435, 437.

§ 345. [1] Richards *v.* United States, 175 Fed. 911, 926, 99 C. C. A. 401 (8th Cir.); *see also* United States *v.* Gibert, 2 Sumn. 19, Fed. Cas. No. 15204, and Hickory *v.* United States, 151 U. S. 303, 38 L. ed. 170, 14 S. C. 334.

[2] Sorenson *v.* United States, 168 Fed. 785, 94 C. C. A. 181 (8th Cir.).

[3] United States *v.* Isla de Cuba, 2 Cliff. 295, Fed. Cas. No. 15447.

which will make them material fails, then they have no value and under proper instructions will do no harm.[4]

§ 346. Identity.

Concordance in name alone is always some evidence of identity of person; and oddness of name, size of the district where the name exists, length of time, sameness in age, nationality, birthplace, sex, occupation, marks and similarity in features have been recognized in the various cases as circumstantial evidence of more or less weight tending to establish identity of person.[1]

§ 347. Corpus Delicti.

The *corpus delicti* may be established by circumstantial evidence.[1] Where there is no positive proof of the *corpus delicti*, but merely circumstantial evidence, the question of the accused's guilt may be submitted to the jury with the instruction that the circumstantial evidence must be such as to satisfy the jury beyond a reasonable doubt that the *corpus delicti* has been established.[2]

§ 348. Weight.

Circumstantial evidence only warrants a conviction provided it is such as to exclude every reasonable hypothesis but that of guilt of the offense, or, in other words, the facts proved must all be consistent with and point to his guilt only, and inconsistent with his innocence.[1] Whenever circumstantial evidence is relied upon to prove guilt, the circumstances must be proved, and not themselves presumed.[2] Note the qualification of "reasonable doubt of the existence of each fact necessary to be proved" as too emphatic as tending to destroy the rationale of circumstantial evidence.[3]

[4] McInerney *v.* United States, 143 Fed. 729, 739, 74 C. C. A. 655 (1st Cir.); United States *v.* Isla de Cuba, 2 Cliff. 295, Fed. Cas. No. 15447.

§ 346. [1] McInerney *v.* United States, 143 Fed. 729, 739, 74 C. C. A. 655 (1st Cir.).

§ 347. [1] Perovich *v.* United States, 205 U. S. 86, 51 L. ed. 722, 27 S. C. 456; Isaacs *v.* United States, 159 U. S. 487, 40 L. ed. 229, 16 S. C. 51; United States *v.* Searcey, 26 Fed. 435; St. Clair *v.* United States, 154 U. S. 134, 38 L. ed. 936, 14 S. C. 1002.

[2] Perovich *v.* United States, 205 U. S. 86, 51 L. ed. 722, 27 S. C. 456.

§ 348. [1] Vernon *v.* United States, 146 Fed. 121, 123, 76 C. C. A. 547 (8th Cir.).

[2] Vernon *v.* United States, 146 Fed. 121, 76 C. C. A. 547 (8th Cir.).

[3] Richards *v.* United States, 175 Fed. 911, 927, 99 C. C. A. 401 (8th Cir.).

§ 349. **Decoy Letters.**

It is not permissible to use decoy letters for the purpose of creating an offense, but they may be used in order to detect the criminal.[1] In Woo Wai *v.* United States,[2] it was distinctly adjudged that it is against public policy to sustain a conviction for crime where the party or parties are induced to commit it by officers of the Government who thereafter ensnare and apprehend them in such commission. There is something repugnant in the idea of the Government by art and contrivance, entrapping one of its citizens into the commission of crime in order to subject him to criminal prosecution, and such prosecutions have been felt by the Courts to be more or less objectionable in morals and in policy.[3] But decoy letters are permissible to trace the authorship or the identity of the sender of obscene matter through the mail and are admissible in evidence upon proper proof, and the sender thereof may be punished for using the mails for such purpose even though the obscene matter was sent in response to a decoy letter of a post office inspector.[4] In such a case the court said: "The law was actually violated by the defendant; he placed letters in the post office which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letters, was a government detective, in no manner detracts from his guilt." [5] A decoy is not a confederate, therefore his acts are not imputable to the accused as principal.[6]

§ 349. [1] United States *v.* Healy, 202 Fed. 349; United States *v.* Whittier, 5 Dill. 35, Fed. Cas. No. 16688; Goode *v.* United States, 159 U. S. 663, 40 L. ed. 297, 16 S. C. 136.

[2] 223 Fed. 412, 137 C. C. A. 604 (9th Cir.).

[3] United States *v.* Jones, 80 Fed. 513; United States *v.* Echols, 253 Fed. 862; Sam Yick *v.* United States, 240 Fed. 60, 153 C. C. A. 96 (9th Cir.).

[4] Price *v.* United States, 165 U. S. 311, 41 L. ed. 727, 17 S. C. 366; Shepard *v.* United States, 160 Fed. 584, 87 C. C. A. 486 (8th Cir.); Ackley *v.* United States, 200 Fed. 217, 118 C. C. A. 403 (8th Cir.); Grimm *v.* United States, 156 U. S. 604, 39 L. ed. 550, 15 S. C. 470; Andrews *v.* United States, 162 U. S. 420, 41 L. ed. 1023, 16 S. C. 798.

[5] Rosen *v.* United States, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434.

[6] Sprinkle *v.* United States, 141 Fed. 811, 73 C. C. A. 285 (4th Cir.).

§ 350. Alibi — Burden of Proof.

The doctrine has been adopted in some jurisdictions that a plea of alibi is an extrinsic defense and must be proved by the defendant by a preponderance of evidence. On the other hand, many cases lay down the rule that a plea of alibi is not an affirmative defense, requiring the defendant to establish it, but that time and place are essential ingredients of the crime, to be proved by the prosecution beyond a reasonable doubt. The latter appears to be the doctrine of the federal courts. It may be noted here that even in those jurisdictions where the burden of proof of alibi is held to be on the defendant, he is not required to prove the defense by a preponderance of evidence. The burden of proof that the defendant was present at the time and place alleged is on the prosecution, and never shifts. It was therefore held error to charge that the defense of alibi, to be entitled to consideration, must be such as to show that at the very time of commission of the offense charged the accused was at another place so far away and under such circumstances that he could not have participated in the commission of the offense, and that the burden of proof that the defendant was at another place must be sustained by a preponderance of the evidence. This instruction was not cured by a further instruction that if the jury had any reasonable doubt as to whether the defendant was at some other place when the crime was committed, they should give the defendant the benefit of that doubt.[1] It was held that an instruction that an alibi is a proper defense, but that it is more easy to build up and somewhat more difficult to controvert than some other defenses, was not erroneous.[2] The Government called a witness in rebuttal, who was examined as to the presence of the defendant at a particular place at a particular time to rebut testimony which had been offered by the defendant to prove the alibi on which he relied. This testimony was objected to on the ground that the proof was not proper rebuttal. It was held that it was rebuttal testimony.[3] The defense in its attempt to make out an alibi introduced testimony tending

§ 350. [1] Glover *v.* United States, 147 Fed. 426, 77 C. C. A. 450 (8th Cir.).

[2] Fielder *v.* United States, 227 Fed. 832, 142 C. C. A. 356 (8th Cir.).

[3] Goldsby *v.* United States, 160 U. S. 70, 74, 40 L. ed. 343, 16 S. C. 216.

to show that the defendant at a given time was many miles from the place of the murder, and that by the public road he could not have had time to reach this point and have been present at the killing. In order to prove that he could not have reached there by any other more direct route than the public road, one of his witnesses had testified that the country was covered with wire fences. It was held competent to show in rebuttal of this statement that the accused was in possession of a wire cutter, by which the jury could deduce that it was possible for him to travel across the country by cutting the fences. Of course the weight to be attached to the proof was a matter for the jury. The Court's charge in substance instructed the jury to consider all the evidence and all the circumstances of the case, and if a reasonable doubt existed to acquit. It was held that if the accused wished specific charges as to the weight in law to be attached to testimony introduced to establish an alibi, it was his privilege to request the court to give them. If no such request is made he cannot complain of the charge as misleading and tending to cause the jury to disregard the testimony.[4]

§ 351. Traces of Guilt, Etc.

A bank book showing deposits in excess of the defendant's salary from the Government was held not admissible against him under an indictment for extortion, where there was no necessary connection between the deposits and the specific charges against the accused.[1] In determining nationality, it has been held that marked and obvious characteristics, such as color, mode of dressing the hair, language and garb, are admissible;[2] but the value of such evidence in establishing nationality, or natural descent, has been doubted.[3] The post office stamp on an envelope is *prima facie* proof that the letter was mailed.[4] Evidence of the likeness of a child to its supposed father has been held not ad-

[4] Goldsby *v.* United States, 160 U. S. 70, 76, 40 L. ed. 343, 16 S. C. 216.

§ 351. [1] Williams *v.* United States, 168 U. S. 382, 396, 42 L. ed. 509, 18 S. C. 92.

[2] United States *v.* Hung Chang, 134 Fed. 19, 26, 67 C. C. A. 93 (6th Cir.).

[3] United States *v.* Louis Lee, 184 Fed. 651.

[4] United States *v.* Noelke, 1 Fed. 426.

missible in proceedings against him (under a state statute) for not supporting it.[5]

§ 352. **Flight of Accused — Raises No Presumption of Guilt.** The flight of the accused is competent evidence against him as having a tendency to establish his guilt.[1] So it has been held that the flight of the accused under an assumed name, coincident with the theft of letters traced to his possession unexplained, tends strongly to show guilt.[2] But, in Hickory *v.* United States,[3] it was held that while acts of concealment and flight by an accused are competent evidence to go to the jury as tending to establish guilt, yet they are not to be considered *as alone* conclusive; or as creating a legal presumption of guilt; that they are mere circumstances to be considered and weighed, in connection with other proof, with that caution and circumspection which their inconclusiveness, when standing alone, requires.[4] Hickory *v.* United States was followed in Alberty *v.* United States,[5] where it was said that it is especially misleading to charge the jury that, from the fact of absconding, they might infer the fact of guilt, and that flight is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is, in some sense, feeble or strong as the case may be, a confession; and it comes in with the other incidents, the *corpus delicti* being proved from which guilt may be circumstantially inferred.[6] The inference that may be drawn from an escape after arrest is strong or slight according to the facts surrounding the prisoner at the time.[7] The fact of flight, if shown, is not conclusive, nor does it raise a legal presumption of guilt, but is to be given the weight to which the jury think it entitled, under the circumstances shown.[8] In this connection the jury may take into consideration the defend-

[5] United States *v.* Collins, 1 Cr. C. C. 592, Fed. Cas. No. 14835.

§ 352. [1] Allen *v.* United States, 164 U. S. 492, 499, 41 L. ed. 528, 17 S. C. 154.

[2] United States *v.* Jackson, 29 Fed. 503.

[3] 160 U. S. 408, 416, 40 L. ed. 474, 477, 16 S. C. 327.

[4] *See also* to the same effect United States *v.* Greene, 146 Fed. 803.

[5] 162 U. S. 499, 510, 40 L. ed. 1051, 16 S. C. 864.

[6] Starr *v.* United States, 164 U. S. 627, 41 L. ed. 577, 17 S. C. 223.

[7] Bird *v.* United States, 187 U. S. 118, 47 L. ed. 100, 23 S. C. 42.

[8] United States *v.* Greene, 146 Fed. 803.

ant's age, intelligence and financial ability to make a defense.[9] In an early case a prisoner, arrested for alleged larceny, offered the officer a watch and a deed of his house if he would suffer him to escape. This was held evidence of guilt.[10] A "fleeing from justice" within the meaning of the two year limitation statute of Congress, of April 30, 1790, containing a proviso that it shall not extend to any person fleeing from justice, was held to mean to leave one's home or residence or known place of abode, with intent to avoid detection or punishment for some public offense against the United States. If the defendant left his home in Kansas and went to another State solely to avoid the criminal justice of the *State* of Kansas, and not to avoid the criminal justice of the United States — that would not deprive him of the two-years limitation.[11] Under the general issue the prosecutor might introduce evidence to bring the defendant within this proviso.[12] If the government can rebut the two years statute of limitations by showing that the defendant fled from justice at any time during the two years, the defendant apparently may rebut this by evidence that he appeared publicly and notoriously, so that by reasonable diligence he might have been arrested.[13]

§ 353. **Threats of Deceased.**

Previous threats of the deceased that he would kill the accused, communicated to the accused, where there were similar demonstrations immediately prior to the shooting, are admissible for the accused.[1] On a trial for homicide committed in an encounter, where the question as to which of the parties commenced the attack is in doubt, it is competent to prove threats of violence against the defendant by the deceased, though not brought to the defendant's knowledge, for the evidence, though not relevant to show the *quo animus* of the defendant, would be relevant, under such circumstances, to show that at the time of the meeting the deceased

[9] United States *v.* Greene, 146 Fed. 803.

[10] United States *v.* Barlow, 1 Cr. C. C. 94, Fed. Cas. No. 14521.

[11] United States *v.* O'Brian, 3 Dill. D. C. 381, Fed. Cas. No. 15908.

[12] United States *v.* Cook, 17 Wall. 168, 21 L. ed. 538; United States *v.* Greene, 146 Fed. 803.

[13] United States *v.* White, 5 Cr. C. C. 38, 60, Fed. Cas. No. 16675.

§ **353**. [1] Wallace *v.* United States, 162 U. S. 466, 477, 40 L. ed. 1039, 16 S. C. 859.

was seeking the defendant's life.[2] Threats by the deceased, recent and communicated to the accused, were held admissible in evidence in a murder case as relevant to the question whether the latter had reasonable cause to apprehend an attack, fatal to life or fraught with great bodily injury, and hence was justified in acting on a hostile demonstration and one of much less pronounced character than if such threats had not preceded it.[3]

§ 354. **Threats of Accused.**

In all cases where the court is warranted in submitting the law on facts showing that a difficulty with his adversary was provoked on the part of the accused, if there is evidence tending to show that the accused, after provoking his adversary, abandoned his purpose and withdrew from prosecuting the same, it is the duty of the court to instruct the jury as to the effect of such abandonment of purpose, called for by such evidence. Refusal to do so when requested is reversible error.[1] Prior conduct of one accused of murder to show that he had feelings of enmity towards the deceased was held wrongly admitted because the time of the incident testified to, more than a month before the homicide, was too remote, and because the incident itself did not tend to prove any feeling of enmity on the accused's part to the deceased, such as to warrant the jury in inferring that the subsequent homicide was malicious and premeditated.[2]

§ 355. **Threats of Third Person as Res Gestæ in Favor of Defendant.**

It being shown in a trial on an indictment for murder, that on the day of the disappearance of the murdered man and the defendant's wife, the defendant her husband and his relatives were seen together armed with pistols, it was held that the declarations of the defendant at that time as to his purpose were part of the

[2] Wiggins *v.* People, 93 U. S. 465, 23 L. ed. 941.

[3] Allison *v.* United States, 160 U. S. 203, 215, 40 L. ed. 395, 16 S. C. 252.

§ 354. [1] Stevenson *v.* United States, 86 Fed. 106, 112, 29 C. C. A. 600 (5th Cir.); Rowe *v.* United States, 164 U. S. 546, 41 L. ed. 547, 17 S. C. 172.

[2] Bird *v.* United States, 180 U. S. 356, 360, 45 L. ed. 570, 21 S. C. 403.

res gestæ,[1] but the Supreme Court of the United States refused to pass on the question whether it was error to rule out such declarations.

EVIDENCE OF OTHER OFFENSES

§ 356. General Rule.

The general rule is that evidence tending to show the commission by the accused of another independent crime, even of the same kind as that for which he is on trial, is inadmissible.[1] Evidence that at the time of the alleged offense the defendant was engaged in committing a totally different offense, is inadmissible.[2] It is easy to see how such evidence may prejudice the jury against the defendant — may, in fact, lead to his conviction of the offense with which he stands charged, because the jury may believe that he is at least guilty of the other offense. Especially in a case where the evidence is conflicting, the defendant should not have the burden of defending against a separate charge, introduced in evidence, for which he is not indicted, and which has no tendency to legally prove the specific charge for which he is on trial. In brief, the law does not allow one crime to be proved to raise a probability that another has been committed.[3] When a defendant takes the stand he assumes a dual capacity; that of a defendant and that of a witness. As a witness it is sometimes competent to interrogate him as to matters collateral to the issue for the purpose of testing his credibility, but when that is done the government is bound by his answers and is not permitted to call witnesses in rebuttal tending to show that the defendant was guilty of crimes other than those charged in the indictment.[4]

§ 355. [1] Alexander *v.* United States, 138 U. S. 353, 356, 34 L. ed. 954, 11 S. C. 350.

§ 356. [1] Ran *v.* United States, 260 Fed. 131, — C. C. A. — (— Cir.); Fish *v.* United States, 215 Fed. 544, 132 C. C. A. 56 (1st Cir.); Boyd *v.* United States, 142 U. S. 454, 35 L. ed. 1077, 12 S. C. 292; Hall *v.* United States, 235 Fed. 869, 149 C. C. A. 181 (9th Cir.); Dyar *v.* United States, 186 Fed. 614, 621, 108 C. C. A. 478 (5th Cir.).

[2] Taliaferro *v.* United States, 213 Fed. 25, 129 C. C. A. 611 (5th Cir.).

[3] Taliaferro *v.* United States, 213 Fed. 25, 129 C. C. A. 611 (5th Cir.).

[4] Ran *v.* United States, 260 Fed. 131, — C. C. A. — (— Cir.); *Citing*, People *v.* De Carnio, 179 N. Y. 130, 71 N. E. 736; People *v.* Molineaux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; People *v.* Greenwall, 108 N. Y. 296, 15 N. E. 404, 2 Am. St. Rep. 415.

§ 357. Exceptions To Rule.

There are, of course, many instances in which evidence of the commission of other offenses is necessarily admissible, as where the commission of one offense is a circumstance tending to show the commission of the offense for which the defendant is on trial. The fact that a defendant charged with homicide stole an ax or a gun with which the killing was done, the stealing of the weapon, though a distinct offense, would necessarily be in the very nature of the case competent evidence against him on his trial for homicide.[1] And if evidence is competent and relevant as tending to establish guilt of the crime charged, it is not incompetent because it may also tend to show the defendant guilty of another offense.[2] None of these exceptions, when rightly applied, go to the extent of sanctioning the idea that a defendant's propensity to commit crime, or to commit crimes of the same sort as that charged, can be put in evidence to prove him guilty of the particular offense; and to come within the exceptions there must be some other real connection between the extraneous crime and the crime charged.[3] The transaction must always be similar or substantially so.[4] Hence it is admissible, to show the intent of the defendant under an indictment for uttering a raised silver certificate, that he had previously attempted to pass a similar bill.[5]

§ 358. Motive.

Where the intent of the party is matter in issue, it is sometimes in the sound discretion of the court allowable in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.[1]

§ 357. [1] Dyar *v.* United States, 186 Fed. 614, 621, 108 C. C. A. 478 (5th Cir.).

[2] Tucker *v.* United States, 224 Fed. 833, 840, 140 C. C. A. 279 (6th Cir.); Jones *v.* United States, 179 Fed. 584, 103 C. C. A. 142 (9th Cir.); Moore *v.* United States, 150 U. S. 57, 37 L. ed. 996, 14 S. C. 26; Lueders *v.* United States, 210 Fed. 419.

[3] Fish *v.* United States, 215 Fed. 544, 132 C. C. A. 56 (1st Cir.); Marshall *v.* United States, 197 Fed. 511, 117 C. C. A. 65 (2d Cir.); Hall *v.* United States, 235 Fed. 869, 149 C. C. A. 181 (9th Cir.).

[4] Erber *v.* United States, 234 Fed. 221, 228, 148 C. C. A. 123 (2d Cir.).

[5] Schultz *v.* United States, 200 Fed. 234, 118 C. C. A. 420 (8th Cir.).

§ 358. [1] Wolfson *v.* United States, 101 Fed. 430, 41 C. C. A. 422 (5th

And where such evidence is relevant for this purpose, and has a direct bearing on intent or motive, its admissibility is not affected by the fact that it may tend to prove other offenses.[2] In cases of fraud evidence of kindred offenses not charged may be admitted, if tending to show fraudulent intent.[3] It is particularly applicable to charges of conspiracy to defraud.[4] The court should most

Cir.); Sheridan *v.* United States, 236 Fed. 305, 313, 149 C. C. A. 257 (9th Cir.); Wood *v.* United States, 16 Pet. (U. S.) 342, 10 L. ed. 987; Breese *v.* United States, 106 Fed. 680, 45 C. C. A. 535 (4th Cir.); Breese *v.* United States, 203 Fed. 824, 122 C. C. A. 142 (4th Cir.); Brown *v.* United States, 142 Fed. 1, 73 C. C. A. 187 (7th Cir.); Prettyman *v.* United States, 180 Fed. 30, 103 C. C. A. 384 (6th Cir.); Kinser *v.* United States, 231 Fed. 856, 860, 146 C. C. A. 52 (8th Cir.); Withaup *v.* United States, 127 Fed. 530, 62 C. C. A. 328 (8th Cir.); Olson *v.* United States, 133 Fed. 849, 67 C. C. A. 21 (8th Cir.); Thomas *v.* United States, 156 Fed. 897, 17 L. R. A. (N. S.) 720, 84 C. C. A. 477 (8th Cir.); Schultz *v.* United States, 200 Fed. 234, 118 C. C. A. 420 (8th Cir.); Linn *v.* United States, 234 Fed. 543, 148 C. C. A. 309 (7th Cir.); Packer *v.* United States, 106 Fed. 906, 46 C. C. A. 35 (2d Cir.); Rumble *v.* United States, 143 Fed. 772, 75 C. C. A. 30 (9th Cir.); Walsh *v.* United States, 174 Fed. 615, 98 C. C. A. 465 (7th Cir.); Warden *v.* United States, 204 Fed. 1, 5, 122 C. C. A. 315 (6th Cir.); Kettenbach *v.* United States, 202 Fed. 377, 120 C. C. A. 505 (9th Cir.); Jones *v.* United States, 162 Fed. 417, 89 C. C. A. 303 (9th Cir.), *Affirmed* 179 Fed. 584, 103 C. C. A. 142 (9th Cir.); Chitwood *v.* United States, 153 Fed. 551, 82 C. C. A. 505 (8th Cir.); Farmer *v.* United States, 223 Fed. 903, 139 C. C. A. 341 (2d Cir.); Stern *v.* United States, 223 Fed. 762, 139 C. C. A. 292 (2d Cir.); Samuels *v.* United States, 232 Fed. 536, 542, 146 C. C. A. 494 (8th Cir.); Colt *v.* United States, 190 Fed. 305, 111 C. C. A. 205 (8th Cir.); Trent *v.* United States, 228 Fed. 648, 650, 143 C. C. A. 170 (8th Cir.); Day *v.* United States, 229 Fed. 534, 143 C. C. A. 602 (4th Cir.); Ledbetter *v.* United States, 170 U. S. 606, 42 L. ed. 1162, 18 S. C. 774; United States *v.* Kline, 201 Fed. 954, 959; United States *v.* Kenney, 90 Fed. 257; United States *v.* Watson, 35 Fed. 358.

[2] Edwards *v.* United States, 249 Fed. 686, 690, 161 C. C. A. 596 (6th Cir.); Shea *v.* United States, 236 Fed. 97, 102, 149 C. C. A. 307 (6th Cir.), reviewing the cases; Schultz *v.* United States, 200 Fed. 234, 118 C. C. A. 420 (8th Cir.).

[3] Breese *v.* United States, 203 Fed. 824, 829, 122 C. C. A. 142 (4th Cir.); Wood *v.* United States, 16 Pet. (U. S.) 342, 360, 10 L. ed. 987; Castle *v.* Bullard, 23 How. (U. S.) 172, 187, 16 L. ed. 424; Butler *v.* Watkins, 13 Wall. (U. S.) 456, 464, 20 L. ed. 629; Moore *v.* United States, 150 U. S. 57, 61, 37 L. ed. 996, 14 S. C. 26; Allis *v.* United States, 155 U. S. 117, 119, 39 L. ed. 91, 15 S. C. 36; Bacon *v.* United States, 97 Fed. 35, 42, 38 C. C. A. 37 (8th Cir.); Dorsey *v.* United States, 101 Fed. 746, 756, 41 C. C. A. 652 (8th Cir.).

[4] Shea *v.* United States, 236 Fed. 97, 102, 103, 149 C. C. A. 307 (6th Cir.).

carefully guard the interest of the defendant against any possible misconception by the jury touching the effect of such evidence. Such evidence must have some relevancy to the offense charged,[6] and a direct bearing on the intent.[7]

§ 359. **The Marshall Case.**

On the trial of an indictment for using the mails to defraud in conducting the business of a society named in the indictment and alleged to be a fraudulent organization, the United States Circuit Court of Appeals for the Second Circuit held that it was error to admit testimony showing that the defendant was also at the same time conducting another society of precisely the same kind by identical methods, which society was not mentioned in the indictment. The court said: "It is urged that the testimony was *admissible upon the question of intent; but it is difficult to perceive how the repetition of identical facts can have any legitimate bearing upon this question.* If the evidence as to the Standard Society showed a fraudulent intent, the Government's case in that regard was established; nothing more was needed. If, on the other hand, it failed to show fraudulent intent, how was the omission supplied by duplicating the testimony under a different name? A lawful act does not become unlawful because it is repeated. If an act be shown to be illegal, it is enough. The prosecutor may safely rest on such proof; it does not add to its illegal character to show that it was repeated. If the contention of the Government be correct, the acts of the defendant in relation to the Banker's Company constitute an offense under section 5480 and he had a right to rely upon the rule that he would not be called upon to answer accusations not found in the indictment. It is impossible to say how much of this evidence may have prejudiced

[5] Williamson *v.* United States, 207 U. S. 425, 52 L. ed. 278, 28 S. C. 163; Mitchell *v.* United States, 229 Fed. 357, 361, 143 C. C. A. 477 (2d Cir.); Lueders *v.* United States, 210 Fed. 419, 127 C. C. A. 151 (9th Cir.); Thompson *v.* United States, 144 Fed. 14, 19, 75 C. C. A. 172.

[6] Lueders *v.* United States, 210 Fed. 419, 127 C. C. A. 151 (9th Cir.); Toothman *v.* United States, 203 Fed. 218, 121 C. C. A. 424 (4th Cir.); Prettyman *v.* United States, 180 Fed. 30, 103 C. C. A. 384 (6th Cir.); Scheinberg *v.* United States, 213 Fed. 757, 130 C. C. A. 271 (2d Cir.).

[7] Edwards *v.* United States, 249 Fed. 686, 690, 161 C. C. A. 596 (6th Cir.); Hall *v.* United States, 235 Fed. 869, 149 C. C. A. 181.

the jury." [1] The reasoning of the court in the Marshall case, *supra*, was materially weakened in subsequent cases. Thus, in another case [2] the same court held that where evidence as to other offenses is closely interwoven with the case on trial, it is admissible. It also held that the Marshall case was *sui generis*, and did not indicate that the general rule as to evidence showing intent was to be abrogated.[3] Evidence of other offenses committed by the accused having no connection with or relation to that for which he is upon trial is not, of course, ordinarily admissible. But, when the offense charged is one that involves the fraudulent intent or motive of the accused, it is permissible in criminal as well as in civil cases to introduce evidence of other acts and transactions of the party upon trial of a kindred nature to show his intent or motive in the particular act directly under investigation, even though it may show the commission of other offenses than that for which he is being tried. Indeed, in no other way, in many cases, could the fraudulent intent or motive of the accused be established, for the single act under investigation might not alone be decisive either way; but when that act is considered in connection with other transactions of a like or similar character occurring at or near the same time, which also involve the intent or motive of the party, the intent and motive in doing the act under investigation may thus be made to appear with almost conclusive certainty.[4]

§ 360. **Limit to Admissibility of Proof of Other Offenses.**

The similar offense sought to be proved must raise a logical inference that the accused intended to commit a similar offense.

§ 359. [1] Marshall *v.* United States, 197 Fed. 511, 117 C. C. A. 65 (2d Cir.).

[2] Parker *v.* United States, 203 Fed. 950, 952, 122 C. C. A. 252 (2d Cir.).

[3] Farmer *v.* United States, 223 Fed. 903, 911, 139 C. C. A. 341 (2d Cir.).

[4] Wood *v.* United States, 16 Pet. (U. S.) 342, 359, 10 L. ed. 987; Moore *v.* United States, 150 U. S. 57, 60, 61, 37 L. ed. 996, 14 S. C. 26; Williamson *v.* United States, 207 U. S. 425, 451, 52 L. ed. 278, 28 S. C. 163; Thomas *v.* United States, 156 Fed. 897, 911, 84 C. C. A. 477 (8th Cir.), 17 L. R. A. (N. S.) 720; Bryan *v.* United States, 133 Fed. 495, 500, 66 C. C. A. 369 (5th Cir.); Olson *v.* United States, 133 Fed. 849, 854, 67 C. C. A. 21 (8th Cir.); Commonwealth *v.* Jackson, 132 Mass. 16; People *v.* Harris, 136 N. Y. 423, 33 N. E. 65, 74; Colt *v.* United States, 190 Fed. 305, 307, 111 C. C. A. 205 (8th Cir.).

And it is not a logical inference to say that testimony of an assault upon a child nearly three years previously shows that the defendant had a design or intent to make an assault three years later on another child. This is proof of a collateral matter, tending to produce the belief that the defendant is a person of depraved moral character.[1] Transactions of like general nature occurring at about the same time that the transactions involved in the case on trial occurred have been admitted to disclose intent.[2] In cases involving fraud, or the intent with which an accused does an act, collateral facts and circumstances, and his other acts of a similar character, both prior and subsequent, not too remote in time, are admissible in evidence.[3] No limit as to time is placed upon the power of the court to admit evidence of a series of prior similar transactions committed by the accused in the ordinary course of his business. The period of time is largely within the discretion of the trial court.[4] They must not, however, be too remote.[5] That such evidence also had a bearing upon the defense of good character does not affect its admissibility.[6] The admission of evidence of other transactions prior to the period of limitation, which has a bearing on what occurred subsequently, has been held not to be error where it has no tendency to show the commission of any offense prior to that charged.[7] On the trial of an indictment under Section 300 of the Penal Code, for setting fire to a yacht in order to prejudice the underwriter of the insurance

§ 360. [1] Hall *v.* United States, 235 Fed. 869, 871, 149 C. C. A. 181 (9th Cir.).

[2] Hoss *v.* United States, 232 Fed. 328, 336, 146 C. C. A. 376 (8th Cir.); Bettman *v.* United States, 224 Fed. 819, 830, 140 C. C. A. 265 (6th Cir.).

[3] Moffatt *v.* United States, 232 Fed. 522, 533, 146 C. C. A. 480 (8th Cir.); Allis *v.* United States, 155 U. S. 117, 39 L. ed. 91, 15 S. C. 36.

[4] Schultz *v.* United States, 200 Fed. 234, 118 C. C. A. 420 (8th Cir.); Kettenbach *v.* United States, 202 Fed. 377, 384, 120 C. C. A. 505 (9th Cir.); Spurr *v.* United States, 87 Fed. 701, 31 C. C. A. 202 (6th Cir.); Walsh *v.* United States, 174 Fed. 615, 98 C. C. A. 461 (7th Cir.); Williamson *v.* United States, 207 U. S. 425, 52 L. ed. 278, 28 S. C. 163.

[5] Bird *v.* United States, 180 U. S. 356, 45 L. ed. 570, 21 S. C. 403.

[6] Huff *v.* United States, 228 Fed. 892, 143 C. C. A. 290 (5th Cir.); Van Gesner *v.* United States, 153 Fed. 46, 82 C. C. A. 180 (9th Cir.); Sapir *v.* United States, 174 Fed. 219, 98 C. C. A. 227 (2d Cir.); Stern *v.* United States, 223 Fed. 762, 139 C. C. A. 292 (2d Cir.); Farmer *v.* United States, 223 Fed. 903, 911, 139 C. C. A. 341 (2d Cir.).

[7] United States *v.* Hongendobler, 218 Fed. 187.

policy, it was held to be reversible error to admit evidence of other fires to yachts or automobiles previously owned by the defendant, on which he collected insurance, where the testimony tended to show that the fire in the case at bar was accidental.[8] It is reversible error to compel a defendant on cross-examination to testify as to whether his partner was not under indictment on the same charge.[9]

COMPETENCY OF WITNESSES

§ 361. **Conviction of Crime.**

The disposition of courts and legislatures to remove disabilities from witnesses has led to the admission of the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case. Especially as applied to the competency of witnesses convicted of crime, the former common law rule disqualifying such witnesses will no longer be followed, but the conviction will be given due consideration in determining the credibility and weight of their testimony.[1] Proof of the commission of a crime discredits a witness, but it does not absolutely exclude him from the witness stand.[2] It has been held that a person convicted of forgery in the State court while a minor and sentenced to the reformatory for indeterminate sentence is a competent witness.[3] A conviction of an infamous crime in a State court rendering the person incompetent to testify in the State court does not render him incompetent to testify in the Federal courts, any more than it would in the courts of a foreign jurisdiction, for the Federal courts, while following the State laws, do not give effect to a conviction by a State court.[4] In any case, in the absence of any statute, the record of the conviction, or an exemplified copy thereof, must be produced in order to disqualify

[8] Fish *v.* United States, 215 Fed. 544, 132 C. C. A. 56 (1st Cir.).

[9] Tingle *v.* United States, 87 Fed. 320, 30 C. C. A. 666 (5th Cir.).

§ 361. [1] Rosen *v.* United States, 245 U. S. 467, 62 L. ed. 406, 38 S. C. 148; Baltimore & Ohio R. R. Co. *v.* Rambo, 59 Fed. 75, 8 C. C. A. 6 (6th Cir.).

[2] Rosen *v.* United States, 237 Fed. 810, 151 C. C. A. 52 (2d Cir.); Pakas *v.* United States, 240 Fed. 350, 153 C. C. A. 276 (2d Cir.).

[3] Rosen *v.* United States, 237 Fed. 810, 151 C. C. A. 52 (2d Cir.).

[4] Pakas *v.* United States, 240 Fed. 350, 355, 153 C. C. A. 276 (2d Cir.), *Following* Brown *v.* United States, 233 Fed. 353, 147 C. C. A. 289 (6th Cir.).

a witness by establishing incompetency by reason of his prior conviction of a felony.[5] The effect of a full and complete pardon is to remove penalties and disabilities and restore the witness to his full rights.[6] A telegram "pardoning a witness" convicted of felony was held a satisfactory showing of pardon so as to enable the witness to testify.[7] A pardon to an individual must be proved. A general proclamation of amnesty will be judicially noticed.[8]

§ 362. Codefendants.

Codefendants who have pleaded guilty are competent to testify for the Government against their codefendants in the indictment.[1] When two persons are jointly indicted for crime, *and a severance is ordered*, one of the accused, whose case is undisposed of, may be called and examined as a witness on behalf of the Government against his codefendant.[2]

§ 363. Husband and Wife.

At common law a wife was not a competent witness for or against her husband on grounds of public policy,[1] and under the common law the wife of one of several defendants on trial at the same time could not be called as a witness for or against any of them.[2] The interstate transportation of a married woman by her husband in violation of Act June 25, 1910, c. 395, is such a personal wrong as

[5] Bise *v.* United States, 144 Fed. 374, 74 C. C. A. 1 (8th Cir.); Glover *v.* United States, 147 Fed. 426, 77 C. C. A. 450 (8th Cir.); United States *v.* Woods, 4 Cr. C. C. 484, Fed. Cas. No. 16760; United States *v.* Biebusch, 1 Fed. 213.

[6] Thompson *v.* United States, 202 Fed. 401, 407, 120 C. C. A. 575 (9th Cir.); Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Boyd *v.* United States, 142 U. S. 450, 35 L. ed. 1076, 12 S. C. 392; Ex parte Wells, 18 How. (U. S.) 307, 15 L. ed. 421.

[7] Pablo *v.* United States, 242 Fed. 905, 155 C. C. A. 493 (9th Cir.).

[8] United States *v.* Wilson, 7 Pet. (U. S.) 150, 8 L. ed. 640; United States *v.* Hall, 53 Fed. 352.

§ 362. [1] Ryan *v.* United States, 216 Fed. 13, 39, 132 C. C. A. 257 (7th Cir.); Benson *v.* United States, 146 U. S. 325, 329, 333, 36 L. ed. 991, 13 S. C. 60.

[2] Benson *v.* United States, 146 U. S. 325, 36 L. ed. 991, 13 S. C. 60. *Quære:* Can he so testify when no severance has been ordered? The Ryan Case, *supra*, seems to hold so.

§ 363. [1] United States *v.* Gwynne, 209 Fed. 993.

[2] Talbott *v.* United States, 208 Fed. 144, 125 C. C. A. 360 (5th Cir.); Bassett *v.* United States, 137 U. S. 496, 34 L. ed. 762, 11 S. C. 165; Reg *v.* Thompson, 12 Cox, Cr. C. 202.

authorizes the wife to testify against her husband.[3] In cases where the personal rights of either spouse are concerned the exceptions to the husband's or wife's privilege should be benevolently regarded, and the law permits the husband or wife to testify in protection or in vindication of his or her right to be secured in his or her person against threat or assault made by one against the other.[4] The question in such case appears to be whether the offense is not merely a crime "against the marital relations" but is also a crime "against the wife."[5] The exception to the common law rule that a wife is not a competent witness for or against her husband, does not include an injury committed upon the person of the woman prior to her marriage.[6] A bigamous or plural wife may testify against the bigamous husband.[7] This rule is also regulated by statute, which is as follows: "That in any proceeding or examination before a grand jury, a judge, justice, or a United States commissioner, or a court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the person accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution without the consent of the husband or wife, as the case may be; and such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation deemed confidential at common law."[8] Section 2 of the same Act provides: "That in any prosecution for bigamy or unlawful cohabitation, under any statute of the United States,

[3] United States *v.* Bozeman, 236 Fed. 432; Pappas *v.* United States, 241 Fed. 665, 154 C. C. A. 423 (9th Cir.); Cohen *v.* United States, 214 Fed. 23, 130 C. C. A. 417 (9th Cir.); Denning *v.* United States, 247 Fed. 463, 159 C. C. A. 517 (5th Cir.); United States *v.* Rispoli, 189 Fed. 271. But see *Contra*, Johnson *v.* United States, 221 Fed. 250, 137 C. C. A. 106 (8th Cir.), and also United States *v.* Gwynne, 209 Fed. 993, where the offense was committed before marriage.

[4] United States *v.* Rispoli, 189 Fed. 271.

[5] Denning *v.* United States, 247 Fed. 463, 465, 159 C. C. A. 517 (5th Cir.).

[6] United States *v.* Gwynne, 209 Fed. 993.

[7] Miles *v.* United States, 103 U. S. 304, 26 L. ed. 481.

[8] Act of May 3, 1887, c. 397; § 1, 24 Stat. L. 635.

whether before a United States commissioner, justice, judge, a grand jury, or any court, an attachment for any witness may be issued by the court, judge or commissioner, without a previous subpœna, compelling the immediate attendance of such witness, when it shall appear by oath or affirmation, to the commissioner, justice, judge or court, as the case may be, that there is reasonable ground to believe that such witness will unlawfully fail to obey a subpœna issued and served in the usual course in such cases; and in such case the usual witness fee shall be paid to such witness so attached: *Provided*, that the person so attached may at any time secure his or her discharge from custody by executing a recognizance with sufficient surety, conditioned for the appearance of such person at the proper time, as a witness in the cause or proceeding wherein the attachment may be issued." [9] It was recently held [10] — one Judge dissenting — that in a criminal prosecution for violating the liquor laws of the United States, the husband was not a competent witness on behalf of the wife. The common law rule is that neither spouse is competent to testify for or against the other.[11]

§ 364. Religious Belief, Interest, Etc.

Any religious belief, whatever it may be, which recognizes the usual form of oath administered, recognizing a divine punishment for falsehood, is sufficient to qualify, but a witness who does not believe in divine punishment for a false oath is, under the common law, incompetent to testify.[1] A witness whose religious sentiments are objected to will be permitted to explain them.[2] Evidence showing interest in accused by a witness is admitted.[3]

IMPEACHING AND SUSTAINING WITNESSES

§ 365. Impeachment Testimony In General — Reward.

The rules as to the impeachment and sustaining of witnesses are the same in civil and criminal cases. It is competent to ask

[9] Act of May 3, 1887, c. 397, § 2, 24 Stat. L. 635.

[10] Adams *v.* United States, 259 Fed. 214 (C. C. A. 8th Cir.).

[11] State *v.* Vaughan, 136 Mo. App. 645, 118 S. W. 1186.

§ 364. [1] United States *v.* Miller, 236 Fed. 798.

[2] United States *v.* White, 5 Cr. C. C. 38, Fed. Cas. No. 16675.

[3] Murray *v.* United States, 247 Fed. 874, 160 C. C. A. 96 (4th Cir.).

a witness for the prosecution whether he is to receive a reward in case the defendant should be convicted, or to prove that fact by any competent evidence. But it is not competent to show that he has made a statement to another that he is to have a reward, when he himself has not been interrogated as to what he said to such person, unless this is done for the purpose of impeachment.[1]

§ 366. By Former Conviction.

It is competent for the purpose of discrediting a witness to show that he has been convicted of a crime. The general rule is that the crime must rise to the dignity of a felony or petit larceny. Whatever may be the limit in this respect, nothing short of a conviction of a crime is admissible for the purpose of impeachment. A mere accusation or indictment will not be admitted, for the reason that innocent men are often arrested charged with a criminal offense. The proper evidence of a conviction of crime is the record thereof.[1]

§ 367. Bad Character of Witness.

Evidence will not be admitted that a witness is a common prostitute, to discredit her testimony. The question must be confined to her general reputation for veracity, and whether from his knowledge of that general reputation the impeaching witness would believe her on oath.[1]

§ 368. By Indictment.

In a prosecution for one crime, evidence that the accused was indicted for another distinct offense is inadmissible on the question of his credibility as a witness. It is not uncommon for entirely innocent persons to be indicted, and this raises no presumption of guilt.[1]

§ 369. The Impeaching Question.

In United States *v.* White,[1] the Court said that the only question as to the character of the witness proper to be asked is: "Are

§ 365. [1] Taylor *v.* United States, 89 Fed. 954, 32 C. C. A. 449 (9th Cir.).

§ 366. [1] Baltimore & Ohio R. R. Co. *v.* Rambo, 59 Fed. 75, 80, 8 C. C. A. 6 (6th Cir.); Glover *v.* United States, 147 Fed. 426, 429, 77 C. C. A. 450 (8th Cir.).

§ 367. [1] United States *v.* Masters, 4 Cr. C. C. 479, Fed. Cas. No. 15739.

§ 368. [1] Coyne *v.* United States, 246 Fed. 120, 158 C. C. A. 346 (5th Cir.).

§ 369. [1] 5 Cr. C. C. 38, 42, Fed. Cas. No. 16675.

you acquainted with the general reputation of the witness as to veracity, and from your knowledge of that general reputation would you believe him upon his oath?" And it refused to permit evidence to be given of the general bad character of the witness. A witness may be impeached by evidence of inconsistent statements.[2] What is proper impeaching evidence is ordinarily within the sound discretion of the trial judge,[3] who also determines the sufficiency of the foundation for impeachment.[4] Contradiction of testimony collateral to the issue on trial, introduced for impeachment, is not ordinarily permissible.[5]

§ 370. Collateral Issues.

So, where the prosecution questions the defendant as to a wholly collateral charge against him, for impeachment purposes, it is bound by his answer that the case had been quashed.[1] Impeaching witnesses may be sustained in the same way that their impeachment is attempted. Evidence as to good character is excluded until the character has been brought into question.[2] Impeaching testimony must have reference to some matter which is relevant and material to the issue on trial.[3] A witness in a criminal case cannot be impeached as to a collateral matter and as to what he said in reference to such collateral matter to third parties.[4]

[2] Pappas *v.* United States, 241 Fed. 665, 154 C. C. A. 423 (9th Cir.).

[3] Pablo *v.* United States, 242 Fed. 905, 155 C. C. A. 493 (9th Cir.).

[4] The Charles Morgan, 115 U. S. 69, 29 L. ed. 316, 5 S. C. 1172.

[5] Bullard *v.* United States, 245 Fed. 837, 158 C. C. A. 177 (4th Cir.); United States *v.* White, 5 Cr. C. C. 38, Fed. Cas. No. 16675; United States *v.* Holmes, 1 Cliff. 98, Fed. Cas. No. 15382.

§ 370. [1] Bullard *v.* United States, 245 Fed. 837, 158 C. C. A. 177 (4th Cir.).

[2] Woey Ho *v.* United States, 109 Fed. 888, 48 C. C. A. 705; Spurr *v.* United States, 59 U. S. App. 633, 87 Fed. 701, 31 C. C. A. 202.

[3] Lueders *v.* United States, 210 Fed. 419, 424, 127 C. C. A. 151 (9th Cir.); Filasto *v.* United States, 211 Fed. 329, 127 C. C. A. 578 (2d Cir.).

[4] Lankster *v.* State, 72 S. W. 388, 390; State *v.* Sheppard, 49 W. Va. 582; Welch *v.* State, 104 Ind. 347; Garner *v.* State, 76 Miss. 515, 520; Williams *v.* State, 73 Miss. 820; Butler *v.* State, 34 Ark. 480; Moore *v.* People, 108 Ill. 484; Commonwealth *v.* Crittenden, 82 Ken. 164; Farris *v.* People, 129 Ill. 521, 528; Ferguson *v.* United States, 72 Nebr. 350, 100 N. W. 800.

§ 371. **Binding Character of Evidence.**

Whoever calls the witness, even the defendant, makes him his own witness.[1] So, where the prosecutor refused to call a witness, but had the witness in Court and endorsed on the indictment and the defendant thereupon called him, it was held that he made him his own witness. The court said: "Therefore the witness, if called by the prisoner, must be considered his witness, as much as those subpœnaed and called by him."[2] It is legitimate upon cross-examination to interrogate a witness for the defense upon any subject regarding which he has been examined on his direct; as to other matters the District Attorney makes him his own witness, and should not be permitted to impeach him.[3] In Frye *v.* Bank of Illinois,[4] the court said: "The authorities are uniform that it is only the general reputation of a witness that can be inquired into for the purpose of impeaching his testimony; and although there is some conflict in the decisions as to whether the inquiry should be confined to the general character of the witness for truth and veracity, we think the better rule is that it should be so confined." This decision has been followed in Dimick *v.* Downs,[5] and the other authorities here cited. "Thus, a witness may not be impeached by evidence that he is in the habit of associating with lewd and unchaste women, neither is it permissible, as a rule, to impeach a female witness by attacking her reputation for chastity even where it is proposed to prove that she is a common prostitute."[6]

CREDIBILITY, WEIGHT AND SUFFICIENCY

§ 372. **Credibility of Witnesses for Jury.**

The credibility of the witnesses is for the jury, under proper instructions from the court.[1] The maxim, "*Falsus in uno, falsus in omnibus*", has to do solely with the weight, not with the admissibility, of the evidence. The jury is the sole judge of the credibility

§ 371. [1] Reg. *v.* Woodhead, 2 Car. & K. 520.

[2] Reg. *v.* Cassidy, 1 F. & F. 79.

[3] Marshall *v.* United States, 197 Fed. 511, 117 C. C. A. 65 (2d Cir.).

[4] 11 Ill., 367, 373.

[5] 82 Ill., 570.

[6] Kolb *v.* Union R. R. Co. 23 R. I. 72, 49 Atl. 392, 54 L. R. A. 646.

§ 372. [1] Cuomo *v.* United States, 231 Fed. 116, 145 C. C. A. 304 (2d Cir.); United States *v.* Post, 128 Fed. 950; United States *v.* Murphy, 16 Pet. (U. S.) 203, 10 L. ed. 938.

of the witness. If they believe that a witness has willfully and knowingly given false testimony, they are no longer required, as a rule of law, to reject his entire testimony. But they may believe him to be so discredited by his falsehood in the one matter that they will give no weight to his testimony on any point.[2] As a general rule, positive testimony as to a particular fact, uncontradicted, should control the decision; but this rule may not apply, as where there is an inherent improbability in the witness' statements, contradiction by physical facts, or a manner of testifying raising doubts as to the witness' sincerity.[3] The credibility of uncorroborated witnesses who have been convicted of crime is for the jury,[4] but a conviction based on such testimony will not be set aside on motion for a new trial unless in the judgment of the court the conviction was unjust.[5]

§ 373. **Weight and Sufficiency of Evidence For Jury.**

Moral probability, however strong, cannot take the place of legal evidence, and inferences which the jury may draw in a criminal case must be based upon facts which of themselves tend to establish the guilt of the accused.[1] The evidence in every criminal case should be sufficient to warrant a reasonable conclusion of the defendant's guilt. Otherwise, it is the duty of the trial court to instruct a verdict in his favor. Evidence only sufficient to raise a conjecture or suspicion is not legal evidence, for the jury must be governed by the evidence of facts upon which the suspicion is based, not by the suspicion itself.[2]

§ 373 *a*. **Evidence — Number of Witnesses.**

On the ground that the admission of cumulative evidence is within the discretion of the court, it is held that the limiting of the

[2] Shecil *v.* United States, 226 Fed. 184, 141 C. C. A. 181 (7th Cir.).

[3] Norton *v.* United States, 205 Fed. 593, 601, 123 C. C. A. 609 (8th Cir.); Quock Ting *v.* United States, 140 U. S. 417, 35 L. ed. 501, 11 S. C. 733.

[4] United States *v.* Knoell, 230 Fed. 509, *affirmed* 239 Fed. 16, 152 C. C. A. 66 (3d Cir.); Richardson *v.* United States, 181 Fed. 1, 104 C. C. A. 69 (3d Cir.).

[5] United States *v.* Knoell, 230 Fed. 509, *affirmed* 239 Fed. 16, 152 C. C. A. 66 (3d Cir.).

§ 373. [1] Wolf *v.* United States, 238 Fed. 902, 906, 152 C. C. A. 36 (4th Cir.).

[2] Mickle *v.* United States, 157 Fed. 229, 84 C. C. A. 672 (8th Cir.).

number of witnesses testifying to facts tending to show good faith of defendants to thirteen, where about one hundred thirty were tendered, was within the discretion of the court.[1]

ACCOMPLICES' TESTIMONY

§ 374. **Corroboration of Accomplice.**

While there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them,[1] it is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them; but such charge to be presented to the jury must be asked by counsel for the defendant.[2] But in a very recent case,[3] Judge Thomas took the case from the jury where the accomplice had contradicted himself on the stand and his testimony was so shaken and discredited that the learned jurist felt that he could not upon his conscience hazard the liberty of the defendant upon such testimony. In other words, where testimony of accomplices is relied on by the government, it is recognized as the better practice for the court in its charge to direct attention to the complicity of the witnesses, and to duly caution the jury respecting such testimony. But error is not predicable merely for failure to so charge the jury.[4] In Sykes *v.* United States,[5] and in Ryan

§ 373 *a*. [1] Chapa *v.* United States, 261 Fed. 775, — C. C. A. — (— Cir.).

§ 374. [1] Caminetti *v.* United States, 242 U. S. 470, 61 L. ed. 442, 37 S. C. 192, and the cases cited in the immediately succeeding notes.

[2] Crawford *v.* United States, 212 U. S. 183, 53 L. ed. 465, 29 S. C. 260; Holmgren *v.* United States, 217 U. S. 509, 54 L. ed. 861, 30 S. C. 588; Bennett *v.* United States, 227 U. S. 333, 57 L. ed. 531, 33 S. C. 288; Lung *v.* United States, 218 Fed. 817, 134 C. C. A. 505 (9th Cir.).

[3] United States *v.* Murphy, 253 Fed. 404.

[4] Wallace *v.* United States, 243 Fed. 300, 307, 156 C. C. A. 80 (7th Cir.); Diggs *v.* United States, 242 U. S. 470, 61 L. ed. 442, 37 S. C. 192, *affirmed* 220 Fed. 545, 136 C. C. A. 147 (9th Cir.); Holmgren *v.* United States, 217 U. S. 509, 54 L. ed. 861, 30 S. C. 588; Gretsch *v.* United States, 242 Fed. 897, 155 C. C. A. 485 (3d Cir.); Knoell *v.* United States, 239 Fed. 16, 152 C. C. A. 66 (3d Cir.), *affirming* 230 Fed. 509; United States *v.* Giuliani, 147 Fed. 594; United States *v.* Fischer, 245 Fed. 477, *affirmed* 250 Fed. 793, 163 C. C. A. 125 (3d Cir.); Rollis *v.* United States, 246 Fed. 832, 159 C. C. A. 134 (5th Cir.); Patterson *v.* United States, 246 Fed. 833, 159 C. C. A. 135 (5th Cir.); Bossel-

v. United States,[6] corroboration other than the evidence of accomplices connecting the accused with the crime was required in order to sustain the conviction. In the recent case of Crawford *v.* United States,[7] Mr. Justice Peckham adverted to the cautiousness that should be exercised by courts in ruling upon the admissibility of remote circumstances in criminal prosecutions, dependent upon the testimony of a person sustaining the relation of *particeps criminis* to the case, and said: "But a felon, being also a confessed accomplice, was thus produced by the Government as a witness for the purpose of proving its case against defendant. . . . Without his evidence it would have been difficult, if not impossible, to convict the defendant. . . . The evidence of a witness, situated as was Lorenz, is not to be taken as that of an ordinary witness, of good character, in a case whose testimony is generally and *prima facie* supposed to be correct. . . . The facts surrounding this case make it particularly important that the rules in regard to material errors should be most rigidly adhered to. If it be not clear that no harm could have resulted from the commission of this material error, the judgment should be reversed." [8] There is no precise formula for such a charge which must be observed in the federal courts. The admonition to be given is a matter of caution and not a hard and fast rule of law. The language used may properly be varied to some extent according to the degree of criminality of the accomplice and the circumstances under which he testifies.[9] The uncorroborated testimony, contradictory and contradicted testimony of a confessed criminal, induced by hope of immunity, that the accused, who was not

man *v.* United States, 239 Fed. 82, 152 C. C. A. 132 (2d Cir.); Erber *v.* United States, 234 Fed. 221, 148 C. C. A. 123 (2d Cir.); Crawford *v.* United States, 212 U. S. 183, 53 L. ed. 465, 29 S. C. 260; Lung *v.* United States, 218 Fed. 817, 134 C. C. A. 505 (9th Cir.); Richardson *v.* United States, 181 Fed. 1, 104 C. C. A. 69 (3d Cir.); United States *v.* Flemming, 18 Fed. 907; Ahearn *v.* United States, 158 Fed. 606, 85 C. C. A. 428 (2d Cir.); Hanley *v.* United States, 123 Fed. 849, 59 C. C. A. 153 (2d Cir.); Mark Yick Hee *v.* United States, 223 Fed. 732, 139 C. C. A. 262 (2d Cir.).

[5] 204 Fed. 909, 123 C. C. A. 205 (8th Cir.).

[6] 216 Fed. 13, 132 C. C. A. 257 (7th Cir.).

[7] 212 U. S. 183, 203, 53 L. ed. 465, 29 S. C. 260.

[8] Richards *v.* United States, 175 Fed. 911, 99 C. C. A. 401 (8th Cir.).

[9] Hays *v.* United States, 231 Fed. 106, 110, 145 C. C. A. 294 (8th Cir.).

present when the crime was committed, was one of the perpetrators or instigators, does not constitute substantial evidence of that fact which will sustain a conviction.[10] Keliher *v.* United States[11] follows the law of Massachusetts as it stood at the time of the Revolution, and requires corroboration in " portions of the testimony material to the issue." [12] The rule as to cautioning the jury should apply where witnesses introduced by the defendant confess themselves to be confederates in the crime.[13] The testimony or confession of an alleged hireling accomplice, turned State's evidence, was held to be sufficiently corroborated by circumstances and his facile character and characteristics making him an easy tool for the accused.[14] The proper reluctance of the courts, in the enforcement of a wise policy, to permit a conviction based on accomplice testimony to stand, is overborne by a verdict which gives credence to such testimony, unless this is in turn overborne by the judgment of the court that the conviction was unjust.[15]

§ 375. Evidence of Coconspirators — When Admissible.

During the pendency of the conspiracy, any declaration of a conspirator made for the purpose of accomplishing or in the prosecution of same is admissible against all the conspirators, but an admission of one conspirator after the conspiracy has come to an end, either by success or failure in attaining its object, is not admissible against the others.[1]

DIRECT AND CROSS-EXAMINATION

§ 376. Leading Questions on Direct Examination.

Leading questions suggesting an answer which will be presumably favorable to the questioner are as a general rule for-

[10] Sykes *v.* United States, 204 Fed. 909, 913, 123 C. C. A. 205 (8th Cir.).

[11] 193 Fed. 8, 15, 114 C. C. A. 128 (1st Cir.).

[12] *See also* United States *v.* Giuliani, 147 Fed. 594; United States *v.* Ybanez, 53 Fed. 536; United States *v.* Lancaster, 44 Fed. 896 (following the Massachusetts doctrine).

[13] United States *v.* Sykes, 58 Fed. 1000.

[14] Valdez *v.* United States, 244 U. S. 432, 61 L. ed. 1242, 37 S. C. 725.

[15] United States *v.* Knoell, 230 Fed. 509.

§ 375. [1] Heard *v.* United States, 255 Fed. 829, — C. C. A. — (8th Cir.); Donnelly *v.* United States, 228 U. S. 243, 57 L. ed. 820, 33 S. C. 449; Logan *v.* United States, 144 U. S. 263, 36 L. ed. 429, 12 S. C. 617; Brown *v.* United States, 150 U. S. 93, 37 L. ed. 1010, 14 S. C. 37;

bidden.[1] A leading question is one which suggests or *leads* to the answer, "which", as Greenleaf expresses it, "embodying a material fact, admits of an answer by a simple negative or affirmative",[2] or, as Starkie says, "to which the answer, 'yes', or 'no', would be conclusive."[3] Putting words into the witness' mouth is clearly objectionable. So, where a witness was asked if he remembered the accused making a specific statement to him, quoting his express words, the court said: "It must be confessed that this was most obnoxious to the objection of a leading examination of the prosecution's own witness. It not only suggested the matter desired, but put words in the mouth of the witness, who could only say, 'It was something like that.' The Government, however, got the full force of the words suggested by the prosecutor."[4] Words are at times especially significant. If counsel are permitted to so frame a question put to their witness as to suggest the answer desired, there is always imminent danger of getting before the jury phrases and ideas not really those of the witness.[5] Leading questions may not be put upon the examination in chief. The rule is well settled, though there are some exceptions to it.[6] "The general rule undoubtedly is to leave the propriety of leading questions to the sound discretion of the trial court, the exercise of which is not ordinarily ground of error. The application of the rule obtains where the witness is apparently unwilling, or unfriendly to the questioner, or where the party has been misled by previous assurances of counsel. It must, however, be conceded that the abuse of such discretion would have no corrective if it were rigidly maintained that it is not reviewable."[7]

Royal Insurance Co. *v.* Taylor, 254 Fed. 805, — C. C. A. — (4th Cir.).

§ **376.** [1] St. Clair *v.* United States, 154 U. S. 134, 38 L. ed. 936, 14 S. C. 1002; Nurnberger *v.* United States, 156 Fed. 721, 732, 84 C. C. A. 377 (8th Cir.); Peters *v.* United States, 94 Fed. 127, 36 C. C. A. 105 (9th Cir.); United States *v.* Angell, 11 Fed. 34, 39; United States *v.* Dickinson, 2 McLean, 325, 331, Fed. Cas. No. 14958.

[2] 1 Greenl. 481.

[3] 1 Stark. 150; United States *v.* Angell, 11 Fed. 34, 39.

[4] Nurnberger *v.* United States, 156 Fed. 721, 732, 84 C. C. A. 377 (8th Cir.).

[5] Nurnberger *v.* United States, 156 Fed. 721, 735, 84 C. C. A. 377 (8th Cir.).

[6] United States *v.* Angell, 11 Fed. 34, 39.

[7] Nurnberger *v.* United States, 156 Fed. 721, 734, 84 C. C. A. 377 (8th Cir.).

§ 377. **Surprise, Etc.**

There may be circumstances, arising from the conduct of a witness, which shall require leading questions to be put to him, when examined as a witness in chief. This matter must depend upon the judgment of the Court.[1] Where a counsel introducing a witness is taken by surprise by his answers, he may ask the court to be permitted to put leading questions to him. The matter is in the sound discretion of the court.[2] The party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness.[3] A party who calls a witness and is taken by surprise by his unexpected and unfavorable testimony may question him concerning declarations and statements previously made by him, *but he cannot impeach the witness*.[4] Among other exceptions to the rule that leading questions may not be put on cross-examination, it is said, both by Greenleaf and Starkie, that, where a witness is called to contradict the testimony of a former witness, who has stated that such and such expressions were used, or certain things said, it is the usual practice to ask whether those particular expressions were used, or those things said, without putting the question in the general form of inquiring what was said.[5]

§ 378. **Form of Question.**

As to the form of a question to be propounded to a witness in chief, the general rule is that a question shall not be so propounded to a witness as to indicate the answer desired. The form "Do you or do you not know?" etc. has been held a leading question, which may be so emphasized as to indicate, in the strongest terms, the desired answer. It is a matter of no great difficulty, in every examination of a witness, by a general remark to inform him on what points he is to be examined, and then to elicit his knowledge

§ 377. [1] United States *v.* Dickinson, 2 McLean, 325, 331, Fed. Cas. No. 14958.

[2] St. Clair *v.* United States, 154 U. S. 134, 150, 38 L. ed. 936, 14 S. C. 1002; Putnam *v.* United States, 162 U. S. 687, 694, 40 L. ed. 1118, 16 S. C. 923.

[3] Hickory *v.* United States, 151 U. S. 303, 309, 38 L. ed. 170, 14 S. C. 334.

[4] Hurley *v.* State, 46 Ohio St. 320, 21 N. E. 645. (This case contains a review of all the cases on the subject, both in England and the United States.)

[5] 1 Stark. 152; 1 Greenl. 482.

respecting them by such questions as do not lead to the answer desired.[1]

§ 379. **Leading Questions on Cross-Examination.**

In the cross-examination leading questions are admissible on the ground that the witness, having been called by one party, may not be equally willing to disclose all he knows that shall be favorable to the other.[1]

§ 380. **Refreshing Memory.**

A witness may refer to notes to refresh his memory, but he is not allowed to read them as his testimony.[1] A witness may, while under examination, refresh his memory by the use of a writing made by himself at or so near the time of the transaction that the facts are fresh in his memory, or by the use of any writing, not made by himself, which he read or thoroughly examined while the facts were fresh in his recollection, and which he then knew stated the facts correctly.[2] Government witnesses may be asked in examination in chief as to written and all statements made by them to Government representatives with relation to the subject matter of the case on trial for the purpose of refreshing their memory.[3] However, where the witness is permitted to refresh his recollection with a paper, it is to be tendered to the other side for inspection just as soon as it has been identified, otherwise, the defendant's right of confrontation is violated.[4]

§ 381. **Right to Cross-Examination.**

Evidence must be so presented that the opponent shall have the opportunity of testing it by cross-examination.[1] So, an official

§ **378.** [1] United States *v.* Dickinson, 2 McLean, 325, 331, Fed. Cas. No. 14958.

§ **379.** [1] United States *v.* Dickinson, 2 McLean 325, 331, Fed. Cas. No. 14958.

§ **380.** [1] McClendon *v.* United States, 229 Fed. 523, 143 C. C. A. 591 (8th Cir.).

[2] Hodson *v.* United States, 250 Fed. 421, 424, 162 C. C. A. 491 (8th Cir.); Putnam *v.* United States, 162 U. S. 687, 694, 40 L. ed. 1118, 16 S. C. 923; The J. S. Warden, 219 Fed. 517, 521, 135 C. C. A. 267 (3d Cir.).

[3] Hyde *v.* United States, 225 U. S. 347, 56 L. ed. 1114, 32 S. C. 793.

[4] Prdjun *v.* United States, 237 Fed. 799, 151 C. C. A. 41 (6th Cir.); Morris *v.* United States, 149 Fed. 123, 80 C. C. A. 112 (5th Cir.).

§ **381.** [1] United States *v.* O. G. Hempstead & Son, 153 Fed. 483; United States *v.* French, 117 Fed. 976; Lutcher *v.* United States, 72 Fed. 968, 19 C. C. A. 259 (5th Cir.).

report by a Government chemist, made for the Board of General Appraisers, relating to merchandise involved in the case, was held incompetent because *ex parte* and not subject to cross-examination.[2] And the deposition of a deceased witness, taken without notice to the defendant, and without his presence, or that of any one in his behalf, is not admissible against him on his trial.[3]

§ 382. **Scope of Cross-Examination.**

A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of a party against whom he is called, and a denial of this right is a prejudicial and fatal error.[1] It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary.[2]

§ 383. **Inconsistent Statements.**

When the Government calls a witness to establish the charge laid in the indictment against a defendant, it, in effect, vouches for the truth of the testimony thus given by the witness, who is then subject to a fair and full cross-examination upon that subject. It is always proper, relevant and material cross-examination to draw forth from a witness the fact that, when the transaction was recent and his recollection fresh, he had told a different story, one so inconsistent with that which he had testified that both stories could not be true.[1]

§ 384. **What Will Not Prevent Cross-Examination.**

Neither a witness nor a party may lawfully escape a cross-examination by an admission that on another occasion the witness had made statements inconsistent with his testimony at the trial and that they were false. Cross-examination may not be shut off in this way. The cross-examiner has the right to prove by his

[2] United States *v.* O. G. Hempstead & Son, 153 Fed. 483.

[3] United States *v.* French, 117 Fed. 976.

§ 382. [1] Heard *v.* United States, 255 Fed. 829, — C. C. A. — (8th Cir.).

[2] Safford *v.* United States, 233 Fed. 495, 147 C. C. A. 381 (2d Cir.); Heard *v.* United States, 255 Fed. 829, — C. C. A. — (8th Cir.); Gilmer *v.* Higley, 110 U. S. 47, 28 L. ed. 62, 3 S. C. 478; Resurrection Gold Mining Co. *v.* Fortune Gold Mining Co., 129 Fed. 668, 64 C. C. A. 180 (8th Cir.).

§ 383. [1] Heard *v.* United States, 255 Fed. 829, — C. C. A. — (8th Cir.).

adversary's witness, if he can, what inconsistent statements he has made, not only in general, but in every material detail, for the more specific and substantial the contradictory statements were, the less credible is the testimony of the witness.[1]

§ 385. **Limitations and Scope of Cross-Examination.**

In the case of an ordinary witness or where the defendant takes the stand, the cross-examination is usually confined within the scope of the direct examination.[1] State rules on the subject of cross-examination are not accepted by the Federal courts, which are controlled by their own practice in this respect, and do not permit cross-examination to go beyond the scope of the direct examination.[2] A party in whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error.[3] The scope of the proper cross-examination is determined by the subject matter of the direct examination and not by the precise questions or answers relative to such matters in the direct examination. When a witness is examined in chief regarding a conversation or statement concerning a given subject, he may be cross-examined to bring forth the whole of that conversation.[4] The trial court has a wide range of discretion regarding cross-examination.[5] In the cross-examination of witnesses in criminal

§ 384. [1] Heard *v.* United States, 255 Fed. 829, — C. C. A. — (8th Cir.).

§ 385. [1] Sawyer *v.* United States, 202 U. S. 150, 50 L. ed. 972, 26 S. C. 575; Fitzpatrick *v.* United States, 178 U. S. 304, 44 L. ed. 1078, 20 S. C. 944; Johnston *v.* Jones, 1 Black (U. S.), 209, 17 L. ed. 117; Teese *v.* Huntingdon, 23 How. (U. S.) 2, 16 L. ed. 479.

[2] Hendrey *v.* United States, 233 Fed. 5, 15, 147 C. C. A. 75 (6th Cir.); McKnight *v.* United States, 122 Fed. 926, 61 C. C. A. 112 (6th Cir.).

[3] Heard *v.* United States, 255 Fed. 829, — C. C. A. — (8th Cir.); Illinois Central R. R. Co. *v.* Nelson, 212 Fed. 69, 128 C. C. A. 525 (8th Cir.); Harrold *v.* Oklahoma, 169 Fed. 47, 94 C. C. A. 415 (8th Cir.); Philadelphia & Trenton R. R. Co. *v.* Stimpson, 39 U. S. (14 Pet.) 448, 10 L. ed. 535; Houghton *v.* Jones, 1 Wall. (U. S.) 702, 17 L. ed. 503; Resurrection Gold Mining Co. *v.* Fortune Gold Mining Co., 129 Fed. 668, 64 C. C. A. 180 (8th Cir.).

[4] Heard *v.* United States, 255 Fed. 829, — C. C. A. — (8th Cir.); Commercial State Bank *v.* Moore, 227 Fed. 19, 141 C. C. A. 573 (8th Cir.); Gilmer *v.* Higley, 110 U. S. 47, 28 L. ed. 62, 3 S. C. 471; Æolian Co. *v.* Standard Music Roll Co., 176 Fed. 811, 815.

[5] Holsman *v.* United States, 248 Fed. 193, 160 C. C. A. 271 (9th Cir.).

cases, a wide latitude is permitted. It is always permissible to show the interest, bias and prejudice of the witness, and to inquire about any and every relevant and material matter to the issue in controversy which in any way tends to throw light on the feelings of the witness, or explains and makes clear his situation with respect to the defendant, in order that the jury may be fully informed of all the facts and circumstances tending to throw light on the weight and importance of the evidence as given.[6] The right of cross-examination is not limited to the precise, narrow scope of the questions in chief, but extends to the subject matters of the direct examination.[7] A defendant is not confined to the remedy of a motion to strike out evidence improperly admitted on direct examination. He is entitled to a cross-examination to explain what would otherwise be unfavorable to him. A court's withdrawal of evidence from the consideration, of the jury, frequently is much less effective in removing from their minds an impression made by it than explanatory or rebutting evidence going to prove that the circumstance which the excluded evidence tended to prove, was one incapable of supporting an inference unfavorable to the party against whom that evidence was introduced.[8]

§ 386. Instances.

Where a witness testifies to the good reputation of an accused, he may properly be asked on cross-examination whether he has ever heard of him having been accused of doing acts wholly inconsistent with the character which he has attributed to him, provided the form of the questions asked is not so objectionable as to justify reversal.[1] Questions on cross-examination not within the scope of the direct examination, and not relevant to the issues, will be excluded.[2] In a prosecution for false swearing in a bankruptcy proceeding, it was held improper to allow the govern-

[6] King *v.* United States, 112 Fed. 988, 995, 50 C. C. A. 647 (5th Cir.).

[7] Owl Creek Coal Co. *v.* Goleb, 232 Fed. 445, 448, 146 C. C. A. 439 (8th Cir.).

[8] Meyer *v.* United States, 220 Fed. 822, 826, 135 C. C. A. 564 (5th Cir.).

§ 386. [1] Jung Quey *v.* United States, 222 Fed. 766, 771, 138 C. C. A. 314 (9th Cir.).

[2] Kettenbach *v.* United States, 202 Fed. 377, 120 C. C. A. 505 (9th Cir.); Feener *v.* United States, 249 Fed. 425, 427, 161 C. C. A. 399 (1st Cir.).

ment, in examining a hostile witness, to bring out on cross-examination the whole of his testimony before the referee, where it was not done merely to refresh his memory.[3] A witness who has testified to contradictory statements of the prosecuting witness can be cross-examined as to whether he communicated his conversation with the witness to the defendant.[4] Where an accused becomes a witness in his own behalf, his cross-examination is not restricted to the precise questions put to him in direct. It is the subject matter involved which governs the limitation of the inquiry.[5] A cross-examiner, for the purpose of showing the character of the party on the stand from his own admissions, may go into collateral matters, but he is bound by the answers he obtained.[6] So, where, in a White Slave Act violation prosecution, the defendant testified in his own behalf, and on cross-examination was asked if he had not beaten a certain woman with his fist, and answered in the negative, it was held the government could not introduce evidence to show the contrary.[7] In a proceeding for perjury, where the prosecution brought out on cross-examination of a witness that she admitted she falsely charged the prosecuting witness with her seduction, the defendant is, on redirect examination, entitled to bring out her explanation, if any, for her statement, that is, whether her false charge or her testimony admitting its falseness, was true.[8]

§ 387. **The Defendant as a Witness.**

The Act of Congress is as follows:[1] "In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, in the United States courts, Territorial courts and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness.

[3] Rosenthal *v.* United States, 248 Fed. 684, 160 C. C. A. 584 (8th Cir.).

[4] Kinser *v.* United States, 231 Fed. 856, 146 C. C. A. 52 (8th Cir.).

[5] Stewart *v.* United States, 211 Fed. 41, 48, 127 C. C. A. 477 (9th Cir.).

[6] Johnson *v.* United States, 215 Fed. 679, 686, 131 C. C. A. 613 (7th Cir.).

[7] Johnson *v.* United States, 215 Fed. 679, 131 C. C. A. 613 (7th Cir.).

[8] Safford *v.* United States, 233 Fed. 495, 503, 147 C. C. A. 381 (2d Cir.).

§ 387. [1] Act of March 16, 1878, c. 37, 20 Stat. L. 30.

And his failure to make such request shall not create any presumption against him." But when a party offers himself as a witness in his own behalf, he must be treated as any other witness, and subject to any exceptions that would apply to any other witness. In other words, the act frees him from such disability.[2] However, it is error for the prosecuting attorney to obtain evidence as to the accused's habits and conduct, the only effect of which is to degrade the defendant before the jury.[3]

§ 388. **Defendant Cannot Be Required to Furnish Original Evidence.**

A defendant in a criminal case cannot be compelled to answer on cross-examination as to any facts not relevant to his direct examination. Thus, if the prosecution should go further and compel the defendant, on cross-examination, to write his own name or that of another person when he had not testified in reference thereto in his direct examination, this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself.[1]

§ 389. **Examination of the Defendant.**

There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself, had reached its full development in the common law, was there considered as resting on the law of nature, and was embedded in that system as one of its great and distinguished attributes.[1] It is improper to ask a witness for the prosecution on his cross-examination, who admits having employed counsel to assist the district attorney, the question, how much he paid such attorney.[2] A defendant or any other witness may be cross-examined as to whether he is addicted to the use of morphine or other drugs. He may also be asked whether he had the instrument necessary for the administration of the drug

[2] United States *v.* Hollis, 43 Fed. 248; Wolfson *v.* United States, 101 Fed. 430, 41 C. C. A. 422 (5th Cir.).

[3] Allen *v.* United States, 115 Fed. 3, 52 C. C. A. 597 (9th Cir.).

§ 388. [1] Fitzpatrick *v.* United States, 178 U. S. 304, 315, 44 L. ed. 1078, 20 S. C. 944.

§ 389. [1] Bram *v.* United States, 168 U. S. 532, 545, 42 L. ed. 568, 18 S. C. 183.

[2] United States *v.* Ball, 163 U. S. 662, 41 L. ed. 300, 16 S. C. 1192.

in his possession, and upon the production of same it may be exhibited to the jury.[3] A question put to a defendant whether he had committed another specified offense was held admissible, on cross-examination, where the court made it plain to the jury that the evidence was admitted, not to prove the offense on trial, but solely, in so far as it involved moral delinquency, as affecting his credibility as a witness in his own behalf.[4] But the soundness of this decision may well be questioned. When the accused takes the stand in his own behalf, he ought not be heard to speak alone of those things favorable to his interest and be silent on things which may be antagonistic to his case.[5]

§ 390. **Cross-Examination of Witnesses Called by Court.**

If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge is entitled to call him. When a witness is called by the judge, the counsel of neither party has a right to cross-examine him without the permission of the court. The judge must exercise a discretion, whether he will allow such witness to be cross-examined.[1] If what the witness has said in answer to the questions put to him by the judge is adverse to either party, the judge would no doubt allow, and he ought to allow, the parties to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted. In the present case the answers of the son had no real bearing upon the issues in the action, and the only reason for cross-examining him must have been a wish to prejudice the jury.[2] A witness called in this way (by the court) is the witness of the judge, not of either of the parties. It is the function of the judge to try and find out the truth, whether he is hearing a case with or without a jury. Neither party can cross-examine a witness so called, as of right — leave of the court must be obtained.[3] Where a witness

[3] Wilson *v.* United States, 232 U. S. 563, 58 L. ed. 728, 34 S. C. 347.

[4] Christopoulo *v.* United States, 230 Fed. 788, 791, 145 C. C. A. 98 (4th Cir.); Fields *v.* United States, 221 Fed. 242, 137 C. C. A. 98 (4th Cir.).

[5] Caminetti *v.* United States, 242 U. S. 470, 61 L. ed. 442, 37 S. C. 192.

§ 390. [1] Coulson *v.* Disborough, L. R. 2 Queens Bench Div. 316.

[2] Coulson *v.* Disborough, *supra.*

[3] *Ibid.*

is thus called and examined by the court, a general cross-examination should not be allowed, and the cross-examination should be limited to the issues in the case.[4] Where the prosecutor did not call the defendant's father, himself suspected of the crime, the court called him for the defendant, but allowed him to be cross-examined to discredit him, yet would not allow him to be contradicted by other witnesses.[5]

EXAMINATION BY COURT

§ 391. **Improper Catechism by Court.**

Where a witness testified positively in support of the accused's alibi, it was held improper for the court to catechize him at length on the point, and tell him that if he was mistaken he could correct his statement, and to think, and correct his testimony if there was any doubt in his mind concerning it.[1] The examination of witnesses is more the appropriate function of counsel than of the judge of the court. It is a task of great delicacy and much difficulty for a presiding judge to so conduct the examination of a witness as to prevent the jury from learning the trend of his mind.[2] An extended examination of a witness by the court must be unfair unless it partakes partly of the nature of a cross-examination, and though great skill and tact and perfect fairness be employed, there is much danger the impression or opinion of the court as to the truthfulness, candor, and reliability of the witness as to the weight and value of his testimony will be manifested to the jury.[3] Necessarily the extent to which the trial judge will participate in the examination of a witness is largely a matter of discretion with him, to be determined from the circumstances of the particular case as they arise; but in a jury trial where the parties are represented by able counsel, it is scarcely possible to conceive circumstances under which the court is free to enter upon a lengthy examination of witnesses.[4] And any remarks calculated to prejudice the jury, *or an expression of opinion by*

[4] Coulson *v.* Disborough, *supra.*

[5] Reg. *v.* Bodle, 6 C. & P. 186.

§ 391. [1] Glover *v.* United States, 147 Fed. 426, 77 C. C. A. 450 (8th Cir.).

[2] Dunn *v.* People, 172 Ill. 582, 589, 50 N. E. 137.

[3] Dunn *v.* People, 172 Ill. 582, 595, 50 N. E. 137.

[4] O'Shea *v.* People, 218 Ill. 352, 359, 75 N. E. 981.

the judge in the hearing of the jury, has been held ground for reversing the judgment.[5]

EXPERT AND OPINION EVIDENCE

§ 392. In General.

Whether a witness is or is not an expert as to any particular science or art is to be determined by the court before he can be admitted to testify before the grand jury or in the trial of a cause.[1] In determining the admissibility of expert testimony it is always important to observe the distinction between the province of the jury and that of the expert, because generally an expert will not be permitted to give an opinion upon a question which it is the duty and province of the jury to demand.[2] The probative value of an expert's testimony is for the jury,[3] and an objection that a witness qualifying as an expert generally, lacks knowledge of the subject matter of his testimony, is one going to the weight rather than to the admissibility of the testimony.[4] "It has been declared by the courts that expert testimony is not of the best nor highest order, and that it is extremely dangerous, unless well guarded, and closely confined within its legitimate province. It is often necessary, as in this case, in order that justice may be done; and without it the truth cannot always be determined. But it is a fact well known to every practitioner at the bar, and within the judicial knowledge of courts, I think, that latterly the experts, on both sides of the cause, become too often eager attorneys before the trial is ended and before their testimony is given. It, therefore, becomes desirable, and necessary to the due administration of justice, that the scope and power of their utterances shall not be extended; that they shall be held strictly to the rules laid down for their guidance and control. Especially should this be so in criminal cases, where the liberty or life of the

[5] Briggs *v.* People, 219 Ill. 330, 76 N. E. 499; Kennedy *v.* People, 44 Ill. 283; Marzen *v.* People, 173 Ill. 43, 50 N. E. 249; Cunningham *v.* People, 195 Ill. 550, 562, 63 N. E. 517; People *v.* Jacobs, 243 Ill. 580, 90 N. E. 1092.

§ 392. [1] United States *v.* Fischer, 245 Fed. 477; United States *v.* Kilpatrick, 16 Fed. 765, 772.

[2] People *v.* Lehr, 196 Ill. 361, 63 N. E. 725.

[3] United States *v.* Fischer, 245 Fed. 477.

[4] United States *v.* Fischer, 245 Fed. 477.

accused is at stake." [5] The Supreme Court of Iowa sanctioned as instruction to the jury that expert evidence is of the lowest order.[6] In deciding a motion in a patent infringement suit, in 1876, Sir George Jessel, Master of the Rolls,[7] said: "Now, in the present instance I have, as usual, the evidence of experts on the one side and on the other, and, as usual, the experts do not agree in their opinion. There is no reason why they should. As I have often explained since I have had the honor of a seat on this bench, the opinion of an expert may be honestly obtained, and it may be quite different from the opinion of another expert also honestly obtained. But the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the court. A man may go, and does sometimes, to half a dozen experts. I have known it in cases of valuation within my own experience at the bar. He takes their honest opinions, he finds three in his favor and three against him; he says to the three in his favor, will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one. I was told that by the solicitor in the cause. That is an extreme case, no doubt, but it may be done, and therefore I have always the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained. I am sorry to say the result is that the court does not get that assistance from the experts which, if they were unbiased, and fairly chosen, it would have a right to expect."

§ 393. Instances.

An experienced chemist was held qualified to testify as an expert as to the therapeutic value of a medicine which he had analyzed. It was, of course, for the jury to determine the weight to be given

[5] People *v.* Vanderhoof, 71 Mich. 158.

[6] Whitaker *v.* Parker, 42 Iowa, 163, 69 N. W. 427.

[7] Thorn *v.* Worthing Skating Rink Co., L. R. 6 Ch. Div. 415, note at p. 416.

to his testimony, taking into consideration his knowledge and experience, as to which he had testified.[1] And an expert chemist was held entitled to give his opinion, in a prosecution for illegally manufacturing smoking opium, as to the difference between foreign and domestic smoking opium.[2] The testimony of experts upon the results appearing from account books which are in evidence is generally accepted as a valuable aid in the consideration of the accounts, and to that extent relaxation of the rule as to the best evidence is uniformly approved by the authorities.[3]

§ 394. **Distinctions.**

A distinction must be kept in mind between expert testimony and testimony such as that of a person in a particular line of business identifying goods belonging to that business.[1] It has been said that expert evidence should be received and acted upon with much caution,[2] but the better rule probably is that it is to be weighed and judged like any other kind of evidence.

§ 395. **Non-Expert Opinion Evidence.**

The opinions of witnesses are constantly taken as to the result of their observations on a great variety of subjects. All that is required in such cases is that the witnesses should be able properly to make the observations, the result of which they give; and the confidence bestowed on their conclusions will depend upon the extent and completeness of their examination and the ability with which it is made.[1] An opinion bearing upon the financial ability of a defendant without a statement of facts on which it was based was held inadmissible.[2] Non-expert witnesses were permitted to testify whether a person was suffering, nervous, in misery, weak, feeble, in distress, sore or in pain.[3] Where the

§ 393. [1] Samuels *v.* United States, 232 Fed. 536, 542, 146 C. C. A. 494 (8th Cir.).

[2] Lee Mow Lin *v.* United States, 250 Fed. 694, 162 C. C. A. 656 (8th Cir.).

[3] Brown *v.* United States, 142 Fed. 1, 73 C. C. A. 187 (7th Cir.).

§ 394. [1] Kerrch *v.* United States, 171 Fed. 366, 96 C. C. A. 258 (1st Cir.).

[2] United States *v.* Pendergast, 32 Fed. 198. *See also* § 392 *supra.*

§ 395. [1] Hopt *v.* Utah, 120 U. S. 430, 437, 30 L. ed. 708, 7 S. C. 614.

[2] Gould *v.* United States, 209 Fed. 730, 737, 126 C. C. A. 454 (8th Cir.).

[3] Chicago & Eastern Illinois R. Co. *v.* Randolph, 199 Ill. 126, 65 N. E. 142.

question of a corporation's insolvency at a specified time is collaterally involved, in a criminal prosecution, the opinion of a witness, otherwise qualified, who was in a position to know the facts, may be admissible on that issue for what it is worth.[4] In a prosecution for homicide committed on an Indian reservation, a witness was permitted to testify that from an intimate knowledge of Indian characteristics gained from many years' official connection with Indian reservations, and his observation of the defendant in the light of such knowledge, the latter was in his opinion a white man and not an Indian. Such evidence may not be very strong or conclusive, but it is good for what it is worth.[5] A witness, who testified that he had been accustomed to handling firearms for thirty or thirty-five years, was permitted to testify as to the apparent freshness of cartridges in a revolver taken from a defendant on his arrest several hours after an alleged assault, though the witness was not shown to be an expert.[6] Testimony of a witness that when certain persons arrived on a property, " apparently by arrangement, they all rushed in there together," deduced from the appearance of things, was held incompetent. It would have been competent to prove facts and circumstances indicating that the men rushed in, but not to prove the impression made upon the mind of the witness.[7] The " impression " of a witness that a voice he heard was that of the defendant, was held incompetent. (Objected to on ground of irrelevancy.)[8]

§ 396. **Medical Expert Testimony.**

Questions to medical witnesses requiring their opinions are admissible where the assumed facts recited in the questions are warranted by the proof in the case, and the evidence sought to be elicited is of a character justifying an expression of opinion by the witnesses. The jury, after all, are at liberty to give to such evidence such weight as in their judgment it is entitled to.[1] Physi-

[4] Hendrey *v.* United States, 233 Fed. 5, 15, 147 C. C. A. 75 (6th Cir.).

[5] Stewart *v.* United States, 211 Fed. 41, 47, 127 C. C. A. 477 (9th Cir.).

[6] Jackson *v.* United States, 102 Fed. 473, 485, 42 C. C. A. 452 (9th Cir.).

[7] Ball *v.* United States, 147 Fed. 32, 37, 78 C. C. A. 126 (9th Cir.).

[8] Pilcher *v.* United States, 113 Fed. 248, 51 C. C. A. 205 (5th Cir.).

§ 396. [1] Bram *v.* United States, 168 U. S. 532, 569, 42 L. ed. 568, 18 S. C. 183.

cians are not allowed to give their opinions upon a controverted case; they cannot draw inferences of fact from the evidence, but may simply declare their opinions upon a known or hypothetical state of facts. Counsel may put to the physicians states of facts they think warranted by the evidence. If the jury consider any of these states of fact are proved, the opinions thereon are admissible evidence.[2] The defendant is not entitled to an instruction that the opinions of medical experts admitted in evidence, if uncontradicted by other experts, must be accepted and acted on by the jury as absolute proof.[3] The great weight of reason and authority is against allowing the statements in medical books to be introduced in testimony; and even where a State has passed a statute permitting such books to be read in civil and criminal cases in the State courts, such a statute has no application to criminal cases in the Federal Courts of such State.[4] On questions of mental disease, the jury are given the benefit of the professional opinions of skilled witnesses.[5] The opinion of a physician as to a defendant's mental condition, based in part on representations made to him by the defendant or others prior to the trial, cannot be considered by the jury.[6] Expert testimony as to mental condition is not to be taken in place of the jury's own judgment, but to be used by them for what they think it is worth.[7] On an issue of insanity, the jury is not bound by the opinions of experts. "A jury should not capriciously or recklessly disregard the advice of medical men of experience in dealing with diseases of the human mind, and the advice of physicians as to such matters should be carefully weighed, but the final responsibility in arriving at a conclusion as to the mental condition of the prisoner rests upon the jury." [8] A non-expert, who knew the prisoner in a murder trial before the killing, may state his opinion of the mental condition of the prisoner at that time, but not after the event, except under special circumstances.[9] "It is

[2] United States *v.* McGlue, 1 Curt. 1, 9 Fed. Cas. No. 15679.

[3] United States *v.* Perkins, 221 Fed. 109.

[4] United States *v.* Perkins, *supra.*

[5] United States *v.* Faulkner, 35 Fed. 730.

[6] United States *v.* Faulkner, *supra.*

[7] *Ibid.*, at 733.

[8] United States *v.* Chisholm, 149 Fed. 284, 289, 153 Fed. 808.

[9] Queenan *v.* Oklahoma, 190 U. S. 548, 47 L. ed. 1175, 23 S. C. 762.

unnecessary to lay down the rule that it never can be done, for instance, when the opinion clearly appears to sum up a series of impressions received at different times. It is enough to say that, at least, it should be done with caution and not without special reasons." [10] It is not necessary to show experience in special cases, as in gunshot wounds, to qualify a physician and surgeon to testify as an expert relative to the elevation in which a pistol must have been held to inflict a certain wound.[11] The opinion of a physician who had made a post-mortem examination of the deceased, who was killed by a blow on his head, as to the direction from which the blow was delivered, was held admissible, not as expert testimony in the strict sense of the term, but as a statement of a conclusion of fact.[12]

§ 397. **On Handwriting.**

Expert opinion as to the genuineness of a handwriting, from mere inspection, "though generally of slight weight, and often immaterial, is competent." [1] The jury are not bound by the opinion of an expert witness as to handwriting further than it coincides with their own opinion, or than they think it deserves to be credited with on account of his experience.[2] An expert witness who testified that he had seen over four hundred signatures and other specimens of the handwriting of a defendant charged with forgery, was held competent to state his opinion that the signature alleged to have been forged was written by the defendant.[3] An expert handwriting witness may not be cross-examined as to photographic reproductions in his possession where no reference has been made in his testimony in chief to such photographs.[4] Experts will not be allowed to prove to the court or jury what is the proper or legal construction of any writing. So, in a prosecution for using the mails in disposing of corporate stock by misrepresentations, testimony of experts as to the validity of patents

[10] Queenan *v.* Oklahoma, *supra.*

[11] Kelly *v.* United States, 27 Fed. 616, 618.

[12] Hopt *v.* Utah, 120 U. S. 430, 30 L. ed. 708, 7 S. C. 614.

§ 397. [1] Rinker *v.* United States, 151 Fed. 755, 761, 81 C. C. A. 379 (8th Cir.).

[2] United States *v.* Molloy, 31 Fed. 19; United States *v.* Pendergast, 32 Fed. 198.

[3] Neall *v.* United States, 118 Fed. 699, 707, 56 C. C. A. 31 (9th Cir.).

[4] Franklin *v.* United States, 193 Fed. 334, 341, 113 C. C. A. 258 (3d Cir.).

held by the corporation was inadmissible. But where the court tells the jury to disregard the legal views of the expert, the presumption is that the jury will disregard that incorporated in the expert opinion.[5] Non-experts, though having only a limited acquaintance with a handwriting, who have seen the defendant write and who express themselves qualified to give an opinion on the subject, are allowed to examine documents and testify that they were written by the defendant. Their limited acquaintance with the defendant's writing is held merely to affect the weight of their opinion.[6] Seeing a person write even once makes a witness competent as a non-expert in regard to his signature.[7] If a witness as to the authorship of handwriting is an illiterate man, or one whose business seldom brings him into contact with writing and written documents, his opinion will be entitled to much less weight than if he is an educated man, even if in no sense an expert.[8] A knowledge of the handwriting of a defendant charged with forgery possessed by a witness who was not an expert in handwriting, would not, of itself, qualify him to testify whether a forged signature made in imitation of the handwriting of another was or was not written by the defendant.[9] The Statute provides: "In any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court or officer conducting such proceeding, to prove or disprove such genuineness." [10] This statute changes the common law rule, which did not permit the comparison of handwriting unless that constituting the standard of comparison was properly in the case for other purposes.[11] The statutes of States as to comparison of writings for the purpose of

[5] Menefee *v.* United States, 236 Fed. 826, 835, 150 C. C. A. 88 (9th Cir.).

[6] Rinker *v.* United States, 151 Fed. 755, 760, 81 C. C. A. 379 (8th Cir.).

[7] Murray *v.* United States, 247 Fed. 874, 160 C. C. A. 96 (4th Cir.).

[8] United States *v.* Gleason, 37 Fed. 331.

[9] Neall *v.* United States, 118. Fed. 699, 707, 56 C. C. A. 31 (9th Cir.).

[10] Act of Feb. 26, 1913, ch. 79, 27 Stat. L. 683.

[11] Maxey *v.* United States, 207 Fed. 327, 125 C. C. A. 77 (8th Cir.); Short *v.* United States, 221 Fed. 248, 137 C. C. A. 104 (8th Cir.).

determining handwriting never had any effect upon criminal proceedings in the courts of the United States.[12]

§ 398. **Cross-Examination of Experts.**

An examination in chief cannot be so conducted as to compel the cross-examining counsel to merely follow the line of questions there asked; but, when a general subject is opened by an examination in chief, the cross-examining counsel may go fully into details, and may put the case before the expert witness in various phases. Each side has a right to take the opinion of the witness upon its theory of the facts established by the evidence. While it is true that a cross-examination must be confined to the subject of the examination in chief, it is not true that the cross-examining party is confined to any particular part of the subject. He has a right in such a case as this to leave out of the hypothetical question facts assumed by the counsel on the direct examination, if he deems them not proved, and he also has a right to add to the question such facts as he thinks the evidence establishes.[1]

§ 399. **Undue Restrictions of Cross-Examination of Expert Witnesses.**

Great latitude should also be allowed in cross-examination, especially in capital cases, and the court should never interpose except where there is a manifest abuse of the right.[1] In a well-considered case,[2] Mr. Justice Scott commented as follows: "No medical books were read to the jury as evidence or for any other purpose, and it will not be necessary to discuss the admissibility of such evidence. But on cross-examination of the attending physician, who made a diagnosis of the disease of which the assured died, and pronounced it *delirium tremens*, paragraphs from standard authors, that treat of that disease, were read to the witness, and he was asked whether he agreed with the authors, and that is complained of as error hurtful to the cause of defendant. The testimony of

[12] United States *v.* Jones, 10 Fed. 469; United States *v.* Mathias, 36 Fed. 892.

§ 398. [1] Louisville & N. A. & Ch. Ry. Co. *v.* Farley, 104 Ind. 409, 3 N. E. 389.

§ 399. [1] Ritzman *v.* People, 110 Ill. 362, 371; Tracy *v.* People, 97 Ill. 101, 103; Sutton *v.* People, 119 Ill. 250, 251, 10 N. E. 376.

[2] Connecticut Mutual Life Ins. Co. *v.* Ellis, 89 Ill. 516, 519.

this witness was of the utmost importance, and certainly plaintiff was entitled to reasonable latitude in the cross-examination. The witness had given the symptoms of the disease with which the assured was affected and pronounced it *delirium tremens*, and, as a matter of right, plaintiff might test the knowledge possessed by the witness, of that disease, by any fair means that promised to elicit the truth. It will be conceded, it might be done by asking proper and pertinent questions, and what possible difference could it make whether the questions were read out of a medical book or framed by counsel for that purpose? Ordinarily, the limits of cross-examination of a witness are within the sound discretion of the court, and, usually, the greatest latitude is allowable that can be consistently given, for the discovery of the truth. The witness in this case stated that he had read text books that he might be able to state why he 'diagnosed the case as *delirium tremens*.' Assuming to be familiar with standard works that treat of *delirium tremens*, it was not unfair to the witness to call his attention to the definitions given in the books of that particular disease, and asking him whether he concurred in the definitions. How could the knowledge of the witness of such subjects be more fully tested? That is, in no just sense, reading books to the jury as evidence, or for the purpose of contradicting the witness. The rule announced may be liable to abuse. Great care should always be taken by the court to confine such cross-examination within reasonable limits, and to see that the quotations read to the witness are so fairly selected as to present the author's views on the subject of the examination. That the cross-examination was in the presence and hearing of the jury could not, of course, be avoided, as the witness was examined in open court."

PRIVILEGED COMMUNICATIONS

§ 400. Mode of Transmission.

A communication is not privileged merely because of the method of its transmission. In United States *v.* Hunter,[1] it was admitted that the United States and the States have a right to call for and use such telegrams as may be pertinent to any matter pending before their respective Grand Juries or Courts, in relation

§ 400. [1] 15 Fed. 712.

to prosecutions for crimes; and it was also admitted that telegrams having no pertinency to such inquiries are inadmissible, and ought not to be produced. The only question was as to the proper mode to require the production of those proper to be produced and as to those which should be excluded, and the Court formulated the following rule: "When the district attorney, either upon his own motion or at the instance of the grand jury, applies for the subpœna, he should state that there is a question either pending before the grand jury or court, as the case may be, in which certain telegrams sent from or received at the telegraph office in charge of the witness named are believed to be pertinent to the question to be considered, and should state the names of the parties sending or receiving the telegrams, and should further state the periods between which, or the day upon which, sent or received, which should be a reasonable time; or, if the names of the parties should not be known, then the time should be stated, and the subject matter which the dispatches are supposed to contain, or to which they are supposed to relate, in either case, in order that the court or judge ordering the subpœna may have some means of judging the relevancy of the testimony sought."

§ 401. **Waiver.**

The privilege may be expressly waived,[1] and, it has been held, by the inference arising from silence or failure to object promptly.[2] But it has been doubted whether waiver should be implied in criminal cases.

§ 402. **Public Officers — State Secrets.**

A communication made to a public prosecutor, purporting to disclose matters concerning a public offense, is privileged.[1] By a

§ 401. [1] United States *v.* Lee, 107 Fed. 702, 704.

[2] Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186.

§ 402. [1] Vogel *v.* Gruaz, 110 U. S. 311, 28 L. ed. 158, 4 S. C. 12; Worthington *v.* Scribner, 109 Mass. 487. *See* argument against official privileges. Burr's Trial, Robertsons' Repr. II, 517, quoted IV. Wigmore on Evidence, p. 3343. *See also* Burr's Trial, Robertsons' Repr. I, 121, 127, 186, 255, II. 536. Marshall's dictum as to production of letter by President to General Wilkinson which might have involved international relations. The President forwarded the letter without objection. See IV. Wigmore, p. 3345, quotation.

statute of Illinois the duty of the State's attorney was to "commence and prosecute" all criminal proceedings. It was held that under this provision it was the province and the privilege of any person who knew of facts tending to show the commission of a crime, to lay these facts before the State's attorney; therefore, public policy will protect all such communications, absolutely, and without reference to the motive or intent of the informer or the question of probable cause. So a communication by a person who inquires of the attorney whether the facts communicated made out a case of larceny for a criminal prosecution is an absolutely privileged communication and cannot, in a suit against such person for damages for slander, be testified to by the State's attorney. It made no difference that there was evidence of the speaking of the same words to persons other than the State's attorney.[2] Since it is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws, a court of justice will not compel or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.[3] In England the rule has been long established in revenue cases and prosecutions for high treason, and has often been applied in civil actions. It has been held that a police officer is not bound to disclose the name of the person from whom he received the information leading to the arrest of the accused.[4] But it is to be presumed that if the disclosure were material to the case it would be ordered to be made.[5] The conversations of Government detectives and other agents with witnesses, with the purpose and effect of inducing and influencing the evidence of such witnesses, do not rise to the dignity of state secrets, and,

[2] Vogel *v.* Gruaz, 110 U. S. 311, 28 L. ed. 158, 4 S. C. 12.

[3] Vogel *v.* Gruaz, 110 U. S. 311, 28 L. ed. 158, 4 S. C. 12; Dawkins *v.* Rokeby, L. R. 7 H. L. 744; Worthington *v.* Scribner, 109 Mass. 487 (collecting and reviewing the authorities).

[4] United States *v.* Moses, 4 Wash. (C. C.) 726, Fed. Cas. No. 15825.

[5] Reg. *v.* Richardson, 3 Fost. & F. 693.

when a witness so induced or influenced appears on the stand and testifies, he may be cross-examined as to any and all inducements made to him on the part of any one in connection with his evidence. It would be intolerable for Government agents to be allowed to give inducements to witnesses and not have the fact freely exposed on the witness stand, so as to inform the court and jury as to the proper weight of the evidence given.[6] The Federal and State Governments have power to provide that returns made to their officers to be used in assessing and collecting revenue and taxes shall not be revealed by such officers. These provisions protect the officers against commitment for contempt for refusal to produce such returns on subpœna by a court.[7] A deputy collector of internal revenue cannot be compelled to testify, in a criminal proceeding in a State court, as to statements made to him by an applicant for a special retail liquor dealer's tax stamp, which statements were made for the purpose of being reduced to writing and embodied in the records of the internal revenue office. To divulge such statements would be to divulge the contents of the records themselves, which is forbidden by the internal revenue regulations.[8] A communication on official affairs by one officer to another is within the privilege. Public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. So it was held that an action cannot be maintained against the government, in the Court of Claims, upon a contract for secret services during war, made between the President and the claimant.[9] The correspondence between a district attorney, who represents the United States, and the attorney-general, is confidential in its nature and cannot be cited by third persons.[10] A statement by a person accused of

[6] King *v.* United States, 112 Fed. 988, 996, 50 C. C. A. 647 (5th Cir.).

[7] In re Valecia Condensed Milk Co., 240 Fed. 310, 153 C. C. A. 236 (7th Cir.), and cases cited in immediately preceding note.

[8] In re Huttman, 70 Fed. 699; In re Weeks, 82 Fed. 729; In re Comingore, 96 Fed. 552; Boske *v.* Comingore, 177 U. S. 459, 44 L. ed. 846, 20 S. C. 701; In re Lamberton, 124 Fed. 446; Stegall *v.* Thurman, 175 Fed. 813. *Contra*, In re Hirsch, 74 Fed. 928.

[9] Totten *v.* United States, 92 U. S. 105, 23 L. ed. 605.

[10] United States *v.* Six Lots of Ground, 1 Woods 234, Fed. Cas. No. 16299.

murder, made to the district attorney prior to the trial concerning the facts and circumstances attending the death of the deceased, was held not a privileged communication.[11] The Bankruptcy Act does not deprive a witness of his privilege under a State statute to refuse to produce income tax returns by the bankrupt.[12]

§ 403. **Grand Jurors.**

Grand Jurors have been allowed to testify as to confessions made by the prisoner when he was being examined before them on oath as a witness against another person.[1] The obligation of secrecy imposed on a grand juror by his oath concerning proceedings before the grand jury is not removed by his discharge as a juror, but continues unless removed by the court in the interest of justice.[2] The reasons given for this secrecy in regard to testimony have been criticized by modern text writers. The necessity for the secrecy usually ends with the grand jury's finding being filed with the public prosecutor.

§ 404. **Husband and Wife.**

Privileged communications between husband and wife are protected at common law.[1] Whether a communication between husband and wife is a matter of confidence is a question to be passed on in the first place by the presiding judge, and where the facts are clearly doubtful his ruling will not be set aside by an appellate tribunal.[2] The rule is clear that communications between husband and wife are ruled out only when they are confidential. On the trial of a criminal case, the testimony was admitted of the defendant's divorced wife as to the contents of a lost paper which had been handed to her by the defendant while she was still his wife, during a consultation between them and others relating to matters out of which the prosecution arose. It did not appear from the record that the communication was con-

[11] Itow *v.* United States, 223 Fed. 25, 138 C. C. A. 439 (9th Cir.).

[12] In re Valecia Condensed Milk Co., 240 Fed. 310, 153 C. C. A. 236 (7th Cir.).

§ 403. [1] United States *v.* Negro Charles, 2 Cr. C. C. 76, Fed. Cas. No. 14786

[2] In re Atwell, 140 Fed. 368.

§ 404. [1] Hopkins *v.* Grimshaw, 165 U. S. 342, 41 L. ed. 739, 17 S. C. 401.

[2] Jacobs *v.* United States, 161 Fed. 694, 698, 88 C. C. A. 554 (1st Cir.).

fidential, or that the paper was not read by the others present; therefore, its admission was held not reversible error.[3]

§ 405. **Attorney and Client.**

Indispensable elements of a privileged communication between attorney and client are: (1) The professional relation of attorney and client at the very time the communication is made; (2) the making of the communication on account of that relation; and (3) the necessity or relevancy of the communications to the subject matter of the attorney's engagement, in order to enable him to use his ability, skill and learning in the discharge of his office of attorney in relation thereto.[1] Counsel for a bankrupt is not required, when examined as a witness in the bankruptcy proceedings, to disclose any information as to the affairs of the bankrupt, which he received as such counsel from the bankrupt or from persons to whom he was referred by the bankrupt for the purpose of obtaining such information as such counsel.[2] The privilege does not exist where the attorney becomes acquainted with facts from another source than his client, even while he is acting as an attorney. So an attorney is not entitled to refuse to identify documents which he has witnessed, nor to testify as to facts concerning which he obtained knowledge from third persons.[3] The ground upon which the rule has been rested for more than a century is the vital importance to the client that he should feel perfectly safe in disclosing the secrets of his case to his legal advisor. Protected by the privilege, he may be confident that, with few exceptions, whatever he may communicate cannot thereafter be used against him.[4] An accused admitted to bail could not be found. On investigation by the grand jury it appeared that his counsel was not retained by the accused, but by some person acting for him, or in his interest. It was held that the counsel might be compelled to disclose the name and residence or usual place of abode of such person, but not the interest such person had in the matter.[5] The

[3] Jacobs *v.* United States, 161 Fed. 694, 88 C. C. A. 554 (1st Cir.).

§ 405. [1] 1 Greenl. on Ev. (16th Ed.) 244; Jones on Ev. (2d Ed.) 751; York *v.* United States, 224 Fed. 88, 90, 138 C. C. A. 356 (8th Cir.), and many state cases.

[2] In re Aspinwall, 7 Ben. 433, Fed. Cas. No. 591.

[3] In re Ruos, 159 Fed. 252; Beaven *v.* Stuart, 250 Fed. 972, — C. C. A. — (5th Cir.).

[4] In re Ruos, 159 Fed. 252, 256.

[5] United States *v.* Lee, 107 Fed. 702.

relation does not excuse an attorney from withholding from a proper tribunal evidence bearing upon an intention or arrangement on the part of the client to perform some illegal act in the future, nor the actual doing of the act.[6] "The general rule," said Mr. Justice Story, in Chirac *v.* Reinicker,[7] "is not disputed that confidential communications between client and attorney are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts are communicated by a client to a counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent."[8] So, statements regarding the commission of a crime already committed, made by the person committing it to an attorney at law when consulting him in that capacity, are privileged communications, whether a fee has or has not been paid, and whether litigation is pending or not.[9] The court distinguished the case from Queen *v.* Cox,[10] where the attorney was consulted for advice which, without his knowledge, was intended by the client to aid in a scheme to defraud. It was held that in such a case the communication between attorney and client was not privileged. In a case where the point was not actually before the court, the court said: "But it may be remarked in passing that it has been held in England that a communication made in furtherance of any criminal or fraudulent purpose is not privileged. Queen *v.* Cox, L. R. 14 Q. B. D. 153. And the English rule appears to have been regarded with favor in the Supreme Court of the United States in Alexander *v.* United States, 138 U. S. 353, 34 L. ed. 954, the rule being limited to cases where the party is tried for the crime in furtherance of which the communication was made."[11] In order to remove the pro-

[6] United States *v.* Lee, 107 Fed. 702, 703.

[7] 11 Wheat. (U. S.) 280, 294, 6 L. ed. 474.

[8] Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280, 294, 6 L. ed. 474; Alexander *v.* United States, 138 U. S. 353, 358, 34 L. ed. 954, 11 S. C. 350; York *v.* United States, 224 Fed. 88, 90, 138 C. C. A. 356 (8th Cir.).

[9] Alexander *v.* United States, 138 U. S. 353, 34 L. ed. 954, 11 S. C. 350; followed in Lew Moy *v.* United States, 237 Fed. 50, 150 C. C. A. 252 (8th Cir.).

[10] L. R. 14 Q. B. D. 153.

[11] Kaufman *v.* United States, 212 Fed. 613, 618, 129 C. C. A. 149 (2d Cir.).

tection it is necessary that the accused be on trial for the identical crime concerning which the communication contemplating it was made and not for a different crime.[12] The rule of the statute does not extend to the protection of matter communicated not in its nature private or which cannot be termed the subject of a confidential communication. So, a letter written by an attorney to his client, advising him of the terms of an injunction granted against him in a suit in which the attorney is employed, is not a privileged communication, since it contains nothing in the way of a confidential disclosure, and it is admissible in evidence to show actual notice of the injunction by the client.[13] An accused was charged with aiding and abetting a bankrupt corporation, of which he was president and manager, to conceal its assets from its trustee. It was held that evidence of the accused's attorney that he was retained by the accused as attorney for the corporation, and also to represent the accused individually, was not objectionable as privileged. It was necessary for the witness to give this testimony before the accused could claim his privilege as to communications which passed between him and the attorney about which he was asked and which were excluded upon the theory that they were privileged.[14] The presence of a third party, particularly if he is an opposing party, indicates that the communication is not confidential or privileged.[15] Communications made in good faith to an attorney at law for the purpose of obtaining his professional advice or assistance are privileged although no fee is paid.[16] Nor does it matter that after the communications the attorney declines to act.[17] There is some diversity of opinion upon this question, but the above is the better sustained by sound principle. It is in accord with the common custom of those who seek professional advice. The man who goes to the lawyer does so as a client, and the lawyer who listens to him does so pro-

[12] Alexander *v.* United States, 138 U. S. 353, 34 L. ed. 954, 11 S. C. 530.

[13] Aaron *v.* United States, 155 Fed. 833, 84 C. C. A. 67 (8th Cir.).

[14] Kaufman *v.* United States, 212 Fed. 613, 618, 129 C. C. A. 149 (2d Cir.).

[15] 1 Greenl. on Ev. (16th Ed.) 246; York *v.* United States, 224 Fed. 88, 91, 138 C. C. A. 356 (8th Cir.).

[16] Alexander *v.* United States, 138 U. S. 353, 34 L. ed. 954, 11 S. C. 350; Lew Moy *v.* United States, 237 Fed. 50, 53, 150 C. C. A. 252 (8th Cir.).

[17] Lew Moy *v.* United States, 237 Fed. 50, 53, 150 C. C. A. 252 (8th Cir.).

fessionally. The communications preliminary to actual retainer or engagement are frequently necessary and they should be unrestrained and without apprehension of disclosure. That this should be so is of public interest, and is essential to the intelligent and honorable practice of the law. Various obstacles to a definite contractual relation may appear from the communications, — prior inconsistent duty to others, ethical professional standards, time and opportunity, disagreement as to compensation, and so on, but generally the preliminary conference must be had, and the disclosures made are within the spirit of the immunity. The fair and reasonable operation of the admitted general rule requires that liberality of construction.[18] An accused who, with others, was charged with conspiring to bring or cause to be brought into the United States from Mexico Chinese persons not authorized to enter, lived in a State distant from the place of trial, and, shortly before trial, at the suggestion of a codefendant, consulted the attorney representing his codefendant for the purpose of employing him as local counsel. The accused made communications to this attorney relative to the charge, but after conversations the attorney declined to act. It was held that, notwithstanding his declinature and the fact that no fee was paid, the communications were privileged, and it was error to require the attorney to disclose them. The rule was not changed by the fact that the accused's codefendant afterwards pleaded guilty on the advice of such attorney.[19] Although a letter from a client to an attorney may be a privileged communication, it appears that the defendant may be asked if the signature to the letter shown him is his.[20]

§ 406. Physician and Patient.

At common law communications to physicians were not privileged, and in the absence of a statute are accordingly not privileged in the Federal Courts. Many States have passed statutes providing that physicians or surgeons shall not be allowed to disclose information acquired while attending a patient in a professional capacity, and which was necessary to enable him to act

[18] Lew Moy *v.* United States, 237 Fed. 50, 53, 150 C. C. A. 252 (8th Cir.).

[19] Lew Moy *v.* United States, 237 Fed. 50, 150 C. C. A. 252 (8th Cir.).

[20] Clark *v.* United States, 245 Fed. 112, 157 C. C. A. 408 (9th Cir.).

in that capacity. These State statutes would not be binding on the Federal Courts in criminal cases.

HEARSAY EVIDENCE

§ 407. General Rule.

The general rule, subject to certain well-established exceptions as old as the rule itself, applicable in civil cases, and therefore to be rigidly enforced where life or liberty are at stake, is that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is inadmissible.[1] Hearsay evidence, with a few well-recognized exceptions, is excluded by courts that adhere to the principles of the common law. The chief grounds of its exclusion are that the reported declaration (if in fact made) is without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination, these being most important safeguards of the truth, where a witness testifies in person, and as of his own knowledge; and, moreover, he who swears in court to the extrajudicial declaration does so (especially where the alleged declarant is dead) free from the embarrassment of present contradiction and with little or no danger of successful prosecution for perjury. It is commonly recognized that this double relaxation of the ordinary safeguards must very greatly multiply the probabilities of error; and that hearsay evidence is an unsafe reliance in a court of justice.[2] The rule extends to written as well as to oral statements.[3] One of the exceptions to the rule excluding it is that which permits the

§ 407. [1] Hopt *v.* Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. C. 202; Haugher *v.* United States, 173 Fed. 54, 97 C. C. A. 372 (4th Cir.).

[2] Donnelly *v.* United States, 228 U. S. 243, 273, 57 L. ed. 820, 33 S. C. 449.

[3] Todd *v.* United States, 221 Fed. 205, 136 C. C. A. 615 (8th Cir.).

reception, under certain circumstances, and for limited purposes, of declarations of third parties made contrary to their own interest; but it is almost universally held that this must be an interest of a pecuniary character; and the fact that the declaration, alleged to have been thus extrajudicially made, would probably subject the declarant to a criminal liability is held not to be sufficient to constitute it an exception to the rule against hearsay evidence.[4] Testimony of the prosecuting witness as to what a third person told her regarding the defendant, was held to be hearsay and incompetent.[5] Likewise self-serving declarations are as a rule inadmissible.[6]

§ 408. **Dying Declarations.**

Dying declarations are a marked exception to the general rule that hearsay testimony is not admissible, and are received from the necessities of the case and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present.[1] Dying declarations are limited to criminal prosecutions, where the subject matter of the investigation is the death of the declarant.[2] They are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed in favor of the defendant as well as against him.[3] Such declarations are limited to facts, and will not be admitted as to opinions, such as of the accused's motives or malice.[4] To render

[4] Donnelly *v.* United States, 228 U. S. 243, 273, 57 L. ed. 820, 33 S. C. 449; Berkley Peerage Case, 4 Camp. 401; Sussex Peerage Case, 11 Cl. & Fin. 85, 103, 109, 8 Eng. Reprint. 1034, 1042.

[5] Safford *v.* United States, 233 Fed. 495, 147 C. C. A. 381 (2d Cir.); Todd *v.* United States, 221 Fed. 205, 136 C. C. A. 615 (8th Cir.); Stewart *v.* United States, 211 Fed. 41, 127 C. C. A. 477 (9th Cir.); United States *v.* Barker, 4 Wash. C. C. 464, Fed. Cas. No. 14520; United States *v.* Jourdine, 4 Cr. C. C. 338, Fed. Cas. No. 15499; United States *v.* Nailor, 4 Cr. C. C. 372, Fed. Cas. No. 15853.

[6] Thomson *v.* United States, 242 Fed. 401, 120 C. C. A. 575 (9th Cir.); Fields *v.* United States, 221 Fed. 242, 137 C. C. A. 98 (4th Cir.).

§ 408. [1] Carver *v.* United States, 164 U. S. 694, 41 L. ed. 602, 17 S. C. 228; Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917, 13 S. C. 50; S. C. 156 U. S. 237, 39 L. ed. 409, 15 S. C. 337.

[2] United States *v.* McGurk, 1 Cr. C. C. 71, Fed. Cas. No. 15680; Reg. *v.* Hind, 8 Cox Cr. C. 300.

[3] Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917, 13 S. C. 50; Kirby *v.* United States, 174 U. S. 47, 43 L. ed. 808, 19 S. C. 574.

[4] United States *v.* Veitch, 1 Cr. C. C. 115, Fed. Cas. No. 16614.

the declarations admissible, it must be shown by the party offering them in evidence that they were made under a sense of impending death.[5] The utmost caution is exercised by the trial court to see that it is established that they were made under the impression of almost immediate dissolution.[6] In this particular the requirement of the law is very stringent.[7] It has been held that a declaration is admissible if made while hope lingers, if it is afterwards ratified when hope is gone, or if made when the person is without hope, though afterwards he regains confidence. But the repetition of a dying declaration cannot itself be admitted as a reiteration of the alleged facts if made when hope has been regained.[8] The fact that the deceased has received extreme unction may be proved to show that she must have known she was *in articulo mortis*.[9] It is not essential to the admission of the declaration that death should have actually ensued immediately,[10] though the time elapsing between the making of the declaration and the death is one of the elements to be considered.[11] Dying declarations may be contradicted in the same manner as other testimony.[12] Evidence of other statements by the deceased inconsistent with his dying declarations may be received, in impeachment,[13] and may be discredited by proof that the deceased's character was bad, or that he did not believe in a future state of rewards or punishment.[14] The defendant is entitled to have all the declaration put in evidence.[15]

[5] Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917, 13 S. C. 50; Kelly *v.* United States, 27 Fed. 616.

[6] Carver *v.* United States, 160 U. S. 553, 40 L. ed. 532, 16 S. C. 388.

[7] Carver *v.* United States, 164 U. S. 694, 41 L. ed. 602, 17 S. C. 228; Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917, 13 S. C. 50; United States *v.* Woods, 4 Cr. C. C. 484, Fed. Cas. No. 16760.

[8] Carver *v.* United States, 160 U. S. 553, 555, 40 L. ed. 532, 16 S. C. 388.

[9] Carver *v.* United States, 164 U. S. 694, 41 L. ed. 602, 17 S. C. 228.

[10] Carver *v.* United States, 160 U. S. 553, 40 L. ed. 532, 16 S. C. 388; Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917, 13 S. C. 50.

[11] Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917, 13 S. C. 50.

[12] Carver *v.* United States, 164 U. S. 694, 41 L. ed. 602, 17 S. C. 228.

[13] Carver *v.* United States, 164 U. S. 694, 41 L. ed. 602, 17 S. C. 228.

[14] Carver *v.* United States, 164 U. S. 694, 41 L. ed. 602, 17 S. C. 228.

[15] Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917, 13 S. C. 50.

BEST AND SECONDARY EVIDENCE

§ 409. **Definition and General Rule.**

Primary evidence, or as it is more properly termed, the best evidence, is that kind of evidence which insures the greatest certainty of the fact in issue. Secondary evidence is that which shows that better evidence of the fact in issue presumably exists. Evidence which does not show on its face that better may be forthcoming is not secondary, but primary. The rule requiring the production of the best evidence of which the case is susceptible only excludes that evidence which indicates the existence of more original sources of information, and is confined to cases where there exists, or is presumed to exist, primary as well as secondary evidence.[1]

§ 410. **Applications of the Rule.**

Where the originals or letter press copies of letters are in the possession of the defendant in a criminal proceeding, and the defendant fails to produce them and cannot be compelled to do so, the door is open for secondary evidence of their contents. Of course, whether such letters ever were written, and what, if written, they contained, present a question of fact depending on the credibility of the witness, and that question of fact is for the consideration of the jury, and not for the determination of the court.[1] Since a defendant cannot be compelled to produce an original document of a highly criminal character, neither notice nor demand to produce it is necessary as a foundation for the introduction of secondary evidence of any document which the evidence may show is in his possession or under his control.[2] A tracing made by a government inspector of entries in a hotel register before the removal of the leaf by some person unknown, and shown to be an accurate representation of the signatures, was held admissible as secondary evidence in a prosecution for breaking into a post office in the vicinity.[3]

§ 409. [1] United States Sugar Refinery *v.* E. P. Allis Co., 56 Fed. 786, 6 C. C. A. 121 (7th Cir.).

§ 410. [1] Dunbar *v.* United States, 156 U. S. 185, 196, 39 L. ed. 390, 15 S. C. 325.

[2] McKnight *v.* United States, 122 Fed. 926, 929, 61 C. C. A. 112 (6th Cir.).

[3] Considine *v.* United States, 112 Fed. 342, 50 C. C. A. 272 (6th Cir.).

§ 411. **Public Records and Books of Account.**

Where records required by law to be kept are present in court, though not produced, abstracts made by a witness therefrom, giving the pertinent facts, may be introduced.[1] It is proper for an expert accountant to give a summary of books and documents, where the items are multifarious and voluminous, and of a character to render it difficult for the jury to comprehend material facts without the aid of such statement. But the true rule is held to be that, before such expert testimony may be given, the books or documents must be public records, or if they are private books of account or documents, that sufficient evidence must first be given to admit the books or documents themselves in evidence, unless the books or documents are admitted to be correct. Otherwise, items in books of account might be given in evidence through the testimony of an expert accountant when the account books themselves would not be admissible. This would be wrong in principle and dangerous in practice.[2] So, where the books of account of a bank are in court and subject to inspection by counsel, a witness who is familiar therewith may summarize their contents in his testimony.[3] The admission in evidence of books of account of private parties constitutes one of the exceptions to the rule of evidence which excludes hearsay testimony. This exception was born of necessity, and the courts have always required, in the absence of statutory provision, that before private books of account can be admitted in evidence, over the objection of the opposing party, some evidence must be introduced as to their trustworthiness. The mere fact that the laws of the United States make it a crime to make false entries in the books of a national bank does not make the books *prima facie* evidence of their contents, simply on their being identified as bank books, but their admissibility is determined by the rule governing the admission of entries in private books of account.[4] Papers used in a naval

§ 411. [1] Hart *v.* United States, 183 Fed. 368, 105 C. C. A. 588 (6th Cir.).

[2] Phillips *v.* United States, 201 Fed. 259, 269, 120 C. C. A. 149 (8th Cir.).

[3] Lennon *v.* United States, 164 Fed. 953, 90 C. C. A. 617 (8th Cir.).

[4] Phillips *v.* United States, 201 Fed. 259, 120 C. C. A. 149 (8th Cir.); Bacon *v.* United States, 97 Fed. 35, 38 C. C. A. 37 (8th Cir.); Chaffee *v.* United States, 18 Wall. (U. S.) 516, 21 L. ed. 908.

court-martial are official documents and authenticated copies thereof are admissible in evidence the same as the originals.[5]

§ 412. Letters and Telegrams.

Secondary evidence of letters, telegrams and correspondence in general is never admissible until the non-production of the originals is explained. Proof of the fact that the State court's receiver, after subpœna by the Government for the production of certain books in his hands, fails and refuses to produce the books, constitutes a sufficient foundation for the introduction of secondary evidence of their contents, if material.[1] On a trial under Section 215 proved copies of letters mailed to the accused are admissible without otherwise accounting for the absence of the originals.[2] The contents of telegrams are proved either by primary or secondary evidence. Primary evidence is the original telegram itself or the admissions of the sender. Secondary evidence of a telegram may consist of a copy proved to be correct or an oral account of the contents by one who has seen it and knows its contents. Before secondary evidence, however, may be received, the absence of the primary evidence must, of course, be satisfactorily accounted for. In the practical application of this rule, for the proof of the contents of telegrams, it must first be determined which is the original, the message sent or the one received. This, as a general rule, is determined by ascertaining whether the contents of the telegram sent or those of the one received are in issue.[3] Applying this rule, it was held that where the Government sought to prove a telegram alleged to have been sent by the accused as an incriminating circumstance, the message filed at the sending office would be the original, and proof of its loss or destruction was required before secondary evidence of its contents was admissible.[4] Where there was evidence that a cipher telegram came into the defendant's

[5] Cohn *v.* United States, 258 Fed. 355, — C. C. A. — (2d Cir.).

§ 412. [1] Foster *v.* United States, 178 Fed. 165, 175, 101 C. C. A. 485 (6th Cir.).

[2] Watlington *v.* United States, 233 Fed. 247, 147 C. C. A. 253 (8th Cir.); Trent *v.* United States, 228 Fed. 648, 143 C. C. A. 170 (8th Cir.); McKnight *v.* United States, 122 Fed. 926, 61 C. C. A. 112 (6th Cir.).

[3] Montgomery *v.* United States, 219 Fed. 162, 164, 135 C. C. A. 60 (8th Cir.); Reg. *v.* Regan, 16 Cox Cr. C. 203; United States *v.* Babcock, 3 Dill. 571, Fed. Cas. No. 14485.

[4] Montgomery *v.* United States, 219 Fed. 162, 135 C. C. A. 60 (8th Cir.).

possession, secondary evidence of its contents was properly received (a reply telegram).[5]

DEMONSTRATIVE EVIDENCE

§ 413. Generally.

Demonstrative evidence, such as of counterfeit coins, tools, implements, weapons, etc. is not admissible against a defendant if there is nothing to show the connection of the defendant therewith, or their connection with the crime charged.[1] On a trial for burglary, weapons and implements found in the defendant's possession when arrested, eighteen days after the burglary and nineteen miles distant, were not admissible where there was nothing to connect the possession or employment of these articles with the burglary.[2] In the multiplication of reported cases touching the evidential effect of the possession by the accused of implements and materials adaptable to the commission of the crime in question, it will be found that some courts have admitted such facts for the consideration of the jury when such possession was more or less remote from the time and locus of the crime; but their admissibility depended upon their being connected up with or traced to the *res gestæ*. If articles found on the defendant had been traced to his possession prior to the burglary or theft, and there had been any evidence tending to show the presence of the defendant about the premises near to the time of the trespass, and the like, the jury might have been advised that such possession of articles and implements, if the evidence tended to show that they were probably used in executing the crime, was a circumstance for their consideration. But the mere possession, eighteen days after the crime and nineteen miles distant from the locus, without any proof of the presence of the defendant in the locality, or the employment of such articles in the commission of the crime, was not evidence of the defendant's complicity, nor was it evidence "that they were going to commit some other crime." The ability to commit a crime does not evidence the

[5] Heinze *v.* United States, 181 Fed. 322, 104 C. C. A. 510 (2d Cir.).

§ 413. [1] Haugh *v.* United States, 173 Fed. 54, 97 C. C. A. 372 (4th Cir.); Sorenson *v.* United States, 168 Fed. 785, 94 C. C. A. 181 (8th Cir.).

[2] Sorenson *v.* United States, 168 Fed. 785, 94 C. C. A. 181 (8th Cir.).

act.[3] On a trial for murder the picture of the murdered man is admissible on the question of identity if for no other reason.[4] The existence of blood stains at or near a place where violence has been inflicted is always relevant and admissible in evidence.[5] In a prosecution for counterfeiting, it was held that permitting a plating machine taken from the defendants to be operated before the jury to demonstrate that coins could be plated with it such as the defendants made and uttered was not error.[6]

§ 414. Experiments in Court.

The granting or refusing to make experiments in the presence of the jury seems to be within the sound discretion of the Court and a refusal of same will ordinarily not be reviewed on writ of error.[1] All experiments before the jury to demonstrate certain facts must be done in open court and in the presence of the defendant. An instruction that a jury may make certain experiments in the jury room was held to be erroneous.[2]

§ 415. Variance — Generally.

The evidence and pleadings must be substantially to the same effect in criminal as well as in civil proceedings.[1] The allegations and proofs must correspond in a criminal case, and proofs without allegations are as ineffectual as allegations without proofs.[2] The controlling consideration is whether the charge was fairly and fully enough stated to apprise defendant of what he must meet, and to protect him against another prosecution, and whether those particulars in which the proof may differ in form from the charge support the conclusion that the defendant could have been misled

[3] Sorenson *v.* United States, 168 Fed. 785, 94 C. C. A. 181 (8th Cir.).

[4] Wilson *v.* United States, 162 U. S. 613, 40 L. ed. 1090, 16 S. C. 895.

[5] Wilson *v.* United States, 162 U. S. 613, 620, 40 L. ed. 1090, 16 S. C. 895.

[6] Taylor *v.* United States, 89 Fed. 954, 32 C. C. A. 449 (9th Cir.).

§ 414. [1] Ball *v.* United States, 163 U. S. 662, 41 L. ed. 300, 16 S. C. 1192.

[2] Wilson *v.* United States, 116 Fed. 484, 53 C. C. A. 652 (9th Cir.).

§ 415. [1] United States *v.* Keen, 26 Fed. Cas. No. 15510.

[2] Brown *v.* People, 173 Ill. 34, 37, 50 N. E. 106; Rabens *v.* United States, 146 Fed. 978, 77 C. C. A. 224 (4th Cir.); United States *v.* Lancaster, 44 Fed. 896; United States *v.* Newton, 52 Fed. 275; Regina *v.* Steel, 2 Moody's Crown Cases Reserved, 246, 41 E. C. L. 187; Rex *v.* Hamilton, 7 C. & P. 448, 32 C. C. L. 701; Marvin *v.* United States, 167 Fed. 951, 93 C. C. A. 351.

to his injury.[3] To try a person for a different offense than the one charged in the indictment or information would seem on principle to be in violation of the Fifth and Sixth Amendments of the Constitution of the United States, both amendments being intended to afford the defendant an opportunity to meet the charges against him and to apprise him of the nature of the accusation which he will be called upon to meet at the trial.

§ 416. Instances of Variance.

It is not a fatal variance that the offense was charged as to two persons and proved only as to one.[1] Where the indictment alleged that the grand jurors were ignorant of a more particular description than that given in the indictment, it is a variance if the prosecution does not satisfy them as to that fact.[2] The great weight of authority is to the effect that an indictment in a forgery case is fatally defective for variance between the signature of the original instrument and that appearing in the instrument set out in the indictment.[3] Time and place, when they are of the essence of the crime charged, must be proved or there is a fatal variance.[4] "Max" and "Matt" are not *idem sonans* and a conviction was reversed for variance between the indictment and the proof in these two names.[5]

§ 417. Second Trial.

The granting of a new trial wipes out the previous verdict and judgment, and the case proceeds anew.[1] The second trial must

[3] Harrison *v.* United States, 200 Fed. 662, 119 C. C. A. 78 (6th Cir.); Sutton *v.* People, 145 Ill. 279, 34 N. E. 420.

§ 416. [1] Bennett *v.* United States, 194 Fed. 630, 114 C. C. A. 402 (6th Cir.), *affirmed* in 227 U. S. 333, 57 L. ed. 531, 33 S. C. 288; Commonwealth *v.* Billings, 167 Mass. 283, 45 N. E. 910.

[2] Feener *v.* United States, 249 Fed. 425, 161 C. C. A. 399 (1st Cir.); White *v.* People, 32 N. Y. 465.

[3] United States *v.* Smith, Fed. Cas. No. 16326; State *v.* Woodrow, 56 Kan. 217, 42 Pac. 714; State *v.* Twitty, 9 N. C. 248; Agee *v.* State, 113 Alab. 52, 21 So. 207.

[4] United States *v.* Groff, Fed. Cas. No. 15244; People *v.* Bevans, 52 Cal. 470; Rice *v.* People, 38 Ill. 435; Bromley *v.* People, 150 Ill. 297, 37 N. E. 209.

[5] Vincendeau *v.* People, 219 Ill. 474.

§ 417. [1] Nohrden *v.* Northeastern R. R. Co., 59 S. Car. 87, 37 S. E. 228; Kilpatrick *v.* Grand Trunk Ry. Co., 74 Vt. 288, 52 Atl. 531.

be conducted as if there had been no previous trial.[2] Incompetent evidence received at the first trial cannot be received on the second trial.[3] And it is improper to refer to the defendant's previous conviction.[4]

[2] Nohrden *v.* Northeastern R. R. Co., 59 S. Car. 87, 37 S. E. 228.

[3] Nohrden *v.* Northeastern R. R. Co., 59 S. Car. 87, 37 S. E. 228.

[4] Holmgren *v.* United States, 217 U. S. 509, 54 L. ed. 861, 30 S. C. 588; Ogden *v.* United States, 112 Fed. 523, 50 C. C. A. 380 (3d Cir.); Mattox *v.* United States, 156 U. S. 237, 39 L. ed. 409, 15 S. C. 337.

CHAPTER XXXIII

MOTION FOR A DIRECTED VERDICT

§ 418. Scope of the Motion.

It is unusual to question the sufficiency of an indictment by a motion for a directed verdict. The court, however, will grant the motion if it appears that the indictment is so defective that it will be fatal on a motion in arrest of judgment.[1] On a motion to direct a verdict for the defendant the question is whether there is any competent evidence in the record justifying the court to submit the case to the jury.[2] When by the opening statement in a criminal case a fact is deliberately admitted by the prosecution which must necessarily prevent a conviction, the trial court may, on its own initiative or upon motion of the defendant's counsel, close the case by directing a verdict for the accused.[3] At the close of the evidence in every trial by jury a duty rests on the court to decide whether or no any substantial evidence has been adduced to sustain the claim of the plaintiff. If this question is decided negatively, the trial court is bound to direct a verdict for the defendant. This rule is laid down by Judge Clifford in Commissioners of County of Marion *v.* Clark,[4] as follows: "Decided cases may be found where it is held that, if there is a scintilla of evidence in support of the case, the Judge is bound to leave it to the jury; but the modern decisions have established the more

§ 418. [1] Stearns *v.* United States, 152 Fed. 900, 82 C. C. A. 48 (8th Cir.).

[2] Dean *v.* United States, 246 Fed. 568, 158 C. C. A. 538 (5th Cir.).

[3] United States *v.* Dietrich, 126 Fed. 676.

[4] 94 U. S. 278, 284, 24 L. ed. 59.

reasonable rule, to wit: that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed." [5] The Federal Appellate Courts regard a motion by the defendant for a directed verdict as challenging the legal sufficiency of the evidence. A request by the defendant for a directed verdict, says Sanborn, J. in Isbell *v.* United States: [6] "Necessarily and unavoidably presents this question of law to the mind of the trial judge for decision and to the mind of every lawyer within hearing of the request. No statement to the court that the ground of it is the absence of substantial evidence to sustain the plaintiff's cause of action could call that ground more forcibly to its attention than the request itself, because that is the ground which first occurs to the mind and on which such a request is ordinarily based." [7] This rule is applicable to criminal as well as civil cases.

[5] Giblin *v.* McMullen, L. R. 2 P. C. Apps. 335; Improvement Co. *v.* Munson, 14 Wall. (U. S.) 448, 20 L. ed. 872; Pleasants *v.* Fant, 22 Wall. (U. S.) 120, 22 L. ed. 782; Parks *v.* Ross, 11 How. 373; Merchants' Bank *v.* State Bank, 10 Wall. (U. S.) 637, 19 L. ed. 1015; Hickman *v.* Jones, 9 Wall. (U. S.) 201, 19 L. ed. 553. *See also* Patton *v.* Texas & Pacific Ry. Co., 179 U. S. 660, 45 L. ed. 361, 21 S. C. 275; Brady *v.* Chicago G. W. Ry. Co., 114 Fed. 100, 105, 52 C. C. A. 48, 52, 53 (8th Cir.); Cole *v.* German Savings & Loan Soc., 124 Fed. 113, 121, 122, 59 C. C. A. 593, 601, 602 (8th Cir.); St. Louis Cordage Co. *v.* Miller, 126 Fed. 495, 508, 61 C. C. A. 477, 490 (8th Cir.); Chicago Great Western Ry. Co. *v.* Roddy, 131 Fed. 712, 713, 65 C. C. A. 470, 471 (8th Cir.); Western Union Telegraph Co. *v.* Baker, 140 Fed. 315, 319, 72 C. C. A. 87, 91 (8th Cir.); First Nat. Gold Min. Co. *v.* Altvater, 149 Fed. 393, 397, 79 C. C. A. 213, 217 (8th Cir.); Duff *v.* United States, 185 Fed. 101, 107 C. C. A. 319 (4th Cir.); Missouri Pac. Ry. Co. *v.* Oleson, 213 Fed. 329, 330, 130 C. C. A. 31, 32 (8th Cir.).

[6] 227 Fed. 788, 142 C. C. A. 312 (8th Cir.).

[7] Dean *v.* United States, 246 Fed. 568, 158 C. C. A. 538 (5th Cir.); Chicago, Milwaukee & St. Paul Ry. Co. *v.* Bennett, 181 Fed. 799, 801, 104 C. C. A. 309, 311 (8th Cir.); Hedderly *v.* United States, 193 Fed. 561, 571, 114 C. C. A. 227, 237 (9th Cir.); Atchison, Topeka & S. F. Ry. Co. *v.* Meyers, 76 Fed. 443, 444, 447, 22 C. C. A. 268, 269, 272 (7th Cir.); Wiborg *v.* United States, 163 U. S. 632, 658, 41 L. ed. 289, 16 S. C. 1127; McDowell *v.* United States, 257 Fed. 298 (8th Cir.); Louisville & N. R. Co. *v.* Womack, 173 Fed. 752, 97 C. C. A. 520 (6th Cir.). *Contra:* Adams *v.* Shock, 104 Fed. 54, 43 C. C. A. 407 (7th Cir.).

In Sparf *v.* United States[8] (a murder case), the opinion of the court by Mr. Justice Harlan reads as follows: "The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them. But if there are no facts in evidence bearing upon the issue to be determined, it is the duty of the court, especially when so requested, to instruct them as to the law arising out of that state of case. So, if there be some evidence bearing upon the particular issue in a cause, but it is so meagre as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury."[9] The court held that while cases announcing the above rule were of a civil nature, they are with few exceptions applicable to criminal causes, and indicate the true test for determining the respective functions of court and jury. The court also held that the trial Judge has the right even in a capital case to instruct the jury as a matter of law to return a verdict of acquittal on the evidence adduced by the prosecution.[10]

§ 419. Court Cannot Direct a Verdict of Guilty.

In a criminal case, the court cannot direct a verdict of guilty.[1] If the trial court in giving an instruction to the jury should construct it in such a way that it would be inferred from the tenor of the instruction that the jury is required to convict, the appellate court will treat this as though it were a directed verdict of guilty and will therefore reverse the judgment.[2]

§ 420. Application of Theory of Innocence on Motion to Direct.

Evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis

[8] 156 U. S. 51, at pages 99 to 100, 39 L. ed. 343, 15 S. C. 273.

[9] Pleasants *v.* Fant, 89 U. S. 116, 121, 22 L. ed. 780; Montclair Twp. *v.* Dana, 107 U. S. 162, 27 L. ed. 436; Randall *v.* Baltimore & Ohio R. R. Co., 109 U. S. 478, 27 L. ed. 1003; Schofield *v.* Chicago M. & St. Paul R. R. Co., 14 U. S. 615, 619, 29 L. ed. 224; Marshall *v.* Hubbard, 117 U. S. 415, 419, 29 L. ed. 919; Meehan *v.* Valentine, 145 U. S. 611, 625, 36 L. ed. 835.

[10] Sparf *v.* United States, 156 U. S. 51, 39 L. ed. 343, 15 S. C. 273.

§ 419. [1] Sparf *v.* United States, 156 U. S. 51, 105, 39 L. ed. 343, 15 S. C. 273; United States *v.* Taylor, 11 Fed. 470.

[2] Cummins *v.* United States, 232 Fed. 844, 147 C. C. A. 38 (8th Cir.).

but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against him.[1]

§ 421. Saving Questions for Review.

In order to save for review the question whether the evidence of the prosecution was sufficient to entitle it to be submitted to the jury, the proper method is to move the court for a directed verdict at the close of the Government's case, or at the close of all the evidence.

§ 422. Waiver by Introducing Evidence — When Not a Waiver.

There are a number of cases holding that the claim of the insufficiency of the evidence introduced by the Government in a criminal case is waived, if after the close of the Government's testimony the motion of the defendant for a directed verdict is overruled and the defendant introduces evidence in his own behalf.[1] But this rule is not applicable to a case where there is no legal or competent evidence whatever in the record justifying

§ 420. [1] Isbell *v.* United States, 227 Fed. 788, 142 C. C. A. 312 (8th Cir.); Union Pacific Coal Co. *v.* United States, 173 Fed. 737, 740, 97 C. C. A. 578, 581 (8th Cir.); Vernon *v.* United States, 146 Fed. 121, 123, 124, 76 C. C. A. 547, 550 (8th Cir.); Hayes *v.* United States, 169 Fed. 101, 103, 94 C. C. A. 449, 451 (8th Cir.); W. F. Corbin & Co. *v.* United States, 181 Fed. 296, 305, 104 C. C. A. 278, 287 (6th Cir.); Prettyman *v.* United States, 180 Fed. 30, 43, 103 C. C. A. 384, 397 (6th Cir.); Harrison *v.* United States, 200 Fed. 662, 664, 119 C. C. A. 78, 80 (6th Cir.); United States *v.* Richards (D. C.), 149 Fed. 443, 454; United States *v.* Hart (D. C.), 78 Fed. 868, 873. *Affirmed*, 84 Fed. 799, 28 C. C. A. 612 (3d Cir.); United States *v.* McKenzie (D. C.), 35 Fed. 826, 827, 828.

§ 422. [1] Stearns *v.* United States, 152 Fed. 900, 82 C. C. A. 48 (8th Cir.); Hodson *v.* United States, 250 Fed. 421, 162 C. C. A. 491 (8th Cir.); Sandals *v.* United States, 213 Fed. 569, 131 C. C. A. 21 (6th Cir.); Gould *v.* United States, 209 Fed. 730, 126 C. C. A. 454 (8th Cir.); Simpson *v.* United States, 184 Fed. 817, 107 C. C. A. 89 (8th Cir.); Leyer *v.* United States, 183 Fed. 102, 105 C. C. A. 394 (2d Cir.); Thlinket Packing Co. *v.* United States, 236 Fed. 109 (9th Cir.); Burton *v.* United States, 142 Fed. 57, 73 C. C. A. 243 (8th Cir.); Goldman *v.* United States, 220 Fed. 57, 135 C. C. A. 625 (6th Cir.); Clark *v.* United States, 245 Fed. 112, 157 C. C. A. 408 (9th Cir.).

the conviction. In such a case there is no waiver and the reviewing court will reverse the conviction even though no motion to direct a verdict was made at any time.[2] In criminal cases when a plain error is committed in a matter vital to the defendant the Appellate Courts invariably exercise their discretion to correct it.[3] By an Act of Congress in force February 26, 1919, amending Section 269 of the Federal Judicial Code, it is now the duty of the Federal Courts on motion for new trial or on writ of error to examine the entire record without regard to technicalities or exceptions.[4] Nevertheless, it is the safer practice to preserve the question of the sufficiency of the evidence by repeating the motion for a directed verdict at the close of all the evidence.[5]

[2] Clyatt *v.* United States, 197 U. S. 207, 49 L. ed. 726, 25 S. C. 429; Wiborg *v.* United States, 163 U. S. 632, 41 L. ed. 289, 16 S. C. 1197.

[3] Clyatt *v.* United States, 197 U. S. 207, 49 L. ed. 726, 25 S. C. 429; Wiborg *v.* United States, 163 U. S. 632, 41 L. ed. 289, 16 S. C. 1197; William *v.* United States, 158 Fed. 30.

[4] August *v.* United States, 257 Fed. 388, — C. C. A. — (8th Cir.).

[5] Rimmerman *v.* United States, 186 Fed. 307, 108 C. C. A. 385; Clark *v.* United States, 245 Fed. 112, 157 C. C. A. 408 (9th Cir.); Thlinket Packing Co. *v.* United States, 236 Fed. 109 (9th Cir.); Tucker *v.* United States, 224 Fed. 833, 140 C. C. A. 279 (6th Cir.); Kasle *v.* United States, 233 Fed. 878, 147 C. C. A. 552 (6th Cir.).

CHAPTER XXXIV

ARGUMENT OF UNITED STATES ATTORNEY

§ 423. Quasi Judicial Officer.

Contemporary incumbents of the offices of district and prosecuting attorneys, in their zealous, and at times, passionate efforts to gain records for numerous convictions in criminal cases, are prone to disregard the basic and fundamental nature of their positions. The rule was well stated by Justice Cooley, in People *v.* Bemis,[1] that a prosecuting attorney is a *quasi* judicial officer and must be exclusively the representative of public justice. The language used by Judge Vann, in People *v.* Fielding,[2] is much stronger. "If he (public prosecutor) lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment." The public prosecutor is regarded universally as a *quasi* judicial officer presumed to act impartially in the interest only of justice, and to accord the defendant a fair trial.[3]

§ 423. [1] 51 Mich. 422, 16 N. W. 794.

[2] 158 N. Y. 542, 547.

[3] Fitter *v.* United States, 258 Fed. 567, — C. C. A. — (2d Cir.); People *v.* Davenport, 13 Cal. 632, 110 Pac.

§ 424. Right to Open and Close.

The attorney for the Government has the right to close in all criminal prosecutions.[1] It was held that the defendant had the right to open and close on the trial for the purpose of determining the mental condition of the defendant and whether he was sane enough to aid his counsel in the defense.[2]

§ 425. Argument Must Be Based on Facts in Record.

A United States attorney has no right to present an argument to the jury not based on evidence in the case if such an argument tends in the slightest degree to prejudice the jury against the defendant;[1] nor may he make any statement not connected with the case, if that statement be prejudicial to the defendant.[2] And if such statements of the United States attorney are not corrected by the court or withdrawn by the prosecuting attorney, they constitute reversible error,[3] if shown to be unwarranted and so improper as to be clearly injurious to the accused.[4]

318; State *v.* Blackman, 108 La. 121, 32 So. 334; State *v.* Warford, 106 Mo. 55, 16 S. W. 886; People *v.* Fielding, 158 N. Y. 542, 53 N. E. 497; State *v.* Osborn, 54 Oregon, 289, 103 Pac. 627; Commonwealth *v.* Shoemaker, 240 Pa. St. 255; Commonwealth *v.* Nicely, 130 Pa. 261, 270.

§ 424. [1] United States *v.* Bates, 2 Cranch (C. C.), 405, Fed. Cas. No. 14543.

[2] United States *v.* Chisolm, 149 Fed. 284.

§ 425. [1] Lowden *v.* United States, 149 Fed. 673, 79 C. C. A. 361 (5th Cir.); Hall *v.* United States, 150 U. S. 76, 37 L. ed. 1003, 14 S. C. 22; Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92; Graves *v.* United States, 150 U. S. 118, 37 L. ed. 1021, 14 S. C. 40.

[2] August *v.* United States, 257 Fed. 388 (C. C. A. 8th Cir.); Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765; Graves *v.* United States, 150 U. S. 118, 37 L. ed. 1021, 14 S. C. 40; Washington *v.* State, 87 Ga. 12; Hall *v.* United States, 150 U. S. 76, 82, 37 L. ed. 1013, 14 S. C. 22.

[3] August *v.* United States, 257 Fed. 388; Lowden *v.* United States, 149 Fed. 673, 79 C. C. A. 361 (5th Cir.); Hall *v.* United States, 150 U. S. 76, 82, 37 L. ed. 1003, 14 S. C. 22; Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92; Graves *v.* United States, 150 U. S. 118, 37 L. ed. 1021, 14 S. C. 40; Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765; Hopt *v.* Utah, 120 U. S. 430, 442, 30 L. ed. 708, 7 S.C. 614; Rose *v.* United States, 227 Fed. 357, 363, 142 C. C. A. 53 (8th Cir.).

[4] Higgins *v.* United States, 185 Fed. 710, 108 C. C. A. 48 (6th Cir.); Chadwick *v.* United States, 141 Fed. 225, 72 C. C. A. 343 (6th Cir.); Crumpton *v.* United States, 138 U. S. 361, 34 L. ed. 958, 11 S. C. 355; Lowden *v.* United States, 149 Fed. 673, 79 C. C. A. 361 (5th Cir.); Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92.

§ 426. Comment on Failure of Defendant to Testify Prohibited.

At common law no one was compelled to testify in his own behalf.[1] This maxim was embodied in our own Constitution [2] and upheld by our own courts.[3] Furthermore, at common law, he was not even permitted to testify, but must rest on the duty of the Government to prove his guilt.[4] Obviously in cases where testimony by the accused would easily establish his innocence, it was unjust to keep him from the stand. And so by statute the accused was accorded the right to testify, if he so desired.[5] In many cases, particularly where the defendant has undergone confinement in jail for a considerable time before trial, or when, because of physical deformity or nervousness or timidity, the appearance of the defendant may be against him, it may not be desirable for him to go on the stand. To relieve the defendant from such embarrassment, the statute provides that his failure to testify should not create any presumption of guilt against him.[6] Accordingly, the district attorney may not call the accused to the stand against his wish [7] nor demand of him the production of any document in the presence of the jury,[8] nor may he comment on the neglect, failure or refusal of a defendant to avail himself of his right to

§ 426. [1] Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765.

[2] Constitution, 5th Amendment: " . . . no person shall be compelled in any criminal case to be a witness against himself . . . "

[3] Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765; Tucker *v.* United States, 151 U. S. 164, 38 L. ed. 112, 14 S. C. 299; Lee *v.* United States, 150 U. S. 476, 37 L. ed. 1150, 14 S. C. 163; Stone *v.* United States, 167 U. S. 178, 42 L. ed. 127, 17 S. C. 778, holding that this would apply to cases *quasi* criminal in nature, to recover a penalty, forfeiture, etc.; Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524; York *v.* United States, 241 Fed. 656, 154 C. C. A. 414 (9th Cir.).

[4] Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765.

[5] Act of Congress, March 16, 1878, 20 Stat. 30, c. 37 (U. S. Compiled Stat. 1916, § 1465).

[6] Act of March 16, 1878, 20 St. 30, c. 37 (U. S. Comp. Stat. 1916, § 1465).

[7] Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765; Lee *v.* United States, 150 U. S. 476, 37 L. ed. 1150, 14 S. C. 163; Tucker *v.* United States, 151 U. S. 164, 38 L. ed. 112, 14 S. C. 299; Stone *v.* United States, 167 U. S. 178, 42 L. ed. 127, 17 S. C. 778; Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524.

[8] McKnight *v.* United States, 122 Fed. 926, 61 C. C. A. 112 (6th Cir.); Hanish *v.* United States, 227 Fed. 584, 142 C. C. A. 216 (7th Cir.).

testify.[9] Any such comment constitutes reversible error.[10] And even if the comment be not a direct reference to the failure of the accused to testify, but is designed, in an indirect way, to bring the attention of the jury to the defendant's failure to testify, it will constitute reversible error.[11]

§ 427. **Instances of Unfair Comment.**

"I want to say to you, gentlemen of the jury, that if I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my character, but I will go upon the stand and hold up my hand before high heaven and testify to my innocence of crime." This statement was held to be reversible error.[1] If, however, the defendant takes the stand in his own behalf, he reverts to the status of an ordinary witness.[2] On a motion for a continuance, it is improper for either court or prosecuting attorney, if the jury be present in the court room, to make comments to the merits of the case, which are detrimental to the defendant. Such remarks are equivalent to an erroneous instruction.[3] It is improper for a district attorney to ask a defendant when on the witness stand whether his partner was not under indictment for using the mails to defraud.[4]

[9] Diggs *v.* United States, 220 Fed. 545, 136 C. C. A. 147 (9th Cir.).

[10] Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765; United States *v.* Snyder, 14 Fed. 554, 557; Dimmick *v.* United States, 121 Fed. 638, 644, 57 C. C. A. 664 (9th Cir.); Rose *v.* United States, 227 Fed. 357, 363, 142 C. C. A. 53 (8th Cir.); Tucker *v.* United States, 151 U. S. 164, 38 L. ed. 112, 14 S. C. 299; McKnight *v.* United States, 115 Fed. 972, 54 C. C. A. 358 (6th Cir.); Stout *v.* United States, 227 Fed. 799, 803, 142 C. C. A. 323 (8th Cir.); Reagan *v.* United States, 157 U. S. 301, 39 L. ed. 709, 15 S. C. 610.

[11] Shea *v.* United States, 251 Fed. 440, 445, 163 C. C. A. 458 (6th Cir.); Lowden *v.* United States, 149 Fed. 673, and cases cited; — *Certiorari denied*, 210 U. S. 434.

§ 427. [1] Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765.

[2] Diggs *v.* United States, 220 Fed. 545, 136 C. C. A. 147 (9th Cir.); Reagan *v.* United States, 157 U. S. 301, 39 L. ed. 709, 15 S. C. 610; Fitzpatrick *v.* United States, 178 U. S. 304, 44 L. ed. 1078, 20 S. C. 944; Sawyer *v.* United States, 202 U. S. 150, 166, 50 L. ed. 972, 26 S. C. 575; Balliet *v.* United States, 129 Fed. 689, 64 C. C. A. 201 (8th Cir.); United States *v.* Brown, 40 Fed. 457; Williams *v.* United States, 254 Fed. 52 (5th Cir.).

[3] Allen *v.* United States, 115 Fed. 3, 52 C. C. A. 597 (9th Cir.).

[4] Tingle *v.* United States, 87 Fed. 320, 30 C. C. A. 666 (5th Cir.).

§ 428. **Comment as to Character of the Defendant.**

The legal presumption exists that the defendant's character is good,[1] and he may rest on that presumption.[2] The Circuit Court of Appeals for the Eighth Circuit has laid down the rule that in a criminal trial, there being no evidence introduced on the subject, the court will not charge that there is a legal presumption of good character of the accused.[3] These cases lay down the modern rule, and the rule of an earlier case [4] is of no effect now. He may, if he choose, 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.[5] But where the defendant fails to offer evidence as to good character, it is improper for the district attorney to appeal to the jury to assume that the defendant's character is bad, because he failed to prove the contrary.[6] Not only may the district attorney not refer to the defendant's failure to prove his good character, but unless the defendant himself makes character an issue, the district attorney may not even introduce evidence to prove bad character or habits as part of his case.[7]

§ 429. **Inflaming the Minds of the Jury.**

It is highly improper for a United States attorney to use inflammatory language calculated to prejudice the accused in the eyes

§ 428. [1] Lowden *v.* United States 149 Fed. 673, 79 C. C. A. 361 (5th Cir.); Higgins *v.* United States, 185 Fed. 710, 108 C. C. A. 48 (6th Cir.); Dimmick *v.* United States, 121 Fed. 638, 57 C. C. A. 664 (9th Cir.).

[2] Mullen *v.* United States, 106 Fed. 892, 46 C. C. A. 22 (6th Cir.); Lowden *v.* United States, 149 Fed. 673, 79 C. C. A. 361 (5th Cir.).

[3] De Moss *v.* United States, 250 Fed. 87, 162 C. C. A. 259 (8th Cir.); Greer *v.* United States, 240 Fed. 320, 153 C. C. A. 246 (8th Cir.), *affirmed*, 245 U. S. 559, 62 L. ed. 469, 38 S. C. 209; Price *v.* United States, 218 Fed. 149, 132 C. C. A. 1 (8th Cir.); Chambliss *v.* United States, 218 Fed. 154, 132 C. C. A. 112 (8th Cir.).

[4] Mullen *v.* United States, 106 Fed. 892, 46 C. C. A. 22 (6th Cir.).

[5] Edgington *v.* United States, 164 U. S. 361, 41 L. ed. 467, 17 S. C. 72; Le More *v.* United States, 253 Fed. 887, — C. C. A. — (5th Cir.).

[6] Hall *v.* United States, 256 Fed. 748, — C. C. A. — (4th Cir.); McKnight *v.* United States, 97 Fed. 208, 38 C. C. A. 115 (6th Cir.); Higgins *v.* United States, 185 Fed. 710, 108 C. C. A. 48 (6th Cir.); Dimmick *v.* United States, 121 Fed. 638, 57 C. C. A. 664 (9th Cir.); Lowden *v.* United States, 149 Fed. 673, 79 C. C. A. 361 (5th Cir.).

[7] Gordon *v.* United States, 254 Fed. 53; Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92.

of the jury. Hence, in a recent case,[1] in a prosecution for attempted bribery of officers of selective draft boards, references to the war with Germany were held to be prejudicial error. In another recent case [2] arising under the Espionage Act, the court held it to be reversible error for the district attorney to bring to the notice of the jury that the defendant had failed to introduce a witness who would testify to the patriotism of the accused or object to the prosecution. Likewise statements by the district attorney to the jury commenting upon the absence of the defendant's wife and that she ought to be sitting by the side of her husband, during the trial, impose a duty upon the court, if his attention is called to them specially, to interfere and put a stop to them as it was held to be prejudicial to the accused.[3] In Morris *v.* United States,[4] the prosecutor attempted to show a document to a witness to refresh his memory. The defendant's objection that it could not be used because it had not been shown to him was overruled by the trial judge. The Circuit Court of Appeals, in reversing the case on the ground that the defendant's right of confrontation was violated, said: "that the universal rule of evidence in the courts of this country (is) that, where a witness is permitted to examine and refresh his recollection with a paper, it is to be tendered to the other side for inspection just as soon as it has been identified."

§ 430. **Duty of Court to Repress Improper Argument.**

It is the duty of the trial court, the objection being made, to stop the district attorney from continuing this line of argument and to take steps to remove, as far as possible, its influence upon the jury.[1] And it is the duty of the court to treat the defendant's counsel with respect, bearing in mind that the latter is an officer of the court.[2]

§ 431. **Effect of Improper Argument of District Attorney.**

Where the objection is thus sustained by the court and the words of the district attorney are withdrawn at once, it is ordinarily

§ 429. [1] August *v.* United States, 257 Fed. 388, — C. C. A. — (8th Cir.).

[2] Hall *v.* United States, 256 Fed. 748, — C. C. A. — (4th Cir.).

[3] Graves *v.* United States, 150 U. S. 118, 37 L. ed. 1021, 14 S. C. 40.

[4] 149 Fed. 123, 80 C. C. A. 112 (5th Cir.).

§ 430. [1] Lowden *v.* United States, 149 Fed. 673, 79 C. C. A. 361 (5th Cir.).

[2] Adler *v.* United States, 182 Fed. 464, 104 C. C. A. 608 (5th Cir.).

considered that the injurious effect is thereby remedied and the incident does not of itself constitute ground for a new trial.[1] But an impression upon the jury may have been so strong, that even the withdrawal of the words still leaves the jury prejudiced. In such cases, it will be left to the discretion of the trial court whether the remarks of the district attorney so influenced the jury as to produce the conviction of the defendant.[2]

§ 432. **Necessity of Objection and Exception — New Rule.**

Formerly the rule was that a party defendant could not complain of an improper argument of counsel unless he duly objected and took proper exceptions to it.[1] This rule was qualified by another well known rule, that in criminal cases courts are not inclined to be exacting with reference to the specific character of the objections made, and will, in the exercise of sound discretion, notice error in the trial although the question was not properly raised by objection or exception.[2] By an Act of February 26, 1919, Congress amended Section 269 of the Judicial Code and established a new rule which virtually abolished the office of an exception on the trial of any case. This Act reads as follows: "Section 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment

§ 431. [1] Lowden *v.* United States, 149 Fed. 673, 79 C. C. A. 361 (5th Cir.); Dunlop *v.* United States, 165 U. S. 486, 498, 41 L. ed. 799, 17 S. C. 375; Wright *v.* United States, 108 Fed. 805, 48 C. C. A. 37 (5th Cir.); *Writ of Certiorari denied*, 181 U. S. 620, 45 L. ed. 1031, 21 S. C. 924; Kellog *v.* United States, 103 Fed. 200, 43 C. C. A. 179 (6th Cir.).

[2] Lowden *v.* United States, 149 Fed. 673, 79 C. C. A. 361 (5th Cir.).

§ 432. [1] Chambers *v.* United States, 237 Fed. 520, 150 C. C. A. 395 (8th Cir.); Donaldson *v.* United States, 208 Fed. 4, 125 C. C. A. 316 (9th Cir.); Carlisle *v.* United States, 194 Fed. 827, 114 C. C. A. 531 (4th Cir.); Higgins *v.* United States, 185 Fed. 710, 108 C. C. A. 48 (6th Cir.); Union Pacific R. R. Co. *v.* Field, 137 Fed. 14, 69 C. C. A. 536 (8th Cir.); Cudahy Packing Co. *v.* Skoumal, 125 Fed. 470, 60 C. C. A. 306 (8th Cir.).

[2] Savage *v.* United States, 213 Fed. 31, 130 C. C. A. 1 (8th Cir.); Crawford *v.* United States, 212 U. S. 183, 194, 53 L. ed. 465, 29 S. C. 260; Wiborg *v.* United States, 163 U. S. 632, 659, 41 L. ed. 289, 299, 16 S. C. 1127.

after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." Interpreting this rule, the United States Circuit Court of Appeals in a recent case[3] held that it is the duty of every court to consider the propriety of an argument of a United States attorney in a criminal case irrespective of the fact that no exception was taken to same.

[3] August *v.* United States, 257 Fed. 388 (C. C. A. 8th Cir.).

CHAPTER XXXV

CHARGE TO JURY

§ 433. No Directed Verdict of Guilty.

In a criminal case the court cannot direct a verdict of guilty against the defendant of the offense charged,[1] nor of any offense less or greater than that charged even when the facts are admitted beyond dispute.[2] Neither can the court charge the jury that the intent was proved.[3]

§ 434. Functions of Court and Jury.

Under the Constitution and laws of the United States, the jury in a criminal case is not the judge of the law. It is to take the law from the court and to apply it to the facts which it finds

§ 433. [1] Sparf *v.* United States, 156 U. S. 51, 39 L. ed. 343, 15 S. C. 273; Cummings *v.* United States, 232 Fed. 844, 147 C. C. A. 38 (8th Cir.); McKnight *v.* United States, 111 Fed. 735, 49 C. C. A. 594 (6th Cir.); United States *v.* Taylor, 11 Fed. 470.

[2] Sparf *v.* United States, 156 U. S. 51, 39 L. ed. 343.

[3] Cummings *v.* United States, *supra.*

from the evidence.[1] The court cannot assume facts. It is the province of the jury to pass on the facts and it is improper for the court to instruct the jury that they may assume the existence of certain facts.[2] Comments by the court concerning the value of evidence are not assignable for error when the jury are left at full liberty to determine the issues of fact for themselves and the rules of law are properly stated.[3] The comments of the judge must at all times be dispassionate.[4] It is reversible error to submit to the jury the question whether a conspiracy includes means of which there is no evidence.[5] And this is so because 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. The court is not warranted to decide, as a matter of law, a single issue presented by the indictment or to withdraw the same from the consideration of the jury.[6]

§ 435. **Language.**

The court is not bound to accept the language which counsel employ in framing instructions, nor is it obliged to repeat instructions already given in different language.[1]

§ 436. **State Laws.**

State laws forbidding judges, in instructing juries, to express opinions upon the facts are not controlling on Federal Courts.[1]

§ **434.** [1] Konda *v.* United States, 166 Fed. 91, 92 C. C. A. 78 (7th Cir.); Snitkin *v.* United States, (C. C. A. 7th Cir., March 30, 1920); Sparf *v.* United States, 156 U. S. 51, 39 L. ed. 343, 15 S. C. 273; United States *v.* Keller, 19 Fed. 633; United States *v.* Morris, 1 Curt. 23, Fed. Cas. No. 15815.

[2] Dolan *v.* United States, 123 Fed. 52, 59 C. C. A. 176 (9th Cir.), and *see* cases in note 1.

[3] Smith *v.* United States, 157 Fed. 721, 732, 85 C. C. A. 353 (8th Cir.). *Certiorari* denied 208 U. S. 618, 52 L. ed. 647, 28 S. C. 569.

[4] Stokes *v.* United States, 264 Fed. 19, C. C. A. (8th Cir.). Reynolds *v.* United States, 98 U. S. 145, 25 L. ed. 244; Hickory *v.* United States, 160 U. S. 408, 40 L. ed. 474, 16 S. C. 327; Foster *v.* United States, 188 Fed. 305, 110 C. C. A. 283 (4th Cir.).

[5] Nash *v.* United States, 229 U. S. 373, 57 L. ed. 1232, 33 S. C. 780; Patterson *v.* United States, 222 Fed. 599, 650, 138 C. C. A. 123 (6th Cir.). Snitkin *v.* United States, *supra*.

[6] Konda *v.* United States, *supra*; Snitkin *v.* United States, *supra*.

§ **435.** [1] Sugarman *v.* United States, 249 U. S. 182, — L. ed. — S. C. —; Agnew *v.* United States, 165 U. S. 36, 41 L. ed. 624, 17 S. C. 235; Bennett *v.* United States, 227 U. S. 333, 57 L. ed. 531, 33 S. C. 288; Holt *v.* United States, 218 U. S. 245, 54 L. ed. 1021, 31 S. C. 20; Blanton *v.* United States, 213 Fed. 320, 130 C. C. A. 22 (8th Cir.).

§ **436.** [1] Vicksburg and Meridian

§ 437. Summing Up the Facts.

The Federal rule is similar to that held by the English Courts that the presiding judge may, if he deems it to be proper, sum up the facts to the jury; if no rule of law is misstated, and the questions of fact are ultimately submitted to the determination of the jury, an expression of opinion upon the facts is not reviewable on error.[1] It is the duty of the presiding judge to call the jury's attention to particular points, and to comment upon the tendency, force and comparative weight of conflicting testimony.[2] But it is improper for the court to arbitrarily single out certain facts without consideration of other modifying facts.[3] In reviewing the evidence, the judge must be careful not to unduly emphasize certain parts of the testimony nor prejudice the jury by his actions or words. He must constantly keep in mind, especially in criminal cases, that the importance and power of his office and the theory and rule requiring impartial conduct on his part make his slightest action or suggestion of great weight with the jury.[4]

§ 438. The Jury Must Be Left Free to Pass on Facts.

The jurors are the judges of the fact; expressions of opinion by the court on a question of fact should be so guarded as to leave the jury free in the exercise of its own judgment. They should distinctly be made to understand that the judge's statement is not given as a point of law by which they are to be governed, but as a mere opinion to which they should attach no more weight than it is entitled.[1] The trial judge must not usurp the functions of the jury or appeal to their passion or prejudice,[2] as the jury is naturally

R. R. Co. *v.* Putnam, 118 U. S. 545, 553, 30 L. ed. 257, 7 S. C. 1; Philadelphia & R. R. R. Co. *v.* Maryland, 239 Fed. 1, 152 C. C. A. 51 (3d Cir.).

§ 437. [1] Starr *v.* United States, 153 U. S. 614, 624, 38 L. ed. 841, 14 S. C. 919; Simmons *v.* United States, 142 U. S. 148, 35 L. ed. 968, 12 S. C. 171; Lovejoy *v.* United States, 128 U. S. 171, 32 L. ed. 389, 9 S. C. 57.

[2] Starr *v.* United States, 153 U. S. 614, 38 L. ed. 841, 14 S. C. 919; United States *v.* Sarchet, Fed. Cas. No. 16224.

[3] Perovich *v.* United States, 205 U. S. 86, 51 L. ed. 722, 27 S. C. 456; Weddel *v.* United States, 213 Fed. 208, 129 C. C. A. 552 (8th Cir.).

[4] Adler *v.* United States, 182 Fed. 464, 104 C. C. A. 608 (5th Cir.).

§ 438. [1] Starr *v.* United States, 153 U. S. 614, 625, 38 L. ed. 841, 14 S. C. 919; Rudd *v.* United States, 173 Fed. 912, 97 C. C. A. 462 (8th Cir.); Oppenheim *v.* United States, 241 Fed. 625, 154 C. C. A. 383 (2d Cir.). Compare, Stokes *v.* United States, *supra*.

[2] Sandals *v.* United States, 213 Fed. 569, 130 C. C. A. 149 (6th Cir.); Hickory *v.* United States, 160 U. S.

sensitive to the court's expressions of opinion concerning the issues of fact in any case.[3] The reviewing court will take judicial notice that the influence of the trial judge on the jury is so great that his slightest word or intimation is received with deference and may prove controlling.[4]

§ 439. **Court Expressing Indignation and Improper Comments.** Where the trial judge manifested indignation at the circumstances of the case, in terms which were not consistent with due regard for the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances, the Supreme Court of the United States expressed its disapprobation of this mode of instructing and advising a jury.[1] In a leading case,[2] the court summed up the matter as follows: "In a criminal case we think the judge has the right, and indeed it is his duty to present the evidence to the jury in such a light and with such comments that the jury may see its relevancy and its pertinency to the particular issue upon which it was admitted, and thus be better qualified to appreciate its character and weight and to determine its credibility. These questions are for the jury, but it is proper that a judge should assist the jury in marshalling the evidence so that they may the more readily and intelligently come to a conclusion which shall be satisfactory to themselves, consistent with the evidence and in accordance with the law. The judge should do this *in a fair and impartial manner*, having due regard to the rights of the defendant and with a serious and anxious desire for their preservation. . ." He must take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province.[3] And the judge has no right to persuade the jury as to the facts or to argue the case for either

408, 40 L. ed. 474, 16 S. C. 327; Mullen *v.* United States, 106 Fed. 892, 46 C. C. A. 22 (6th Cir.).

[3] Starr *v.* United States, 153 U. S. 614, 38 L. ed. 841, 14 S. C. 919; Hickory *v.* United States, 160 U. S. 408, 424, 425, 40 L. ed. 474, 16 S. C. 327; Foster *v.* United States, 188 Fed. 305, 308, 310, 110 C. C. A. 283 (4th Cir.)

[4] Starr *v.* United States, 153 U. S. 614, 38 L. ed. 841, 14 S. C. 919.

§ 439. [1] Starr *v.* United States, 153 U. S. 614, 38 L. ed. 841, 14 S. C. 919.

[2] People *v.* Fanning, 131 N. Y. 659, 663.

[3] Starr *v.* United States, 153 U. S. 614, 625, 38 L. ed. 841, 14 S. C. 919.

side.[4] When the remarks of the court are so positive and emphatic that the jury may have believed a finding for the accused would have subjected them to ridicule, a mere withdrawal of words and a direction to the jury that the question is for them is not always sufficient, and the just remedy is a new trial.[5] Perhaps a judge cannot be considered as going out of his province in giving a caution to the jury as to giving effect to the testimony of the accused; but the policy of the enactment allowing him to be a *competent* witness should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law.[6] It is improper for a court to express an opinion to the jury, that the defendant on trial is guilty of the offense charged. That question is one for the jury to decide.[7] There is one case not in harmony with the trend of authorities.[8] It was held that the indication by a district judge in his charge that he thought the defendant guilty does not furnish ground for a new trial. A large latitude is allowed to a trial judge in the Federal Courts in expressing his opinion to the jury, so long as he leaves the ultimate issue of guilt or innocence to their decision. An instruction that omits the element of knowledge on the part of accused is error.[9] In a trial for murder through the shooting by another person, the instruction must include the rule that the shooting was intentionally encouraged and aided by the words or acts of the accused, and to omit it is error.[10] And even where the facts of a case justly aroused the indignation of the court, it was held error for the court to express its indignation in a way that would prejudice the jury and this seems to be entirely correct.[11] And it is well settled that every appeal by the court to the passion or prejudice of the jury should be promptly rebuked, for it is

[4] Oppenheim *v.* United States, 241 Fed. 625, 629, 154 C. C. A. 383 (2d Cir.).

[5] Rudd *v.* United States, 173 Fed. 912, 914, 97 C. C. A. 462 (8th Cir.).

[6] Hicks *v.* United States, 150 U. S. 442, 452, 37 L. ed. 1137, 14 S. C. 144; Allison *v.* United States, 160 U. S. 203, 207, 40 L. ed. 395, 16 S. C. 252.

[7] United States *v.* Tenurck, 5 Cranch (C. C.), 562; Breese *v.* United States, 108 Fed. 804, 48 C. C. A. 36 (4th Cir.); Cummins *v.* United States, 232 Fed. 844, 147 C. C. A. 38 (8th Cir.).

[8] Perkins *v.* United States, 228 Fed. 408, 420, 142 C. C. A. 638 (4th Cir.).

[9] Hicks *v.* United States, 150 U. S. 442, 37 L. ed. 1137, 14 S. C. 144.

[10] Hicks *v.* United States, *supra.*

[11] *Ibid.*

obvious that the jury is sensitive to the court's expression of opinion.[12]

§ 440. **Instructions as to Defenses Generally.**

A defendant in a criminal case is entitled to have the court clearly state to the jury each distinct and important theory of defense, so that the jury may understand that theory and the essential rules of law applicable thereto.[1] The failure to give an instruction limiting the purpose for which particular evidence may be considered is not error, where such instruction is not specially requested.[2]

§ 441. **Instructions on Presumption of Innocence.**

It is a fundamental principle of the common law that the burden of proving the defendant guilty as charged in the indictment beyond a reasonable doubt rests upon the prosecution and does not shift.[1] Reasonable doubt of guilt may exist, though there may not be probability of innocence.[2] All defendants are entitled to the benefit of the presumption of innocence which continues until the verdict is rendered [3] and it is error to charge that the jury must find the defendant guilty beyond a reasonable doubt and refuse to charge as to the legal presumption of innocence.[4] When testimony contradictory or explanatory of inferences and presumptions claimed to flow from the evidence is introduced by the defendant, it becomes a part of the government's burden of proof to make the case so clear that there is no

[12] Reynolds *v.* United States, 98 U. S. 145, 25 L. ed. 244; Hickory *v.* United States, 160 U. S. 408, 40 L. ed. 474, 16 S. C. 327; Foster *v.* United States, 188 Fed. 305, 110 C. C. A. 283 (4th Cir.).

§ 440. [1] Hendrey *v.* United States, 233 Fed. 5, 18, 147 C. C. A. 71 (6th Cir.); Patterson *v.* United States, 222 Fed. 599, 649, 138 C. C. A. 123 (6th Cir.).

[2] Hallowell *v.* United States, 253 Fed. 865, — C. C. A. — (9th Cir.).

§ 441. [1] Wilson *v.* United States, 232 U. S. 563, 58 L. ed. 728, 34 S. C. 347; Coffin *v.* United States, 156 U. S. 432, 39 L. ed. 481, 15 S. C. 394; Melton *v.* United States, 120 Fed. 504, 57 C. C. A. 134 (5th Cir.); Davis *v.* United States, 160 U. S. 469, 40 L. ed. 499, 16 S. C. 353.

[2] Nordan *v.* State, 143 Ala. 13, 39 So. 411; Wade *v.* State, 71 Ind. 535.

[3] Agnew *v.* United States, 165 U. S. 36, 41 L. ed. 624, 17 S. C. 235; Coffin *v.* United States, 156 U. S. 432, 39 L. ed. 481, 15 S. C. 394; Hall *v.* United States, 235 Fed. 869, 149 C. C. A. 181 (9th Cir.).

[4] Cochran *v.* United States, 157 U. S. 286, 39 L. ed. 704, 15 S. C. 628.

reasonable doubt as to such inferences and presumptions.[5] The presumption of innocence shields a corporation to the same extent that it shields an individual.[6]

§ 442. **Reasonable Doubt — Defined.**

A reasonable doubt is such a doubt as would cause a prudent and rational man to pause or hesitate to act in the determination of any of the affairs of life of the highest importance to himself.[1] The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.[2] An instruction that a reasonable doubt is one for which "a reason could be given based on the evidence or want of evidence in the case" was held to be improper but not ground for reversal.[3] The court in another case[4] held the following charges to be valid: "The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty, unless from all the evidence you believe him guilty beyond a reasonable doubt. The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if after such

[5] Potter *v.* United States, 155 U. S. 438, 448, 39 L. ed. 214, 15 S. C. 144.

[6] Interstate Commerce Commission *v.* Chicago G. W. R. Co., 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 S. C. 493.

§ 442. [1] Pettine *v.* Territory of New Mexico, 201 Fed. 489, 119 C. C. A. 581 (8th Cir.); Hopt *v.* Utah, 120 U. S. 430, 30 L. ed. 708, 7 S. C. 614; Maupin *v.* United States, 258 Fed. 607, — C. C. A. — (4th Cir.).

[2] Commonwealth *v.* Webster, 5 Cush. (Mass.) 320.

[3] Griggs *v.* United States, 158 Fed. 572, 85 C. C. A. 596 (9th Cir.). *But see* Pettine *v.* Territory of New Mexico, 201 Fed. 489, 119 C. C. A. 581 (8th Cir.), where it was held reversible error.

[4] Hopt *v.* Utah, 120 U. S. 430, 30 L. ed. 708, 7 S. C. 614.

impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt." The following definition of reasonable doubt was held to be objectionable: "A reasonable ground of doubt is one which is reasonable from the evidence or want of evidence. It must be a ground of doubt for which a reason can be given, which reason must be based upon the evidence or want of evidence." [5] However, it may be said as a general rule, that definitions approved in some courts have been held reversible error in others. The difficulty lies in explaining words which perhaps define themselves better than can be done by any paraphrase or elucidation. Consequently there is hopeless confusion in the adjudicated cases as to the definition of reasonable doubt. Mr. Justice Woods said: "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." [6]

§ 443. Failure of a Defendant to Testify.

The policy of the enactment that a defendant shall, at his own request and not otherwise, be a competent witness should not be defeated by hostile comments of a trial judge whose duty it is to give reasonable effect and force to the law.[1] The wise and humane provision of the law is that the person charged shall, at his own request, but not otherwise, be a competent witness.[2] The rule is universal that the neglect, failure or even refusal of a defendant to avail himself of his right to testify in his own behalf must not provoke comment.[3] Any comment which is manifestly designed to direct attention of the jury to the defendant's failure

[5] Owens *v.* United States, 130 Fed. 279, 64 C. C. A. 525 (9th Cir.).

[6] Miles *v.* United States, 103 U. S. 312, 26 L. ed. 481.

§ 443. [1] Hicks *v.* United States, 150 U. S. 442, 37 L. ed. 1132, 14 S. C. 144; Diggs *v.* United States, 220 Fed. 545, 137 C. C. A. 113 (9th Cir.); Brown *v.* Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. C. 644; United States *v.* Wetmore, 218 Fed. 237.

[2] Hicks *v.* United States, 150 U. S. 442, 37 L. ed. 1132, 14 S. C. 144.

[3] Diggs *v.* United States, 220 Fed. 545, 137 C. C. A. 113 (9th Cir.); Brown *v.* Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. C. 644; United States *v.* Wetmore, 218 Fed. 227.

to testify, or necessarily resulting so, is reversible error.[4] The statute [5] restrains both court and counsel from commenting on the failure of the accused to testify.[6] But charging the jury that certain testimony has not been contradicted does not call the attention of the jury to the fact that defendant did not testify.[7]

§ 444. **Flight of Defendant.**

An instruction to the jury that the flight of the accused person was a fact for the jury's consideration was held to be a proper instruction; [1] but where the jury was told that the flight of the defendant was a silent admission of his guilt,[2] or that the wicked flee when no man pursueth, but the innocent are as bold as a lion,[3] were held erroneous because the jury were in substantial effect told that the defendant's flight was in a sense a confession of his guilt.[4]

§ 445. **Character.**

The defendant is entitled to a legal presumption that his character is good. Where the defendant failed to introduce any evidence as to his good character, it was held improper for the district attorney to appeal to the jury to assume that the defendant's character was bad because he failed to prove the contrary.[1] In criminal prosecutions, the accused will be allowed

[4] Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765; Stout *v.* United States, 227 Fed. 799, 142 C. C. A. 323 (8th Cir.); Shea *v.* United States, 251 Fed. 440, 445, 163 C. C. A. 458 (6th Cir.); McKnight *v.* United States, 115 Fed. 972, 981, 54 C. C. A. 358 (6th Cir.).

[5] Act of March 16, 1878, ch. 37, 20 Stat. L. 30 (3 U. S. Comp. St. 1916, § 1465).

[6] Stout *v.* United States, 227 Fed. 799, 142 C. C. A. 323 (8th Cir.); Wilson *v.* United States, 149 U. S. 60, 37 L. ed. 650, 13 S. C. 765.

[7] Sidebotham *v.* United States, 253 Fed. 417 (9th Cir.).

§ 444. [1] Stewart *v.* United States, 211 Fed. 41, 127 C. C. A. 477 (9th Cir.).

[2] Starr *v.* United States, 164 U. S. 627, 41 L. ed. 577, 17 S. C. 223.

[3] Hickory *v.* United States, 160 U. S. 408, 40 L. ed. 474, 16 S. C. 327.

[4] Allen *v.* United States, 164 U. S. 492, 499, 41 L. ed. 528, 17 S. C. 154; Alberty *v.* United States, 162 U. S. 499, 509, 40 L. ed. 1051, 16 S. C. 864.

§ 445. [1] Hall *v.* United States, 256 Fed. 748 (C. C. A. 4th Cir.); Lowden *v.* United States, 149 Fed. 673, 79 C. C. A. 361 (5th Cir.); Higgins *v.* United States, 185 Fed. 710, 108 C. C. A. 48 (6th Cir.); Dimmick *v.* United States, 121 Fed. 638, 57 C. C. A. 664 (9th Cir.); Mullen *v.* United States, 106 Fed. 892, 46 C. C. A. 22 (6th Cir.).

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.[2] A good reputation alone may create a reasonable doubt. A defendant is entitled to a specific instruction on that point. Character evidence cannot be considered on the the same basis as evidence relating to substantive facts.[3] And unless the accused has introduced evidence of his good character, the prosecution cannot introduce evidence of bad character and habits as part of the case.[4] The courts now hold that in a criminal case where no evidence in regard to defendant's character was offered, there is no presumption that his character is good and he is not entitled to such an instruction.[5] These cases thereby supersede the contrary rule laid down in an earlier case.[6]

§ 446. Exceptions to Charge.

The rule in relation to exceptions to instructions is that the matter excepted to shall be so brought to the attention of the court before the retirement of the jury as to enable the judge to correct his instructions.[1] A defendant on trial on a criminal charge must endeavor to secure a ruling upon the various points

[2] Edgington *v.* United States, 164 U. S. 361, 41 L. ed. 467, 17 S. C. 72; Le More *v.* United States, 253 Fed. 887 (5th Cir.).

[3] Snitkin *v.* United States (C. C. A. 7th Cir., March 30, 1920); *citing:* Edgington *v.* United States, 164 U. S. 361, 41 L. ed. 464, 17 S. C. 72. The Court cannot limit the number of witnesses on the part of the defendant to prove good character. People *v.* Minsky, 227 N. Y. 94; State *v.* Randall, 173 N. W. (Minn.) 425. And *see also,* generally, Carrara Paint Co. Agency *v.* Carrara Paint Co., 137 Fed. 319 and cases collected in 8 Ann. Cas. 828.

[4] Gordon *v.* United States, 254 Fed. 53, 54 (5th Cir.); Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92.

[5] De Moss *v.* United States, 250 Fed. 87, 162 C. C. A. 259 (8th Cir.); Greer *v.* United States, 240 Fed. 320, 153 C. C. A. 246 (8th Cir.), *affirmed,* 245 U. S. 559, 62 L. ed. 469, 38 S. C. 209; Chambliss *v.* United States, 218 Fed. 154, 132 C. C. A. 112 (8th Cir.); Price *v.* United States, 218 Fed. 149, 132 C. C. A. 1 (8th Cir.).

[6] Mullen *v.* United States, 106 Fed. 892, 46 C. C. A. 22 (6th Cir.).

§ 446. [1] Hickory *v.* United States, 160 U. S. 408, 40 L. ed. 474, 16 S. C. 327; Lewes *v.* United States, 146 U. S. 370, 36 L. ed. 1011, 13 S. C. 136; Western Union Telegraph Co. *v.* Baker, 85 Fed. 690, 29 C. C. A. 392 (9th Cir.); Copper River & N. W. Ry. Co. *v.* Heney, 211 Fed. 459, 128 C. C. A. 131 (9th Cir.); Arizona & N. M. Ry. Co. *v.* Clark, 207 Fed. 817, 125 C. C. A. 305 (9th Cir.); Riddell *v.* United States, 244 Fed. 695, 157 C. C. A. 143 (9th Cir.); Gilson *v.* United States, 258 Fed. 588, — C. C. A. — (2d Cir.).

raised or objected to by him from the presiding judge and incorporate same in a bill of exceptions.[2] The parts of the charge excepted to must be read in conjunction with the paragraph following the same parts excepted to, when they relate to and are explanatory of the same subject matter.[3] Appellate courts are not inclined to grant a new trial on account of an ambiguity in the charge to the jury where it appears that the complaining party made no reasonable effort at the trial to have the matter explained, except where the court is of the opinion that the jury was misled or wrongly directed.[4] Where no exceptions are taken to the instructions while the jury is at bar, the reviewing court is not required to consider them; but in criminal cases the courts are not inclined to be so exacting and sometimes will, in the exercise of a sound discretion, notice error in the trial of a criminal case although no objection was made while the jury was at bar.[5] The giving and refusing of instructions cannot be reviewed unless the evidence is preserved by a bill of exceptions.[6] The extent to which the recent Act of Congress [7] has abrogated the rules as to exceptions has not been determined by the Supreme Court of the United States. It is suggested that counsel continue to take exceptions as before, and that the effect of the act may be to aid a party in an unfortunate and unjust situation created by not having taken an exception.

[2] Allis *v.* United States, 155 U. S. 117, 39 L. ed. 91, 15 S. C. 36; Arizona & N. M. Ry. Co. *v.* Clark, 207 Fed. 817, 125 C. C. A. 305 (9th Cir.).

[3] Coffin *v.* United States, 162 U. S. 664, 40 L. ed. 1109, 16 S. C. 943; Agnew *v.* United States, 165 U. S. 36, 41 L. ed. 624, 17 S. C. 235; Walsh *v.* United States, 174 Fed. 615, 98 C. C. A. 461 (7th Cir.).

[4] Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. ed. 478; Castle *v.* Bullard, 23 How. (U. S.) 172, 16 L. ed. 424; Allis *v.* United States, 155 U. S. 117, 39 L. ed. 91, 15 S. C. 36; Beckwith *v.* Bean, 98 U. S. 266, 284, 25 L. ed. 124.

[5] Clyatt *v.* United States, 197 U. S. 207, 221, 49 L. ed. 726, 25 S. C. 429; Wiborg *v.* United States, 163 U. S. 632, 41 L. ed. 289, 16 S. C. 1127; Crawford *v.* United States, 212 U. S. 183, 194, 53 L. ed. 465, 29 S. C. 260; Weems *v.* United States, 217 U. S. 349, 54 L. ed. 793, 30 S. C. 544; Williams *v.* United States, 158 Fed. 30, 36, 88 C. C. A. 296 (8th Cir.).

[6] Duluth St. Ry. Co. *v.* Speaks, 204 Fed. 573, 123 C. C. A. 99 (8th Cir.); Robinson *v.* Stearns, 204 Fed. 772, 123 C. C. A. 222 (3d Cir.); Cooper River & N. W. Ry. Co. *v.* Reeder, 211 Fed. 280, 127 C. C. A. 648 (9th Cir.).

[7] Act of February 26, 1919.

CHAPTER XXXVI

VERDICT

§ 447. Keeping the Jury Together.

The Seventh Amendment to the Constitution of the United States exacts a trial by jury according to the course of the common law, that is, by an unanimous verdict.[1] The Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in State courts or the standards which must be applied concerning the same.[2] In all felony cases the jury must be kept together until a verdict is reached or discharged by the Court.[3] If a jury in a criminal case during the progress of the trial separate without authority of the court, their verdict will be set aside, where it

§ 447. [1] American Publishing Co. *v.* Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 S. C. 618; Springville *v.* Thomas, 166 U. S. 707, 41 L. ed. 1172, 17 S. C. 717; Capital Traction Co. *v.* Hoff, 174 U. S. 1, 43 L. ed. 873, 19 S. C. 580; Minneapolis & St. L. R. R. Co. *v.* Bombolis, 241 U. S. 211, 60 L. ed. 961, 36 S. C. 595.

[2] Minneapolis & St. L. R. R. Co. *v.* Bombolis, 241 U. S. 211, 60 L. ed. 961, 36 S. C. 595.

[3] Chitty Cr. Law, 628.

appears that in consequence of such separation they were exposed to improper influences which might have operated to the prejudice of the accused in such manner as to affect their verdict.[4] But the jury by consent may bring in a sealed verdict.[5] A verdict will not be set aside for the failure of the marshal to take the oath before taking the jury to the jury room for deliberation.[6]

§ 448. **In Cases of Disagreement or Failure to Agree.**

It is improper for the court and it constitutes reversible error to inquire of the jury, when they report that they are unable to agree, how the jury is divided.[1] It is, however, proper to recall a jury after they have been in deliberation for the purpose of giving additional instructions. A refusal to again charge or instruct the jury after the latter's request for instructions on material points is reversible error.[2] When the jury returns to court for further instruction, if the defendant requests it, it is the duty of the court to instruct that such portions of the charge of the court which were given at the request of the defendant were as material as those of the prosecution and a failure to so charge the jury constitutes reversible error.[3] The court has power to recall the jury for further instructions.[4]

§ 449. **Coercing the Jury to Return a Verdict.**

A trial judge has no right to coerce the jury after the jury is out for a considerable time to arrive at a verdict. The court has the right to ask the jury to reach an agreement if it is possible for them to do so, but the remarks must not be coercive nor is it proper for the court to refer to the expense that the Government will be put to if the jury disagree.[1] It is proper for the court to instruct the jury in substance, that in a large proportion of cases absolute certainty could not be expected; that although the

[4] Russel *v.* People, 44 Ill. 508.

[5] Pounds *v.* United States, 171 U. S. 35, 43 L. ed. 62, 18 S. C. 729.

[6] Ball *v.* United States, 163 U. S. 662, 41 L. ed. 300, 16 S. C. 1192.

§ 448. [1] Burton *v.* United States, 196 U. S. 283, 49 L. ed. 482, 25 S. C. 243.

[2] Burton *v.* United States, *supra.*

[3] *Ibid.*

[4] Allis *v.* United States, 155 U. S. 117, 39 L. ed. 91, 15 S. C. 36; Allen *v.* United States, 164 U. S. 492, 41 L. ed. 528, 17 S. C. 154.

§ 449. [1] Peterson *v.* United States, 213 Fed. 920, 130 C. C. A. 398 (9th Cir.); Burton *v.* United States, 196 U. S. 283, 49 L. ed. 482, 25 S. C. 243.

verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.[2] But care should be taken that the verdict truly represents the free and untrammeled opinion of the individual jurors, and the defendant is entitled to an instruction that, while it is the duty of each juror to discuss and consider the opinion of others, he must decide the case upon his own opinion of the evidence and upon his own judgment.[3]

§ 450. **Misconduct in Jury Room — Newspaper Articles before Jury after Retiring.**

It is improper for a jury to read newspaper comments upon the case upon which they are about to deliberate. A violation of this rule is good cause for setting the verdict aside,[1] but it has been held that where after interrogating the jury the court was satisfied that the newspaper comments had not the slightest influence upon the jury, the verdict will not be set aside for such impropriety.[2] The misconduct of one of the jurors in obtaining a volume of the Federal Statutes while the jury was deliberating on the case was held not to be ground for reversal.[3] "A verdict is the expression of the concurrence of individual judgments, rather than

[2] Allan *v.* United States, 164 U. S. 492, 41 L. ed. 528, 17 S. C. 154.

[3] People *v.* Faber, 199 N. Y. 256, 92 N. E. 674; People *v.* Sheldon, 156 N. Y. 268.

§ 450. [1] Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917, 13 S. C. 50; Marrin *v.* United States, 167 Fed. 951, 93 C. C. A. 351 (3d Cir.).

[2] Marrin *v.* United States, 167 Fed. 951, 93 C. C. A. 351 (3d Cir.).

[3] Colt *v.* United States, 190 Fed. 305, 111 C. C. A. 205 (8th Cir.); *Certiorari* denied, 223 U. S. 729, 56 L. ed. 633, 32 S. C. 527.

the product of mixed thoughts. It is not the theory of jury trials that the individual conclusions of the jurors should be added up, the sum divided by twelve, and the quotient declared the verdict, but that from the testimony each individual juror should be led to the same conclusion; and this unanimous conclusion of twelve different minds is the certainty of fact sought in the law."[4] A juror has no right to bring his personal knowledge of fact into the jury room, and it is proper for the court to hear evidence as to what has transpired and set aside the verdict of guilty for that reason.[5] But ordinarily testimony of fellow jurors will not be heard to impeach their verdict.[6] On a motion for new trial the question is not the inviolability of the matters and things which have transpired in the jury room, but the legal effect to be given them in setting aside the verdict.[7]

§ 450 *a*. **Misconduct in Jury Room, *Continued*.—Sending Exhibits to Jury.**

It is usually improper to let the jury take the testimony of books, papers and depositions or other exhibits with them to the jury room. The jury are to receive the testimony in open court.[1] Under the common law instruments under seal, and which were admitted in evidence, could be sent to the jury, while all other documents, not under seal, could not be sent to the jury room.[2] There being no statute on the subject the common law rule must control the practice in the Federal Court.[3] It is improper for the jury to discuss the defendant's failure to testify or the fact

[4] Brewer, J. State *v.* Bydee, 17 Kansas, 462, *approved* in People *v.* Faber, 199 N. Y. 256, 259.

[5] State *v.* Lorenzy, 109 Pac. 1064 (Tex. Crim. App.); Richmond *v.* States, 127 S. W. 823; People *v.* Zeiger, 6 Park (N. Y.), 355; Falls *v.* City of Sperry, 68 Nebr. 420, 94 N. W. 529.

[6] McDonald *v.* Pless, 238 U. S. 264, 59 L. ed. 1300, 35 S. C. 783.

[7] 1 Greenl. Evidence (16th Ed.), § 252 *a*.

§ 450 *a*. [1] Ramford *v.* State, 61 Ill. 365; Chadwick *v.* Chadwick, 52 Mich. 549; Bullan *v.* Granger, 63 Mich. 311; Kalamazoo Novelty Mfg. Co. *v.* McAllister, 36 Mich. 327; Burton *v.* Wilkes, 66 N. C. 604; Williams *v.* Thomas, 78 N. C. 47; Outlaw *v.* Hurdle, 1 Jones (N. C.), 150; Watson *v.* Davis, 7 Jones L. (N. C.), 178; Nichols *v.* State, 65 Ind. 512.

[2] 1 Gilb. Ev. (Lofft. 5th Ed.) 20; 2 Rol. Abr. 686, pl. 2; 2 Hale P. C. 306; Trials per Pais, 297; Farmers Bank *v.* Whinfield, 24 Wend. (N. Y.) 419; Outlaw *v.* State, 1 Jones L. (N. C.) 150, *approved*, in 78 N. C. 47; Nichols *v.* State, 65 Ind. 512.

[3] *See* § 10 *supra*.

that the defendant abandoned his wife, and such misconduct is ground for a new trial.[4]

§ 451. **Inconsistent and Repugnant Verdict.**

Where the essence of the offense is stated in several counts an acquittal of one is necessarily an acquittal of the other and a verdict finding the defendant not guilty on one count and guilty on the other will, under these circumstances, be set aside — one operating as a bar to a conviction on the other.[1] The Federal Courts have repudiated the technical doctrine of inconsistency and repugnancy in verdicts. In theory of law each count charges a distinct substantive offense, and the finding of the jury as to a particular count is independent of and unaffected by the finding upon any other count.[2] If the gravamen of the charge in each count, on which there has been a verdict of guilty, is the same, there is no inconsistency in the verdict. If, in contemplation of law, the legal effect of the allegations in the various counts on which there has been a verdict of guilty is the same, the courts will not upset the verdict on the ground of inconsistency, where the only inconsistency is in respect to immaterial particulars concerning the means by which the crime was committed.[3] But if the indictment states in different counts several distinct offenses, a general verdict of guilty will not be upheld if the evidence is insufficient to sustain each and every count of the indictment.[4] The recommendation of mercy oftentimes incorporated in verdicts, while entitled to great weight, is not binding on the court.[5]

§ 452. **May Be Found Guilty of an Attempt instead of a Consummated Offense.**

The statute provides: "In all criminal causes the defendant may be found guilty of any offense the commission of which is neces-

[4] Fuller *v.* State, 58 Tex. Cr. Rep. 571, 127 S. W. 1150.

§ 451. [1] State *v.* Hendrick, 179 Mo. 300. *See also* concurring opinion of Judge Sanborn in Peara *v.* United States, 221 Fed. 213, 136 C. C. A. 623 (8th Cir.).

[2] Walsh *v.* United States, 174 Fed. 615, 620, 98 C. C. A. 461 (7th Cir.); Flickinger *v.* United States, 150 Fed. 1, 79 C. C. A. 515 (6th Cir.); *Certiorari* denied 204 U. S. 671, 51 L. ed. 673, 27 S. C. 783; Harvey *v.* United States, 159 Fed. 419, 86 C. C. A. 399 (3d Cir.).

[3] Walsh *v.* United States, 174 Fed. 615, 620, 98 C. C. A. 561 (7th Cir.); Flickinger *v.* United States, 150 Fed. 1, 79 C. C. A. 515 (6th Cir.).

[4] Burt *v.* State, 48 S. 851 (Ala.).

[5] Jones *v.* State, 7 Ga. App. 825.

sarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; provided, that such attempt be itself a separate offense." [1] Under this statute it was held that there must be some evidence that bears upon the questions of attempt. The jury would not be justified in finding a verdict of manslaughter if there were no evidence on which to base such a finding and in that event the court would have the right to instruct the jury to that effect.[2] The statute applies to offenses other than murder. Thus, on an indictment for assault with the intent to kill a conviction was secured for simple assault.[3] The court went so far as to hold that on an indictment for burglary the jury may find the prisoner guilty of larceny only.[4] The latter part of the statute, which permits a finding of an attempt to commit the offense so charged, is but a subdivision of the first part of the statute. An attempt to commit a crime bears to the said crime the relation of an offense necessarily included therein.[5] It was accordingly held that a charge of a monopoly in violation of the Anti-Trust Act, Sec. 1, will support a verdict against a defendant for an attempt to commit this crime. This section does not apply to misdemeanors, because the doctrine of merger of offenses does not apply to petty crimes.[6] Under this statute a defendant charged in the indictment with the crime of murder may be found guilty of a lower grade of crime, viz.: manslaughter.[7] It is competent for a jury by its verdict to render a verdict of guilty without capital punishment.[8]

§ 452. [1] Revised Statute § 1035.

[2] Sparf & Hansen *v.* United States, 156 U. S. 51, 39 L. ed. 343, 15 S. C. 273; United States *v.* Carr, 1 Woods, 480, 25 Fed. Cas. No. 14732; United States *v.* Hansee, 79 Fed. 303.

[3] United States *v.* Cropley, 4 Cr. C. C. 517, 25 Fed. Cas. No. 14892.

[4] United States *v.* Dixon, 1 Cr. C. C. 414, 25 Fed. Cas. No. 14968.

[5] United States *v.* Patterson, 201 Fed. 697.

[6] Berkowitz *v.* United States, 93 Fed. 452, 35 C. C. A. 379 (3d Cir.).

[7] St. Clair *v.* United States, 154 U. S. 134, 38 L. ed. 936, 14 S. C. 1002; United States *v.* Linnier, 125 Fed. 83; Wallace *v.* United States, 162 U. S. 466, 40 L. ed. 1039, 16 S. C. 859; United States *v.* Leonard, 2 Fed. 669; United States *v.* Meagher, 37 Fed. 875; United States *v.* Lewis, 111 Fed. 630.

[8] Winston *v.* United States, 172 U. S. 303, 43 L. ed. 456, 19 S. C. 212.

§ 453. [1] Wilson *v.* United States, 232 U. S. 563, 58 L. ed. 728, 34 S. C. 349; Keck *v.* United States, 172 U. S. 434, 43 L. ed. 505, 19 S. C. 254; United States *v.* Stephens, 8 Sawy.

§ 453. "Attempts" and the Doctrine of "Locus Penitentiæ."

The doctrine of *locus penitentiæ* has been recognized generally in the United States.[1] The general presumption exists "that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent."[2] But a mere intention to commit a crime is not punishable unless followed by some overt act. Consequently a party cannot be held for an offense if he voluntarily abandons the plan or scheme to commit that offense before its execution.[3] In other words, to entitle the government to maintain a prosecution for an evil intention, some concurring act must have followed the unlawful thought. A mere unexecuted intention does not bind or commit the person who conceives or indulges in it. So, if a party abandons his evil intention at any time before so much of the act is done as constitutes a crime, such abandonment takes from what has been done its indictable qualities.[4] Mere solicitation to commit an offense is not indictable.[5] Thus, in Keck *v.* United States,[6] it was held that mere acts of concealment of merchandise on entering the waters of the United States, however preparatory they may be and however cogently they may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction. As the offense of smuggling is not complete unless some goods, wares and merchandise are actually brought on shore or carried from the shore contrary to law, a person may be guilty of divers practices, which have a direct tendency thereto, without being guilty of any offense. In People *v.* Murray,[7] the defendant was indicted for an attempt

116, 12 Fed. 52; People *v.* Murray, 14 Cal. 159; Pinkard *v.* State, 30 Ga. 757; Cox *v.* People, 82 Ill. 191; Thompson *v.* People, 96 Ill. 158; Stephens *v.* State, 107 Ind. 185, 8 N. E. 94; Stabler *v.* Comm. 95 Pa. 318; State *v.* Hurley, 79 Vt. 28, 64 Atl. 78; State *v.* Butler, 35 W. Va. 90.

[2] Agnew *v.* United States, 165 U. S. 36, 50, 41 L. ed. 624, 17 S. C. 235. *See also* Rex *v.* Moore, 3 B. & Ad. 184; Regina *v.* Jones, 9 C. & P. 258.

[3] Keck *v.* United States, 172 U. S. 434, 43 L. ed. 505, 19 S. C. 254; United States *v.* Britton, 108 U. S. 199, 27 L. ed. 698, 2 S. C. 531.

[4] Stephens *v.* State, 107 Ind. 185; Pinkard *v.* State, 30 Ga. 757.

[5] State *v.* Butler, 26 W. Va. 90; Cox *v.* People, 82 Ill. 191; Thompson *v.* People, 96 Ill. 158.

[6] 172 U. S. 445.

[7] 14 Cal. 159 (Opinion per Mr. Justice Field).

to contract an incestuous marriage with his niece. Evidence showed the declarations of his determination to contract the marriage, his elopement with his niece for that avowed purpose, and his request to one of the witnesses to go for a magistrate to perform the ceremony. The court held this did not constitute an attempt, saying: "The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party." In one case,[8] the court, in sustaining a demurrer to an information accusing the defendant of "attempting" to introduce liquor into the Territory of Alaska, said that the intent to introduce liquor must be coupled with an act done in pursuance to such an intention.

§ 454. Where Several Defendants Are on Trial.

The statute provides: "On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause, as to the other defendants, may be tried by another jury."[1] In a trial of a consolidated indictment against several defendants, it is improper for the court to instruct the jury that they must agree on a verdict as to all of the defendants.[2] A verdict finding the defendant guilty on some counts and not mentioning the other counts at all is an acquittal on the other counts.[3] Likewise, a verdict finding some of the defendants guilty and silent as to the other defendants on trial is equivalent to an acquittal of the latter.[4]

§ 455. Effect of Verdict Silent as to Some Counts.

Where a jury, although convicting as to some, are silent as to other counts of an indictment, and are discharged without the

[8] United States *v.* Stephen, 12 Fed. 52.

§ 454. [1] Revised Statute § 1036.

[2] Bucklin *v.* United States, 159 U. S. 682, 40 L. ed. 305, 16 S. C. 182.

[3] Jolly *v.* United States, 170 U. S. 402, 42 L. ed. 1085, 18 S. C. 624; People *v.* Weil, 243 Ill. 208, 90 N. E. 731.

[4] State *v.* Stone (S. C.), 69 S. E. 659.

consent of the accused; the effect of such discharge is "equivalent to acquittal" because as the record affords no adequate legal cause for the discharge of the jury, any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent. But such obviously is not the case, when a jury have not been silent as to a particular count, but where, on the contrary, disagreement is formally entered on the record. The effect of such entry justifies the discharge of the jury, and therefore a subsequent prosecution for the offense as to which the jury has disagreed and on account of which it has been regularly discharged, would not constitute second jeopardy.[1] The jury may convict on some of the counts and acquit on others.[2]

§ 456. **Presence of the Accused Required at Rendition of Verdict — Exception.**

"It is the right of the defendant in cases of felony to be present at all stages of the trial, — especially at the rendition of the verdict and, if he be in such custody and confinement as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside. The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into court by its order. But the case is quite different when, after being present through the progress of the trial and up to the dismissal of the jury to their room, he voluntarily absents himself from the court room, where he and his bail obligated themselves that he should be." [1]

§ 455. [1] Silvester *v.* United States, 170 U. S. 262, 42 L. ed. 1029, 18 S. C. 580.

[2] Wilson *v.* United States, 176 Fed. 806.

§ 456. [1] Mr. Justice Van Devanter in Diaz *v.* United States, 223 U. S. 442, 56 L. ed. 500, 32 S. C. 250.

CHAPTER XXXVII

MOTIONS FOR NEW TRIAL

§ 457. The New Statute.

"All of said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." [1]

§ 458. When the Motion Must Be Made.

Generally a motion for a new trial must be made during the term and before judgment.[1] But when it appears that certain material evidence was received at the trial which was untruthful, the trial court will grant a new trial, though the defendant is guilty of laches in making application for same.[2] In the Fifth Circuit, it was held that the defendant need not be present during the argument and disposition of the motion for a new trial.[3] The propriety of this ruling may well be questioned in view of the well settled law requiring the presence of the defendant

§ 457. [1] § 269 of Federal Judicial Code as amended February 26, 1919.

§ 458. [1] Trafton *v.* United States, 147 Fed. 513, 78 C. C. A. 79 (1st Cir.).

[2] United States *v.* Radford, 131 Fed. 378. *Compare* United States *v.* Mayer, 235 U. S. 55, 59 L. ed. 129, 35 S. C. 16.

[3] Alexis *v.* United States, 129 Fed. 60, 63 C. C. A. 498 (5th Cir.).

at every stage of the case. A motion for a new trial disposes of the substantial rights of the accused,[4] and the defendant possesses a right which he cannot waive to be present in court.[5] The trial court, however, cannot grant a new trial after the close of the term even though there is newly discovered evidence unless a motion to that effect had been made during the term and the trial court reserved decision. Otherwise the Circuit Court of Appeals will nullify such a grant by a writ of prohibition.[6]

§ 459. The Granting or Refusal of a New Trial.

The granting or refusal of a new trial rests in the sound discretion of the trial court and generally is not reviewable on a writ of error.[1] In this instance as in every other when discretionary power is reposed in a court, it does not carry with it the right of abuse.[2] When the trial court rejects affidavits in support of a motion for a new trial, the court virtually asserts a refusal to perform its duties and that of course will be reviewed on writ of error.[3]

§ 460. Motion for New Trial for Newly Discovered Evidence after Allowance of Writ of Error.

The procedure, relating to the subject of motion for new trial after the suing out of a writ of error, has been considered for the first time by the United States Circuit Court of Appeals for the

[4] Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917, 13 S. C. 50.

[5] Hopt *v.* Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. C. 202.

[6] United States *v.* Mayer, 235 U. S. 55, 59 L. ed. 129, 35 S. C. 16.

§ 459. [1] Holmgren *v.* United States, 217 U. S. 509, 521, 54 L. ed. 861, 30 S. C. 588; Towe *v.* United States, 238 Fed. 557, 151 C. C. A. 493 (4th Cir.); Lueders *v.* United States, 210 Fed. 419, 127 C. C. A. 151 (9th Cir.); Bernal *v.* United States, 241 Fed. 339, 154 C. C. A. 219 (5th Cir.); *Writ of Certiorari denied*, 245 U. S. 672; Kulp *v.* United States, 210 Fed. 249, 127 C. C. A. 67 (3d Cir.); Kettenbach *v.* United States, 202 Fed. 377, 120 C. C. A. 505 (9th Cir.); Blitz *v.* United States, 153 U. S. 308, 38 L. ed. 725, 14 S. C. 924.

[2] Taylor *v.* United States, 244 Fed. 321, 156 C. C. A. 607 (4th Cir.); Chambers *v.* United States, 237 Fed. 513, 150 C. C. A. 395 (8th Cir.); Holt *v.* United States, 218 U. S. 245, 54 L. ed. 1021, 31 S. C. 2; Holmgren *v.* United States, 217 U. S. 509, 54 L. ed. 861, 30 S. C. 588.

[3] Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917, 13 S. C. 50; Chambers *v.* United States, 237 Fed. 513, 150 C. C. A. 395 (8th Cir.); Smith *v.* United States, 231 Fed. 25, 145 C. C. A. 213 (9th Cir.); Dwyer *v.* United States, 170 Fed. 160, 95 C. C. A. 416 (9th Cir.); Ogden *v.* United States, 112 Fed. 523, 50 C. C. A. 380 (3d Cir.); Haws *v.* Victoria Cooper Min. Co., 160 U. S. 303, 40 L. ed. 436, 16 S. C. 282.

First Circuit.[1] The proper practice is to file a motion in the reviewing court, supported by affidavits, for leave to file a motion or petition in the court below suggesting the additional testimony. Upon filing of such petition the court will pass primarily upon the questions whether the new matter is material; and whether it was available before the trial and whether the applicant was guilty of laches. Such an application may be entertained by the Appellate Tribunal even after judgment or mandate.[2]

§ 461. **Incompetent Testimony.**

The admission of evidence which is neither relevant nor material to the questions upon trial and to which objection is made by the defendant constitutes a fatal error, being in violation of the defendant's right to have the jury decide only questions in issue.[1] The assumption is that such evidence is prejudicial,[2] unless it clearly appears to the contrary.[3] But the admission of incompetent testimony to which no objection was made cannot be raised for the first time on a motion for a new trial. As, for instance, objection to a husband's testifying against his wife,[4] or misconduct on the part of the district attorney.[5]

§ 462. **Jurors Cannot Impeach Their Own Verdicts.**

Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with

§ 460. [1] In re Gamewell Fire-Alarm Tel. Co., 73 Fed. 908, 20 C. C. A. 111 (1st Cir.).

[2] Boston & R. Elec. St. Ry. Co. *v.* Bemis Car Box Co., 98 Fed. 121, 38 C. C. A. 661 (1st Cir.); Bliss *v.* Reed, 106 Fed. 314, 45 C. C. A. 304 (3d Cir.); Westinghouse El. & Mfg. Co. *v.* Stanley Instrument Co., 138 Fed. 823, 71 C. C. A. 189 (1st Cir.).

§ 461. [1] Sparks *v.* Territory of Oklahoma, 146 Fed. 371, 76 C. C. A. 594 (8th Cir.).

[2] King *v.* United States, 112 Fed. 988, 50 C. C. A. 647 (5th Cir.).

[3] Dimmick *v.* United States, 116 Fed. 825, 54 C. C. A. 329 (9th Cir.).

[4] United States *v.* Knoell, 230 Fed. 509. *Affirmed*, 239 Fed. 16, 152 C. C. A. 66 (3d Cir.).

[5] Smith *v.* United States, 231 Fed. 25, 145 C. C. A. 213 (9th Cir.), but *see* August *v.* United States, 257 Fed. 388 (C. C. A. 8 Cer.), construing new statute.

individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict at least unless their harmlessness is made to appear.[1] In Hyde *v.* United States,[2] it was held that an affidavit by a juror in support of a motion for new trial to the effect that the verdict was the result of an agreement between certain of the jurors who believed that all the defendants should be acquitted, by which agreement the acquittal of one of the defendants was exchanged for the conviction of the defendant Hyde, was insufficient to justify a new trial.

§ 463. **Misconduct Affecting Jurors.**

The reviewing tribunal will order a new trial, whenever the defendant is not tried by an impartial jury,[1] or when the indictment is handed to the jury by an officer of the court on the back of which is indorsed the verdict of a former jury finding the defendant guilty.[2] But the Circuit Court of Appeals of the Eighth Circuit held that the fact that a deputy marshal made statements to the jury while in their room as to the penalty which the court will probably inflict if the defendants are found guilty, is not conclusive proof that the defendants' rights were prejudiced. The court, relying on Mattox *v.* United States,[3] decided that the granting of a new trial is absolutely within the discretion of the trial court and not subject to review, notwithstanding the fact that the deputy marshal advised the jury that the court would only impose a fine on the defendants.[4]

§ 462. [1] Mattox *v.* United States, 146 U. S. 140, 36 L. ed. 917; Walsh *v.* United States, 174 Fed. 615, 98 C. C. A. 461 (7th Cir.).

[2] 225 U. S. 347, 56 L. ed. 1114, 32 S. C. 793.

§ 463. [1] Simpson *v.* United States, 184 Fed. 817, 107 C. C. A. 89 (8th Cir.); Harrison *v.* United States, 200 Fed. 662, 119 C. C. A. 78 (6th Cir.).

[2] Ogden *v.* United States, 112 Fed. 523, 50 C. C. A. 380 (3d Cir.).

[3] 146 U. S. 140, 147, 150, 36 L. ed. 917, 13 S. C. 50.

[4] Chambers *v.* United States, 237 Fed. 513, 150 C. C. A. 395 (8th Cir.). As to the reviewability of orders denying motions for new trial, see note 2 of § 459 *supra*.

CHAPTER XXXVIII

MOTION IN ARREST OF JUDGMENT

§ 464. Scope of the Motion.

As a general rule whatever is fatal on demurrer is equally so on a motion in arrest of judgment, provided, the defect is one of substance and not of mere form. A motion in arrest of judgment must, from the nature of things, be made after the trial has been concluded.[1] The better practice, however, is to attack an insufficiency in the indictment by demurrer.[2] This motion may be used for the purpose of taking advantage of any essential defect in the indictment based upon knowledge obtained during or after the conclusion of the trial,[3] because the indictment fails to allege any substantive offense against the United States,[4] or because the verdict is defective,[5] because the indictment charged in each count at least two separate and distinct offenses. The question of duplicity cannot be raised after verdict unless the defendant can show that his rights were prejudiced by this error. Generally it will be held that the indictment is not materially defective and

§ 464. [1] Hillegass *v.* United States, 183 Fed. 199, 105 C. C. A. 631 (3d Cir.); United States *v.* Kilpatrick, 16 Fed. 765, 774.

[2] Clement *v.* United States, 149 Fed. 305, 313, 79 C. C. A. 243 (8th Cir.); Morris *v.* United States, 168 Fed. 682, 94 C. C. A. 168 (8th Cir.).

[3] Cooper *v.* United States, 247 Fed. 45, — C. C. A. —(4th Cir.); United States *v.* Marrin, 159 Fed. 767. *Affirmed*, 167 Fed. 951, 93 C. C. A. 351 (3d Cir.).

[4] Morris *v.* United States, 168 Fed. 682, 94 C. C. A. 168 (8th Cir.); Blitz *v.* United States, 153 U. S. 308, 38 L. ed. 725, 14 S. C. 924; Clement *v.* United States, 149 Fed. 305, 79 C. C. A. 243 (8th Cir.).

[5] Patterson *v.* United States, 2 Wheat. (U. S.) 221, 4 L. ed. 224; 1 Archibald's Crim. Pl. 341, 671, 672.

therefore Revised Statute § 1025 applies.[6] A bill of particulars does not cure bad pleading. It is therefore immaterial whether or not the defendant had requested a bill of particulars when a motion is made in his behalf in arrest of judgment.[7] In United States *v.* Bartow,[8] the court held that when an indictment is loosely drawn so as to afford doubt as to whether it is sufficient to support a conviction, the indictment should not be quashed but be left to be solved upon a motion in arrest of judgment. But such a process puts a person in jeopardy, causing him irreparable injury to his character when as a matter of fact he may be innocent. Judge Sanborn, in United States *v.* Corbett,[9] disapproves of the method mentioned in United States *v.* Bartow, *supra*. He held that since by a recent statute when a motion to quash is sustained, it may be reviewed by writ of error on the part of the United States, there is no reason why a person should be put in jeopardy and then after a possible conviction seek to be exonerated by a motion in arrest of judgment.

§ 465. Grounds for the Motion.

The law is well settled that a judgment in a criminal case will, after conviction, be arrested only for matter appearing of record which would render the judgment erroneous if given; or for matter which should appear and does not appear on the record; the evidence being no part of the record for such purpose. The rule in civil cases, that the matter alleged on arrest must be such as would have been sufficient on demurrer to overturn the action or plea, also applies to criminal cases.[1] Under Revised Statute § 1025 a formal defect in the indictment not tending to prejudice the rights of a defendant affords no ground for a motion in arrest of judg-

[6] United States *v.* Bayaud, 16 Fed. 376, 78 C. C. A. 323; Morgan *v.* United States, 148 Fed. 189 (8th Cir.); Connors *v.* United States, 158 U. S. 408, 39 L. ed. 1033, 15 S. C. 951.

[7] United States *v.* Tubbs, 94 Fed. 356.

[8] 10 Fed. 874.

[9] 162 Fed. 687.

§ 465. [1] United States *v.* Maxey, 200 Fed. 997; United States *v.* Marrin (D. C.), 159 Fed. 767. *Affirmed*, 167 Fed. 951, 93 C. C. A. 351 (3d Cir.); United States *v.* Kilpatrick, 16 Fed. 765, 773; United States *v.* Barnhardt, 17 Fed. 579; Towe *v.* United States, 238 Fed. 557, — C. C. A. — (4th Cir.); United States *v.* Erie R. Co., 222 Fed. 444; Demolli *v.* United States, 144 Fed. 363, 75 C. C. A. 365 (8th Cir.).

ment. The objection should be pointed out on demurrer to the indictment or otherwise taken advantage of at the trial, and if this course is not pursued,[2] judgment will not be arrested.

§ 466. **Motions in Arrest of Judgment Are Reviewable.**

Rulings in arrest of judgment are always reviewable by appellate tribunals.[1] The Circuit Court of Appeals of the Ninth Circuit, relying on Canal and Claiborne Street R. R. Co. *v.* Hart,[2] held that a motion in arrest of judgment is not reviewable on a writ of error.[3] But the decision in the Canal and Claiborne Street R. R. Co. *v.* Hart, *supra*, does not support that statement. The defendant in that case tried to arrest the judgment because of certain evidence given at the trial. The court held that since a judgment will only be arrested for matter appearing in the record and the evidence for that purpose being no part of the record, the defendant was virtually making the necessary allegations for a motion for a new trial and misnamed it a motion in arrest of judgment. Then the court added that since it really amounted to a motion for a new trial it was within the discretion of the trial court to grant or refuse same and was not reviewable on a writ of error.

[2] Holmgren *v.* United States, 217 U. S. 509, 54 L. ed. 861, 30 S. C. 588; Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. ed. 681, 28 S. C. 428; Morris *v.* United States, 161 Fed. 672, 88 C. C. A. 532 (8th Cir.); Clement *v.* United States, 149 Fed. 305, 79 C. C. A. 243 (8th Cir.); Rosen *v.* United States, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434; United States *v.* Chase, 27 Fed. 807.

§ 466. [1] Blitz *v.* United States, *supra;* Snitkin *v.* United States (C. C. A. 7th Cir. March 30, 1920).

[2] 114 U. S. 654, 661, 29 L. ed. 226, 5 S. C. 1127.

[3] Andrews *v.* United States, 224 Fed. 418, 139 C. C. A. 646 (9th Cir.); Beyer *v.* United States, 251 Fed. 39, — C. C. A. — (9th Cir.).

CHAPTER XXXIX

SENTENCE AND JUDGMENT

§ 467. Constitutional Provisions.

The Eighth Amendment to the Constitution of the United States provides that cruel and unusual punishment shall not be inflicted. This provision is a limitation upon the Federal Government and does not apply to the States.[1] The historical data relating to the adoption of the Eighth Amendment was ably reviewed in Weems *v.* United States,[2] in an elaborate opinion by Mr. Justice McKenna, and in the dissenting opinion of Mr. Justice White, the present Chief Justice. Even before the

§ 467. [1] Ex parte Watkins, 7 Peter (U. S.), 573, 8 L. ed. 786; Ensign *v.* Pennsylvania, 227 U. S. 592, 57 L. ed. 658, 33 S. C. 321; Collins *v.* Johnston, 237 U. S. 502, 59 L. ed. 1071, 35 S. C. 649; O'Neill *v.* Vermont, 144 U. S. 323, 36 L. ed. 450, 12 S. C. 693; Barron *v.* Baltimore, 7 Peter (U. S.), 243, 8 L. ed. 672; Pervear *v.* Massachusetts, 5 Wall. (U. S.) 475, 18 L. ed. 608; McElvaine *v.* Bruch, 142 U. S. 155, 35 L. ed. 971, 12 S. C. 156.

[2] 217 U. S. 349, 54 L. ed. 793, 30 S. C. 544.

adoption of the Constitution much had been done toward mitigating the severity of the common law, particularly the administration of the criminal branch. The number of capital crimes in this country, at least, had been largely decreased and trial by ordeal and by battle had never existed here.[3] Ordinarily, the term " cruel and unusual punishment " implies something inhuman, barbarous, torture and alive.[4] The Supreme Court of the United States [5] declined to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments should not be inflicted, but it stated that it was safe to affirm that punishments of torture, such as where the prisoner was drawn or dragged to the place of execution, in treason; or where he was disembowelled alive, beheaded and quartered in high treason, or burning alive in treason, and all others in the same line of unnecessary cruel acts were forbidden by the Constitution of the United States. But in the Weems case,[6] the Supreme Court of the United States by a divided court held that what constitutes cruel and unusual punishment has not been exactly defined, that the Eighth Amendment to the Constitution of the United States is progressive and does not prohibit merely the cruel and unusual punishments known in 1787 and 1869 but may acquire wider meaning as public opinion becomes enlightened by human justice. For these reasons the court held that punishment by imprisonment, carrying during his imprisonment a chain on the ankle hanging from the wrist, comes within the condemnation of the Constitutional prohibition against cruel and unusual punishments.[7] In another case [8] ten years' imprisonment for assault with a dangerous weapon was held not to be out of all proportion to the offense. The extent of the punishment, upon conviction, ought to be such as is warranted by law, and such as appears to be best calculated to answer the ends of precaution necessary to deter others from the commission of the offense, in addition to the

[3] Holden *v.* Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. C. 383.

[4] Weems *v.* United States, 217 U. S. 349, 54 L. ed. 793, 30 S. C. 544.

[5] Wilkerson *v.* Utah, 99 U. S. 130, 25 L. ed. 346.

[6] 217 U. S. 349, 54 L. ed. 793, 30 S. C. 544.

[7] Weems *v.* United States, 217 U. S. 349, 54 L. ed. 793, 30 S. C. 544.

[8] Jackson *v.* United States, 102 Fed. 471, 488, 42 C. C. A. 452 (9th Cir.).

punishment of the individual offender.[9] In imposing sentence for two distinct offenses carved out of one transaction, the court should take into consideration the fact that, while technically two or more offenses have been committed, actually there has been but one occurrence. Every good judge should carefully weigh all the circumstances, regardless of his power to impose sentence separately for each offense.[10] There is a contrariety of opinion upon the question whether, when a defendant has been convicted or acquitted upon an indictment for one of the separate offenses included in an indictment, that is a bar to a prosecution for another of the offenses involved in the same act.[11] The Supreme Court of the United States is inclined to hold that in such a case the bar is complete. Thus, in Ex parte Nielsen,[12] the court said: "But be that as it may, it seems to us very clear that, where, as in this case, a person has been tried and convicted for a crime, which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." The sentence and punishment imposed upon a defendant for any violation of the statute which is within the punishment provided for by the statute cannot be regarded as excessive, cruel or unusual.[13] In re Kemmler,[14] the court held that punishments were cruel when they involved torture or a lingering death; but the punishment of death was not cruel within the meaning of the Constitution; that it implied something inhuman and barbarous and something more than the mere extinguishment of life. The punishment on each of five counts, of five years, the periods being concurrent and not cumulative, and a fine of $1,000 on each of seven counts was held not to be cruel and unusual within the prohibition.[15]

[9] Jackson *v.* United States, 102 Fed. 471, 488, 42 C. C. A. 452 (9th Cir.).

[10] United States *v.* Harmison, 3 Sawyer (U. S.), 556.

[11] United States *v.* Beerman, 5 Cranch (C. C.), 412, Fed. Cas. No. 14560. *Overruled* by Hoiles *v.* United States, 3 MacArthur, 370; Larton *v.* State, 7 Mo. 55; Comm. *v.* Andrews, 2 Mass. 409; State *v.* Thurston, 2 McMul. 393.

[12] 131 U. S. 119.

[13] Jackson *v.* United States, 102 Fed. 473, 487, 42 C. C. A. 452 (9th Cir.).

[14] 136 U. S. 436, 34 L. ed. 519, 10 S. C. 930.

[15] Badders *v.* United States, 240 U. S. 391, 60 L. ed. 706, 36 S. C. 367.

§ 468. **Measure and Mode of Punishment.**

Ordinarily the question and the extent of punishment and place of confinement or mode of punishment is one which rests in the sound discretion of the trial court, provided it is within the limit prescribed by statute.[1] The jury cannot dictate the judgment to the court. There is but one exception to this rule. Under § 330 of the Penal Code the jury is empowered in capital cases to qualify its verdict of guilty by adding "without capital punishment." There need be no mitigating circumstances for the jury in such cases to render a qualified verdict, nor is the jury answerable to the court for its decision.[2] The defendant nevertheless is guilty of a capital offense but the judge is obliged to impose a sentence of life imprisonment.[3] Though the indictment may contain several counts, only one judgment may be entered.[4] Punishment may be imposed on each count of the indictment.[5] But this rule is subject to qualifications that two or more separate offenses which are committed at the same time and are part of a single continuing criminal act, inspired by the same criminal intent which is essential to each offense, are susceptible to but one punishment.[6] Thus in a case [7] under a Federal statute providing that any person who fraudulently forges a postal money order, or any person who fraudulently utters a forged postal money order, shall receive a certain punishment, defendant had been sentenced to imprisonment on a count charging the forging of an

§ 468. [1] Freeman *v.* United States, 243 Fed. 353, 156 C. C. A. 133 (9th Cir.).

[2] Manuel *v.* United States, 254 Fed. 272, — C. C. A. — (8th Cir.); Winston *v.* United States, 172 U. S. 303, 43 L. ed. 456, 19 S. C. 212.

[3] Good Shot *v.* United States, 104 Fed. 257, 43 C. C. A. 525 (8th Cir.); Fitzpatrick *v.* United States, 178 U. S. 304, 44 L. ed. 1078, 20 S. C. 944.

[4] Freeman *v.* United States, 227 Fed. 732, 142 C. C. A. 256 (2d Cir.); United States *v.* Carpenter, 151 Fed. 214, 81 C. C. A. 194 (9th Cir.).

[5] Burton *v.* United States, 202 U. S. 344, 50 L. ed. 1057, 26 S. C. 688; Carter *v.* McClaughry, 183 U. S. 365, 46 L. ed. 236, 22 S. C. 181; Gavriers *v.* United States, 220 U. S. 338, 55 L. ed. 489, 31 S. C. 421.

[6] Stevens *v.* McClaughry, 207 Fed. 18, 125 C. C. A. 102 (8th Cir.); Munson *v.* McClaughry, 198 Fed. 72, 117 C. C. A. 180 (8th Cir.); Halligan *v.* Wayne, 179 Fed. 112, 102 C. C. A. 410 (9th Cir.); In Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 S. C. 556; In re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 S. C. 672.

[7] United States *v.* Carpenter, 151 Fed. 214, 81 C. C. A. 194 (9th Cir.).

order, and to a separate imprisonment on a count charging an uttering of the same order, and the court in passing said: "If this section were before us for construction, unaffected by precedent, we should be disposed to hold that it was intended to provide for the punishment of two distinct offenses, one of forging or altering a money order, and one of uttering the same; and that the first two counts of the indictment which is before us charge distinct and separate crimes, punishable by separate sentences. But it has been generally held that the forging and uttering of a forged instrument are parts of one transaction, the sentence based on a general verdict or plea of guilty must impose only one penalty, and that a separate sentence for each count is erroneous and void." And one accused of burglary with intent to commit larceny may in the second count of the same indictment be charged with the larceny, and on such an indictment may be convicted and punished for either offense, but not for both; and where there is a general verdict of guilty he may be sentenced for the burglary only.[8] And while it is regular in pleadings to join a count for forging an instrument with a count for passing the same instrument, in the same indictment, it is not permissible to have a separate conviction and judgment under each count. The practice in such cases only permits one judgment. The Supreme Court of Illinois stated the rule as follows: "As to the joinder, . . . the authorities are abundant. But we have been unable to find any case which warrants two separate convictions and judgments where the one offense is introductory to and forms a part of the other. The forgery here, if committed by accused, was but preparatory to and formed a part of the crime of passing the forged note, and there was error in rendering separate judgments on the several findings of the jury. Whether the people might have had a sentence under one of the verdicts and had the other set aside, is not before the court, and that question is not decided."[9]

[8] Halligan ex parte Wayne, 179 Fed. 112, 102 C. C. A. 410 (9th Cir.). *But see* Morgan *v.* Sylvester, 231 Fed. 886; Morgan *v.* Devine, 237 U. S. 632, 59 L. ed. 1150, 35 S. C. 712; Ebeling *v.* Morgan, 237 U. S. 625, 59 L. ed. 1151, 35 S. C. 710, holding that Congress created two separate offenses in Sections 190 and 192 of the Criminal Code.

[9] Parker *v.* People, 97 Ill. 32.

§ 469. **Punishment as Affected by Different Statutes on Same Subject.**

Where an earlier act prescribes the punishment for a specific class of offenses, or otherwise treats of a specific subject, that act is not affected by a subsequent general law which prescribes the punishment for many classes of offenses, including that class treated by the earlier special law, or treats of many subjects including that treated by the earlier special law; but, unless a contrary intent is clearly expressed or indubitably inferable from the acts they must stand and be read and construed together as a single act, the act regarding the specific class or subject as the law of that class or subject, and the later more comprehensive act as the general law of the classes or subjects not treated by the earlier act.[1]

§ 470. **Concurrent and Cumulative Sentences.**

The doctrine that sentences cannot be cumulative is not followed in the Federal Courts.[1] Under convictions upon separate counts

§ 469. [1] Cook County National Bank *v.* United States, 107 U. S. 445, 450, 451, 27 L. ed. 537, 2 S. C. 561; Frost *v.* Wenie, 157 U. S. 46, 48, 39 L. ed. 614, 15 S. C. 532; State *v.* Stoll, 17 Wall (U. S.), 425, 430, 431, 436, 21 L. ed. 650; Board of Commissioners *v.* Ætna Life Insurance Company, 90 Fed. 222, 227, 32 C. C. A. 585, 590 (8th Cir.); Christie-Street Commission Co. *v.* United States, 136 Fed. 326, 333, 69 C. C. A. 464, 471 (8th Cir.); United States *v.* Ninety-Nine Diamonds, 139 Fed. 961, 965, 72 C. C. A. 9, 13 (8th Cir.); 2 L. R. A. (N. S.) 185; City Realty Co. *v.* S. R. H. Robinson Contracting Co. (C. C.), 183 Fed. 176, 181; Hemmer *v.* United States, 204 Fed. 898, 906, 908, 123 C. C. A. 194, 202, 204 (8th Cir.); Priddy *v.* Thompson, 204 Fed. 955, 959, 123 C. C. A. 277, 281 (8th Cir.); Sweet *v.* United States, 228 Fed. 421, 426, 143 C. C. A. 3, 8 (8th Cir.); Soliss *v.* General Electric Co., 213 Fed. 204, 208, 129 C. C. A. 548, 552 (8th Cir.); King *v.* Pomeroy, 121 Fed. 287, 294, 58 C. C. A. 209, 216 (8th Cir.); United States *v.* Healey, 160 U. S. 136, 147, 40 L. ed. 369, 16 S. C. 247; United States *v.* Greathouse, 166 U. S. 601, 41 L. ed. 1130, 17 S. C. 701; Townsend *v.* Little, 109 U. S. 504, 512, 27 L. ed. 1012, 3 S. C. 357; Petri *v.* Creelman Lumber Co., 199 U. S. 487, 496, 499, 50 L. ed. 281, 26 S. C. 133; Ex parte United States, 226 U. S. 420, 424, 57 L. ed. 281, 33 S. C. 170; Stoneberg *v.* Morgan, 246 Fed. 98, 158 C. C. A. 324 (8th Cir.). *See also* Snitkin *v.* United States (C. C. A. 7th Cir. March 30, 1920), holding that prosecutor cannot elect to prosecute under statute carrying the heaviest penalty.

§ 470. [1] Freeman *v.* United States, 227 Fed. 732, 142 C. C. A. 256 (2d Cir.).

for distinct offenses of the same character judgment may be entered and sentence passed for a specified term of imprisonment upon each count and the terms may be made consecutive and cumulative. By the common law, cumulative sentences may be imposed, the imprisonment under one to commence on the termination of that under another. A sentence of imprisonment to commence upon the expiration of a preceding sentence is not uncertain because by Revised Statute § 5544, as amended by Act of March 3, 1875, convicts who are chargeable with no misconduct are entitled to a good time credit on their sentences.[2] If the punishment ordered to be inflicted is within the maximum provided for, which could be inflicted upon one good count, the validity of the remaining counts will not be reviewed.[3] The material part of a judgment sentencing one to imprisonment is that which specifies the period of incarceration and the place of imprisonment, and in those respects it should be definite and certain, but when it unnecessarily fixes the time when the term of imprisonment shall begin, such provision is merely directory or provisional, and in case the execution of the sentence is suspended, as permitted by law, by proceedings in error, the term is to be computed from the time when the defendant is actually incarcerated.[4]

§ 471. **Judgment on Pleas of Guilt.**

A plea of guilty is equal to a verdict of conviction. It therefore follows, that if the defendant enters such a plea, the court must still pronounce judgment.[1]

§ 472. **Costs.**

Upon conviction the defendant is not chargeable with the fees of or costs in procuring witnesses for the Government who did not testify.[1]

[2] Howard *v.* United States, 75 Fed. 896; Chadwick *v.* United States, 141 Fed. 225.

[3] Classon *v.* United States, 142 U. S. 140, 35 L. ed. 966, 12 S. C. 169; Harvey *v.* United States, 159 Fed. 419, 86 C. C. A. 399 (3d Cir.); Bartholomew *v.* United States, 177 Fed. 902, 101 C. C. A. 182 (6th Cir.); Botsford *v.* United States, 215 Fed. 510, 132 C. C. A. 22 (6th Cir.).

[4] In re Morse, 117 Fed. 763.

§ 471. [1] Green *v.* Commonwealth, 12 Allen (Mass.), 155.

§ 472. [1] United States *v.* Miller, 223 Fed. 183.

§ 473. Suspending Sentence.

The District Court has no power to suspend sentence.[1] The court has a right to temporarily suspend its judgment, and continue to do so from time to time in a criminal cause, for the purpose of hearing and determining motions and other proceedings which may occur after verdict, and which may properly be considered before judgment. But the court cannot suspend its judgment for an indefinite time or for no justifiable reason or cause.[2] The court has the power, on a motion of the defendant, to defer the beginning of a sentence named in the judgment, for such time as, within the judgment of the court, is reasonable, as, for instance, in case of temporary illness, or a necessity involving the interest of others as well as himself, that his affairs should be arranged or an application, in good faith, being about to be made to the Supreme Court for a writ of certiorari, pending such application, provided the same be within a reasonable time.[3]

§ 474. Sentence and Correction — Term.

The rule in the Federal Court is that a motion to vacate or set aside a judgment must be made before the expiration of the term at which the judgment is rendered.[1] It is no longer open to doubt that within the term and before the sentence is carried out, a defendant may move to vacate the judgment, and in arrest of the judgment and for new trial. These motions, particularly the one in arrest of judgment, give the court an opportunity to pass upon the validity of the indictment. It is not too late to make these motions after judgment if made during the term.[2] When the orderly procedure of appeal is employed, the case is kept within the control and disposition of the courts; and if the judgment be

§ 473. [1] Ex parte United States, 242 U. S. 27, 61 L. ed. 129, 37 S. C. 72.

[2] United States *v.* Wilson, 46 Fed. 748.

[3] Walsh *v.* United States, 177 Fed. 208, 101 C. C. A. 378 (7th Cir.).

§ 474. [1] United States *v.* Jenkins, 176 Fed. 672, 100 C. C. A. 224 (4th Cir.).

[2] United States *v.* Mayer, 235 U. S. 55, 59 L. ed. 129, 35 S. C. 16; Ex parte Cassett, 18 Fed. 86; Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872; Reynolds *v.* United States, 98 U. S. 145, 25 L. ed. 244; on re Bonner, 151 U. S. 242, 38 L. ed. 149, 14 S. C. 323; Williams *v.* United States, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92; Ex parte Waterman, 33 Fed. 29.

excessive or illegal, it may be modified or changed, and complete justice done to the prisoner.[3]

§ 475. **When Judgment Can Be Vacated.**

A judgment entered without jurisdiction may be vacated at any time.[1] Payment of a sum of money to obtain release from imprisonment cannot be deemed voluntary.[2]

§ 476. **Judgments for Fines.**

"In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: Provided, That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid."[1] This section means that the Government has remedies, other than imprisonment, similar to those of private individuals for the collection of their debts.[2] The imposition of a fine does not create a debt and if the defendant dies, the Government cannot collect the amount from the estate.[3]

§ 477. **Judgment Imposing Fine Only.**

Where a fine is imposed by the court, it is discretionary with the court whether it will order the defendant in custody until the fine is paid.[1]

[3] Bryant *v.* United States, 214 Fed. 51, 130 C. C. A. 491 (8th Cir.); Ex parte Spencer, 228 U. S. 652, 57 L. ed. 1010, 33 S. C. 709; Murphy *v.* Massachusetts, 177 U. S. 155, 44 L. ed. 711, 20 S. C. 639; Ball *v.* United States, 163 U. S. 662, 41 L. ed. 300, 16 S. C. 1192.

§ 475. [1] Harris *v.* Hardman, 14 How. (U. S.) 344, 14 L. ed. 444; Ex parte Grenshaw, 15 Peter (U. S.), 119, 10 L. ed. 682; Shuford *v.* Cain, 1 Abb. (U. S.) 302, 22 Fed. Cas. No. 12823; United States *v.* Wallace, 46 Fed. 569; Thomas *v.* American Freehold Land and Mortgage Co., 47 Fed. 550.

[2] Devlin *v.* United States, 12 Ct. Cl. 266.

§ 476. [1] Revised Statute § 1041.

[2] Clark *v.* Allen, 114 Fed. 374. *Affirmed* in 126 Fed. 738, 62 C. C. A. 58 (4th Cir.).

[3] United States *v.* Mitchell, 163 Fed. 1014. *Affirmed* in United States *v.* Dunne, 173 Fed. 254, 97 C. C. A. 420 (9th Cir.).

§ 477. [1] Matter of Jackson, 96 U. S. 727, 24 L. ed. 877.

§ 478. **Exemption Laws.**

Upon conviction in the Federal Court on a criminal charge carrying with it the penalty of a fine, the prisoner may avail himself of the exemption privileges provided for in § 1042 Revised Statutes of the United States.[1]

§ 479. **Remedy for Persons Unable to Pay Fine.**

"When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil percept for debt by the laws of (State where oath is administered); and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God.' And thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts."[1] Although there is no statute providing that a fine imposed may be enforced by imprisonment until it is paid, this section implies that this may be done but it is not to be construed to indicate that it may be extended beyond the maximum term of imprisonment fixed for that particular offense.[2] The word *jail* in the section refers to a place of confinement and a Federal prisoner

§ 478. [1] Clark *v.* Allen, 114 Fed. 374.

[2] In re Greenwald, 77 Fed. 590; Ex parte Peeke, 144 Fed. 1016.

§ 479. [1] Revised Statute § 1042. Same as Revised Statute § 5296.

can be detained there until the term of imprisonment for non-payment of the fine expires.[3] This section and the preceding Section 1041 are to be construed together as putting the United States on the same footing with civil creditors and as giving the families of poor convicts the benefit of the homestead exemption laws.[4] On the reversal of an order of *habeas corpus* which erroneously discharged the prisoner, the United States can return him to the penitentiary where he will be detained until he is discharged or has taken the oath under this section.[5]

§ 480. **Designation of Place of Imprisonment.**

A Federal Court has power to sentence a defendant to be confined in the penitentiary located in another district where no suitable place is to be had within the district where the court is located.[1]

[3] Haddox *v.* Richardson, 168 Fed. 635, 94 C. C. A. 171 (4th Cir.).

[4] Allen *v.* Clark, 114 Fed. 374. *Affirmed* 126 Fed. 738, 62 C. C. A. 58 (4th Cir.); Fink *v.* O'Neil, 106 U. S. 272, 27 L. ed. 196, 1 S. C. 325.

[5] Haddox *v.* Richardson, 168 Fed. 635, 94 C. C. A. 171 (4th Cir.).

§ 480. [1] United States *v.* McMahon, 164 U. S. 81, 41 L. ed. 357, 17 S. C. 28; Haynes *v.* United States, 101 Fed. 818, 42 C. C. A. 34 (8th Cir.).

CHAPTER XL

PAROLE ACT

§ 481. **Conditions of Prisoner's Release on Parole.**

"That every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided." [1] Where the prisoner's sentence of eight years was commuted to four years, he is eligible for parole when he has served one third of his commuted sentence of four years.[2] Parole is tantamount to commutation as it substitutes a lesser punishment for a greater one.[3] Where the prisoner is in jail serving two sentences, the second of which was illegally imposed, he is eligible for release on parole when he has served one third of the first and valid sentence.[4]

§ 482. **Boards of Parole.**

"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 for such prison, which shall establish rules and regulations for its procedure subject to the approval of the Attorney-General. The chief clerk of such prison shall be clerk of said board of parole, and meetings shall be held at each prison as often as the regulations of such board shall provide: *Provided*, That in every case where a prison other than a United States Penitentiary is used for the confinement of such prisoners it shall be the duty of the Attorney-General to designate the officers of said prison, who, together with the superintendent of prisons, shall constitute such board for said prison." [1]

§ 481. [1] Act of June 25, 1910, c. 387, § 1, 36 Stat. L. 819, amended Jan. 23, 1913, c. 9, 37 Stat. L. 650.

[2] Duehay *v.* Thompson, 223 Fed. 305, 138 C. C. A. 507 (9th Cir.), *Affirming* 217 Fed. 484.

[3] Duehay *v.* Thompson, *supra*.

[4] O'Brien *v.* McClaughry, 209 Fed. 816, 126 C. C. A. 540 (8th Cir.).

§ 482. [1] Act of June 25, 1910, ch. 387, § 2, 36 Stat. L. 819.

§ 483. **Application for Parole.**

"That if it shall appear to said board of parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then said board of parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said board of parole shall prescribe, and to remain while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by Act of Congress; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board: *Provided*, That no release on parole shall become operative until the findings of the board of parole under the terms hereof shall have been approved by the Attorney-General of the United States." [1] "Legal custody" and "control" as used in this act do not contemplate actual custody or confinement, for the paroled prisoner can go outside of the prison in the discretion of the board and transportation is furnished to the place where he wants to go.[2] Under this section it was held: "It must appear to the board by showing in the manner prescribed that there is reasonable probability that the applicant for a parole will abide by the law; and if in the belief or judgment of the board his release is not incompatible with the welfare of society, the board may, in its discretion, authorize parole." [3]

§ 484. **Violation of Parole — Warrant for Retaking Prisoner.**

"That if the warden of the prison or penitentiary from which said prisoner was paroled or said board of parole or any member

§ 483. [1] Act of June 25, 1910, ch. 387, § 3, 36 Stat. L. 819.

[2] Ex parte Marcil, 207 Fed. 809.

[3] Per Hunt, J., in Redman *v.* Duehay, 246 Fed. 283, 159 C. C. A. 13 (9th Cir.).

thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner." [1] This section refers to the consequence of the violation of this act.[2]

§ 485. **Officers Authorized to Execute Warrant — Expenses.**

" That any officer of said prison or any federal officer authorized to serve criminal process within the United States, to whom such warrant shall be delivered, is authorized and required to execute such warrant by taking such prisoner and returning him to said prison within the time specified in said warrant therefor. All necessary expenses incurred in the administration of this Act shall be paid out of the appropriation for the prison in connection with which such expense was incurred, and such appropriation is hereby made available therefor." [1]

§ 486. **Action by Board on Issue of Warrant — Revocation of Parole.**

" That at the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced." [1] If a prisoner violates his parole, he is not entitled to any commutation for good behavior in serving the remainder of the sentence.[2]

§ 484. [1] Act of June 25, 1910, ch. 387, § 4, 36 Stat. L. 820.

[2] Halligan *v.* Marcil, 208 Fed. 403, 125 C. C. A. 619 (9th Cir.).

§ 485. [1] Act of June 25, 1910, ch. 387, § 5, 36 Stat. L. 820.

§ 486. [1] Act of June 25, 1910, ch. 387, § 6, 36 Stat. L. 820.

[2] Halligan *v.* Marcil, 208 Fed. 403, 125 C. C. A. 619 (9th Cir.).

§ 487. **Parole Officer for Each Penitentiary — Supervision of Paroled Prisoners by Marshals.**

"That each board of parole shall appoint a parole officer for the penitentiary over which it has jurisdiction. Subsequent to the direction and control of such board, it shall be the duty of such officer to aid paroled prisoners in securing employment and to visit and exercise supervision over them while on parole, and such officer shall have such authority and perform such other duties as the board of parole may direct. The salary of each parole officer shall be fixed by the board of parole, but shall not exceed one thousand five hundred dollars per annum, which, together with his actual and necessary traveling expenses, when approved by such board, shall be paid out of the appropriation for the maintenance of the penitentiary to which he is assigned, which appropriation is hereby made available for the purpose. In addition to such parole officers the supervision of paroled prisoners may also be devolved upon the United States marshals when the board of parole may deem it necessary." [1]

§ 488. **Gratuities or Transportation to Paroled Prisoners.**

"That it shall be the duty of the warden to furnish to any and all paroled prisoners the usual gratuities, consisting of clothing, transportation, and five dollars in money; the transportation furnished shall be to the place to which the paroled prisoner has elected to go, with the approval of the board of parole. The warden of the prison who furnishes these gratuities is hereby authorized to charge the actual cost of the same in his accounts against the United States; *Provided, however,* That when any such paroled prisoner shall have received his final discharge, while he is away from such prison, he shall be entitled to no further gratuities provided for discharged prisoners under existing law." [1]

§ 489. **United States Prisoners in State Reformatories — Parole under State Laws.**

"That whenever any person has been convicted of any offense against the United States which is punishable by imprisonment,

§ 487. [1] Act of June 25, 1910, ch. 387, § 7, 36 Stat. L. 820.

§ 488. [1] Act of June 25, 1910, ch. 387, § 8, 36 Stat. L. 820.

and has been sentenced to imprisonment and is confined therefore, in any reformatory institution of any State in accordance with section fifty-five hundred and forty-eight of the Revised Statutes, or other laws of the United States, then if such state has laws for the parole of prisoners committed to such institutions by the courts of that State, such person convicted of any offense against the United States shall be eligible to parole on the same terms and conditions and by the same authority and subject to recommittal for violation of such parole in the same manner, as persons committed to such institutions by the courts of said State, and the laws of said State relating to the parole of prisoners and the supervision thereof in such institutions are hereby adopted and made to apply to persons committed to such institutions for offenses against the United States. The necessary cost of parole and supervision of such prisoners, to the State where such institution is located shall be paid by the United States out of the appropriation for the support of prisoners confined in state institutions, which appropriation is hereby made available for the purpose. No such prisoner shall be entitled to go on parole until the Attorney-General shall have approved the order therefor; *Provided*, That when a prisoner is committed to such institution outside of the State where he lives he may be permitted by his parole to return to his home, and in such case the supervision of such prisoner on parole shall devolve upon the marshal of the district where said prisoner lives, and in case such prisoner should violate his parole a warrant for his recommitment shall be delivered to and executed by said marshal." [1]

§ 490. **Power of President to Grant Pardon or Commutation or Good Time Allowance by Act of Congress.**

"That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by Act of Congress." [1] The President's power to commute is conferred upon him by the Constitution, and cannot be affected by legis-

§ 489. [1] Act of June 25, 1910, c. 387, § 9, 36 Stat. L. 821.

§ 490. [1] Act of June 25, 1910, c. 387, § 10, 36 Stat. L. 821.

lative action or impaired or undetermined in any particular.[2] The commutation by the President does not substitute a punishment for that of the court but is a mere modification thereof.[3]

§ 491. **Location and Erection of Government Prisons.**

"That the Attorney-General and Secretary of the Interior be, and are hereby authorized and directed to purchase three sites, two of which shall be located as follows: one north, the other south of the thirty-ninth degree of north latitude and east of the Rocky Mountains, the third site to be located west of the Rocky Mountains, and the same to be located geographically as to be most easy of access to the different portions of the country, and cause to be erected thereon suitable buildings for the confinement of all persons convicted of any crime whose term of imprisonment is one year or more at hard labor by any court of the United States in any State, Territory or District, under the jurisdiction of the Department of Justice of the United States, and the plans, specifications and estimates of such sites and buildings shall be previously made and approved according to law, and shall not exceed the sum of five hundred thousand dollars each." [1] The erection of government prisons is left to the discretion of Congress and the courts have no control in this matter.[2] This section refers to such crimes as the statutes make punishable by hard labor.[3]

§ 492. **Employment of Convicts.**

"That the sum of one hundred thousand dollars is further appropriated, to be expended under the discretion of the Attorney-General, in the fitting of workshops for the employment of the prisoners: *Provided, however,* that the convicts be employed exclusively in the manufacture of such supplies for the Government as can be manufactured without the use of machinery, and the prisoners shall not be worked outside the prison enclosure." [1]

[2] Thompson *v.* Duehay, 217 Fed. 484.

[3] Duehay *v.* Thompson, 223 Fed. 305, 138 C. C. A. 507 (9th Cir.).

§ 491. [1] Act of March 3, 1891, c. 529, § 1, 26 Stat. L. 839.

[2] Ex parte Karstendick, 93 U. S. 396, 23 L. ed. 889.

[3] Mitchell *v.* United States, 196 Fed. 874, 116 C. C. A. 436 (9th Cir.).

§ 492. [1] Act of March 3, 1891, c. 529, § 2, 26 Stat. L. 839.

§ 493. **Selection of Location of Prisons.**

"That the Attorney-General and the Secretary of the Interior be, and are hereby authorized to select the State, District or Territory, in which to locate and erect the prisons; *Provided*, That the consent of the authorities of such State, District or Territory be first obtained." [1]

§ 494. **Prison Officers — Rules.**

"That the control and management of said prisons be vested in the Attorney-General, who shall have power to appoint a superintendent, assistant superintendent, warden, keeper, and all other officers necessary for the safe-keeping, care, protection and discipline of such United States prisoners. He shall also have authority to promulgate such rules for the government of the officials of said prisons and prisoners as he may deem proper and necessary." [1]

§ 495. **Prisoners' Transportation — Expenses.**

"That the transportation of all United States prisoners convicted of crimes against the laws of the United States in any State, District or Territory, and sentenced to terms of imprisonment in a penitentiary, and their delivery to the superintendent, warden or keeper of such United States prisons, shall be by the marshal of the District or Territory where such conviction may occur, after the erection and completion of said prisons. That the actual expenses of such marshal, including transportation and subsistence, hire, transportation and subsistence of guards, and the transportation and subsistence of the convict or convicts, be paid, on the approval of the Attorney-General, out of the judiciary fund." [1]

§ 496. **Transportation Home of Discharged Prisoners.**

"Every prisoner when discharged from the jail and prison shall be furnished with transportation to the place of his residence within the United States at the time of his commitment under sentence of the court, and if the term of his imprisonment shall have been for one year or more, he shall also be furnished with

§ 493. [1] Act of March 3, 1891, c. 529, § 3, 26 Stat. L. 839.

§ 494. [1] Act of March 3, 1891, c. 529, § 4, 26 Stat. L. 839.

§ 495. [1] Act of March 3, 1891, c. 529, § 5, 26 Stat. L. 839.

suitable clothing, the cost not to exceed twelve dollars, and five dollars in money." [1]

§ 497. **Confinement of Juvenile Offenders — Confinement of Prisoners in the United States Military Prison.**

"This act shall not apply to minors, who, in the judgment of the judges presiding over United States Courts, shall be committed to reformatory institutions. *And Provided*, that nothing in this act shall be construed as prohibiting the courts of the United States from sentencing to or confining prisoners, either civil or military, in the United States Military prison at Fort Leavenworth, Kansas." [1]

§ 498. **Deductions from Term for Good Conduct.**

"The said Attorney-General, in formulating rules and regulations for the conduct of said prisons, is hereby authorized to establish rules for commutation for good behavior of said convicts, but not for a longer time than two months for the first year's imprisonment, and two months for each succeeding year." [1] The prisoner's term of sentence begins to run from the first day of sentence and commutation for good behavior is figured accordingly.[2] This section has been enlarged and modified by the Act of June 21, 1902, c. 1140, 32 Stat. L. 397, to the effect: "That each prisoner who has been or shall hereafter be convicted of any offense, against the laws of the United States, and is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary or jail, or in any penitentiary, prison, or jail of any State or Territory, for a definite term, other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated as follows, commencing on the first day of his arrival at the penitentiary, prison or jail: Upon a sentence of not less than six months nor more than one year, five days for each month; upon a sentence of more than one year and less than three years, six days for each month; upon a sentence of not less than three years and less than five years, seven days for each month;

§ 496. [1] Act of March 3, 1891, c. 529, § 6, 26 Stat. L. 840.

§ 497. [1] Act of March 3, 1891, c. 529, § 7, 26 Stat. L. 840.

§ 498. [1] Act of March 3, 1891, c. 529, § 8, 26 Stat. L. 840.

[2] In re Jennings, 118 Fed. 479.

upon a sentence of not less than five years and less than ten years eight days for each month; upon a sentence of ten years or more, ten days for each month. When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated." This Act has no reference to prisoners sentenced previous to its enactment.[3]

§ 499. **Designation of Penitentiary — Separation of Youthful Prisoners.**

"That the Attorney-General shall be authorized to designate to which of said prisons persons convicted in such States or Territories shall be carried for confinement: *Provided*, That in the construction of the prison buildings provided for in this act there shall be such arrangement of cells and yard space as that prisoners under twenty years of age shall not be in any way associated with prisoners above that age, and the management of the class under twenty years of age shall be as far as possible reformatory." [1]

§ 500. **Actual Reasonable Cost of Subsistence Paid.**

"Hereafter there shall be allowed and paid by the Attorney-General for the subsistence of prisoners in the custody of any marshal of the United States and the warden of the jail in the District of Columbia, such sum only as it reasonably and actually cost to subsist them. And it shall be the duty of the Attorney-General to prescribe such regulations for the government of the marshals and the warden of the jail in the District of Columbia, in relation to their duties under this chapter, as will enable him to determine the actual and reasonable expenses incurred." [1]

§ 501. **Designation of Penitentiary — Transportation of Prisoners — Expenses — Change of Place of Imprisonment.**

"All persons who have been, or who may hereafter be, convicted of crime by any court of the United States, including consular courts, whose punishment is imprisonment in a District or Territory or country where, at the time of conviction or at any time

[3] Woodward *v.* Bridges, 144 Fed. 156; United States *v.* Jackson, 143 Fed. 783, 75 C. C. A. 41 (9th Cir.); United States *v.* Farrar, 139 Fed. 260, 71 C. C. A. 386 (2d Cir.); In re Walters, 128 Fed. 791.

§ 499. [1] Act of March 3, 1891, c. 529, § 9, 26 Stat. L. 840.

§ 500. [1] Act of May 12, 1864, c. 85, 13 Stat. L. 75; Act of March 5, 1872, c. 30, 17 Stat. L. 35.

during the term of imprisonment, there may be no penitentiary, or jail suitable for the confinement of convicts, or available therefor, shall be confined during the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney-General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the District or Territory where the conviction has occurred; and in case of convictions by a consular court the transportation shall be by some properly qualified agent or agents designated by the Department of State, the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and agent or agents to be defrayed from the appropriation for bringing home criminals; and if the conviction be had in the District of Columbia, the transportation and delivery shall be by the warden of the jail of that District, the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia only, to be paid by the Attorney-General out of the judiciary fund. But if, in the opinion of the Attorney-General, the expense of transportation from any State, Territory, or the District of Columbia in which there is no penitentiary will exceed the cost of maintaining them in jail in the State, Territory, or the District of Columbia, during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences. And the place of imprisonment may be changed in any case when, in the opinion of the Attorney-General, it is necessary for the preservation of the health of the prisoner, or, when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel and improper treatment: *Provided, however,* That no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf." [1] The object of this section

§ 501. [1] As amended by Act of July 12, 1876, c. 183, 19 Stat. L. 88, and Act of March 3, 1901, c. 873, 31 Stat. L. 1450.

is to define the duties of the Attorney-General when there is no jail or penitentiary in the district where the prisoner is convicted.[2] This section is to be construed with the other sections; it may be treated as a proviso to sections 5541 and 5542.[3] The courts cannot order the sentence to be served in a certain penitentiary, if the statutes assign that penitentiary for the service of sentences for offenses of a different type.[4] If the statutory contingencies have not been complied with, as to changing the place of confinement, the prisoner should consent or have notice before the sentence of the court is changed.[5] The Attorney-General has the power to change the place of imprisonment of a prisoner because of his health, but the court cannot order such removal after the term has expired.[6] Under this section, a prisoner cannot be sent to a penitentiary a great distance from his home if there is no finding by the Attorney-General that a penitentiary in the district is not available.[7]

§ 502. **Contracts for Subsistence.**

"The Attorney-General shall contract with the managers or proper authorities having control of such prisoners, for the imprisonment, subsistence, and proper employment of them, and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners will be confined." [1] Under this section it appears that the Attorney-General shall contract for the maintenance, under certain circumstances, of prisoners in state penitentiaries.[2]

§ 503. **Ordering Sentences Executed in House of Correction.**

"Whenever any person is convicted of any offense against the United States which is punishable by fine and imprisonment, or

[2] United States *v.* McMahon, 164 U. S. 81, 41 L. ed. 357, 17 S. C. 28; United States *v.* Cobb, 43 Fed. 570; Ex parte McClusky, 40 Fed. 71.

[3] Ex parte Karstendick, 93 U. S. 396, 23 L. ed. 889.

[4] In re Bonner, 151 U. S. 242, 38 L. ed. 149, 14 S. C. 323.

[5] United States *v.* Lane, 221 Fed. 299.

[6] United States *v.* Greenwald, 64 Fed. 6; United States *v.* Lane, 221 Fed. 299.

[7] Keliher *v.* Mitchell, 250 Fed. 904.

§ 502. [1] Act of May 12, 1864, c. 85, 13 Stat. L. 75; Act of March 5, 1872, c. 30, 17 Stat. L. 35.

[2] County of Lewis and Clarke *v.* United States, 77 Fed. 732.

by either, the court by which the sentence is passed may order the sentence to be executed in any house of correction or house of reformation for juvenile delinquents within the State or district where such court is held, the use of which is authorized by the legislature of the State for such purpose." [1]

§ 504. **Juvenile Offenders.**

"Juvenile offenders against the laws of the United States, being under the age of sixteen years, and who may hereafter be convicted of crime, the punishment whereof is imprisonment, shall be confined during the term of sentence in some house of refuge to be designated by the Attorney-General, and shall be transported and delivered to the warden or keeper of such house of refuge by the marshal of the district where such conviction has occurred; or, if such conviction be had in the District of Columbia, then the transportation and delivery shall be by the warden of the jail of that district, and the reasonable actual expense of the transportation, necessary subsistence, and hire, and transportation of assistants and the marshals or warden, only, shall be paid by the Attorney-General, out of the judiciary fund." [1]

§ 505. **Contracts for Subsistence — Juvenile Offenders.**

"The Attorney-General shall contract with the managers or persons having control of such houses of refuge for the imprisonment, subsistence and proper employment of all such juvenile offenders, and shall give the several courts of the United States and of the District of Columbia notice of the places so provided for the confinement of such offenders; and they shall be sentenced to confinement in the house of refuge nearest the place of conviction so designated by the Attorney-General." [1]

§ 505 *a*. **Discretion of Attorney-General.**

The policy of the law as shown from the numerous enactments of Congress is to vest the Attorney-General with vast powers over the welfare and parole of Federal prisoners. Whether it was

§ 503. [1] Act of March 3, 1835, c. 40, 4 Stat. L. 777.

§ 504. [1] Act of March 3, 1865, c. 121, 13 Stat. L. 538; Act of March 5, 1872, c. 30, 17 Stat. L. 35.

§ 505. [1] Act of March 3, 1865, c. 121, 13 Stat. L. 538; Act of March 5, 1872, c. 30, 17 Stat. L. 35.

wise to place the prisoner into the hands of the Chief Prosecuting Attorney or whether it would be better to place the whole matter of paroles and prison administration in the hands of an independent impartial board is a question deserving great thought and reflection.

§ 506. **Furnishing Clothing and Money to Discharged Prisoners.**

"That on the discharge from any prison of any person convicted under the laws of the United States, on indictment, he or she shall be provided by the warden or keeper of said prison with one plain suit of clothes and five dollars in money, for which charge shall be made and allowed in the accounts of said prison with the United States: *Provided,* That this section shall not apply to persons sentenced for a term of imprisonment of less than six months." [1]

§ 506. [1] Act of March 3, 1875, c. 145, § 2, 18 Stat. L. 480.

CHAPTER XLI

CONTEMPT

§ 507. Power to Punish.

The courts of the United States, like all other courts, have the inherent power to punish for contempt.[1] The process of contempt is a severe remedy and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct.[2] Section 268 of the Federal Judicial Code provides: "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the

§ 507. [1] Stuart *v.* Reynolds, 204 Fed. 709, 123 C. C. A. 13 (5th Cir.); In re Maury, 205 Fed. 626, 123 C. C. A. 642 (9th Cir.); United States *v.* Shipp, 203 U. S. 563, 51 L. ed. 319, 27 S. C. 165; Ex parte Robinson, 19 Wall. (U. S.) 505, 22 L. ed. 205; Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 S. C. 77.

[2] Stuart *v.* Reynolds, 204 Fed. 709, 123 C. C. A. 13 (5th Cir.); California Paving Co. *v.* Molitor, 113 U. S. 609, 28 L. ed. 1106, 5 S. C. 618.

discretion of the court, contempts of their authority: Provided, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." The statute is merely declaratory of the inherent power of Federal Courts to administer summarily punishment for contempt.[3]

§ 508. **Presence of the Court.**

In construing the words "presence or proximity of the Court," physical nearness to the place where the Court is in session at the actual commission of the acts charged as a contempt is not important, but, as in the case of constructive presence in criminal cases, the misbehavior is committed where it takes effect.[1] The Court, at least when in session, is present in every part of the place set apart for its own use and for the use of its officers, jurors, and witnesses, and misbehavior anywhere in such place is misbehavior in the presence of the court.[2] In the case of Toledo Newspaper Co. *v.* United States,[3] Chief Justice White said: "The test of power is in the character of the acts in question; when their direct tendency is to prevent or obstruct the discharge of judicial duty, they are subject to be restrained through summary contempt proceedings." The United States Commissioners have not the power to punish for contempt, but must report the misconduct to the court.[4] Under Section 157 of the Federal Judicial Code, the Court of Claims is granted power to punish for contempt in the

[3] Toledo Newspaper Co. *v.* United States, 247 U. S. 402, 62 L. ed. 1186, 38 S. C. 560.

§ 508. [1] Independent Publ. Co. *v.* United States, 240 Fed. 849; United States *v.* Huff, 206 Fed. 700; United States *v.* Toledo Newspaper Co., 220 Fed. 458, *Affirmed* in 247 U. S. 402, 62 L. ed. 1186, 38 S. C. 560.

[2] United States *v.* Toledo Newspaper Co., 247 U. S. 402, 62 L. ed. 1186, 38 S. C. 560; Matter of Savin, 131 U. S. 267, 33 L. ed. 150, 9 S. C. 699.

[3] 247 U. S. 402, 62 L. ed. 1186, 38 S. C. 560.

[4] In re Perkins, 100 Fed. 950; United States *v.* Shipp, 203 U. S. 563, 51 L. ed. 319, 27 S. C. 164; United States *v.* Beavers, 125 Fed. 778.

manner prescribed by the common law. In order to punish perjury in the presence of the court as a contempt, there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty.[5]

§ 509. **Contempt under the Clayton Act.**

Section 21 of the Clayton Act provides: "Any person who shall willfully disobey any lawful writ, process, order, rule, decree or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as hereinafter provided."[1] Section 22 of the same Act further provides: "Whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,* That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable

[5] Ex parte William F. Hudgings, 249 U. S. 378, — L. ed. —, 39 S. C. 427, per Chief Justice White.

§ 509. [1] Act of Oct. 15, 1914, c. 323, § 21, 38 Stat. L. 738.

bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer. In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information. If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: Provided, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance." [2]

§ 510. **Contempt of Interstate Commerce Commission.**

The Interstate Commerce Commission has power to compel the attendance of a witness and a failure to obey a subpœna issued

[2] Act of Oct. 15, 1914, c. 323, § 22, 38 Stat. L. 738.

by the Commission constitutes contempt.[1] But this power embraces only complaints for violations of the Interstate Commerce Act and investigations by the Commission upon matters which are properly the subject of such complaint.[2]

§ 511. **Contempt of Congressional Committees.**

The Constitution does not expressly grant to Congress the right to punish for contempt, except that Article I, § 5 grants such powers to the House in dealing with its own members. However, in so far as this power is necessary for the preservation of legislative authority, to that extent is such power to punish implied in the grant of legislative authority. The punishment that Congress may impose is limited, therefore, to protection and preservation of its legislative functions. Imprisonment for such contempt cannot be extended beyond the session of the legislature during which it was committed.[1]

§ 512. **Classification — Civil and Criminal Contempt.**

Contempts are neither wholly civil nor altogether criminal. An act may partake of the characteristics of both and it may not always be easy to classify a particular act as belonging to either one of these two classes. The character and purpose of the punishment often serve to distinguish the classes of cases. If it is for civil contempt, the punishment is remedial and for the benefit of the complainant. But, if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court.[1] Where a proceeding for contempt is criminal in its nature it partakes of the elements and attributes of a criminal action. The accused is presumed to be innocent until proven guilty.[2] Proof of guilt consistent with that required in any other criminal prose-

§ **510.** [1] United States *v.* Skinner, 218 Fed. 870.

[2] Harriman *v.* Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 S. C. 123.

§ **511.** [1] Anderson *v.* Dunn, 6 Wheat. (U. S.) 204, 56 L. ed. 242; Marshall *v.* Gordon, 243 U. S. 543, 61 L. ed. 881, 37 S. C. 448.

§ **512.** [1] Gompers *v.* Buck's Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 31 S. C. 492; Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. ed. 997, 24 S. C. 665; In re Nevitt, 117 Fed. 448, 54 C. C. A. 622 (8th Cir.); Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524.

[2] Jones *v.* United States, 209 Fed. 585, 126 C. C. A. 407 (7th Cir.).

cution is requisite to a conviction.[3] The accused cannot be compelled to testify against himself.[4] The imposition of a fine for criminal contempt is a judgment in a criminal case.[5] Contempts may be classified as direct and indirect, or constructive, and as civil or criminal. That conduct, consisting of acts done or words spoken in the presence of the court, which tends to obstruct, interrupt or prevent justice is a direct contempt. A constructive contempt is one arising from matters not transpiring in court, yet subverting or obstructing the due administration of justice.[6]

§ 513. **Acts Constituting Contempt — Generally.**

A witness whose conduct shows beyond doubt that he is refusing to tell what he knows, or that his testimony is a mere transparent sham, is guilty of contempt,[1] and may be punished for such contempt distinct from the punishment for perjury.[2] But a witness may properly refuse to answer a question if such answer tends to incriminate him,[3] nor may he be compelled to produce his private books and papers which would incriminate him or result in forfeiture of his property. Such procedure is abhorrent to the law and contrary to the principles of free government.[4] This protection, however, may not be extended to uphold a refusal to produce the books of a corporation by one of its officers, under investigation, because, as against the corporation, their production might be lawfully compelled, and as to the officer such production is no self-incrimination since he is not compelled to produce his private books.[5] One of several partners of a firm, served with a subpœna *duces tecum*, calling for papers in the posses-

[3] Kelly *v.* United States, 250 Fed. 947, 163 C. C. A. 197 (9th Cir.); Oates *v.* United States, 233 Fed. 201, 147 C. C. A. 207 (4th Cir.).

[4] United States *v.* Jose, 63 Fed. 951; Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524.

[5] Creekmore *v.* United States, 237 Fed. 743, 150 C. C. A. 497 (8th Cir.); Stuart *v.* Reynolds, 204 Fed. 709, 123 C. C. A. 13 (5th Cir.); In re Frankel, 184 Fed. 539.

[6] Indianapolis Water Co. *v.* American Strawboard Co., 75 Fed. 972.

§ 513. [1] In re Schulman, 177 Fed. 191, 101 C. C. A. 361 (2d Cir.); United States *v.* Appel, 211 Fed. 495; Ex. parte Hudgings, 249 U. S. 378, — L. ed. —, 39 S. C. 427.

[2] In re Steiner, 195 Fed. 299.

[3] In re Shea, 166 Fed. 180.

[4] Boyd *v.* United States, 116 U. S. 616, 29 L. ed. 746, 6 S. C. 524.

[5] Wheeler *v.* United States, 226 U. S. 478, 57 L. ed. 309, 33 S. C. 158; Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 52 L. ed. 327, 28 S. C. 178.

sion of others of the partners, must use diligent efforts to obtain the documents called for, and failure to make such effort is contempt.[6] A corporation, like an individual, may be guilty of contempt in refusing to obey a subpœna *duces tecum* which sufficiently specifies the books or papers required to be produced.[7] There has been some question raised as to whether the publication of a newspaper article, which when read in the presence of the court, is punishable as a contempt, it being maintained that, since the publication may be made at a considerable distance from the courtroom, it would not come within the provision of the Federal statute. As pointed out, however, the crime is committed where it takes effect and publications which reflect upon the court, counsel, parties, or witnesses, respecting the cause and which tend to obstruct the administration of justice, constitute contempt.[8] A newspaper or magazine publication reflecting upon the presiding judge is contemptuous when its tendency is to interfere with the administration of justice in a pending cause,[9] and the constitutional right of the freedom of the press is not violated by the infliction of a punishment for contempt in connection with a contemptuous publication.[10] Newspaper comment on the testimony and giving names of witnesses before a Federal grand jury, obtained by observing those entering the grand jury room, hindered the secrecy of the affairs of the grand jury and was punishable as a contempt.[11] A newspaper which published articles concerning the defendant's character, which was read by the jury and necessitated its discharge, was held guilty of contempt, and that the

[6] In re Munroe, 210 Fed. 326.

[7] Heller *v.* Ilwaco Mill & Lumber Co., 178 Fed. 111.

[8] Patterson *v.* Colorado, 205 U. S. 454, 51 L. ed. 879, 27 S. C. 556; United States *v.* Toledo Newspaper Co., 247 U. S. 402, 62 L. ed. 1186, 38 S. C. 560; Independent Publishing Co. *v.* United States, 240 Fed. 849, 153 C. C. A. 535 (9th Cir.); United States *v.* Providence Tribune Co., 241 Fed. 524.

[9] Toledo Newspaper Co. *v.* United States, 247 U. S. 402, 62 L. ed. 1186, 38 S. C. 560; Patterson *v.* Colorado, 205 U. S. 454, 51 L. ed. 879, 27 S. C. 556; In re Independent Publishing Co., 240 Fed. 849, 153 C. C. A. 535 (9th Cir.); United States *v.* Providence Tribune Co., 241 Fed. 524; Gorham Mfg. Co. *v.* Emery-Bird-Thayer Dry-Goods Co., 92 Fed. 774.

[10] United States *v.* Toledo Newspaper Co., 247 U. S. 402, 62 L. ed. 1186, 38 S. C. 560; Independent Publishing Co. *v.* United States, 240 Fed. 849.

[11] United States *v.* Providence Tribune Co., 241 Fed. 524.

statements published were true constituted no valid defense.[12] In proceedings for contempt to punish a newspaper for the publication of articles intending to bear pressure upon a judge to make him decide pending litigation a particular way, it is immaterial whether the article came to the attention of such judge or whether it did, in fact, influence his opinion.[13] Any words uttered by speech, by writing, or by printing outside of the regular course of litigation, which are designed to bring contempt upon the courts in the exercise of their judicial functions, or to pervert in a pending case the administration of justice, constitute contempt.[14] A marshal who subpœnas a talesman known to him to be friendly to the defendant is not thereby guilty of contempt.[15] An unprovoked assault on plaintiff's attorney, in full view of the jury room, and while the jury were deliberating, was held to be contempt.[16] One who communicates with a juror pending a trial, or has such relations with a juror as may tend improperly to influence the action of such juror, is punishable for contempt although it cannot be proved that such acts were committed with unlawful intent.[17] An attempt to influence prospective jurors, made several city blocks away from the courthouse, was held to be an interference with the due administration of justice within the contemplation of Federal statutes.[18] A grand juror is not guilty of contempt when he discloses the testimony or other proceedings of the jury after it has been discharged, since, obviously, such conduct cannot obstruct the administration of justice.[19] It is contempt of court to interfere with property in *custodia legis*.[20] Language or conduct intended to incite others to a violation of the court's order is a contempt of court.[21] But the defendants are not guilty of contempt

[12] Independent Publishing Co. *v.* United States, 240 Fed. 849.

[13] United States *v.* Toledo Newspaper Co., 247 U. S. 402, 62 L. ed. 1186, 38 S. C. 560.

[14] In re Chesseman, 49 N. J. L. 115, 6 Atl. 517.

[15] Richards *v.* United States, 126 Fed. 105, 61 C. C. A. 161 (9th Cir.).

[16] United States *v.* Barrett, 187 Fed. 378.

[17] Ellis *v.* United States, 206 U. S. 246, 51 L. ed. 1047, 27 S. C. 600; Kelly *v.* United States, 250 Fed. 947, 163 C. C. A. 197 (9th Cir.).

[18] Kirk *v.* United States, 192 Fed. 273, 112 C. C. A. 531 (9th Cir.).

[19] Atwell *v.* United States, 162 Fed. 97, 89 C. C. A. 97 (4th Cir.).

[20] Clay *v.* Waters, 178 Fed. 385, 101 C. C. A. 645 (8th Cir.).

[21] United States *v.* Debs, 64 Fed. 724; In re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 S. C. 900; United

for having conspired to commit a contempt.[22] Where a deposition was taken and published in furtherance of a conspiracy to impose upon the Federal Court in another State, it was held that such an act did not come within the clause empowering punishment for misbehavior "so near the presence of the court as to obstruct the administration of justice", unless the deposition was actually offered or used as evidence.[23] The filing of a suit in a State Court to enjoin an order of a Federal Court is not contempt,[24] nor is the filing of a new suit after *supersedeas* from the United States Supreme Court covering the same subject matter contempt of court.[25] To constitute contempt, violation of a lawful writ, process, order, rule, decree, or command of the court, by one not a party to the proceeding, such violation must have been after actual knowledge of the order or other command.[26] Disobedience of an order void for want of jurisdiction is not contempt.[27] A person cited for contempt may be excused for failure to comply with an order for the payment of money, on showing his inability to comply therewith.[28]

§ 514. Imprisonment for Debt.

Where the prisoner has the power to comply with the order, having the money or thing in question in his possession, he may be punished for his failure to obey an order commanding him to surrender it without involving any rule of law against imprison-

States *v.* Haggarty, 116 Fed. 510; United States *v.* Gehr, 116 Fed. 520; Stewart *v.* United States, 236 Fed. 838, 150 C. C. A. 100 (8th Cir.).

[22] Doniphan *v.* Lehman, 179 Fed. 173.

[23] Doniphan *v.* Lehman, 179 Fed. 173.

[24] Royal Trust Co. *v.* Washburn R. R. Co., 139 Fed. 865, 71 C. C. A. 579 (7th Cir.).

[25] Natal *v.* State of Louisiana, 123 U. S. 516, 31 L. ed. 233, 8 S. C. 253. *See also* Guaranty Trust Co. of New York *v.* North Chicago St. R. R. Co., 130 Fed. 801, 65 C. C. A. 65 (7th Cir.).

[26] In re Wilk, 155 Fed. 943; Toledo, A. A. & N. M. Ry. Co. *v.* Pennsylvania Co., 54 Fed. 746; Garrigan *v.* United States, 163 Fed. 16, 89 C. C. A. 491 (7th Cir.); Pettibone *v.* United States, 148 U. S. 197, 37 L. ed. 419, 13 S. C. 542.

[27] Stuart *v.* Reynolds, 204 Fed. 709, 123 C. C. A. 13 (5th Cir.); In re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 S. C. 164; In re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 S. C. 482; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 S. C. 724.

[28] In re Sobol, 242 Fed. 487, 155 C. C. A. 263 (2d Cir.).

ment for debt.[1] However, if despite the bankrupt's inability, the court forces him to pay such money into court or to his creditors under the guise of punishing the bankrupt for contempt, it has been held that such action is a violation of the constitutional provisions against imprisonment for debt.[2]

§ 515. **In Bankruptcy.**

Section 2 (13) Bankruptcy Act gives bankruptcy courts powers "to enforce obedience by bankrupts, officers and other persons, to all lawful orders, by fine or imprisonment, or fine and imprisonment." Section 2 (16) authorizes the court to "punish persons for contempts committed before referees"; Section 41 *a* defines contempts before referees and Section 41 *b* prescribes the procedure for summary hearing and punishment by the judge. A bankrupt who fails to obey an order of the bankruptcy court to pay over to his trustee money found to be in his possession and control, and property belonging to his estate, may be committed for contempt until he complies.[1] But the court should be satisfied by the evidence beyond a reasonable doubt of the ability of the bankrupt to comply with the order to turn over money or property to his trustee before exercising the power to imprison for contempt.[2]

§ 516. **Procedure — Complaints and Informations.**

The United States Circuit Court of Appeals for the Eighth Circuit held that an information charging the respondents with a criminal contempt may be filed by the District Attorney on information and belief. The theory adopted by the court for this decision is that a criminal contempt is not one of the cases falling within the Fifth or Sixth Amendment to the Constitution of the United States.[1] This same ruling was made in another case.[2] It

§ **514.** [1] Mueller *v.* Nugent, 184 U. S. 1, 46 L. ed. 405, 22 S. C. 269.

[2] Walton *v.* Walton, 54 N. J. E. 607, 35 Atl. 289; American Trust Company *v.* Wallis, 126 Fed. 464, 61 C. C. A. 342 (3d Cir.).

§ **515.** [1] In re Purvine, 96 Fed. 192, 37 C. C. A. 446 (5th Cir.); Ripon Knitting Works *v.* Schreiber, 101 Fed. 810; In re Denell, 100 Fed. 633.

[2] Boyd *v.* Glucklich, 116 Fed. 131, 53 C. C. A. 451 (8th Cir.); In re Davison, 143 Fed. 673.

§ **516.** [1] Creekmore *v.* United States, 237 Fed. 743, 150 C. C. A. 497 (8th Cir.). *See also* Merchants' Stock and Grain Company *v.* Board of Trade, 201 Fed. 20, 120 C. C. A. 582 (8th Cir.).

[2] Kelly *v.* United States, 250 Fed. 947, 163 C. C. A. 947 (9th Cir.).

was further held that the Fifth Amendment to the Constitution of the United States, providing that no person shall be compelled in any criminal case to be a witness against himself, does not apply to proceedings instituted against the accused for contempt of court where the contempt charge does not constitute a crime.[3] Judge Hook, who sat in the *Merchants' Stock and Grain Co. case, supra*, dissented from the view taken by the majority that a defendant in a charge of criminal contempt may be compelled to testify and incriminate himself, and in this he is borne out at least *arguendo* by the decision of the United States Supreme Court.[4] The statutes provide that "All crimes and offenses committed against the provisions of chapter seven, Title 'Crimes', which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney." [5]

§ 517. **Procedure, *Continued*.**

The proceedings to punish may be brought by warrant of attachment or by rule to show cause, the method being discretionary with the court.[1] Proceedings in criminal contempt should have a separate title, inasmuch as it is a distinct proceeding from the main cause.[2] Process of arrest for contempt, not committed in the court's presence, cannot properly issue, except upon the filing of an affidavit or information stating positively the facts, and in such a way as to show *prima facie* the commission of a contempt.[3] The accused must be clearly informed of the charges against him, and whether a criminal or civil contempt is alleged, to enable defendant to prepare his defense properly.[4] A preliminary affidavit is not insufficient because made on information and belief.[5]

[3] Merchants' Stock and Grain Co. *v.* Board of Trade, 201 Fed. 20, 120 C. C. A. 582 (8th Cir.).

[4] Gompers *v.* Buck's Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 31 S. C. 492.

[5] Revised Statute § 1022.

§ 517. [1] In re Steiner, 195 Fed. 299.

[2] S. Anargyros *v.* Anargyros & Co., 191 Fed. 208; Phillips Sheet & Tin Plate Co. *v.* Amalgamated A. of I. S. & T. W., 208 Fed. 335.

[3] Ex parte Stricker, 109 Fed. 145.

[4] Gompers *v.* Buck's Stove Range Co., 221 U. S. 418, 55 L. ed. 797, 31 S. C. 492; Aaron *v.* United States, 155 Fed. 833, 84 C. C. A. 67 (8th Cir.).

[5] Creekmore *v.* United States, 237 Fed. 743, 150 C. C. A. 497 (8th Cir.).

§ 518. **Right to Jury Trial.**

It has been uniformly held that a defendant charged with contempt is not entitled to a trial by jury.[1]

§ 519. **Change of Venue.**

A defendant charged with contempt is not entitled to a change of judge or venue.[1] An examination of the opinion of the Court cited in note shows that this point was decided on general principles and without regard to Section 21 of the Federal Judicial Code. The observations made in Chapter XXI of this book, on the subject of change of venue, generally, are applicable also to contempt proceedings.

§ 520. **Disclaimer under Oath.**

Disclaimer under oath of intention to be disrespectful or to commit contempt was at common law sufficient to purge the accused of the contempt. The Federal Courts, however, declare it to be within the discretion of the court whether under all the circumstances of each case such disclaimer should be accepted as a good defense.[1] Consequently, although it be shown that the alleged contempt was willfully committed, such denial under oath will not purge the accused.[2] A person may be committed for a contempt notwithstanding the act complained of may also constitute a crime and be punishable as such.[3] The procedure in such a case is defined by Section 1245 Compiled Statutes.

§ 521. **Nature and Degree of Punishment.**

If the contempt is civil in its nature, the punishment is remedial for the benefit of the complainant, but if it is for criminal con-

§ 518. [1] Eilenbecker *v.* District Court of Plymouth County, 134 U. S. 31, 33 L. ed. 801, 10 S. C. 424; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 S. C. 1125; In re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 S. C. 900; Merchants' Stock and Grain Co. *v.* Board of Trade of Chicago, 201 Fed. 25; Ex parte Tillinghast, 4 Peters (U. S.), 108, 7 L. ed. 798.

§ 519. [1] Merchants' Stock and Grain Co. *v.* Board of Trade, 201 Fed. 20, 120 C. C. A. 582 (8th Cir.), but see § 509, *supra*, granting trial by jury in certain cases.

§ 520. [1] United States *v.* Huff, 206 Fed. 700.

[2] Oates *v.* United States, 233 Fed. 201, 147 C. C. A. 207 (4th Cir.).

[3] Merchants' Stock and Grain Co. *v.* Board of Trade, 201 Fed. 20, 120 C. C. A. 582 (8th Cir.).

tempt the sentence is punitive to vindicate the authority of the court.[1] Federal statutes declaring that courts may punish for contempt by fine or imprisonment are a limitation upon the manner in which the power may be exercised and are a negation of all other modes of punishment.[2] Under the Federal statutes imposing imprisonment as punishment for contempt, the length of the term and place of confinement or the fine imposed is within the discretion of the court.[3] A sentence for one year and a day in the penitentiary was sustained.[4]

§ 522. **Degree of Proof.**

It is a well-established principle that in a case of criminal contempt the trial court must be convinced of the guilt of the accused beyond a reasonable doubt, and evidence showing guilt resulting in a finding of such facts cannot be reviewed by an Appellate Court, whose inquiry is limited to the question whether there was any evidence upon which to predicate the finding.[1]

§ 523. **Right to Review.**

Contempt judgments are reviewable only in the United States Circuit Court of Appeal on a writ of error.

The Supreme Court has no power to review judgment for criminal contempt either by writ of error or appeal,[1] the sole remedy being by petition for *certiorari*.[2] In a proper case the Supreme

§ **521.** [1] Gompers *v.* Buck's Stove Range Co., 221 U. S. 441, 55 L. ed. 797, 31 S. C. 492.

[2] Ex parte Robinson, 19 Wall. (U. S.) 505, 22 L. ed. 205.

[3] Creekmore *v.* United States, 237 Fed. 743, 150 C. C. A. 497 (8th Cir.); In re Independent Publishing Co., 240 Fed. 849, 153 C. C. A. 535 (9th Cir.).

[4] Creekmore *v.* United States, 237 Fed. 743, 150 C. C. A. 497 (8th Cir.).

§ **522.** [1] Schwartz *v.* United States, 217 Fed. 866, 133 C. C. A. 576 (4th Cir.); Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. ed. 997, 24 S. C. 665.

§ **523.** [1] Hayes *v.* Fischer, 102 U. S. 121, 26 L. ed. 45; In re Debs, 158 U. S. 564, 573, 39 L. ed. 1092, 15 S. C. 900; O'Neil *v.* United States, 190 U. S. 36, 47 L. ed. 945, 23 S. C. 776; Ex parte Kearney, 7 Wheat. (U. S.) 38, 5 L. ed. 391; City of New Orleans *v.* New York Mail Steamship Co., 20 Wall. (U. S.) 387, 22 L. ed. 354; Gompers *v.* United States, 233 U. S. 604, 58 L. ed. 1115, 34 S. C. 693; Toledo Newspaper Co. *v.* United States, 247 U. S. 402, 62 L. ed. 1186, 38 S. C. 560.

[2] Toledo Newspaper Co. *v.* United States, *supra*.

Court will issue *certiorari* in aid of *habeas corpus* proceedings and writs of prohibition, by which the facts in the contempt case may be brought before the court and the merits of the decision in the lower court passed upon.[3] Judgments and orders finding a party to be in contempt of court, although made in the course of civil proceedings, are reviewable in the United States Circuit Court of Appeals solely by writ of error if the object of the order is punitive and criminal in character.[4] But in view of the uncertainty in classifying the contempt charge, a writ of error will sometimes be treated as a petition to revise to avoid injustice.[5] Only the party convicted of contempt can sue out the writ of error,[6] and the fact that a party is in contempt of court does not deprive him of his right to seek a review from the judgment of conviction.[7] A judgment in criminal contempt committed in the course of a bankruptcy proceeding is reviewable by writ of error.[8] An order imposing a fine on an attorney for failure to answer questions before a grand jury is reviewable only by writ of error.[9] Contempt orders which are purely remedial as between the parties to the suit remain interlocutory and are not reviewable, except on appeal from the final decree.[10]

[3] Bessette *v.* Conkey Co., 194 U. S. 324, 334, 48 L. ed. 997, 24 S. C. 665; In re Watts & Sachs, 190 U. S. 1, 47 L. ed. 933, 23 S. C. 718; Toledo Newspaper Co. *v.* United States, 247 U. S. 402, 62 L. ed. 1186, 38 S. C. 560.

[4] Re Merchants' Stock and Grain Co., 223 U. S. 639, 642, 56 L. ed. 584, 32 S. C. 339; Gompers *v.* Buck's Stove Range Co., 221 U. S. 418, 55 L. ed. 797, 31 S. C. 492.

[5] Freed *v.* Central Trust Company of Illinois, 215 Fed. 873, 132 C. C. A. 7 (7th Cir.).

[6] Grant *v.* United States, 227 U. S. 74, 57 L. ed. 423, 33 S. C. 190; Bayard *v.* Lombard, 9 How. 530, 551, 13 L. ed. 425; Payne *v.* Niles, 20 How. (U. S.) 219, 15 L. ed. 895.

[7] Brigham City *v.* Toltec Ranch Co., 101 Fed. 85, 41 C. C. A. 222 (8th Cir.); Montgomery L. & W. P. Co. *v.* Montgomery Traction Co., 219 Fed. 963.

[8] Freed *v.* Central Trust Company of Illinois, 215 Fed. 873, 132 C. C. A. 7 (7th Cir.).

[9] Grant *v.* United States, 227 U. S. 74, 57 L. ed. 423, 33 S. C. 190.

[10] Hultberg *v.* Anderson, 214 Fed. 349, 131 C. C. A. 125 (7th Cir.); Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. ed. 997, 24 S. C. 665; In re Merchants' Stock and Grain Co., 223 U. S. 639, 56 L. ed. 584, 32 S. C. 339.

CHAPTER XLII

HABEAS CORPUS

§ 524. Introductory — Nature of Remedy.

Habeas corpus is the remedy given by the law for the enforcement of the civil right of personal liberty,[1] and is the usual remedy for unlawful imprisonment.[2] "The great writ of *habeas corpus*," says Chief Justice Chase, "has been for centuries esteemed the best and only defense of personal freedom." After a long struggle it was guaranteed in England by the famous *Habeas Corpus Act* of May 27th, 1679. The colonists brought it to America with them and claimed it as "an immemorial right descended to them from their ancestors",[3] and when the confederated colonies became the United States this great writ found prominent sanction in the Constitution. — "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."[4] The judicial action, necessarily implied in the terms of this provision, was authorized and provided for by the act of September 24, 1789, which reads, "All the before mentioned courts (District, Circuit and Supreme) of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[5]

§ 524. [1] Ex parte Tom Tong, 108 U. S. 556, 27 L. ed. 826, 2 S. C. 871.

[2] Chin Yow *v.* United States, 208 U. S. 8, 52 L. ed. 369, 28 S. C. 201; Ex parte Tinkoff, 254 Fed. 222.

[3] Ex parte Yerger, 8 Wall. (U. S.) 85, 95, 19 L. ed. 332.

[4] United States Constitution, Article 1, Section 9.

[5] 1 Statute at L. 81, § 14.

§ 525. **Power of Courts to Issue Writs.**

Revised Statute § 751 provides: "The Supreme Court and the circuit and district courts shall have power to issue writs of *habeas corpus*." [1]

§ 526. **Courts Which May Issue Writ.**

The Supreme Court can only be asked to issue a writ of *habeas corpus* within its original jurisdiction when the inferior court has acted without jurisdiction or exceeded its powers to the prejudice of the party seeking the writ.[1] Courts of Appeal are not authorized to issue original and independent writs of *habeas corpus*.[2] The District Courts have by express provision jurisdiction to issue the writ, their duty to grant or refuse it depending on the facts of each case.[3]

§ 527. **In Custody.**

The court will not proceed to adjudication where there is no subject matter on which the judgment can operate; therefore leave to file a petition for *habeas corpus* will be denied where it is obvious that before a return to the writ can be made, or any other action taken, the prisoner will be out of custody.[1] Something more than moral restraint is necessary to make a case for *habeas corpus*. There must be actual confinement or the present means of enforcing it. While the Acts of Congress concerning this writ are not decisive, perhaps, as to what is a restraint of liberty, they are evidently framed in their provisions for proceedings in such cases on the idea of the existence of some actual restraint.[2] A prisoner out on bail is not restrained of liberty so as to be entitled to discharge on *habeas corpus*.[3] When a person under arrest

§ **525.** [1] Circuit Courts were abolished by the Judicial Code, March 3, 1911, ch. 13, §§ 289–291, and their powers and duties were conferred on the District Courts.

§ **526.** [1] In re Lane, 135 U. S. 443, 34 L. ed. 219, 10 S. C. 760; Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 S. C. 77.

[2] Whitney *v.* Dick, 202 U. S. 132, 137, 50 L. ed. 963, 26 S. C. 584.

[3] Filer *v.* Steele, 228 Fed. 242. *See also* §539, *infra*.

§ **527.** [1] In re Lincoln, 202 U. S. 178, 50 L. ed. 984, 26 S. C. 602; Ex parte Baez, 177 U. S. 378, 44 L. ed. 813, 20 S. C. 673.

[2] Wales *v.* Whitney, 114 U. S. 564, 29 L. ed. 277, 5 S. C. 1050.

[3] Sibray *v.* United States, 185 Fed. 401, 107 C. C. A. 483 (3d Cir.).

applies for discharge on a writ of *habeas corpus*, the issue presented is whether he is unlawfully restrained of his liberty. But there is no unlawful restraint where he is held under a valid order of commitment so that in strict logic the inquiry might extend to the legal sufficiency of the order. In view, however, of the nature of the writ, and the character of the detention under a warrant, no hard and fast rule has been announced as to how far the court will go in passing upon questions raised by *habeas corpus* proceedings.[4]

§ 528. Confined to Jurisdictional Questions.

In *habeas corpus* proceedings, the court is confined largely to the examination of fundamental and jurisdictional questions.[1] If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere.[2] Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance cannot be reviewed by *habeas corpus*. That writ cannot be employed as a substitute for a writ of error.[3] But if the tribunal of original jurisdiction acts beyond

[4] Henry *v.* Henkel, 235 U. S. 219, 59 L. ed. 203, 35 S. C. 54.

§ 528. [1] Frank *v.* Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. C. 582; Ex parte Jim Hong, 211 Fed. 76, 127 C. C. A. 569 (9th Cir.).

[2] Ex parte Coatz, 242 Fed. 1003; United States ex rel. Fong On *v.* McCarthy, 228 Fed. 398; Horner *v.* United States, 143 U. S. 570, 36 L. ed. 266, 12 S. C. 522; In re Cortes, 136 U. S. 330, 34 L. ed. 464, 10 S. C. 1031; Stevens *v.* Fuller, 136 U. S. 468, 34 L. ed. 461, 10 S. C. 911; Re Fassett, 142 U. S. 479, 483, 35 L. ed. 1087, 12 S. C. 295; Ex parte Jim Hong, 211 Fed. 73, 76, 127 C. C. A. 569 (9th Cir.); United States ex rel. Koopowitz *v.* Finley, 245 Fed. 871.

[3] Filer *v.* Steele, 228 Fed. 242, 245; Ex parte Merritt, 245 Fed. 778; Frank *v.* Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. C. 582; Myers *v.* Halligan, 244 Fed. 420, 157 C. C. A. 46 (9th Cir.); Markinson *v.* Boucher, 175 U. S. 184, 44 L. ed. 124, 20 S. C. 76; Walters *v.* McKinnis, 221 Fed. 746; Tinsley *v.* Anderson, 171 U. S. 101, 105, 43 L. ed. 91, 18 S. C. 805; Collins *v.* Johnston, 237 U. S. 502, 59 L. ed. 1071, 35 S. C. 649; Baker *v.* Grice, 169 U. S. 284, 290, 42 L. ed. 748, 18 S. C. 323; Re Frederick, 149 U. S. 70, 75, 37 L. ed. 653, 13 S. C. 793; Ex parte Royall, 117 U. S. 241, 250, 29 L. ed. 868, 6 S. C. 734; Ex parte Siebold, 100 U. S. 371, 375, 25 L. ed. 717; Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; Morgan *v.* Sylvester, 231 Fed. 886, 146 C. C. A. 82 (8th Cir.); Collins *v.* Morgan, 243 Fed. 495, 156 C. C. A. 193 (8th Cir.); McMicking *v.* Schields, 238 U. S. 99, 59 L. ed. 1220, 35 S. C. 665; Ex parte

the scope of its authority, or fails to accord the accused a fair trial or rejects proper evidence offered by him, then relief can and should be afforded by *habeas corpus*.[4] If the court which renders judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*.[5]

§ 529. Regular Procedure Should Be Followed.

In the absence of exceptional circumstances in criminal cases, the regular judicial procedure should be followed and *habeas corpus* should not be granted in advance of trial.[1] It has been demonstrated at the bar that the question brought forward on a *habeas corpus* is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated and may be decided in different courts. The decision, that the individual shall be imprisoned, must always precede the application for a writ of *habeas corpus* and this writ must always be for the purpose of revising that decision and is therefore appellate in its nature.[2] The regular course of proceedings having for their end to determine

Tinkoff, 254 Fed. 222; Harlan *v.* McGourin, 218 U. S. 442, 54 L. ed. 1101, 31 S. C. 44.

[4] Angelus *v.* Sullivan, 246 Fed. 54, 158 C. C. A. 280 (2d Cir.); Ex parte Cohen, 254 Fed. 711.

[5] Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Ex parte Nielsen, 131 U. S. 176, 33 L. ed. 118; Riggins *v.* United States, 199 U. S. 547, 50 L. ed. 303, 26 S. C. 147; Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 S. C. 734; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 S. C. 152; Mackey *v.* Muller, 126 Fed. 161, 62 C. C. A. 139 (9th Cir.).

§ 529. [1] Riggins *v.* United States, 199 U. S. 547, 50 L. ed. 303, 26 S. C. 147; Glasgow *v.* Moyer, 225 U. S. 420, 56 L. ed. 1147, 32 S. C. 753; Jones *v.* Perkins, 245 U. S. 390, 62 L. ed. 358, 38 S. C. 166; In re Lincoln, 202 U. S. 178, 50 L. ed. 984, 26 S. C. 602.

[2] Ex parte Bollman, 4 Cranch (U. S.), 75, 2 L. ed. 554; Riggins *v.* United States, 199 U. S. 547, 50 L. ed. 303, 26 S. C. 147; United States *v.* Hamilton, 3 Dall. (U. S.) 17, 1 L. ed. 490; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 S. C. 734; Ex parte Clarke, 100 U. S. 399, 25 L. ed. 715.

whether the prisoner shall be held or released cannot be thwarted by alleging want of jurisdiction and petitioning for *habeas corpus* mainly for the purpose of securing an earlier hearing.[3]

§ 530. **Sufficiency of Indictment, etc.**

The sufficiency of the indictment as a matter of technical pleading will not be inquired into on *habeas corpus*,[1] nor the sufficiency of the acts set forth in an agreed statement to constitute a crime.[2] Mere irregularities in arrest are not alone grounds for the issue of *habeas corpus*.[3] Disqualifications of grand jurors can be corrected by writ of error and therefore will not authorize *habeas corpus* proceedings if jurisdiction otherwise exists.[4] Disregard of comity between Federal Courts at the instance of the government is not an invasion of the accused's constitutional rights which can be attacked on *habeas corpus*.[5] Disputed questions of fact cannot be reviewed on *habeas corpus*.[6] Where a registrant under the Selective Service Law is certified into the military service, the decisions of the examining boards as to his physical condition cannot be reviewed on *habeas corpus*.[7] The constitutionality of an act cannot be tested by *habeas corpus* in

[3] Ex parte Simon, 208 U. S. 144, 52 L. ed. 429, 28 S. C. 238.

§ 530. [1] Reed *v.* United States, 224 Fed. 378, 140 C. C. A. 64 (9th Cir.); Dimmick *v.* Tompkins, 194 U. S. 540, 48 L. ed. 1110, 24 S. C. 780; Connella *v.* Haskell, 158 Fed. 285, 87 C. C. A. 111 (8th Cir.); Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Matter of Gregory, 219 U. S. 210, 55 L. ed. 184, 31 S. C. 143; Kohl *v.* Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 S. C. 304; Bergemann *v.* Backer, 157 U. S. 655, 39 L. ed. 845, 15 S. C. 727; Drew *v.* Thaw, 235 U. S. 432, 59 L. ed. 302, 35 S. C. 137; Ex parte Birdseye, 244 Fed. 972, 974, *Affirmed* 246 U. S. 657, 62 L. ed. 925, 38 S. C. 424; Pierce *v.* Creecy, 210 U. S. 387, 52 L. ed. 1113, 28 S. C. 714; Munsey *v.* Clough, 196 U. S. 364, 49 L. ed. 515, 25 S. C. 282.

[2] Collins *v.* Morgan, 243 Fed. 495, 156 C. C. A. 193 (8th Cir.).

[3] Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162 (2d Cir.); Dallemagne *v.* Moisan, 197 U. S. 169, 49 L. ed. 709, 25 S. C. 422.

[4] Kaizo *v.* Henry, 211 U. S. 146, 53 L. ed. 125, 29 S. C. 41; Matter of Moran, 203 U. S. 96, 51 L. ed. 105, 27 S. C. 25; Harlan *v.* McGourin, 218 U. S. 442, 54 L. ed. 1101, 31 S. C. 44; In re Wilson, 140 U. S. 575, 35 L. ed. 513, 11 S. C. 870.

[5] Peckham *v.* Henkel, 216 U. S. 483, 54 L. ed. 579, 30 S. C. 255.

[6] Ex parte Graber, 247 Fed. 882; In re Strauss, 126 Fed. 327, 63 C. C. A. 99 (2d Cir.).

[7] De Genaro *v.* Johnson, 249 Fed. 504.

criminal proceedings. While some of the earlier cases [8] held that it could, in the case of Johnson *v.* Hoy [9] the Supreme Court flatly laid down the rule that the writ of *habeas corpus* will not issue to test the constitutionality of a law in a criminal case before trial, and that the only way to bring the act before the Supreme Court is by writ of error. *Habeas corpus* will not lie to release from imprisonment, upon an indictment charging the defendant with refusing contrary to Sections 101–104 (U. S. Compiled Statutes 1901) to testify and give information to a congressional committee. Whether the congressional committee acted within its jurisdiction is a matter to be argued before the court where the indictment is pending.[10] Nor will the courts interfere by *habeas corpus* under a commitment based upon an order of the House of Representatives, when that body, or a committee appointed by it, acts in a judicial capacity.[11] A court cannot, on *habeas corpus*, review a decision upon the legal sufficiency of a defense of former jeopardy.[12] The Supreme Court has frequently decided that matters of defense cannot be heard on *habeas corpus* to test the validity of an arrest in extradition, but must be heard and decided at the trial by the courts of the demanding State.[13] The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to retry the issues, whether of law, constitutional or other, or of fact.[14]

§ 531. **Excessive Sentence.**

The excess of a sentence or judgment beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction and a prisoner held under such excess may be released by writ of *habeas corpus*.[1] *Habeas corpus* will lie where

[8] Cooley *v.* Morgan, 221 Fed. 252, 136 C. C. A. 210 (8th Cir.); Re Siebold, 100 U. S. 371, 25 L. ed. 717; Ex parte Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 S. C. 672.

[9] 227 U. S. 245, 57 L. ed. 497, 33 S. C. 240.

[10] Henry *v.* Henkel, 235 U. S. 219, 59 L. ed. 203, 35 S. C. 54.

[11] United States ex rel. Marshall *v.* Gordon, 235 Fed. 422.

[12] Collins *v.* Morgan, 243 Fed. 495, 156 C. C. A. 193 (8th Cir.); Ex parte Bigelow, 113 U. S. 328, 28 L. ed. 1005, 5 S. C. 542; *but see* earlier cases under heading FORMER JEOPARDY.

[13] Biddinger *v.* Commissioner of Police, City of New York, 245 U. S. 128, 62 L. ed. 193, 38 S. C. 41.

[14] Glasgow *v.* Moyer, 225 U. S. 420, 56 L. ed. 1147, 32 S. C. 753.

§ 531. [1] Stevens *v.* McClaughry, 207 Fed. 18, 125 C. C. A. 102 (8th Cir.).

a district court transcends its powers by imposing a sentence of imprisonment in a penitentiary for a term not authorized by the United States statutes,[2] but only that part of the sentence in excess of the law will be void; the legal portion cannot be attacked in *habeas corpus* proceedings when the illegal part is stricken out,[3] or may on writ of error be annulled.[4] On excessive sentence, the prisoner may be discharged on writ of *habeas corpus* after serving the lawful part of the term.[5] Sentences for two alleged offenses, unlawful cohabitation under the Federal statute and adultery, which were but a single offense, were in excess of the powers and jurisdiction of the court and *habeas corpus* was granted.[6] The excess of a sentence beyond the jurisdiction of the court which renders it, in a case in which it has ample jurisdiction of the subject matter of the case and of the parties, is as void as a judgment in a case in which the court has no jurisdiction, and a prisoner held under such excess alone is entitled to his release by writ of *habeas corpus*.[7] Ordinarily the law will, on *habeas corpus*, grant no relief to a prisoner under such circumstances until the legal part of the sentence is served,[8] but it is held that a prisoner in a Federal penitentiary under a sentence imposing two terms on different counts, to be served successively, the second of which terms is illegal, is entitled to be discharged on *habeas corpus* from such part of the sentence, although his first term has not expired, because of the effect which the illegal part of the sentence has on his right to petition for parole under the parole law.[9] The fact that a

[2] In re Mills, 135 U. S. 263, 34 L. ed. 107, 10 S. C. 762; In re Bonner, 151 U. S. 242, 38 L. ed. 149, 14 S. C. 323.

[3] Harlan *v.* McGourin, 218 U. S. 442, 54 L. ed. 1101, 31 S. C. 44. *See also* Bryant *v.* United States, 214 Fed. 51, 130 C. C. A. 491 (8th Cir.).

[4] United States *v.* Pridgeon, 153 U. S. 48, 38 L. ed. 631, 14 S. C. 746.

[5] United States *v.* Peeke, 153 Fed. 166, 82 C. C. A. 340 (3d Cir.); Munson *v.* McClaughry, 198 Fed. 72, 117 C. C. A. 180 (8th Cir.); Ex parte Hewitt, Fed. Cas. No. 6442; Cuyler *v.* Atlantic & N. C. R. R. Co., 131 Fed. 95; In re Burns, 113 Fed. 987. *See also* In re Graham, 138 U. S. 461, 34 L. ed. 1051, 11 S. C. 363.

[6] In re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 S. C. 672.

[7] Stoneberg *v.* Morgan, 246 Fed. 98, 158 C. C. A. 324 (8th Cir.).

[8] O'Brien *v.* McClaughry, 209 Fed. 816, 126 C. C. A. 540 (8th Cir.); In re Swan, 150 U. S. 637, 37 L. ed. 1207, 14 S. C. 225; Collins *v.* Morgan, 243 Fed. 495, 156 C. C. A. 193 (8th Cir.).

[9] O'Brien *v.* McClaughry, 209 Fed. 816, 126 C. C. A. 540 (8th Cir.).

sentence providing for imprisonment and fine imposes no fine is not available on *habeas corpus*, as the defendant is not injured thereby.[10] Where the defect in a sentence, attacked in an application for *habeas corpus*, does not inhere in the trial or verdict, but relates only to the sentence, the court, instead of discharging the prisoner, should return him to the trial court for a correction of the sentence.[11]

§ 532. **Special Uses of Writ.**

Some of the special uses of the writ of *habeas corpus* are: (*a*) to aid appellate jurisdiction;[1] (*b*) to inquire into the identity of a prisoner in an extradition proceeding;[2] (*c*) to review an order of deportation.[3]

§ 533. **Extradition Proceedings under Treaty.**

The settled rule is that the writ of *habeas corpus* cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*.[1]

[10] Linningen *v.* Morgan, 241 Fed. 645, 154 C. C. A. 403 (8th Cir.); Bartholomew *v.* United States, 177 Fed. 902, 101 C. C. A. 182 (6th Cir.).

[11] Bryant *v.* United States, 214 Fed. 51, 130 C. C. A. 491 (8th Cir.); In re Bonner, 151 U. S. 242, 38 L. ed. 149, 14 S. C. 323.

§ 532. [1] Frank *v.* Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. C. 582; In re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 S. C. 385; In re Watts & Sachs, 190 U. S. 1, 47 L. ed. 933, 23 S. C. 718.

[2] Ex parte Chung Kin Tow, 218 Fed. 185.

[3] Whitfield *v.* Hanges, 222 Fed. 745, 138 C. C. A. 199 (8th Cir.); Hanges *v.* Whitfield, 209 Fed. 675; Ex parte Gytl, 210 Fed. 918; Ex parte Lam Pui, 217 Fed. 465; Chin Yoy *v.* United States, 208 U. S. 8, 52 L. ed. 369, 28 S. C. 201; Wong Wing *v.* United States, 163 U. S. 228, 41 L. ed. 140, 16 S. C. 977; United States ex rel. Huber *v.* Sibray, 178 Fed. 144; United States ex rel. Bosny *v.* Williams, 185 Fed. 598; Roux *v.* Commissioner of Immigration, 203 Fed. 413, 121 C. C. A. 523 (9th Cir.); United States ex rel. D'Amato *v.* Williams, 193 Fed. 228.

§ 533. [1] Terlinden *v.* Ames, 184 U. S. 270, 278, 46 L. ed. 534, 22 S. C. 484; Ornelas *v.* Ruiz, 161 U. S. 502, 508, 40 L. ed. 787, 16 S. C. 689; Bryant *v.* United States, 167 U. S. 104, 42 L. ed. 94, 17 S. C. 744.

The court issuing the writ may inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute of extradition; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion.[2]

§ 534. Interstate Extradition.

A person held on an executive warrant for extradition to another State may test the legality of his detention under Article 4, § 2, of the United States Constitution by *habeas corpus* proceedings in a Federal Court.[1] The question whether the person sought to be extradited will get a fair trial in the demanding State will not be considered on *habeas corpus*.[2] If the extradition warrant of the governor of the asylum State shows on its face that all the necessary prerequisites have been complied with, this is conclusive, unless the proceedings before the governor appear not to have been regular.[3] Therefore the burden is on the prisoner to show that he is not in fact a fugitive from justice, and that burden requires evidence which is practically conclusive.[4]

§ 535. With Certiorari.

In all cases where a lower Federal Court has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, the Supreme Court, in the exercise of its appellate jurisdiction, may, by the writ of

[2] Terlinden *v.* Ames, 184 U. S. 270, 278, 46 L. ed. 534, 22 S. C. 484; In re Stupp, 12 Blatch. 501, Fed. Cas. No. 13563; In re Adutt, 55 Fed. 376.

§ 534. [1] Ex parte Birdseye, 244 Fed. 972, *Affirmed* 246 U. S. 657, 62 L. ed. 925, 38 S. C. 424; Pierce *v.* Creecy, 210 U. S. 387, 52 L. ed. 1113, 28 S. C. 714; Roberts *v.* Reilly, 116 U. S. 80, 29 L. ed. 544, 6 S. C. 291.

[2] United States ex rel. Brown *v.* Cooke, 209 Fed. 607, 126 C. C. A. 429 (3d Cir.).

[3] Chung Kin Tow *v.* Flynn, 218 Fed. 64, 133 C. C. A. 666 (1st Cir.).

[4] Ex parte Montgomery, 244 Fed. 967, *Affirmed* 246 U. S. 656, 62 L. ed. 924, 38 S. C. 424.

habeas corpus, aided by the writ of certiorari, revise the decision of the lower court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded. It is unimportant in what custody the prisoner may be, if it is a custody to which he has been remanded by the order of an inferior court of the United States. It is not necessary that the action of the inferior court must have resulted in a commitment for trial in a civil court; relief can be had in the Supreme Court, by *habeas corpus*, from imprisonment under military authority to which the petitioner may have been remanded by such a court.[1]

§ 536. **Contempt.**

Persons committed for contempt in failing to comply with an order made in the course of a proceeding of which the judge had no jurisdiction, and which order was therefore absolutely void, are entitled to be discharged on *habeas corpus*.[1]

§ 537. **Deportation Proceedings.**

It is universally held that the courts have no jurisdiction to review the action of the immigration authorities in rejecting an alien unless he has been denied a fair hearing by such authorities.[1] But the court, on *habeas corpus*, will grant an alien, ordered deported without a fair hearing, a conditional discharge to be effective in case the officers fail to give the alien the fair hearing on lawful evidence required by the Immigration Act within a reasonable time.[2] A court may determine, on *habeas corpus*, the jurisdictional

§ **535**. [1] Ex parte Yerger, 8 Wall. (U. S.) 85, 19 L. ed. 332; Kurtz *v.* Moffitt, 115 U. S. 487, 29 L. ed. 458, 6 S. C. 148.

§ **536**. [1] In re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 S. C. 482; In re Burrus, 136 U. S. 586, 34 L. ed. 500, 10 S. C. 850; In re Delgado, 140 U. S. 586, 35 L. ed. 578, 11 S. C. 874; In re Lennon, 166 U. S. 548, 41 L. ed. 1110, 17 S. C. 658; In re McKenzie, 180 U. S. 536, 45 L. ed. 657, 21 S. C. 468; In re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 S. C. 164.

§ **537**. [1] Ex parte Joyce, 212 Fed. 282; Low Wah Suey *v.* Backus, 225 U. S. 460, 56 L. ed. 1165, 32 S. C. 734; Prentis *v.* Seu Leung, 203 Fed. 25, 121 C. C. A. 389 (7th Cir.); Prentis *v.* Cosmos, 196 Fed. 372, 116 C. C. A. 419 (7th Cir.).

[2] United States *v.* Petkos, 214 Fed. 978, 131 C. C. A. 274 (1st Cir.); Billings *v.* Sitner, 228 Fed. 315, 142 C. C. A. 607 (1st Cir.); White *v.* Wong Quen Luck, 243 Fed. 547, 156 C. C. A. 245 (9th Cir.); Ex parte Lalime, 244 Fed. 279; Woo Hoo *v.* White, 243 Fed. 541, 156 C. C. A. 239 (9th Cir.).

question as to whether there was any evidence to support the finding of a commissioner of immigration in deportation proceedings.[3] Where the record shows that the Commissioner of Immigration has exceeded his powers the alien may obtain his release upon *habeas corpus*.[4] The writ has been frequently granted in cases under the Chinese Exclusion Act where a Chinese person seeking to enter the United States has been denied a fair hearing and ordered deported.[5]

§ 538. Military Authorities.

It is settled law that if a military tribunal has jurisdiction to try a person charged with an offense against military law, the civil courts cannot interfere by writ of *habeas corpus*.[1] It is only where a court-martial is without jurisdiction and the party is subjected to illegal imprisonment that a writ of *habeas corpus* can be invoked; otherwise a civil court will not interfere with its judgment.[2] *Habeas corpus* is the appropriate remedy to test whether exemption boards acted within their jurisdiction. *Habeas corpus* will lie to obtain the discharge of minors who have fraudulently enlisted in the United States army or navy.[3]

[3] Katz *v.* Commissioner of Immigration, 245 Fed. 316, 157 C. C. A. 508 (9th Cir.); Backus *v.* Owe Sam Goon, 235 Fed. 847, 149 C. C. A. 159 (9th Cir.).

[4] Gegiow *v.* Uhl, 239 U. S. 3, 60 L. ed. 114, 36 S. C. 2; Nishimura Ekin *v.* United States, 142 U. S. 651, 35 L. ed. 1146, 12 S. C. 336.

[5] Chin Yow *v.* United States, 208 U. S. 8, 52 L. ed. 369, 28 S. C. 201; Fong Yue Ting *v.* United States, 149 U. S. 698, 37 L. ed. 905, 13 S. C. 1016; Chow Loy *v.* United States, 112 Fed. 354, 50 C. C. A. 279 (1st Cir.).

§ 533. [1] Ex parte Dostal, 243 Fed. 664; United States *v.* Williford, 220 Fed. 291, 136 C. C. A. 273 (2d Cir.); Hoskins *v.* Dickerson, 239 Fed. 275, 152 C. C. A. 263 (5th Cir.); Dillingham *v.* Booker, 163 Fed. 696, 90 C. C. A. 280 (4th Cir.); In re Grimley, 137 U. S. 147, 34 L. ed. 636, 11 S. C. 54; United States *v.* Heyburn, 245 Fed. 360; In re Traina, 248 Fed. 1004; United States ex rel. Brown *v.* Commanding Officer, 248 Fed. 1005.

[2] Ex parte Dickey, 204 Fed. 322; Ex parte Tucker, 212 Fed. 569; Ex parte Blazekovic, 248 Fed. 327, *Following* Angelus *v.* Sullivan, 246 Fed. 54; United States ex rel. Pfeffer *v.* Bell, 248 Fed. 992; United States ex rel. Cubyluck *v.* Bell, 248 Fed. 995; United States ex rel. Bartalini *v.* Mitchell, 248 Fed. 997; Summertime *v.* Local Board, 248 Fed. 832.

[3] United States *v.* Williford, 220 Fed. 291, 136 C. C. A. 273 (2d Cir.); In re Morrissey, 137 U. S. 157, 34 L. ed. 644, 11 S. C. 57; Ex parte Rush, 246 Fed. 172.

§ 539. **Power of Judges to Grant Writs.**

Section 752 of the Revised Statutes provides as follows: "The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty."[1]

§ 540. **Territorial Jurisdiction.**

The power to issue writs of *habeas corpus* is by Sections 751, 752 and 753 of the Revised Statutes expressly restricted to the territorial jurisdiction of the court to which the application is made.[1]

§ 541. **When Prisoner Is in Jail.**

Section 753 of the Revised Statutes provides: "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."[1]

§ 542. **Scope of Jurisdiction.**

This section contains no grant of power, but is a restriction upon the power of the Federal Courts, prohibiting the issuance of the writ of *habeas corpus* in behalf of a prisoner in jail, except under the prescribed conditions enumerated in the section.[1] The juris-

§ 539. [1] Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 81; Act of Apr. 10, 1869, ch. 22, 16 Stat. L. 44; Act of Mar. 2, 1833, ch. 57, 4 Stat. L. 634; Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385; Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539.

§ 540. [1] Ex parte Gouyet, 175 Fed. 230.

§ 541. [1] Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 81; Act of Mar. 2, 1833, ch. 57, 4 Stat. L. 634; Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385; Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539.

§ 542. [1] Clifford *v.* Williams, 131 Fed. 100; Ex parte Bell, 240 Fed. 758.

diction of courts of the United States to issue writs of *habeas corpus* is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations.[2] It must therefore be made to appear upon the application for the writ that the party is held in custody in violation of the Constitution, laws or treaties of the United States.[3] A party is entitled to a *habeas corpus* not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner;[4] but the repugnancy of a statute to the constitution of the State by whose legislature it was enacted cannot authorize a writ of *habeas corpus* from a court of the United States unless the petitioner is in custody by virtue of such statute, and unless also the statute is in conflict with the Constitution of the United States.[5]

§ 543. "In Pursuance of Law."

Any obligation fairly and properly inferable from the Constitution of the United States, or any duty of a United States marshal to be derived from the general scope of his duties under the laws of the United States, is a "law" within the meaning of the phrase "in pursuance of a law."[1] "This of course means that if the petitioner is held in custody in violation of the Constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged."[2] The acts of the legislature of a territory are not laws of the United States.[3]

[2] Carfer *v.* Caldwell, 200 U. S. 293, 50 L. ed. 488, 26 S. C. 264.

[3] In re Burrus, 136 U. S. 586, 34 L. ed. 500, 10 S. C. 850; Carfer *v.* Caldwell, 200 U. S. 293, 50 L. ed. 488, 26 S. C. 264; Storti *v.* Massachusetts, 183 U. S. 138, 46 L. ed. 120, 22 S. C. 72; Frank *v.* Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. C. 582; Rogers *v.* Peck, 199 U. S. 425, 50 L. ed. 256, 26 S. C. 87.

[4] In re Nielsen, 131 U. S. 176, 184, 33 L. ed. 118, 9 S. C. 672.

[5] Andrews *v.* Swartz, 156 U. S. 272, 49 L. ed. 422, 15 S. C. 389; Kitchens *v.* Hamilton, 239 U. S. 637, 60 L. ed. 480, 36 S. C. 446; Ex parte Januszewski, 196 Fed. 123.

§ 543. [1] In re Neagle, 135 U. S. 1, 59, 34 L. ed. 55, 10 S. C. 658.

[2] Walters *v.* McKinnis, 221 Fed. 746; In re Neagle, 135 U. S. 1, 41, 34 L. ed. 55, 10 S. C. 658. *See also* United States ex rel. McSweeney *v.* Fullhart, 47 Fed. 802.

[3] Connella *v.* Haskell, 158 Fed. 285, 87 C. C. A. 111 (8th Cir.).

§ 544. **Pursuant to Order, Process or Decree.**

A person who is imprisoned under conviction of a State court for an act done pursuant to an order, process or decree of a court or judge of the United States, within the meaning of § 753 of the Revised Statutes, may apply for a writ of *habeas corpus* to the United States Circuit Judge, who has the power to discharge him.[1] *Habeas corpus* was granted where it was alleged that the act charged as a crime was committed by the prisoner in the performance of his duty as a soldier of the United States; in such a case a court or judge of the United States has authority to determine summarily as a fact whether or not such allegation is true, and if found to be true, to discharge the prisoner on the ground that the State is without jurisdiction to try him for such act.[2] In the case cited in the note below a soldier was stationed to guard over prisoners. A prisoner attempted to escape, whereupon the soldier fired, killing the man. The soldier was arrested by the State authorities, charged with manslaughter, but the Federal Court held that the State Court was without jurisdiction.[3]

§ 545. **From State Courts.**

The Federal Courts are rather averse to interfering with State Courts. The rule is well settled that the Federal Court will not entertain jurisdiction on *habeas corpus*, where the prisoner is held under process of a State Court, charged with the violation of a State statute, except in cases of peculiar urgency.[1] Ordinarily, the

§ 544. [1] Hunter *v.* Wood, 209 U. S. 205, 52 L. ed. 747, 28 S. C. 472, *Affirmed* 155 Fed. 190 (railway ticket agent); In re Leaken, 137 Fed. 680 (Assistant United States Attorney); United States ex rel. McSweeney *v.* Fullhart, 47 Fed. 802 (United States Marshals or their deputies executing Federal process); United States ex rel. Flynn *v.* Fullhart, 106 Fed. 911 (Secret Service Agents); State of West Virginia *v.* Laing, 133 Fed. 887, 66 C. C. A. 617 (members of posse committees); Pundt *v.* Pendleton, 167 Fed. 997 (teamster in army employment).

[2] United States *v.* Lipsett, 156 Fed. 65.

[3] United States *v.* Lipsett, *supra*.

§ 545. [1] Urquhart *v.* Brown, 205 U. S. 179, 51 L. ed. 760, 27 S. C. 459; Reid *v.* Jones, 187 U. S. 153, 47 L. ed. 116, 23 S. C. 89; United States ex rel. Drury *v.* Lewis, 200 U. S. 1, 50 L. ed. 343, 26 S. C. 229; Markuson *v.* Boucher, 175 U. S. 184, 44 L. ed. 124, 20 S. C. 76; Baker *v.* Grice, 169 U. S. 284, 291, 42 L. ed.

Supreme Court of the United States will not issue a writ of *habeas corpus* until all remedies have been exhausted in the highest courts of the State;[2] and even then under the terms of § 753 of the Revised Statutes, in order to entitle a person held by a State to a writ of *habeas corpus*, it must appear that he is deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.[3] But a Federal Court has power to discharge from imprisonment, on *habeas corpus*, a person convicted and sentenced by a State Court which was without jurisdiction and whose judgment is therefore void.[4] Other exceptional circumstances, in which *habeas corpus* has been granted for the discharge of persons in custody under process from a State Court, are found in the cases in the note.[5]

§ 546. **Citizens of Foreign States.**

The part of Revised Statutes § 753 relating to subjects and citizens of foreign states does not give to such subjects and citizens more absolute rights to *habeas corpus* than belong to the other classes of prisoners specified therein. To bring the subject of a foreign state within the section it must further appear that the petitioner's domicile was in the foreign state, and that the validity and effect of the right, authority, protection or exemption claimed under the foreign commission, order or sanction, depend upon the law of nations.[1]

748, 18 S. C. 323; Tinsley *v.* Anderson, 171 U. S. 101, 105, 43 L. ed. 91, 96, 18 S. C. 805; Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 S. C. 297; Re Fredrick, 149 U. S. 70, 77, 37 L. ed. 653, 13 S. C. 793; Ex parte Royall, 117 U. S. 241, 251, 29 L. ed. 868, 6 S. C. 734; Henry *v.* Henkel, 235 U. S. 219, 228, 59 L. ed. 203, 35 S. C. 54.

[2] Frank *v.* Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. C. 582; United States *v.* Sing Tuck, 194 U. S. 161, 48 L. ed. 917, 24 S. C. 621.

[3] Frank *v.* Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. C. 582; Rogers *v.* Peck, 199 U. S. 425, 50 L. ed. 256, 26 S. C. 87.

[4] Ex parte Van Moore, 221 Fed. 954.

[5] Boske *v.* Comingore, 177 U. S. 459, 44 L. ed. 846, 20 S. C. 701; In re Loney, 134 U. S. 372, 3 L. ed. 949, 10 S. C. 584; In re Neagle, 135 U. S. 1, 34 L. ed. 55, 10 S. C. 658; Wildenhus's Case, 120 U. S. 1, 30 L. ed. 565, 7 S. C. 385; Stegall *v.* Thurman, 175 Fed. 813.

§ 546. [1] Horn *v.* Mitchell, 223 Fed. 549, *Affirmed* 232 Fed. 819, 147 C. C. A. 13 (1st Cir.). *Affirmed* 243 U. S. 247, 61 L. ed. 700, 37 S. C. 293.

§ 547. **For Testimonial Purposes.**

The power to issue the writ to bring a prisoner from his place of confinement to testify should only be exercised in case of necessity.[1]

§ 548. **Application for Writ — Notice Required in Cases Involving Law of Nations.**

Section 754 of the Revised Statutes provides as follows: "Application for writ of *habeas corpus* shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application." [1] In cases involving the law of nations, where the petitioner is a subject or citizen of a foreign state and is domiciled therein, is committed or confined, or in custody, by or under the authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under an alleged right, title, authority, privilege, protection or exemption, claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of said proceeding to be prescribed by the court, or justice or judge at the time of granting said writ, shall be served on the Attorney-General or other officer prosecuting said pleas of said state, and due proof of said service shall be made to the Court, or justice or judge before hearing.[2]

§ 549. **Who May Petition and Requisites of Petition for Writ.**

Sections 754, 755, 757, and 758 of the Revised Statutes contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary.[1] The statute

§ **547.** [1] In re Thaw, 172 Fed. 288.

§ **548.** [1] Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

[2] Rev. Stat. § 762. *See also* EXTRADITION, INTERSTATE RENDITION.

§ **549.** [1] Wales *v.* Whitney, 114 U. S. 564, 29 L. ed. 277, 5 S. C. 1050.

requires personal signature and oath by the petitioner; but objection must, of course, be made on these points.[2] Notwithstanding the language of Section 754, it has been the frequent practice to present *habeas corpus* petitions in deportation cases signed and verified by others than the persons detained. In such cases, often because of lack of time, infancy or incompetency, it will be impossible to present a petition signed and verified by the person detained, and the language of Section 760 plainly contemplates petitions so executed.[3] The language of Section 760 seems to contemplate that the petitioner may be one person and the party restrained another. A petition for *habeas corpus* by a Chinese person, ordered deported, which alleges that he was not given a fair and impartial hearing, but does not specify wherein or in what respect he was denied such a hearing is insufficient.[4] The *habeas corpus* acts do not make citizenship a qualification for suing out the writ.[5] The petition must state facts and not merely legal conclusions.[6] Facts duly alleged may be taken to be true, unless denied by the return, or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous.[7]

§ 550. Award of Writ.

Section 755 of the Revised Statutes provides: "The court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."[1]

§ 551. Proceedings on Allowance or Denial of Writ.

The proceedings on a writ of *habeas corpus* in the Federal Courts are not governed by the laws of the States on the subject, but by

[2] Ex parte Dunn, 250 Fed. 871.

[3] United States ex rel. Funaro *v.* Watchorn, 164 Fed. 152.

[4] Lee Leong *v.* United States, 217 Fed. 48, 133 C. C. A. 34 (9th Cir.).

[5] United States *v.* Crook, 5 Dill. 453, Fed. Cas. No. 14891.

[6] United States ex rel. Arnowicz *v.* Williams, 204 Fed. 844; Craemer *v.* State of Washington, 168 U. S. 124, 42 L. ed. 407, 18 S. C. 1; Low Wah Suey *v.* Backus, 225 U. S. 473, 56 L. ed. 1165, 32 S. C. 734.

[7] Whitten *v.* Tomlinson, 160 U. S. 231, 242, 40 L. ed. 406, 16 S. C. 297; Kohl *v.* Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 S. C. 304.

§ 550. [1] Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

the common law of England as it stood at the adoption of the Constitution, subject to such alterations as Congress may see fit to prescribe.[1] Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.[2] When it appears to a court having jurisdiction that the petitioner is restrained of his liberty contrary to the Constitution and laws of the United States, the writ becomes one of right.[3] It is apparent from Section 755 of the Revised Statutes that if it appears from the petition itself that the relator is not entitled to his discharge, the court should deny his petition without issuing the writ. The section only declares the common law practice in this respect.[4] The court is not required either to award a writ, or to issue an order to the respondent to show cause.[5] If the petition is tested by demurrer the statements of fact made therein must be taken as true, but this does not apply to statements of mere conclusions.[6] Under this section it is necessary to turn to the petition to ascertain the petitioner's right to the writ.[7] In *habeas corpus* proceedings, the court will not consider the testimony or weight thereof. But it may, and it is its duty to consider the manner of procuring testimony, its competency and legal admissibility against the petitioner and determine whether or not he has had a fair and impartial trial.[8] The practice in Federal district courts, particularly where Federal penitentiaries are located, and where applications for writs

§ 551. [1] Ex parte Kaine, 2 Blatchf. 1, Fed. Cas. No. 7597.

[2] Rogers *v.* Peck, 199 U. S. 435, 50 L. ed. 256, 26 S. C. 87.

[3] Ex parte Farley, 40 Fed. 66.

[4] In re Haskell, 52 Fed. 795; Franks *v.* Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. C. 582.

[5] Ex parte Collins, 151 Fed. 358; Erickson *v.* Hodges, 179 Fed. 177, 102 C. C. A. 443 (9th Cir.); Horn *v.* Mitchell, 223 Fed. 549, *Affirmed* 232 Fed. 819, 147 C. C. A. 13 (1st Cir.); In re Boardman, 169 U. S. 39, 42 L. ed. 653, 18 S. C. 291.

[6] Choy Gam *v.* Backus, 223 Fed. 487, 139 C. C. A. 35 (9th Cir.).

[7] Terlinden *v.* Ames, 184 U. S. 270, 46 L. ed. 534, 22 S. C. 484; Filer *v.* Steele, 228 Fed. 242; Hammon *v.* Hill, 228 Fed. 999.

[8] United States *v.* Quan Wah, 214 Fed. 462; United States *v.* Lou Chu, 214 Fed. 463; In re Jem Yuen, 188 Fed. 351; Ex parte Lam Pui, 217 Fed. 456; Hange *v.* Whitfield, 209 Fed. 675; Chin Gow *v.* United States, 208 U. S. 8, 52 L. ed. 369, 28 S. C. 201.

of *habeas corpus* are very numerous, to make a preliminary determination as to the propriety of issuing the writ without the personal appearance of the prisoner was held to be not in violation of the statute.[9] In one case [10] writs of *certiorari* were also issued directing the United States Commissioner to send up the original papers and a transcript of the testimony on which the prisoners were committed.

§ 552. **Time for Making Return.**

Section 756 of the Revised Statutes provides as follows: "Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days." [1]

§ 553. **Reasonable Time for Return.**

A reasonable time has always been allowed for making the return.[1]

§ 554. **Form of Returns.**

Section 757 of the Revised Statutes provides as follows: "The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party." [1]

§ 555. **Return to Writ.**

If a return is not put in issue by denial or demurrer or otherwise, it will be taken as conclusive of the facts therein set forth.[1] If a return fails to show that the prisoner's caption and detention were legal and valid at the time the writ was issued he must be discharged.[2]

[9] Murdock *v.* Pollock, 229 Fed. 392, 143 C. C. A. 512 (8th Cir.).

[10] Ornelas *v.* Ruiz, 161 U. S. 502, 40 L. ed. 787, 16 S. C. 689.

§ 552. [1] Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

§ 553. [1] Ex parte Baez, 177 U. S. 378, 44 L. ed. 813, 20 S. C. 673.

§ 554. [1] Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

§ 555. [1] In re Lawler, 40 Fed. 233.

[2] In re Doo Woon, 18 Fed. 898.

§ 556. **Production of Body.**

Section 758 of the Revised Statutes provides as follows: "The person making the return shall at the same time bring the body of the party before the judge who granted the writ." [1]

§ 557. **Production of Body,** ***Continued.***

A willful failure to produce the body is punishable as contempt,[1] but in practice, as where the party has some contagious disease, the production of the body in court is frequently dispensed with.[2]

§ 558. **Time for Hearing.**

Revised Statute § 759 provides as follows: "When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time." [1]

§ 559. **Promptness of Action.**

The interest of both the petitioner and the public require promptness of action in *habeas corpus* cases.[1]

§ 560. **Traverse of Return.**

Section 760 of the Revised Statutes provides as follows: "The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained." [1]

§ 561. **Scope of Traverse.**

The court is not authorized to go outside of an untraversed return for the facts of the case.[1]

§ **556.** [1] Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

§ **557.** [1] Ex parte Young, 50 Fed. 526.

[2] United States ex rel. Schleiter *v.* Williams, 203 Fed. 292.

§ **558.** [1] Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

§ **559.** [1] Storti *v.* State of Massachusetts, 183 U. S. 138, 46 L. ed. 120, 22 S. C. 72.

§ **560.** [1] Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

§ **561.** [1] Moore *v.* United States, 159 Fed. 701, 86 C. C. A. 569 (5th Cir.); Haas *v.* Henkel, 166 Fed. 621.

§ 562. **Summary Hearing and Disposal.**

Section 761 of the Revised Statutes provides as follows: "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." [1]

§ 563. **Procedure Generally.**

The mandate as to summary procedure is applicable to the Supreme Court whether it is exercising its original or appellate jurisdiction.[1] This clause means not as law and justice required at the time of the arrest, but as law and justice require at the time of the hearing.[2] Under this section, the court, on finding the sentence of the accused illegal, may send him back to the trial court for correction of the sentence.[3] It is well settled that *habeas corpus* is a civil and not a criminal proceeding.[4] It has been held that the doctrine of *res adjudicata* does not apply to *habeas corpus*,[5] and that a decision on one writ, refusing a discharge, is no bar to the issue of any number of successive writs, by a court, or magistrate, having jurisdiction.[6]

§ 564. **Disposal of Party.**

"The command of the section is 'to dispose of the party as law and justice require.' All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in *habeas corpus*." [1] Therefore, the court is not confined to simply remanding or releasing prisoners, but may compel a proper and lawful disposition of them.[2] The writ will be denied if it is apparent that its only result would be to remand the prisoner to custody.[3] Under the provision requiring disposal

§ 562. [1] Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

§ 563. [1] Storti *v.* Massachusetts, 183 U. S. 138, 46 L. ed. 120, 22 S. C. 72.

[2] Oig Seen *v.* Burnett, 232 Fed. 850, 147 C. C. A. 44 (9th Cir.).

[3] Bryant *v.* United States, 214 Fed. 51, 130 C. C. A. 491 (8th Cir.).

[4] Goldsmith *v.* Valentine, 36 App. (D. C.) 63; Cross *v.* Burke, 146 U. S. 82, 36 L. ed. 896, 13 S. C. 22.

[5] In re Kopel, 148 Fed. 505. *Contra:* United States *v.* Chung Shee, 71 Fed. 277.

[6] Ex parte Kaine, 3 Blatchf. 1, Fed. Cas. No. 7597.

§ 564. [1] Storti *v.* Massachusetts, 183 U. S. 138, 46 L. ed. 120, 22 S. C. 72; Ex parte Gytl, 210 Fed. 918.

[2] Ex parte Gytl, *supra*.

[3] In re Boardman, 169 U. S. 39, 42 L. ed. 653, 18 S. C. 291.

"of the party as law and justice require", in an application by a prisoner for discharge on the ground that his sentence was illegal, it was held proper for the court on finding a defect in his sentence to direct his return to the court in which he was tried for a correction of the sentence.[4]

§ 565. **Law of Nations; Notice to State Attorney-General.**

Revised Statutes Section 762 provides as follows: "When a writ of *habeas corpus* is issued in the case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed, or confined, or in custody, by or under the authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under an alleged right, title, authority, privilege, protection, or exemption, claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceeding, to be prescribed by the court, or justice, or judge at the time of granting said writ, shall be served on the attorney-general or other officer prosecuting the pleas of said State, and due proof of such service shall be made to the court, or justice, or judge before the hearing." [1]

§ 566. **Pending Appeal.**

Pending an appeal from a final decision declining to issue the writ, the custody of the prisoner cannot be disturbed; but when a writ has been issued and the prisoner remanded, he may be admitted to bail, under the thirty-fourth rule of the United States Supreme Court, pending the final disposition of the appeal. But this rule does not apply to cases from the State Courts, which are regulated by statute.

Revised Statutes Section 766 provides as follows: "Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so

[4] Bryant *v.* United States, 214 Fed. 51, 130 C. C. A. 491 (8th Cir.).

§ 565. [1] Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539.

heard and determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void. *Provided*, That no such appeal shall be had or allowed after six months from the date of the judgment or order complained of."[1] By a special act of Congress it is now provided that no appeal in a *habeas corpus* case arising in a State court shall be allowed to the Supreme Court of the United States unless the Federal judge who heard the application or a Justice of the United States Supreme Court shall certify that there is probable cause for such allowance.

§ 567. **Effect of Pending Appeal.**

The purpose of Section 766 of the Revised Statutes is to prevent the State authorities from doing an act which has been or may be declared by the Federal Courts to be unlawful in a pending proceeding,[1] and from changing, to the prejudice of the accused, the situation as it was at the time the appeal was taken.[2] The bare pendency of the appeal effects a stay.[3]

§ **566**. [1] Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539; Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385. Amended Mar. 3, 1893, ch. 226, 27 Stat. L. 751.

§ **567**. [1] In re Strauss, 126 Fed. 327, 63 C. C. A. 99 (2d Cir.).

[2] McKane *v.* Durston, 153 U. S. 684, 38 L. ed. 867, 14 S. C. 913.

[3] Lambert *v.* Barrett, 159 U. S. 660, 40 L. ed. 296, 16 S. C. 135.

CHAPTER XLIII

REVIEW OF JUDGMENTS IN CRIMINAL CASES

§ 568. "Appeal and Error" as a Distinct Branch of the Law.

The subject of appeal and error from the judgments and decrees of the courts of the United States and from the highest courts of the States is extensive and intricate and of itself constitutes a separate branch of the law. For this reason only a general statement of the law will be found in this chapter, and the reader is referred to a recent work by the author [1] for a general guide on all questions of law relating to Federal appellate jurisdiction and procedure.

§ 569. Mode of Reviewing Judgments in Criminal Cases.

A judgment of conviction rendered against a defendant in a criminal case in a District Court of the United States is reviewable only by writ of error and not by appeal.[1] In order to secure a review of such a judgment, a bill of exceptions duly and seasonably signed and settled by the trial judge is indispensable,[2] except

§ 568. [1] Zoline's "Federal Appellate Jurisdiction and Procedure, with Forms."

§ 569. [1] Buessell *v.* United States, decided April 16, 1919, by the United States Circuit Court of Appeals for the Second Circuit, still unreported, opinion per Rogers, J., reviewing the whole body of the law on this question. *See also* Zoline's "Federal Appellate Jurisdiction and Procedure, with Forms", Chapt. II, § 15, p. 19, and cases cited.

[2] Buessell *v.* United States, *supra;* Zoline's "Federal Appellate Jurisdiction and Procedure, with Forms", Chapt. XVII, "Bill of Exceptions."

that the validity of the indictment may be reviewed without a bill of exceptions;[3] that is so because no exceptions are required to rulings on demurrers or any other pleading. The effect of the Act of September 6, 1916, was that a mistake in choice of remedy between appeal and error is no longer fatal.[4] When that statute was enacted and before there were any decisions on the subject the author expressed the view[5] that, regardless of the liberality of the statute, the reviewing courts may find themselves unable to examine the merits of the case by reason of the form or state of the record. This belief has recently been confirmed by the decision of the United States Circuit Court of Appeals for the Second Circuit.[6] That court so held regardless of this statute and of another recent statute passed February 26, 1919, providing in substance that on the hearing of any case the court shall give judgment "after an examination of the entire record before the court, without regard to technical errors, defects, *or exceptions*, which do not affect the substantial rights of the parties."

§ 570. Who May Sue Out a Writ of Error.

The Government cannot seek to review a judgment of acquittal in criminal cases and this is so even though the verdict was directed by the court and was in fact erroneous.[1] A ruling by the court is as effective in this respect as a verdict of the jury.[2]

§ 571. Writ of Error — By Whom Allowed — Bail Pending Review.

The writ of error may be allowed by the trial judge or any other judge of the circuit in which the trial took place, by a judge of the Court of Appeals or by a Justice of the Supreme Court of the United States, and the writ may be made a supersedeas and the prisoner admitted to bail. A petition for a writ of error together

[3] Buessell *v.* United States, *supra;* Zoline's "Federal Appellate Jurisdiction and Procedure, with Forms", Chapt. XVII, § 30, p. 246.

[4] Zoline's "Federal Appellate Jurisdiction and Procedure, with Forms", Chapt. II, § 7, p. 16.

[5] *Ibid.* Chapt. II, § 8, p. 17.

[6] Buessell *v.* United States, *supra.*

§ 570. [1] United States *v.* Sanges, 144 U. S. 310, 36 L. ed. 445, 12 S. C. 609; United States *v.* Evans, 213 U. S. 297, 53 L. ed. 803.

[2] United States *v.* Oppenheimer, 242 U. S. 85, 61 L. ed. 161, 37 S. C. 68.

with assignment of errors are pre-requisites for the allowance of a writ of error.[1]

§ 572. **When Government May Appeal.**

The Criminal Appeals Act provides: "A writ of error may be taken by and on behalf of the United States, from the district (or circuit) courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit: From a decision or judgment quashing, setting aside or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy. The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant." [1] Under this Act it was held that no appeal lies because of a misinterpretation of the Act, or from the decision of the Court that the indictment is bad in law. The review is limited to questions of law upon the construction of the indictment as made by the Court, which construction, insofar as the facts are concerned, is conclusive on the Supreme Court.[2]

§ 573. **When and in What Court Is the Writ Reviewable.**

Where no constitutional questions are involved the writ of error must be sued out from the United States Circuit Court of Appeals

§ 571. [1] Zoline's "Federal Appellate Jurisdiction and Procedure, with Forms", Chapt. XV, "Preliminary Steps for Securing Appeal or Writ of Error", § 54, p. 226.

§ 572. [1] Act of Mar. 2, 1907, c. 2564, 34 Stat. L. 1246.

[2] Zoline's "Federal Appellate Jurisdiction and Procedure, with Forms", Chapt. V, § 50, p. 77.

for the proper district within six months from the date of judgment,[1] and the decision of the United States Circuit Court of Appeals is final and is reviewable only in the United States Supreme Court by a petition for a writ of *certiorari*. Application for a writ of *certiorari* must be made within three months from the date of the judgment entered by the United States Circuit Court of Appeals. When the constitutionality of a statute or a substantial Federal question is involved and was duly and seasonably raised in the lower court, a writ of error will lie directly to the United States Supreme Court from the judgment of the District Court.[2]

§ 574. What Constitutes Reversible Error.

By a reference to the index of this work the reader will find classified the instances of rulings which have been held to be or not to be reversible error. The index to the several subjects should also be consulted.[1]

§ 573. [1] Section 128 of the Federal Judicial Code; Zoline's "Federal Appellate Jurisdiction and Procedure, with Forms", Chapt. VI, "Jurisdiction of the Circuit Court of Appeals of the United States." *See also* Chapt. VIII., "Certiorari."

[2] Section 238 of the Federal Judicial Code; Zoline's "Federal Appellate Jurisdiction and Procedure, with Forms", Chapt. V, § 36, p. 70.

§ 574. [1] *See also* Zoline's "Appellate Jurisdiction and Procedure, with Forms", Chapt. IV, "What Constitutes Reversible Error."

CHAPTER XLIV

EXTRADITION

I. INTERNATIONAL EXTRADITION

§ 575. Definition.

Extradition may be defined as the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.[1]

§ 576. Treaty Making Power.

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rests upon established principles of international law.[1] Of late most

§ 575. [1] Terlinden *v.* Ames, 184 U. S. 270, 289, 46 L. ed. 534, 22 S. C. 484.

§ 576. [1] United States *v.* Rauscher, 119 U. S. 407, 411, 30 L. ed. 425, 7 S. C. 234; Tucker *v.* Alexandroff, 183 U. S. 424, 431, 46 L. ed. 264, 22 S. C. 195.

civilized powers have entered into treaties or conventions for the mutual surrender of persons charged with the most serious non-political crimes.[2] These treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused.[3] An extradition treaty is the supreme law of the land, of which the courts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of parties growing out of the treaty.[4] The right of surrender by the United States of a citizen or subject of a foreign country who has committed a crime in his own country has no existence without, and can only be secured by a treaty stipulation.[5] Under the exercise of the treaty-making power, Congress has the right to provide for the return of a fugitive criminal to the foreign country from which he fled; and, waiving any requirement of entire reciprocity from the foreign country, it may, by statute, without treaty, provide for such return. This power has been exercised by the Federal government for years without question.[6] But it is the settled policy of the United States Government to refuse to grant extradition except in virtue of express stipulations to that effect. The basis of such stipulations should be complete reciprocity.[7] In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision.[8] The power to surrender is included within the treaty making power. Its exercise pertains to public policy and governmental administration, is devolved on the Executive authority, and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs.[9]

§ 577. A State Has No Power of International Extradition.

A State has no sovereign power of extradition. It can only be granted under the Federal Constitution and statutes.[1] No State

[2] Grin *v.* Shine, 187 U. S. 181, 47 L. ed. 130, 23 S. C. 98.

[3] Grin *v.* Shine, *supra.*

[4] United States *v.* Rauscher, 119 U. S. 407, 419, 30 L. ed. 425, 7 S. C. 234.

[5] Case of Jose Ferreira dos Santo, 2 Brock. 493, 7 Fed. Cas. No. 4016; United States *v.* Davis, 2 Sumner 482, 25 Fed. Cas. No. 14932; Ex parte McCabe, 46 Fed. 363.

[6] In re Neely, 103 Fed. 626, 628.

[7] 6 Opinions Attorney-General, 85.

[8] Terlinden *v.* Ames, 184 U. S. 270, 289, 46 L. ed. 534, 22 S. C. 484.

[9] Terlinden *v.* Ames, *supra.*

§ 577. [1] In re Kopel, 148 Fed. 505.

can, without the consent of Congress, enter into any agreement or compact, express or implied, to deliver up fugitives from justice from a foreign country who may be found within its limits.[2] Extradition from foreign countries must be negotiated through the Federal government and not that of a State, although the demand may be for a crime committed against the laws of that State.[3] It may be noted that there can be no international treaty extradition to Porto Rico from the United States, as by the ratification of the treaty of Paris it became territory of the United States.[4]

§ 578. **Apart from Treaties.**

While a country is under no absolute obligation to surrender fugitives accused of crime unless it has contracted to do so, the existence of a treaty relating only to certain crimes does not deprive either nation of the right to exercise its own discretion pursuant to its own laws in cases not coming within the terms of the treaty.[1]

§ 579. **Construction of Treaties and Statutes.**

Like other treaties, extradition treaties are made a part of the supreme law of the land by the Constitution which authorizes them, and the courts are bound to construe them like any other public law. While the courts will give due consideration to the construction placed upon a treaty by the executive or diplomatic branches of the government, the courts have the duty to act independently, and to accept full responsibility for their own construction of the treaty.[1] A construction of an extradition treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty, is nevertheless of much weight.[2] Furthermore, the construction placed upon some of the provisions of an extradition treaty by the departments of the foreign country with which the treaty is

[2] 3 Opinions Attorney-General, 661.

[3] United States *v.* Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 S. C. 234.

[4] In re Kopel, 148 Fed. 505.

§ 578. [1] Greene *v.* United States, 154 Fed. 401, 410, 85 C. C. A. 251 (5th Cir.).

§ 579. [1] Ex parte Charlton, 185 Fed. 880, 886.

[2] Charlton *v.* Kelly, 229 U. S. 447, 468, 57 L. ed. 1274, 33 S. C. 945.

made, whether executive, legislative, or judicial, is not controlling on our courts.[3] The United States statutes as to extradition treaties and the treaties themselves are to be read and construed together. The treaty provisions, where they are the later, control when the two are irreconcilable.[4] Where the government has dealt with an extradition treaty as subsisting, and has honored the requisition of the foreign government for the surrender of citizens of the United States, the court has not the power to go behind that act and say that the treaty has been ended.[5] Courts are bound by the existence of an extradition treaty to assume that the trial by the demanding country will be fair.[6] The amending act of June 6, 1900, providing for the surrender of persons committing the crimes therein specified within a foreign country occupied by or under the control of the United States, is constitutional. Within the meaning of this act Cuba is a foreign country.[7]

§ 580. **Statutory Provisions.**

Act of Congress of August 12, 1848, ch. 167, 9 Stat. L. 302, is now § 5270 of the Revised Statutes, as amended by the Act of June 6, 1900, ch. 793, 31 Stat. L. 656 (Compl. Statutes § 10110). The section is as follows: "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person, found within the limits of any State, district or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on

[3] Ex parte Charlton, 185 Fed. 880.

[4] Ex parte Charlton, 185 Fed. 880, 887, *Affirmed* Charlton *v.* Kelly, 229 U. S. 447, 463, 57 L. ed. 1274, 33 S. C. 945.

[5] Ex parte Charlton, *supra.*

[6] Glucksman *v.* Henkel, 221 U. S. 508, 55 L. ed. 830, 31 S. C. 704.

[7] Neely *v.* Henkel, 180 U. S. 109, 45 L. ed. 448, 21 S. C. 302.

such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. *Provided*, That whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate or who has violated, the criminal laws in force therein, by the commission of any of the following offenses, namely: murder and assault with intent to commit murder; counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employees or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value; robbery; burglary, defined to be the breaking and entering by night time into the house of another person with intent to commit a felony therein; and the act of breaking and entering the house or building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering, or of breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings,

when the act endangers human life, and who shall depart or flee, or who has departed or fled, from justice, therein to the United States, any Territory thereof or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further*, That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged: *And provided further*, That no return or surrender shall be made of any person charged with the commission of any offense of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial." [1] This section is in force in the case of all treaties of extradition.[2]

§ 581. **Citizenship.**

Most of the extradition treaties of the United States expressly provide that neither of the contracting parties shall be bound to surrender its own subjects. Some of these treaties qualify this by reserving the power to surrender their citizens if in their discretion it be deemed proper to do so.[1] Where it is provided in an extradition treaty that "neither of the contracting parties shall be

§ **580.** [1] Revised Statutes § 5270, amended June 6, 1900, c. 793, 31 Stat. 656; Revised Statutes §§ 5270–5277 are §§ 10118–10123. *See* §§ 1674, 10117, 10124, 10125.

[2] Ex parte Charlton, 185 Fed. 880, 888; Charlton *v.* Kelly, 229 U. S. 447, 463, 57 L. ed. 1274, 33 S. C. 945; Grin *v.* Shine, 187 U. S. 181, 47 L. ed. 130, 23 S. C. 98. *See also* Sections 5272 and 5275 Rev. Stat.; United States *v.* Rauscher, 119 U. S. 407, 423, 30 L. ed. 425, 7 S. C. 234.

§ **581.** [1] See the treaty with Japan, quoted *infra*, this section.

bound to deliver up its own citizens under the stipulations of this treaty," the United States will not surrender one of its citizens.[2] "Persons" in an extradition treaty is construed by the Government of the United States to include citizens of this country.[3] That this interpretation of the word "persons" is the usual one may be inferred from the fact that in thirty-one of the thirty-six extradition treaties made by this government with foreign countries, in which the word "persons" is used, there have been inserted special clauses expressly excluding, from the operation of such treaties, the citizens and subjects of such countries.[4] It has, no doubt, come to be the practice with a preponderant number of nations to refuse to deliver its citizens. The beginning of the exemption is traced to the practice between France and the Low Countries in the eighteenth century. Owing to the existence in the municipal law of many nations of provisions prohibiting the extradition of citizens, the United States has in several of its extradition treaties clauses exempting citizens from their obligation. The treaties in force in 1910 may, therefore, be divided into two classes, those which expressly exempt citizens, and those which do not. Those which do contain the limitation are by far the larger number. Among the treaties which provide for the extradition of "persons", without limitation or qualification, are the following: With Great Britain, August 9, 1842, extended July 12, 1889, "United States Treaties," 1910, pages 650 and 740; with France, November 9, 1843, *supra*, page 526; with Italy, February 8, 1868, *supra*, page 961; with Venezuela, August 27, 1860, *supra*, page 1845; with Ecuador, June 28, 1872, *supra*, page 436; with Dominican Republic, February 8, 1867, *supra*, page 403. The treaty with Japan of April 29, 1886, page 1025, contains a qualification in these words: "Art. VII. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up if in their discretion it be deemed proper to do so." The conclusion reached by the Supreme Court of the United States is that there is no principle of international

[2] Ex parte McCabe, 46 Fed. 363.

[3] Ex parte Charlton, 185 Fed. 880; Neely *v.* Henkel, 180 U. S. 109, 45 L. ed. 448, 21 S. C. 302.

[4] Ex parte Charlton, *supra*.

law by which citizens are excepted out of an agreement to surrender "persons", where no such exception is made in the treaty itself. On the contrary, the word "persons" includes all persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of its conventions and not in others demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons." This interpretation has been consistently upheld by the United States, and enforced under the several treaties which do not exempt citizens.[5] While a violation of the extradition treaty with Italy of 1882 and 1884 by that power might render the treaty denounceable by the United States, it does not render it void and of no effect. It was therefore held that the refusal of Italy to surrender its nationals has not had the effect of abrogating the treaty, but merely of placing the government in the position of having the right to denounce it. The treaty with Italy has been construed by the Supreme Court of the United States, and it was held that extradition treaties need not be reciprocal and that a citizen of the United States may be surrendered for trial to Italy.[6]

§ 582. Place Where Crime Committed.

A clause in a treaty providing for the extradition of persons charged with crimes therein specified "committed within the jurisdiction of either party" does not contemplate crimes committed elsewhere than within the territorial and exclusive jurisdiction of the parties thereto.[1] It must appear therefore, that the criminal acts charged were committed within the territorial jurisdiction of the demanding country.[2] All vessels while upon the high seas and ships of war everywhere are within the jurisdiction of the nations to which they belong.[3] Foreign merchant

[5] Charlton *v.* Kelly, 229 U. S. 447, 466, 467, 57 L. ed. 1274, 33 S. C. 945.

[6] Charlton *v.* Kelly, 229 U. S. 447, 57 L. ed. 1274, 33 S. C. 945, *Affirming* Ex parte Charlton, 185 Fed. 880.

§ 582. [1] 14 Opinions Attorney-General, 281; In re Stupp, 11 Blatch. 124, 23 Fed. Cas. No. 13562.

[2] 8 Opinions Attorney-General, 215; 1 Opinions Attorney-General, 83; In re Taylor, 118 Fed. 196.

[3] 14 Opinions Attorney-General, 281; United States *v.* Cooper, 1 Bond, 1, 25 Fed. Cas. No. 14865.

vessels within the territorial waters of the United States are within the territory of the United States.[4]

§ 583. Offenses in General.

With the exception of the extradition stipulation in the Jay treaty with Great Britain of 1794, which by express provision expired in 1806, and only included murder and forgery, the first extradition treaty was that with Great Britain of 1842, which made extraditable murder or assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper. Since then the list of offenses included in the various treaties has grown to include more than thirty of varying degrees of seriousness.

§ 584. Acts Criminal by Laws of Both Countries.

The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be criminal by the laws of both countries.[1] That principle is frequently expressly embodied in the treaties.[2] The crime need not have the same name in both countries. If the act in question is criminal in both countries, and is within the terms of the treaty, nothing more is required.[3] It is enough if the particular variety of offense is criminal in both jurisdictions.[4] If the offense charged is criminal by the laws of the demanding foreign country and by the laws of the state in which the fugitive is found, it comes within the treaty and is extraditable.[5] The court is concerned solely with the question of the charge of crime, and that crime must be one known as a crime in the place where the hearing was held.[6] The British treaty of 1842 provides that

[4] In re Newman, 79 Fed. 622.

§ 584. [1] Wright *v.* Henkel, 190 U. S. 40, 58, 40 L. ed. 948, 23 S. C. 781; United States *v.* Greene, 146 Fed. 766, 770.

[2] Wright *v.* Henkel, *supra* (British Treaty of 1889).

[3] Greene *v.* United States, 154 Fed. 401, 406; Powell *v.* United States, 206 Fed. 400, 124 C. C. A. 282 (6th Cir.).

[4] Kelly *v.* Griffin, 241 U. S. 6, 14, 60 L. ed. 861, 36 S. C. 487; Wright *v.* Henkel, 190 U. S. 40, 60, 61, 40 L. ed. 948, 23 S. C. 781.

[5] Wright *v.* Henkel, *supra;* Bingham *v.* Bradley, 241 U. S. 511, 60 L. ed. 1136, 36 S. C. 634; Greene *v.* United States, 154 Fed. 401, 85 C. C. A. 251 (5th Cir.).

[6] In re Lincoln, 228 Fed. 70, *Affirmed* 241 U. S. 651, 60 L. ed. 1222, 36 S. C. 721.

only upon sufficient competent evidence to make out a *prima facie* case of the crime charged in the place where the hearing is held shall the defendant be held for extradition.[7] Where the jurisdiction of the Commissioner is clear, and the evidence is abundantly sufficient to furnish reasonable ground for the belief that the accused has committed within the demanding country a crime that is an offense under its laws as well as under those of the state where he was apprehended, and is covered by the terms of the treaty, and that he is a fugitive from justice, a fair observance of the obligations of the treaty requires that he be surrendered.[8] Where the complaint properly charges an offense included in the extradition treaty and also charges one that is not included, the court will presume that the demanding country will respect an existing treaty and only try the person surrendered on the offense on which extradition is allowed.[9] The enumeration of offenses in most extradition treaties is so specific, and marked by such a clear line in regard to the magnitude and importance of those offenses, that they must be interpreted as excluding the right of extradition for any others.[10] Such treaties contemplate only such acts as are, at the date of the treaty, held in both countries to constitute the offense specified.[11] Crimes committed prior to the making of the treaty are included where the language of the treaty is capable of a construction including them, unless they are expressly excluded.[12] If the parties to an international extradition treaty choose to construe it as including a crime not really covered by it, the person extradited has no more cause of complaint than if the parties included the crime by a new treaty. They could do this and the new treaty would be retroactive.[13] Desertion is not a *crime* provided for by any of our numerous extradition treaties with foreign nations.[14] One who has been convicted in contuma-

[7] In re Lincoln, *supra*.

[8] Bingham *v.* Bradley, 241 U. S. 511, 60 L. ed. 1136, 36 S. C. 634; Glucksman *v.* Henkel, 221 U. S. 508, 512, 55 L. ed. 830, 31 S. C. 704.

[9] Kelly *v.* Griffin, 241 U. S. 6, 60 L. ed. 861, 36 S. C. 487; Bingham *v.* Bradley, 241 U. S. 511, 60 L. ed. 1136, 36 S. C. 634.

[10] United States *v.* Rauscher, 119 U. S. 407, 420, 30 L. ed. 425, 7 S. C. 234.

[11] In re Cross, 43 Fed. 517, 519.

[12] In re Angelo de Giacomo, 12 Blatchf. 391, 7 Fed. Cas. No. 3747.

[13] Greene *v.* United States, 154 Fed. 401, 409, 85 C. C. A. 251 (5th Cir.).

[14] Tucker *v.* Alexandroff, 183 U. S. 424, 430, 46 L. ed. 264, 22 S. C. 195.

ciam in a foreign country is to be regarded, not as convicted, but only charged with the offense.[15]

§ 585. Person Extradited Can Be Tried Only for Same Offense.

The weight of authority and sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.[1] The British treaty of 1842 had no express limitation of the right of the demanding country to try a person only for the crime for which he was extradited, and yet the Supreme Court held that there was such a limitation, and that it was to be found in the "Manifest scope and object of the treaty itself"; that there is "no reason to doubt that the fair purpose of the treaty is that the person shall be delivered up to be tried for that offense and no other."[2] At the time of the decision of the Rauscher case both Sections 5272 and 5273 were in existence, and the court considered this was also the obvious meaning of these sections, independently of treaty provisions. The supplemental British treaty of 1889 provides (Article III) that no person extradited "shall be triable or tried" for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered. It is held that the absence of the words "or be punished" in this article does not permit of such punishment although these words appear in similar provisions in other extradition treaties.[3] It is immaterial that the person extradited

[15] Ex parte Fudera, 162 Fed. 591.

§ 585. [1] United States *v.* Rauscher, 119 U. S. 407, 430, 30 L. ed. 425, 7 S. C. 234; Johnson *v.* Browne, 205 U. S. 309, 51 L. ed. 816, 27 S. C. 539.

[2] United States *v.* Rauscher, 119 U. S. 407, 422, 423, 30 L. ed. 425, 7 S. C. 234; Johnson *v.* Browne, 205 U. S. 309, 317, 51 L. ed. 816, 27 S. C. 539.

[3] Johnson *v.* Browne, 205 U. S. 307, 322, 51 L. ed. 816, 27 S. C. 539.

has been convicted and sentenced for the other offense prior to his extradition.[4] An extradition treaty cannot be evaded by making a demand on account of a higher offense defined in the treaty, and then only seeking a trial and conviction for a minor offense not found in the treaty. The circumstance that the same evidence might be sufficient to convict of the minor offense which was produced before the committing magistrate to support the graver charge would not justify this departure from the principles of the treaty.[5] While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that an extradition treaty between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then punish him for another and different offense. Especially should this be the case where the government surrendering the person has refused to make the surrender for the other offense on the ground that such offense was not covered by the treaty.[6] The court of the demanding state, therefore, has no jurisdiction of the person extradited for any purpose other than that for which he was delivered by the asylum state authorities, unless the exercise of jurisdiction is based upon something happening after the extradition.[7] Certainly, a court should not allow itself to be made the instrument of perverting the process of extradition to serve the purpose of a private litigant who was instrumental in having that process resorted to with the object of having the extradited person subjected to a civil liability, instead of being tried for the crime with which he was charged. Where a defendant was extradited from Panama into the Canal Zone on a criminal charge, service on him of an order commanding him to appear and show cause why he should not be attached for contempt, made while he was held in jail as an extradited prisoner, furnished no basis for an adjudication in contempt.[8] On the illegal rearrest of a person extradited on

[4] Johnson *v.* Browne, 205 U. S. 307, 309, 51 L. ed. 816, 27 S. C. 539.

[5] United States *v.* Rauscher, 119 U. S. 407, 432, 30 L. ed. 425, 7 S. C. 234.

[6] Johnson *v.* Browne, 205 U. S. 309, 321, 51 L. ed. 816, 27 S. C. 539

[7] Smith *v.* Government of Canal Zone, 249 Fed. 273, 161 C. C. A. 281 (5th Cir.).

[8] Smith *v.* Government of Canal Zone, 249 Fed. 273, 161 C. C. A. 281 (5th Cir.).

another charge before giving him an opportunity to return to the country from which he was surrendered, his primary recourse is in the courts. He may either apply to the Federal Courts for a writ of *habeas corpus*, or interpose the alleged irregularity of his arrest as a matter of defense on the trial of his case in the State court.[9] The accused is tried for the same offense when he is tried for the same acts and on the same charge set out in the demand and shown by the evidence presented to the commissioner.[10]

§ 586. **Political Offenses.**

It is a recognized principle that nations will not, even irrespective of treaty provisions to that effect, surrender fugitives for political offenses.[1] Emigrants and exiles for causes of political difference at home are entitled to asylum in this country.[2] In many extradition treaties there is an express exclusion of the right to demand extradition for political offenses, and in none of them is this class of offenses mentioned as being the foundation of extradition proceedings.[3] Treaties frequently provide that a fugitive shall not be extradited for an act or offense connected with a political offense.[4] Under this section and an extradition treaty which provides that its provisions "shall not apply to any crime or offense of a political character", the committing magistrate has jurisdiction, and it is his duty, to determine whether the offense charged is political and not subject to extradition.[5] The British supplemental treaty of 1889 provides (Article II) that a fugitive criminal shall not be surrendered for an offense of a political character or if he proves that the requisition for his surrender has been made with a view to try or punish him for an offense of a political character. No person surrendered shall be triable or tried, or be punished for any political crime or offense, or for any act connected therewith, committed previously to his extradition. If any question arises as to whether a case

[9] 23 Opinions Attorney-General, 604.

[10] Greene *v.* United States, 154 Fed. 401, 406, 85 C. C. A. 251 (5th Cir.).

§ 586. [1] British Prisoners, 1 Woodb. & M. 66, 21 Fed. Cas. No. 12734.

[2] 7 Opinions Attorney-General, 537.

[3] United States *v.* Rauscher, 119 U. S. 407, 420, 30 L. ed. 425, 7 S. C. 234.

[4] In re Ezeta, 62 Fed. 972, 999.

[5] In re Ezeta, 62 Fed. 972.

comes within the provisions of the article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time is final. The question whether a demanding country may be trusted to carry out its treaty obligations not to try or punish the person extradited for a political offense is one for the Secretary of State.[6]

§ 587. **Requisition.**

All demands for international extradition must emanate from the supreme political authority of the demanding state.[1] Without such a demand upon the executive of the country in which the fugitive is found there can be no surrender.[2] No prior demand by the foreign government for the return of the accused is necessary to the validity of the proceedings before the commissioner,[3] though the demand of the foreign government must be made to appear to this government some time or somewhere in the proceedings before their consummation by the executive.[4] A certificate of the Secretary of State that application for the extradition of the person named has been made by the foreign government is not necessary, under this section, to the issuance of a warrant of arrest, even where, as in the case of Russia, the treaty provides for such certificate.[5] The word "demand" need not appear in a "formal demand" required by a treaty. "Request" would amount to a demand.[6] If the demanding government has at some time either preceding the accused's arrest, or before the expiration of the time provided in the treaty, formally placed before our government a demand for extradition, and the Secretary of State's mandate has issued thereon, the foreign government cannot again be required to make a demand.[7] It is not necessary

[6] In re Lincoln, 228 Fed. 70.

§ 587. [1] 7 Opinions Attorney-General, 6.

[2] 8 Opinions Attorney-General, 240.

[3] Ex parte Zentner, 188 Fed. 344; Benson *v.* McMahon, 127 U. S. 457, 460, 32 L. ed. 234, 8 S. C. 1240; Grin *v.* Shine, 187 U. S. 181, 193, 47 L. ed. 130, 23 S. C. 98; In re Schlippenbach, 164 Fed. 783.

[4] Ex parte Schorer, 197 Fed. 67, 70; Grin *v.* Shine, 187 U. S. 181, 47 L. ed. 130, 23 S. C. 98; 8 Opinions Attorney-General, 240; 4 Opinions Attorney-General, 201.

[5] In re Schlippenbach, 164 Fed. 783; Grin *v.* Shine, 187 U. S. 181, 47 L. ed. 130, 23 S. C. 98.

[6] Ex parte Charlton, 185 Fed. 880, 889.

[7] Ex parte Charlton, *supra*.

that, in addition to this requisition, the foreign government should make a formal demand before the person arrested may be removed from the asylum country.[8] The requisition for extradition from the foreign government should properly precede the issue of the Secretary of State's certificate.[9] Construed in the light of the original and supplementary conventions with Italy and of this section, it is not obligatory that the "formal demand" referred to in the supplementary treaty of 1884 should be proven in the preliminary proceeding within forty days after the arrest.[10] By this section, an alleged fugitive from justice may be arrested upon complaint, regardless of whether a requisition or demand has been made on this government. Only the surrender of the accused is dependent upon the requisition of the foreign government. The warrant for the surrender is issued by the Secretary of State.[11] An arrest may be made, not necessarily pursuant to a formal requisition of the Italian government, but upon the complaint of the vice consul, Italy's representative in this country.[12] It is not necessary to produce before the commissioner any warrant or equivalent of a warrant of any tribunal of the demanding country, even should the treaty involved require the production of such warrant. By Section 5270 Congress has intentionally waived such treaty requirement.[13]

§ 588. Sufficiency of Evidence. General Rule.

Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient.[1] The evidence sufficient to warrant the committing magistrate in holding the accused for trial must be such as, according to the law of the State in which the accused is apprehended, would be sufficient

[8] Ex parte Charlton, 185 Fed. 880.

[9] Ex parte Charlton, 185 Fed. 880, 888.

[10] Charlton *v.* Kelly, 229 U. S. 447, 464, 57 L. ed. 1274, 33 S. C. 945.

[11] Ex parte Charlton, *supra.*

[12] Ex parte Charlton, 185 Fed. 880, 887.

[13] Ex parte Schorer, 197 Fed. 67; Grin *v.* Shine, 187 U. S. 181, 191, 47 L. ed. 130, 23 S. C. 98.

§ 588. [1] Charlton *v.* Kelly, 229 U. S. 447, 464, 57 L. ed. 1274, 33 S. C. 945; Grin *v.* Shine, 187 U. S. 181, 191, 47 L. ed. 130, 23 S. C. 98; Castro *v.* De Uriarte, 16 Fed. 93.

to commit him for trial.[2] If it satisfies this requirement, it may be circumstantial.[3] It is sufficient if the accused is held on competent legal evidence, and if probable cause exists for believing him guilty of the offense charged. The evidence need not be conclusive, nor must the commissioner who hears the proceedings be absolutely convinced of the defendant's guilt before exercising the power to commit him.[4] Such evidence must be produced as shows, first, that a crime was committed in the demanding country, and, second, that there is at least reasonable ground to believe that the person sought to be extradited is guilty of the offense charged.[5] The commissioner is not obliged to make extended inquiry as to the scope of the criminal jurisprudence of the demanding country, but is by the statute limited to determining whether there is any sufficient evidence of criminality to justify holding the accused for the particular offense, as we understand that offense by its description in the treaty and our laws.[6] Evidence justifying a committing magistrate in holding the accused by imprisonment or by bail to await subsequent proceedings is sufficient.[7] There is not, and cannot well be, any uniform rule determining how far an examining magistrate should hear the witnesses produced by an accused person in an extradition proceeding.[8]

§ 589. **Treaty Provisions as to Sufficient Evidence.**

A provision requiring that a surrender shall be made "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment, if the crime had been there committed", is common to many treaties. Congress, by Section 5270, has, in aid of such treaties, prescribed the procedure upon such a hearing.[1] Where an extradition treaty provides that the surrender shall only be made "upon such evidence of criminality as, according to the laws of the place where the

[2] Ex parte Charlton, 185 Fed. 880.

[3] In re Urzua, 188 Fed. 540.

[4] United States *v.* Piaza, 133 Fed. 998; Ornelas *v.* Ruiz, 161 U. S. 502, 40 L. ed. 787, 16 S. C. 689.

[5] Ex parte La Page, 216 Fed. 256.

[6] In re Schorer, 197 Fed. 67, 79.

[7] Ex parte Glaser, 176 Fed. 702, 100 C. C. A. 254 (2d Cir.); Benson *v.* McMahon, 127 U. S. 457, 32 L. ed. 234, 8 S. C. 1240.

[8] Charlton *v.* Kelly, 229 U. S. 447, 57 L. ed. 1274, 33 S. C. 945.

§ 589. [1] Charlton *v.* Kelly, 229 U. S. 447, 57 L. ed. 1274, 33 S. C. 945.

fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed", a person whose surrender is demanded from the government and who is arrested in one of the States cannot be delivered up except upon such evidence of criminality as under the laws of that State would justify his apprehension and commitment for trial if the crime had there been committed.[2] Under such a treaty provision and the provisions of Section 5270, the proceeding before the committing magistrate is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or by bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge against him.[3]

§ 590. **Hearsay Evidence.**

Mere hearsay evidence, upon which the accused could not have been committed for trial in this country, if the crime had been committed here, will not warrant the extradition for murder to a country whose treaty expressly provides that it shall be upon evidence which would justify commitment for trial if the crime had been committed here.[1]

§ 591. **Defenses. Generally.**

Persons charged with crime in foreign countries, who have taken refuge here, are entitled to the same defenses as others accused of crime within our own jurisdiction.[1]

§ 592. **Defenses of Insanity and Alibi.**

Upon extradition proceedings, an inquiry into the present sanity of the person arrested is improper. The state or kingdom whose

[2] Pettit *v.* Walshe, 194 U. S. 205, 48 L. ed. 938, 24 S. C. 657.

[3] Charlton *v.* Kelly, 229 U. S. 447, 57 L. ed. 1274, 33 S. C. 945 (Italian treaty); Benson *v.* McMahon, 127 U. S. 457, 462, 32 L. ed. 234, 8 S. C. 1240 (Mexican treaty); In re Wadge, 15 Fed. 864.

§ 590. [1] Ex parte Fudera, 162 Fed. 591.

§ 591. [1] Grin *v.* Shine, 187 U. S. 181, 47 L. ed. 130, 23 S. C. 98.

laws have been violated, and whose duty it is to vindicate them, is the only authority to make this investigation, to be instituted by them preliminary to the trial upon the merits.[1] In international extradition proceedings evidence of the accused's insanity at the time of the commission of the offense is inadmissible.[2] This is a defense which should be heard at the time of the trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws.[3] Testimony tending to show an alibi may apparently be considered by the commissioner.[4]

§ 593. **Confrontation with Witnesses Not Required.**

The provision of the Sixth Amendment, requiring confrontation with the witnesses, does not apply to persons extradited under treaties with foreign countries, whose laws may be entirely different from ours;[1] nor does the provision of the Fifth Amendment requiring the presentment or indictment of a grand jury.[2]

§ 594. **Commissioner. Who Is Competent.**

The commissioner or judicial officer referred to in this section is necessarily one acting as such within the State in which the accused was found and arrested. Therefore, a commissioner has no power to issue a warrant for international extradition under which a marshal in another State can arrest the accused and deliver him in another State before the commissioner issuing the warrant, without a previous examination being had before some judge or magistrate authorized by the acts of Congress to act in extradition matters and sitting in the State where the accused is found and arrested.[1] The only qualification required of a commissioner to act in extradition cases is that suggested by this section, that he shall be "authorized so to do by any of the courts of the United States." This grant of power to the courts does not render the section unconstitutional.[2] A commissioner appointed by a district court may examine and issue a warrant for commitment

§ 592. [1] Ex parte Charlton, 185 Fed. 880.

[2] Ex parte Charlton, *supra*.

[3] Charlton *v.* Kelly, 229 U. S. 447, 57 L. ed. 1274, 33 S. C. 945.

[4] Powell *v.* United States, 206 Fed. 400, 404, 124 C. C. A. 282 (6th Cir.).

§ 593. [1] Ex parte La Mantia, 206 Fed. 330.

[2] Ex parte La Mantia, *supra*.

§ 594. [1] Pettit *v.* Walshe, 194 U. S. 205, 48 L. ed. 938, 24 S. C. 657.

[2] Rice *v.* Ames, 180 U. S. 371, 378, 45 L. ed. 577, 21 S. C. 406.

under this section.[3] It is sufficient if the commissioner before whom the accused is to appear is specially authorized to act in extradition cases on the day the warrant for arrest is issued.[4] The District Judge may make the warrant returnable before a specified commissioner specially designated to act in extradition cases.[5] The complaint may be sworn to before any United States Commissioner. It is not necessary that he should be specially authorized to act in extradition proceedings.[6]

§ 595. **Translations of Documents.**

A commissioner should decline to proceed with the inquiry until translations of the papers containing the charges are produced before him.[1]

§ 596. **Continuances.**

Continuances of the examination may be granted in the commissioner's discretion; he is not controlled by a State statute limiting such continuances to ten days.[1] Bail will not ordinarily be granted, in cases of foreign extradition, though that relief may be extended in special circumstances.[2] The power of a Federal Circuit Court to admit to bail in such cases exists independently of statute; but it should be exercised only under the most pressing circumstances. Where the plaintiff in an action in New York involving his whole fortune was arrested on an extradition warrant from Canada the day before the trial of his case was to begin; at the instance of the adverse party, the hardship was held to be such that the court was justified in admitting him to bail until the trial of his case could be completed.[3]

§ 597. **Magistrates' Duties.**

The committing magistrate has no concern with what transpired between the foreign government and our own preceding or subse-

[3] In re Grin, 112 Fed. 790.

[4] Grin *v.* Shine, 187 U. S. 181, 47 L. ed. 130, 23 S. C. 98.

[5] Grin *v.* Shine, *supra.*

[6] *Ibid.*

§ 595. [1] 21 Opinions Attorney-General, 428.

§ 596. [1] Rice *v.* Ames, 180 U. S. 371, 45 L. ed. 577, 21 S. C. 406; In re Macdonnell, 11 Blatchf. 79, 16 Fed. Cas. No. 8771; In re Ludwig, 32 Fed. 774.

[2] Wright *v.* Henkel, 190 U. S. 40, 63, 40 L. ed. 948, 23 S. C. 781. *And see* Pettit *v.* Walshe, 194 U. S. 205, 48 L. ed. 938, 24 S. C. 657.

[3] In re Mitchell, 171 Fed. 289.

quent to the issuing of the warrant or certificate for surrender. His duty is confined to determining: First, whether the warrant or certificate has been issued; second, whether the offense charged against the accused is extraditable under the treaty; third, whether the person brought before him is the one accused of the crime; and, fourth, whether there is a probable cause for holding the accused for trial.[1] Under Section 5270 any one of the judicial officers named therein may, upon complaint, charging one of the crimes named in the treaty, issue his warrant of arrest and hear the evidence of criminality. This done, his duty is, if he deems the evidence sufficient to hold the accused for extradition, to commit him to jail, and to certify his conclusion, with the evidence, to the Secretary of State, who may then, "upon the requisition of the proper authorities of such foreign government, issue his warrant for the surrender of the accused."[2] It is sufficient if the warrant or certificate for surrender be exhibited to the committing magistrate between the arrest and the final hearing.[3]

§ 598. Complaint — Requisites in General.

The rule that the ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent applies to complaints.[1] Under this section a sufficient complaint on oath is essential to the jurisdiction, and a warrant issued without it is void.[2] In a complaint in proceedings for extradition the particularity of an indictment is not required if a crime within the treaty is substantially charged.[3] If the complaint intelligently describes and identifies the offense, and if the offense so described is punishable by the laws of both countries, and if by any name it is included in the extradition treaty, that is enough.[4] It is sufficient if it conforms to the requirements of a

§ 597. [1] Ex parte Charlton, 185 Fed. 880.

[2] Rev. Stat. §§ 5272, 5273; Charlton *v.* Kelly, 229 U. S. 447, 463, 57 L. ed. 1274, 33 S. C. 945.

[3] Ex parte Charlton, 185 Fed. 880, 888.

§ 598. [1] Wright *v.* Henkel, 190 U. S. 40, 57, 40 L. ed. 948, 23 S. C. 781; Grin *v.* Shine, 187 U. S. 181, 47 L. ed. 130, 23 S. C. 98; United States *v.* Greene, 146 Fed. 766, 770; United States *v.* Piaza, 133 Fed. 998.

[2] Ex parte McCabe, 46 Fed. 363.

[3] Ex parte Zentner, 188 Fed. 344; Ex parte Dinehart, 188 Fed. 858.

[4] Powell *v.* United States, 206 Fed. 400, 124 C. C. A. 282 (6th Cir.); Yordi *v.* Nolte, 215 U. S. 227, 230, 54 L. ed. 170, 30 S. C. 90; Ex parte Sternaman, 77 Fed. 595, 597.

preliminary complaint under the local law where the accused is found.[5] The record and depositions from the demanding country need not be actually fastened to the complaint.[6] It is advisable that certified copies of the foreign complaint and warrant be attached to and made a permanent part of the complaint; but it is sufficient if those documents, alleging positively the accused's guilt, are presented to the commissioner with the complaint, and if depositions showing probable cause are produced at the hearing.[7]

§ 599. **Information and Belief.**

The complaint may, in some instances, be upon information and belief,[1] but some attempt must be made to set forth the sources of information or the grounds of affiant's belief, otherwise the complaint will be bad.[2] A complaint, however, need not be made on the complainant's personal knowledge if he annex to it a copy of the indictment found in the foreign country, or the deposition of a witness having personal knowledge of the facts, taken under the statute.[3] A complaint upon information and belief, but setting forth that it was made by the authority of, and at the request of, the British Columbia officials, and that the information upon which it was based was communicated to the complainant, the British vice-consul at Detroit, by those officials, was held sufficient.[4]

§ 600. **Variance.**

If an extraditable crime under the law of the State where the accused is found is sufficiently charged, the effect of variance between complaint and proof is to be decided on general principles, irrespective of the law of that State.[1] A variance between the complaint and the evidence as to the dates of instruments alleged to have been forged has been held immaterial.[2]

[5] In re Herskovitz, 136 Fed. 713.

[6] Yordi *v.* Nolte, 215 U. S. 227, 24 L. ed. 170, 30 S. C. 90.

[7] Powell *v.* United States, 206 Fed. 400, 124 C. C. A. 282 (6th Cir.); Glucksman *v.* Henkel, 221 U. S. 508, 514, 55 L. ed. 830, 31 S. C. 704, *citing* Rice *v.* Ames, 180 U. S. 371, 375, 45 L. ed. 577, 21 S. C. 406.

§ 599. [1] Yordi *v.* Nolte, 215 U. S. 227, 230, 24 L. ed. 170, 30 S. C. 90; Ex parte Dinehart, 188 Fed. 858.

[2] Rice *v.* Ames, 180 U. S. 371, 374, 45 L. ed. 577, 21 S. C. 406.

[3] Rice *v.* Ames, *supra.*

[4] Powell *v.* United States, 206 Fed. 400, 124 C. C. A. 282 (6th Cir.).

§ 600. [1] Glucksman *v.* Henkel, 221 U. S. 508, 55 L. ed. 830.

[2] Ex parte Zentner, 188 Fed. 344.

§ 601. **Prior Rights of Trial.**

The person extradited has not the right to a trial to a conclusion of the case for which he was extradited, if in the meantime he commits another offense or before he can be tried for a crime subsequently committed. The matter lies within the jurisdiction of the State whose laws he has violated since his extradition.[1] This applies to perjury committed on the trial of the crime for which the person was extradited.[2]

§ 602. **Surrender, President's Rights.**

After the accused has been committed for surrender, and even after the refusal of his discharge on *habeas corpus*, the President may decline to surrender him, either on the ground that the case is not within the treaty, or that the evidence is not sufficient to establish the charge of the criminality.[1]

§ 603. **Determination as to Surrender for Surrendering Executive.**

The question of whether or not a fugitive shall be surrendered must of necessity be decided by the government to which the application for the fugitive's surrender is made. The courts of the country which makes the demand are not expected to review the decisions of the government and the courts of the country which makes the surrender,[1] and the decision of the courts of the country of asylum as to whether the crime for which extradition is sought comes within the terms of the treaty is conclusive on the courts of the demanding country.[2] Good faith toward foreign powers with which we have entered into treaties of extradition does not require us to surrender persons charged with crime in violation of our well-settled principles of criminal jurisprudence.

§ 604. **Motive of Prosecution Immaterial.**

The existence of malice or other ulterior purpose on the part of a prosecuting witness in a foreign country will not nullify ex-

§ 601. [1] Collins *v.* Johnston, 237 U. S. 502, 59 L. ed. 1071, 35 S. C. 649.

[2] Collins *v.* Johnston, *supra.*

§ 602. [1] In re Stupp, 12 Blatchf. 501, 23 Fed. Cas. No. 13563.

§ 603. [1] Greene *v.* United States, 154 Fed. 401, 407, 85 C. C. A. 251 (5th Cir.).

[2] Greene *v.* United States, 154 Fed. 401, 410, 85 C. C. A. 251 (5th Cir.).

tradition proceedings otherwise valid.[1] In extradition proceedings for forgery the attitude or motives of the persons defrauded are immaterial.[2]

§ 605. **Sufficiency of Warrant of Extradition.**

It is not usual, nor would it be expedient or practicable, for the warrant of extradition to describe the crime with all the fullness that would be required in an indictment.[1]

§ 606. **Surrender Provisions Not Necessarily Reciprocal.**

The provisions as to surrender are not necessarily reciprocal. Although the Italian Government has given the word "persons" used in the treaty with Italy a meaning to exclude citizens or subjects of the respective countries, and has persistently refused to surrender any Italian subject who has returned there fugitive from the justice of the United States, the desistence of the United States Government from applying for the extradition of Italian subjects charged with crime in this country and fleeing to Italy cannot be construed as an abandonment by this government of its contention that the proper construction of the word " persons " includes subjects and citizens, or as an acknowledgment that the treaty has been abrogated.[1]

§ 607. **Habeas Corpus.**

Habeas corpus will be granted on the ground of want of jurisdiction of the committing magistrate.[1] The rule that a writ of *habeas corpus* be used as a writ of error applies to extradition cases.[2] So, mere errors of a committing magistrate in the rejection of evidence could not be thus reviewed.[3] If a committing magistrate has jurisdiction of the accused's person and of the subject matter, and has before him competent legal evidence of the commission of the crime charged, which, according to the law of the State

§ 604. [1] In re Herskovitz, 136 Fed. 713.

[2] Ex parte Zentner, 188 Fed. 344.

§ 605. [1] Greene *v.* United States, 154 Fed. 401, 405, 85 C. C. A. 251 (5th Cir.).

§ 606. [1] Ex parte Charlton, 185 Fed. 880.

§ 607. [1] Wright *v.* Henkel, 190 U. S. 40, 40 L. ed. 948, 23 S. C. 781.

[2] Charlton *v.* Kelly, 229 U. S. 447, 57 L. ed. 1274, 33 S. C. 945, 46 L. R. A. (N. S.) 397; In re Herskovitz, 136 Fed. 713; Benson *v.* McMahon, 127 U. S. 457, 32 L. ed. 234, 8 S. C. 1240.

[3] Charlton *v.* Kelly, *supra*.

where the accused was apprehended, would justify his apprehension for trial if the crime had been committed in that State, his decision may not be reviewed on *habeas corpus*.[4] The writ of *certiorari* furnishes no wider range for determination of the sufficiency of the facts to warrant holding for extradition, than the writ of *habeas corpus*.[5] The omission of a formal act of release of a person held under an illegal arrest by State authorities and of a subsequent formal and legal arrest thereafter by a United States Marshal under an extradition warrant will not usually furnish grounds for release on *habeas corpus*, where it does not appear that a different rule would be applied in the demanding country.[6]

§ 608. **Direct Appeal to Supreme Court.**

An appeal lies directly to the Supreme Court from a judgment in a *habeas corpus* case where the construction of an extradition treaty is involved,[1] even though it is also necessary to construe the acts of Congress passed to carry the treaty provisions into effect.[2]

§ 609. **Surrender of Property Found in Accused's Possession.**

Under the usages which govern extraditions, property found upon a criminal's person at the time of his arrest, if obtained by the commission of the criminal act with which he is charged, or if material as evidence to prove such act, is generally surrendered with the person at the time of the extradition.[1]

§ 610. **Expenses.**

The ordinary expenses, including counsel's fees, attending the process of international extradition, are to be defrayed by the demanding Government.[1]

[4] Charlton *v.* Kelly, *supra;* Ex parte Zentner, 188 Fed. 344; Re Luis Oteiza, 136 U. S. 330, 34 L. ed. 464, 10 S. C. 1031; Terlinden *v.* Ames, 184 U. S. 270, 46 L. ed. 534, 22 S. C. 484; Re Metzger, 5 How. 176; In re Stupp, 12 Blatchf. 501, 23 Fed. Cas. No. 13563.

[5] In re Lincoln, 228 Fed. 70.

[6] Kelly *v.* Griffin, 241. U. S. 6, 60 L. ed. 861, 36 S. C. 487.

§ 608. [1] Rice *v.* Ames, 180 U. S. 371, 45 L. ed. 577, 21 S. C. 406.

[2] Pettit *v.* Walshe, 194 U. S. 205, 48 L. ed. 938, 24 S. C. 657.

§ 609. [1] 23 Opinions Attorney-General, 535.

§ 610. [1] 7 Opinions Attorney-General, 612.

§ 611. **Documentary Evidence.**

Revised Statute Section 5271 reads as follows: "In every case of complaint, and of a hearing, upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any foreign country may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this section." [1] It is sufficient that foreign affidavits, complaints, warrants, etc., are properly authenticated in accordance with this section. One of the objects of the section is to obviate the necessity of confronting the accused with the witnesses against him; and a construction of it, or of Article X of the British treaty of 1842, that would require the demanding government to send its citizens to another country to institute legal proceedings would defeat the whole object of the treaty.[2] Sufficient authentication of documents admitted in evidence.[3] Evidence of identity held to be insufficient.[4]

§ 612. **Documentary Evidence — *Continued.***

Revised Statute Section 5272 reads as follows: "It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly;

§ 611. [1] Act of August 12, 1848, ch. 167, 9 Stat. L. 302; Act of June 22, 1860, ch. 184, 12 Stat. L. 84.

[2] Bingham *v.* Bradley, 241 U. S. 511, 517, 60 L. ed. 1136, 36 S. C. 634, *citing* Rice *v.* Ames, 180 U. S. 371, 375, 45 L. ed. 577, 21 S. C. 406, and Yordi *v.* Nolte, 215 U. S. 227, 231, 24 L. ed. 170, 30 S. C. 90.

[3] *See* In re Stupp, 12 Blatchf. 501, 23 Fed. Cas. No. 13563.

[4] *See* Ex parte La Mantia, 206 Fed. 330.

and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape." [1] Under this section the Secretary of State has power to review the proceedings in an extradition case certified to him, and this power extends to the review of every question therein presented.[2]

§ 613. **Time Limited for Extradition.**

Revised Statute Section 5273 reads as follows: "Whenever any person who is committed under this title or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application, made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered." [1] Accused will be discharged on expiration of period of two months where no sufficient cause for delay is shown though officer is on his way from foreign country.[2]

§ 614. **Continuance of Provisions.**

Revised Statute Section 5274 reads as follows: "The provisions of the Title relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the exist-

§ **612.** [1] Act of August 12, 1848, ch. 167, 9 Stat. L. 302.

[2] 17 Opinions Attorney-General, 184.

§ **613.** [1] Act of August 12, 1848, ch. 167, 9 Stat. L. 303.

[2] In re Dawson, 101 Fed. 253.

ence of any treaty of extradition with any foreign government, and no longer." [1]

§ 615. **Care and Custody of Accused.**

Revised Statute Section 5275 provides: "Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused." [1]

A person extradited from Great Britain is not protected by Section 5275 from being tried and convicted for a crime committed in the United States after extradition.[2]

§ 616. **Powers of Agent Receiving Offenders.**

Revised Statute Section 5276 reads as follows: "Any person duly appointed as agent to receive, in behalf of the United States, the delivery by a foreign government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping." [1]

§ 617. **Punishment for Interfering with Agent.**

Revised Statute Section 5277 provides as follows: "Every person who knowingly and wilfully obstructs, resists, or opposes such agent in the execution of his duties, or who rescues or attempts to rescue

§ 614. [1] Act of August 12, 1848, ch. 167, 9 Stat. L. 303.

§ 615. [1] Act of March 3, 1869, ch. 141, 15 Stat. L. 337.

[2] Collins *v.* Johnston, 237 U. S. 502, 59 L. ed. 1071, 35 S. C. 649.

§ 616. [1] Act of March 3, 1869, ch. 141, 15 Stat. L. 338.

such prisoner, whether in the custody of the agent or of any officer or person to whom his custody has lawfully been committed, shall be punishable by a fine of not more than one thousand dollars, and by imprisonment for not more than one year." [1]

§ 618. **Place and Nature of Hearing.**

"All hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public." [1]

§ 619. **Fees of Commissioners.**

"The following shall be the fees paid to commissioners in cases of extradition under treaty stipulation or convention between the Government of the United States and any foreign government, and no other fees or compensation shall be allowed to or received by them: For administering an oath, ten cents. For taking an acknowledgment, twenty-five cents. For taking and certifying depositions to file, twenty cents for each folio. For each copy of the same furnished to a party on request, ten cents for each folio. For issuing any warrant or writ, and for any other service, the same compensation as is allowed clerks for like services. For issuing any warrant under the tenth article of the treaty of August ninth, eighteen hundred and forty-two, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any crime or offense as set forth in said article, two dollars. For issuing any warrant under the provision of the convention for the surrender of criminals between the United States and the King of the French concluded at Washington, November ninth, eighteen hundred and forty-three, two dollars. For hearing and deciding upon the case of any person charged with any crime or offense, and arrested under the provisions of any treaty or convention, five dollars a day for the time necessarily employed." [1] This section may be regarded as superseded by Section 1451 which as to compensation in extradition cases re-enacted Revised Statute Section 847.

§ **617**. [1] Act of March 3, 1869, ch. 141, 15 Stat. L. 338.

§ **618**. [1] Act of August 3, 1882, c. 378, § 1, 22 Stat. L. 215.

§ **619**. [1] Act of August 3, 1882, c. 378, § 2, 22 Stat. L. 215.

§ 620. **Witnesses' Fees.**

"That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpœnaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpœnaed in behalf of the United States." [1] The prime purpose of this section is to afford the defendant the means for obtaining the testimony of witnesses and to provide for their fees. In no sense does the statute make relevant, legal or competent evidence which would not have been competent before the statute upon such a hearing. The provision does not have the effect of giving the accused the right to introduce any evidence which would be admissible upon a trial under an issue of not guilty.[2]

§ 621. **Payment of Fees and Costs.**

"That all witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause the amount of said fees and costs so allowed to be reimbursed to the Government of the United States by the foreign government by whom the proceedings for extradition may have been instituted." [1]

§ 622. **Evidence on the Hearing.**

"That in all cases where any depositions, warrants or other papers or copies thereof shall be offered in evidence upon the hear-

§ 620. [1] Act of August 3, 1882, c. 378, § 3, 22 Stat. L. 215.

[2] Charlton *v.* Kelly, 229 U. S. 447, 57 L. ed. 1274, 33 S. C. 945.

§ 621. [1] Act of August 3, 1882, c. 378, § 4, 22 Stat. L. 216.

ing of an extradition case under Title Sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country shall be proof that any deposition, warrant, or other paper or copies thereof, so offered, are authenticated in the manner required by this act." [1] Depositions duly authenticated as this statute requires are properly admitted though some of them are not sworn to.[2] This statute supersedes the requirement of Section 5271 that copies of documents offered in evidence shall be attested by the oath of the person producing them, and such attestation is not necessary.[3] When the documentary evidence has been authenticated as required by the statute, it is admissible, leaving to the commissioner merely the question of determining the sufficiency of the evidence therein contained.[4] It is sufficient if documents are offered, authenticated as certified by the American ambassador, so as to entitle them to be received " for similar purposes "— that is, as evidence of his criminality.[5] The sufficiency of evidence properly certified under Section 5 cannot be reviewed upon *habeas corpus*.[6]

§ 623. **How Fees and Costs Paid.**

" That from and after June thirtieth, nineteen hundred and three, all the fees and costs in extradition cases shall be paid out of the appropriations to defray the expenses of the judiciary, and the Attorney-General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees

§ 622. [1] Act of August 3, 1882, c. 378, § 5, 22 Stat. L. 216.

[2] Ex parte Glaser, 176 Fed. 702, 100 C. C. A. 254 (2d Cir.).

[3] Ex parte Schorer § 197 Fed. 67.

[4] Ex parte Schorer, *supra;* Elias *v.* Ramirez, 215 U. S. 398, 54 L. ed. 253, 30 S. C. 135.

[5] In re Lincoln, 228 Fed. 70. *Affirmed* 241 U. S. 651.

[6] Grin *v.* Shine, 187 U. S. 181, 47 L. ed. 130, 23 S. C. 98; In re Oteiza, 136 U. S. 330, 34 L. ed. 464, 10 S. C. 1031.

and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney-General for deposit in the Treasury of the United States." [1]

§ 624. **Delivery of Fugitives as between Foreign Country and Philippines.**

"That the provisions of section fifty-two hundred and seventy, fifty-two hundred and seventy-one, fifty-two hundred and seventy-two, fifty-two hundred and seventy-three, fifty-two hundred and seventy-four, fifty-two hundred and seventy-five, fifty-two hundred and seventy-six, and fifty-two hundred and seventy-seven of the Revised Statutes (as amended by the Act approved August third, eighteen hundred and eighty-two) so far as applicable, shall apply to the Philippine Islands for the arrest and removal therefrom of any fugitives from justice charged with the commission within the jurisdiction of any foreign government of any of the crimes provided for by treaty between the United States and such foreign nation, and for the delivery by a foreign government of any person accused of crime committed within the jurisdiction of the Philippine Islands. Such fugitives from justice of a foreign country may, upon warrant duly issued, by any judge or magistrate of the Philippine Islands, and agreeably to the usual mode of process, against offenders therein, be arrested and brought before such judge or magistrate, who shall proceed in the matter in accordance with the provisions of the Revised Statutes hereby made applicable to the Philippine Islands; Provided, that for the purposes of this section the order or warrant for delivery of a person committed for extradition prescribed by section fifty-two hundred and seventy-two of the Revised Statutes shall be issued by the Governor of the Philippine Islands under his hand and seal of office, and not by the Secretary of State." [1] This section contained Revised Statute § 5280, which reads as follows: "On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has

§ 623. [1] Act of June 28, 1902, c. 1301, § 1, 32 Stat. L. 475.

§ 624. [1] Act of February 6, 1905, c. 454, § 1, 33 Stat. L. 698.

deserted from a vessel of any such government, while in any port of the United States and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner or any circuit court, justice or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect." It was repealed to take effect upon the termination of provisions of treaties etc., for arrest or imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign countries and for co-operation, etc., of legal authorities in effecting such arrest or imprisonment, pursuant to notice of such termination.[2]

[2] Act of March 4, 1915, c. 153, §§ 16–18.

CHAPTER XLV

EXTRADITION

II. INTERSTATE RENDITION

§ 625. **Fugitives from Justice from State or Territory.**

The statute provides: "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory." [1]

§ 626. **Source of Right of Extradition and Jurisdiction.**

The right of extradition is not founded on any State statute, comity, or contract, but upon the Constitution and laws of the United States.[1] Prior to the adoption of the Constitution fugitives from justice were surrendered between the States conformably to what were deemed to be the controlling principles of equity.[2] The language of the Constitutional provision was not intended to express the law of extradition as usually prevailing among independent nations, but to provide a summary executive proceeding

§ 625. [1] Act of February 12, 1793, c. 7, 1 Stat. L. 302.

§ 626. [1] Ex parte Montgomery, 244 Fed. 967.

[2] Innes *v.* Tobin, 240 U. S. 127, 60 L. ed. 562, 36 S. C. 290; Commonwealth of Kentucky *v.* Dennison, 24 How. (U. S.) 66, 101, 16 L. ed. 717.

whereby the closely associated States of the Union could promptly aid one another in bringing accused persons to trial.[3] It was intended by the Constitutional provision to confer authority upon Congress to deal with the subject of interstate rendition.[4] The Act of 1793 was enacted for the purpose of controlling the subject in so far as it was deemed wise to do so, and its provisions were intended to be dominant and, so far as they operated, controlling and exclusive of state power.[5] The provision will be strictly construed, and all the requirements of the statute must be respected.[6] Upon these provisions of the organic and statutory law of the United States rest exclusively the right of one state to demand, and the obligation of the other state upon which the demand is made to surrender, a fugitive from justice.[7] State laws in aid of Federal legislation should be construed in connection with the laws of Congress.[8]

§ 627. Territories Have Same Right as States.

Under this section the power to demand and surrender fugitive criminals is as complete with Territories as with States.[1] Under this section the executive of a Territory has the same rights and bears the same duties as the Governor of a State.[2] And under Section 17 of the Act of April 12, 1900, c. 191, 31 Stat. L. 77, 81, the governor of Porto Rico has the same power that the governor of any organized Territory has to issue requisitions under this section.[3] Porto Rico is a completely organized Territory, although not a

[3] Biddinger *v.* Commissioner of Police of City of New York, 245 U. S. 128, 62 L. ed. 193, 38 S. C. 41; Lascelles *v.* Georgia, 148 U. S. 537, 37 L. ed. 549, 13 S. C. 687.

[4] Innes *v.* Tobin, *supra;* Prigg *v.* Commonwealth of Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060; Taylor *v.* Taintor, 16 Wall. (U. S.) 366, 21 L. ed. 287; Appleyard *v.* Massachusetts, 203 U. S. 222, 51 L. ed. 161, 27 S. C. 122.

[5] Innes *v.* Tobin, *supra;* Mahon *v.* Justice, 127 U. S. 700, 32 L. ed. 283, 8 S. C. 1204; Lascelles *v.* Georgia, *supra.*

[6] Ex parte Hart, 63 Fed. 249, 259, 11 C. C. A. 165 (4th Cir.); Ex parte Morgan, 20 Fed. 298.

[7] Lascelles *v.* Georgia, *supra.*

[8] Ex parte McKean, 3 Hughes, 23, Fed. Cas. No. 8848.

§ **627.** [1] Kopel *v.* Bingham, 211 U. S. 468, 53 L. ed. 286, 29 S. C. 190; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 S. C. 1148.

[2] Ex parte Krause, 228 Fed. 547; Ex parte Reggel, *supra;* Ex parte Morgan, 20 Fed. 298.

[3] Kopel *v.* Bingham, *supra.*

Territory incorporated into the United States, and there is no reason why Porto Rico should not be held to be such a Territory as is comprised in this section.[4] There is no extradition between the District of Columbia and a State covering cases of fugitives from the District. A crime created by an act of Congress applying specially to the District of Columbia is removable under Section 1014.[5]

§ 628. **"Fugitive from Justice."**

If the alleged fugitive was in the demanding State at the time when the offense was committed, he is, whenever he is thereafter found in another State, presumed to be a fugitive from justice, no matter for what purpose or reason or under what circumstances he left the State.[1] Proof that the defendant committed a crime in one State, and when sought to be subjected to the criminal process of that State he was found in another State, is sufficient to establish that he was a fugitive from justice.[2]

§ 629. **Knowledge of Prosecution Immaterial.**

One who leaves the demanding State before prosecution is anticipated or begun, or without knowledge on his part that he has violated any law, or who, having committed a crime in one State, returns to his home in another, is nevertheless held to be a fugitive from justice within the meaning of this section and the constitutional provision.[1] The fact that the accused was in the State of Illinois at the time it was charged that he committed the crimes for which he was indicted; that the indictments were in form and were certified as required by law, and that he was found in the State of New York, satisfied the requirement of the statute

[4] Kopel *v.* Bingham, *supra.*

[5] United States ex rel. Vause *v.* McCarthy, 250 Fed. 800.

§ 628. [1] Ex parte Montgomery, 244 Fed. 967; Reed *v.* United States, 224 Fed. 378, 140 C. C. A. 64 (9th Cir.); Bassing *v.* Cady, 208 U. S. 386, 52 L. ed. 540, 28 S. C. 392; Drew *v.* Thaw, 235 U. S. 432, 59 L. ed. 302, 35 S. C. 137; Ex parte Hoffstot, 180 Fed. 240.

[2] In re Strauss, 126 Fed. 327, 63 C. C. A. 99 (2d Cir.); Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 S. C. 1148; Roberts *v.* Reilly, 116 U. S. 80, 29 L. ed. 544, 6 S. C. 291.

§ 629. [1] Biddinger *v.* Commissioner of Police of the City of New York, 245 U. S. 128, 62 L. ed. 193, 38 S. C. 41; Roberts *v.* Reilly, 116 U. S. 80, 29 L. ed. 544, 6 S. C. 291; Appleyard *v.* Massachusetts, 203 U. S. 222, 51 L. ed. 161, 27 S. C. 122.

and by its terms made it the duty of the Governor of New York to cause the accused to be arrested and given into the custody of the Illinois authorities.[2]

§ 630. **Escaped Convict.**

One who has been convicted of a crime in one State, has not served the term for which he was sentenced on that conviction, and when wanted was found in another State, is a fugitive from justice.[1]

§ 631. **Flight after Overt Act.**

If the accused does within the demanding State an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the State and does the rest elsewhere, he becomes a fugitive from justice when the crime is complete, if not before.[1]

§ 632. **Constructive Presence Not Sufficient.**

Constructive presence will not suffice as a basis for extradition. The accused must have been physically present in the State in which it is alleged the crime was committed at the time when it was committed in order to make him by his subsequent departure from that State a fugitive from justice,[1] but he will not be discharged on *habeas corpus* when there is merely contradictory evidence as to his presence or absence, since *habeas corpus* is not the proper proceeding to try the question of alibi.[2] The provisions of this section expressly or by necessary implication prohibit the surrender of a person in one State for removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding

[2] Biddinger *v.* Commissioner of Police of the City of New York, *supra.*

§ **630.** [1] Hughes *v.* Pflanz, 138 Fed. 980, 71 C. C. A. 234 (6th Cir.).

§ **631.** [1] Ex parte Graham, 216 Fed. 813; Strassheim *v.* Daily, 221 U. S. 280, 285, 55 L. ed. 735, 31, S. C. 558.

§ **632.** [1] Ex parte Montgomery, 244 Fed. 967; Hyatt *v.* People, ex rel. Corkran, 188 U. S. 691, 47 L. ed. 657, 23 S. C. 456; Ex parte Hoffstot, 180 Fed. 240, 242, *Affirmed* in 218 U. S. 665, 54 L. ed. 1201, 31 S. C. 222; Ex parte Graham, 216 Fed. 813; Munsey *v.* Clough, 196 U. S. 364, 49 L. ed. 515, 25 S. C. 282.

[2] Munsey *v.* Clough, *supra.*

State.[3] A resident of New York, indicted in Pennsylvania for conspiracy to bribe members of the Pittsburg City Council, could not be extradited in the absence of some proof that he had been physically present in Pennsylvania when the offense was committed.[4] The Supreme Court in *habeas corpus* proceedings will not assume, where there is no evidence in the record that the person held for surrender had not been in the demanding State, that the rendition order conflicted with Section 5278 in that respect because the record did show that such person had come into the surrendering State from a State other than the one demanding.[5]

§ 633. **Involuntary Presence in State.**

The exclusive character of the section does not relate to the rendition between States of criminals found in, but who had not fled to, the surrendering State but had been involuntarily brought therein.[1]

§ 634. **Wrongfully Acquired Jurisdiction.**

Article IV, § 2, subd. 2 of the Constitution and this section place no limitation on the power of States to arrest in advance of extradition proceedings. They deal merely with the conditions under which one State may demand rendition from another and under which the alleged fugitive may resist compliance by the State upon which the demand is made.[1] This provision is so narrow in scope that if the removal is actually effected without the interposition of the State's executives — though it be by kidnapping and breach of the peace — the Federal law affords no redress, and interposes no obstacle to the prosecution of the alleged fugitive by the State which has by wrongful act acquired jurisdiction over him.[2]

[3] Innes *v.* Tobin, 240 U. S. 127, 60 L. ed. 562, 36 S. C. 290; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 S. C. 1148; Roberts *v.* Reilly, 116 U. S. 80, 29 L. ed. 544, 6 S. C. 291; Hyatt *v.* People ex rel. Corkran, *supra;* Bassing *v.* Cady, 208 U. S. 386, 392, 52 L. ed. 540, 28 S. C. 392.

[4] Ex parte Hoffstot, *supra.*

[5] Innes *v.* Tobin, *supra.*

§ 633. [1] Innes *v.* Tobin, 240 U. S. 127, 60 L. ed. 562, 36 S. C. 290.

§ 634. [1] Burton *v.* New York Central & Hudson River R. R. Co., 245 U. S. 315, 62 L. ed. 314, 38 S. C. 108.

[2] Burton *v.* New York Central & Hudson River R. R. Co., *supra;* Mahon *v.* Justice, 127 U. S. 700, 32 L. ed. 283, 8 S. C. 1204.

§ 635. **Proof before Governor.**

The question whether the accused is a fugitive from justice is a question of fact, which the governor, upon whom the demand is made, must decide upon such evidence as is satisfactory to him. Strict common law evidence is not necessary.[1] Upon the executive of the State in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from justice. But he is not required to surrender the accused unless it is shown to him by satisfactory proof that he is a fugitive from justice.[2] It is for the executive of the State upon which a demand is made to determine whether he will regard the requisition papers as sufficient proof that the accused has been charged with crime in, and is a fugitive from justice from the demanding State, or whether he will demand further proof.[3] There must be competent evidence of the fact of flight from the demanding State, since that fact lies at the foundation of the right to issue a warrant of extradition. The certificate of the governor of the demanding State is no evidence of the fact.[4] One arrested and held as a fugitive from justice is entitled, upon *habeas corpus*, to question the lawfulness of his arrest and imprisonment, showing by competent evidence that he was not a fugitive from justice, and so overcoming the presumption to the contrary arising from the face of an extradition warrant.[5]

§ 636. **Sufficiency of Requisition Papers.**

Unless the requisition papers do not comply with the statutory requirements in substantial and important particulars the court will not interfere with the removal on *habeas corpus*, where they have been accepted by the governor of the surrendering state as sufficient.[1] But the mere recital, in requisition papers, that an indictment duly authenticated is annexed is of no avail if in fact no indictment is attached.[2]

§ 635. [1] Munsey *v.* Clough, 196 U. S. 364, 372, 49 L. ed. 515, 25 S. C. 282; Roberts *v.* Reilly, 116 U. S. 80, 29 L. ed. 544, 6 S. C. 291.

[2] Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 S. C. 1148.

[3] Marbles *v.* Creecy, 215 U. S. 63, 54 L. ed. 92, 30 S. C. 32.

[4] In re Jackson, 2 Flipp. 183, Fed. Cas. No. 7125; State of Tennessee *v.* Jackson, 36 Fed. 258.

[5] People ex rel. McNichols *v.* Pease, 207 U. S. 100, 109, 52 L. ed. 121, 28 S. C. 58.

§ 636. [1] Ex parte Chung Kin Tow, 218 Fed. 185.

[2] Ex parte Hart, 63 Fed. 249, 11 C. C. A. 165 (4th Cir.).

§ 637. Indictment.

The Constitution does not require, as an indispensable prerequisite to interstate rendition, that there should be an indictment. It requires merely a charge of crime.[1] Since a charge is sufficient, an indictment which clearly describes the crime charged is sufficient, even though it may possibly be bad as a pleading.[2] The indictment need show no more than that the accused was substantially charged with crime.[3] It need not be framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding State.[4] Upon *habeas corpus*, the sufficiency of the indictment, as a matter of technical pleading, will not be inquired into,[5] if it is in substantial conformity with the statute of the demanding State.[6]

§ 638. Affidavit.

As has been said, it is not necessary that extradition proceedings under this section be based on indictment; a verified complaint or affidavit charging a person with an infamous crime is sufficient.[1] The affidavit, when this form of evidence is adopted, must be so explicit and certain that if it were laid before a magistrate it would justify him in committing the accused.[2] Therefore an affidavit founded on information and belief is not sufficient.[3] When it appears that an affidavit on which the requisition is based was regarded by the executive authorities of the respective States concerned as a sufficient basis for their acting, the judiciary will not interfere, on *habeas corpus*, and discharge the accused upon technical grounds, and unless it be clear that what was done was

§ 637. [1] Pierce *v.* Creecy, 210 U. S. 387, 52 L. ed. 1113, 28 S. C. 714, 719; Reed *v.* United States, 224 Fed. 378, 140 C. C. A. 64 (9th Cir.).

[2] Pierce *v.* Creecy, *supra;* Strassheim *v.* Daily, 221 U. S. 280, 55 L. ed. 735, 31 S. C. 558; Munsey *v.* Clough, 196 U. S. 364, 49 L. ed. 515, 25 S. C. 282; Drew *v.* Thaw, 235 U. S. 432, 59 L. ed. 302, 35 S. C. 137.

[3] Ex parte Graham, 216 Fed. 813; Pierce *v.* Creecy, *supra.*

[4] Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 S. C. 1148.

[5] Reed *v.* United States, *supra.*

[6] Pearce *v.* Texas, 155 U. S. 311, 39 L. ed. 164, 15 S. C. 116.

§ 638. [1] In re Strauss, 126 Fed. 327, 63 C. C. A. 99 (2d Cir.).

[2] Ex parte Morgan, 20 Fed. 298; Ex parte Hart, 63 Fed. 249, 11 C. C. A. 165 (4th Cir.).

[3] Ex parte Hart, *supra;* Ex parte Morgan, *supra;* Ex parte Smith, 3 McLean 121, Fed. Cas. No. 12968.

in plain contravention of law.[4] The affidavit required in such cases should set forth the facts and circumstances relied on to prove the crime, under the oath or affirmation of some person familiar with them.[5] Where the affidavit on which a person charged, upon which he has been surrendered, is false, he will be discharged on *habeas corpus*.[6] Where a charge of crime has culminated in a conviction, the record of the conviction is sufficient evidence in proceedings for extradition, and the question of the sufficiency of the affidavits becomes immaterial.[7]

§ 639. **Information.**

An information is not an equivalent of an indictment within this section; nor is the verification, on belief, of an information.[1] An information verified by the prosecuting attorney, who swears that he believes the contents thereof to be true, not that they are true, is not such charging of the commission of a crime before a magistrate of the State as is contemplated by the statute. For the purposes of an affidavit to be used for the arrest and removal of fugitives from justice, this is not sufficient.[2]

§ 640. **Copy of Indictment or Affidavit.**

This section makes it essential to the right to arrest the alleged fugitive under a warrant of the executive of the State where the alleged fugitive is found that such executive be furnished, before issuing his warrant, with a copy of an indictment or an affidavit before a magistrate in the demanding State charging the fugitive with crime committed by him in such State.[1] A requisition cannot be denied when the copy of the affidavit attached thereto is held sufficient by the court of the State where the offense was committed, although it would not be held good in the court of the State where demand is made.[2] Unless the executive is furnished

[4] Compton *v.* State of Alabama, 214 U. S. 1, 8, 53 L. ed. 885, 29 S. C. 605; Ex parte Hoffstot, 180 Fed. 240.

[5] Ex parte Hart, 63 Fed. 249, 259, 11 C. C. A. 165 (4th Cir.).

[6] State of Tennessee *v.* Jackson, 36 Fed. 258.

[7] Hughes *v.* Pflanz, 138 Fed. 980, 71 C. C. A. 234 (6th Cir.).

§ 639. [1] Ex parte Hart, 63 Fed. 249, 11 C. C. A. 165 (4th Cir.).

[2] *Ibid.*

§ 640. [1] Compton *v.* State of Alabama, 214 U. S. 1, 6, 53 L. ed. 885, 29 S. C. 605.

[2] Pearce *v.* Texas, 155 U. S. 311, 39 L. ed. 164, 15 S. C. 116; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250,

with a copy of indictment or affidavit, made as the statute requires, a warrant for removal is void.[3]

§ 641. **Magistrate before Whom Affidavit Made.**

Under this section a person may be regarded as a magistrate before whom the required affidavit can be made if he is so regarded under the law of the State where the alleged crime was committed.[1]

§ 642. **Necessity for Charge.**

In a proceeding before a magistrate for the arrest of a person charged with a crime committed in another State, brought in the State to which he is alleged to have fled, it must appear by admissible proof that in the State where the crime was committed he stands charged through indictment or affidavit before a magistrate or by some other equivalent accusation sanctioned by the laws of that State.[1] Before the governor of the State upon which the demand is made can lawfully comply therewith, it must appear that the person demanded is substantially charged with a crime against the laws of the demanding State. This is always open to inquiry on *habeas corpus*.[2] Such evidence is necessary even in the absence of a State statute requiring it.[3] In interstate rendition proceedings courts will not indulge in technical tests of the sufficiency of a charge where it substantially describes the crime,[4] but the courts must be able to find some appropriate allegation and evidence that a charge has in reality been duly made in the State where the crime is alleged to have been committed.[5] To hold otherwise would open the law to serious abuse, and render it an instrument of oppression. These statutory provisions were framed with reference, not only to actual fugitives, but also to the rights, the individual liberty and security, of innocent persons.[6]

5 S. C. 1148; Webb *v.* York, 79 Fed. 616, 25 C. C. A. 133 (8th Cir.).

[3] Ex parte Hart, 63 Fed. 249, 11 C. C. A. 165 (4th Cir.).

§ 641. [1] Compton *v.* State of Alabama, 214 U. S. 1, 7, 53 L. ed. 885, 29 S. C. 605.

§ 642. [1] Reichman *v.* Harris, 252 Fed. 371, 379, 164 C. C. A. 295 (6th Cir.); Ex parte Morgan, 20 Fed. 298, 308; Ex parte A. W. McKean, 3 Hughes, 23, 25, Fed. Cas. No. 8848.

[2] Roberts *v.* Reilly, 116 U. S. 80, 29 L. ed. 544, 6 S. C. 291; In re Strauss, 126 Fed. 327, 63 C. C. A. 99 (2d Cir.).

[3] Reichman *v.* Harris, *supra*.

[4] Reichman *v.* Harris, *supra;* Pierce *v.* Creecy, 210 U. S. 387, 401, 52 L. ed. 1113, 28 S. C. 714.

[5] Reichman *v.* Harris, *supra*.

[6] *Ibid.*

A warrant issued by a justice of the peace for the arrest of an alleged fugitive, issued on information on oath "that the offense of fugitive from justice has been committed, and accusing M. H. thereof", is not fair and regular on its face, but void, even if considered as including the oath, which recited that the accused had unlawfully entered the State a fugitive from justice from Mississippi, "where he is charged with the crime of murder", since it failed to state how, or under what competent official sanction, the accused was charged with crime in Mississippi, in view of the State statute and Section 5278.[7] The power of the proper peace officer to arrest, without a warrant, a fugitive from justice, provided he has reasonable cause to believe he has committed a felony, has been declared in several States.[8]

§ 643. "Charged with Crime."

The word "charged" in Article IV, § 2, subd. 2, and this section appears to have been used in its broad signification to cover any proceeding which a State might see fit to adopt by which a formal accusation was made against an alleged criminal;[1] and to include all persons accused of crime, the charge continuing until trial and acquittal, or, if convicted, until the sentence has been performed.[2] Briefly, it has been held to mean, charged in the regular course of judicial proceedings.[3]

§ 644. "Treason, Felony or Other Crime."

"Treason, felony or other crime" includes every violation of the criminal laws of the demanding State.[1]

[7] Reichman *v.* Harris, *supra.*

[8] Union Pacific Ry. Co. *v.* Belek, 211 Fed. 699. (This seems contrary to Reichman *v.* Harris case.)

§ 643. [1] Matter of Strauss, 197 U. S. 324, 331, 49 L. ed. 774, 25 S. C. 535; Pierce *v.* Creecy, 210 U. S. 387, 404, 52 L. ed. 1113, 28 S. C. 714.

[2] Hughes *v.* Pflanz, 138 Fed. 980, 71 C. C. A. 234 (6th Cir.).

[3] Ex parte Morgan, 20 Fed. 298; Commonwealth of Kentucky *v.* Dennison, 24 How. (U. S.) 66, 16 L. ed. 717.

§ 644. [1] Taylor *v.* Taintor, 16 Wall. (U. S.) 366, 375, 21 L. ed. 287; Commonwealth of Kentucky *v.* Dennison, 24 How. (U. S.) 66, 16 L. ed. 717; Lascelles *v.* Georgia, 148 U. S. 537, 37 L. ed. 549, 13 S. C. 687; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 S. C. 1148.

§ 645. **"Certified as Authentic."**

By this section the affidavit or indictment upon which a requisition is based must be certified by the governor or chief executive as authentic.[1]

§ 646. **Sufficient Authentication.**

For purposes of extradition authentications required by the statute are sufficient when made by the respective governors. Where affidavits were sworn to before the clerk of an inferior court in the demanding State, but the governor of the State authenticated the affidavits, they were held sufficiently authenticated.[1] It is sufficient that a governor in making requisition for a fugitive from justice certify to the indictment or affidavit as authentic.[2]

§ 647. **Accused's Right to Hearing.**

Extradition proceedings are summary in character, and the person demanded has no constitutional right to be heard before the governor.[1] The governor may act on the requisition papers in the absence of the accused and without previous notice to him.[2] But he plainly has a right to be heard upon the questions involved in his extradition.[3] Therefore apparently his hearing must be before the court upon *habeas corpus* proceedings.[4]

§ 648. **Proceedings.**

Conspiracy being a continuing offense, the demanding State is not bound in the extradition proceedings by the specific date laid.[1] No obligation is imposed by the Constitution or laws of the United States on the agent of a demanding State to so time the arrest of one alleged to be a fugitive from justice and so conduct his deportation from the surrendering State, as to afford him a

§ 645. [1] Ex parte Morgan, 20 Fed. 298.

§ 646. [1] Chung Kin Tow *v.* Flynn, 218 Fed. 64, 133 C. C. A. 666 (1st Cir.).

[2] Tiberg *v.* Warren, 192 Fed. 458, 465, 112 C. C. A. 596 (9th Cir.); Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 S. C. 1148.

§ 647. [1] Reed *v.* United States, 224 Fed. 378, 140 C. C. A. 64 (9th Cir.); Ex parte Chung Kin Tow, 218 Fed. 185; Munsey *v.* Clough, 196 U. S. 364, 372, 49 L. ed. 515, 25 S. C. 282.

[2] Marbles *v.* Creecy, 215 U. S. 63, 68, 54 L. ed. 92, 30 S. C. 32.

[3] Robb *v.* Connolly, 111 U. S. 624, 638, 28 L. ed. 542, 4 S. C. 544.

[4] Ex parte Chung Kin Tow, *supra.*

§ 648. [1] Ex parte Montgomery, 244 Fed. 967.

convenient opportunity, before some judicial tribunal, sitting in the latter State, upon *habeas corpus* or otherwise, to test the question whether he was a fugitive from justice.[2]

§ 649. **Statute of Limitations.**

The statute of limitations is a defense, and cannot be heard on *habeas corpus* to test the validity of an arrest in extradition, but must be heard and decided, at the trial, by the courts of the demanding State.[1]

§ 650. **Warrant of Removal.**

The governor's warrant establishes a *prima facie* case that the arrest and direction for surrender are lawful and valid. The burden is upon the prisoner to show that he is not in fact a fugitive from justice, and that burden requires evidence which is practically conclusive.[1] The governor's warrant for removal is sufficient until the presumption in favor of its legality and regularity is overthrown by contrary proof in a legal proceeding to review the governor's action.[2] The governor's warrant, however, is but *prima facie* sufficient to hold the accused, and it is open to the latter, in *habeas corpus* proceedings, to show by any conclusive evidence that the charge upon which extradition is demanded assumes the absence of the accused person from the State at the time the crime was, if ever, committed.[3] The governor's act in issuing his warrant of removal is not conclusive, and there

[2] Pettibone *v.* Nichols, 203 U. S. 192, 51 L. ed. 148, 27 S. C. 111.

§ 649. [1] Biddinger *v.* Commissioner of Police of City of New York, 245 U. S. 128, 62 L. ed. 193, 38 S. C. 41; Reed *v.* United States, 224 Fed. 378, 140 C. C. A. 64 (9th Cir.); Pierce *v.* Creecy, 210 U. S. 387, 52 L. ed. 1113, 28 S. C. 714.

§ 650. [1] Ex parte Montgomery, 244 Fed. 967; Reed *v.* United States, 224 Fed. 378, 140 C. C. A. 64 (9th Cir.); Chung Kin Tow *v.* Flynn, 218 Fed. 64, 133 C. C. A. 666 (1st Cir.); People ex rel. McNichols *v.* Pease, 207 U. S. 100, 52 L. ed. 121, 28 S. C. 58; Tiberg *v.* Warren, 192 Fed. 458, 112 C. C. A. 596 (9th Cir.); Eaton *v.* State of West Virginia, 91 Fed. 760, 34 C. C. A. 68 (4th Cir.); Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 S. C. 297.

[2] Munsey *v.* Clough, 196 U. S. 364, 372, 49 L. ed. 515, 25 S. C. 282; Roberts *v.* Reilly, 116 U. S. 80, 29 L. ed. 544, 6 S. C. 291; Hyatt *v.* People ex rel. Corkran, 188 U. S. 691, 47 L. ed. 657, 23 S. C. 456.

[3] Hyatt *v.* People ex rel. Corkran, *supra;* In re Cook, 49 Fed. 833; Marbles *v.* Creecy, 215 U. S. 63, 54 L. ed. 92, 30 S. C. 32; Bassing *v.* Cady, 208 U. S. 386, 52 L. ed. 540, 28 S. C. 392.

is no presumption that he had the necessary papers, duly authenticated, before him when he acted.[4]

§ 651. **Bail.**

In extradition proceedings one charged with a misdemeanor only is entitled to bail as a matter of absolute right, unless his liberty under bail would be a menace to the community.[1]

§ 652. **Trial for Other Offenses.**

The rule applicable in international extradition that a person extradited from a foreign country cannot be tried for an offense other than that for which extradition was asked does not apply to interstate rendition. The provision of both the Constitution and the statutes extends to all crimes and offenses punishable by the laws of the State where the act is done.[1] The constitutional provision that a person charged with crime against the laws of a State and who flees from its justice must be delivered up on proper demand, is sufficiently comprehensive to embrace any offense, whatever its nature, which the State, consistently with the Constitution and laws of the United States, may have made a crime against its laws.[2] And upon a fugitive's surrender to the State demanding his return in pursuance of national law, he may there be tried for any other offense than that specified in the requisition for his rendition, and in so trying him against his objection no right, privilege or immunity secured to him by the Constitution and laws of the United States is thereby denied.[3]

§ 653. **Review by Federal Court.**

The governor's act in issuing a warrant of removal can be reviewed on *habeas corpus*, and, if he has not followed the directions and observed the conditions of the Federal Constitution and laws,

[4] Ex parte Hart, 63 Fed. 249, 260, 11 C. C. A. 165 (4th Cir.).

§ **651.** [1] Ex parte Thaw, 209 Fed. 954.

§ **652.** [1] Innes *v.* Tobin, 240 U. S. 127, 60 L. ed. 562, 36 S. C. 290; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 S. C. 1148; Kentucky *v.* Dennison, 24 How. (U. S.) 66, 101, 16 L. ed. 717.

[2] Appleyard *v.* Massachusetts, 203 U. S. 222, 227, 51 L. ed. 161, 27 S. C. 122; Ex parte Reggel, 114 U. S. 642, 650, 29 L. ed. 250, 5 S. C. 1148; Commonwealth of Kentucky *v.* Dennison, 24 How. (U. S.) 66, 69, 16 L. ed. 717.

[3] Lascelles *v.* Georgia, 148 U. S. 537, 37 L. ed. 549, 13 S. C. 687.

can be set aside as void.[1] The court has no jurisdiction to pass upon the question of accused's guilt or consider disputed questions of fact,[2] though it may inquire whether, on the face of the requisition papers, the accused has been charged with a crime in the demanding State.[3]

§ 654. Identity of Accused.

The question of the identity of the person arrested with the person described in the governor's mandate is always open to inquiry on *habeas corpus*.[1]

§ 655. Subsequent Proceedings in Courts of Demanding State.

On *habeas corpus* the court can assume that the person surrendered will be legally tried and protected from illegal violence.[1] On *habeas corpus* in extradition proceedings the court cannot speculate on what ought to be the result of a trial in the place where the Constitution provides for its taking place.[2]

§ 656. Direct Appeal to Supreme Court.

The determination whether an indictment constitutes a charge within the meaning of the extradition clause of the Constitution involves its construction and a direct appeal lies to the Supreme Court.[1]

§ 657. Rearrest after Discharge on Habeas Corpus.

After a discharge on *habeas corpus* in extradition proceedings, the person arrested, if rearrested for extradition for the same offense, may plead *res adjudicata;* but he is not protected from

§ 653. [1] Ex parte Hart, 63 Fed. 249, 260, 11 C. C. A. 165 (4th Cir.); Roberts *v.* Reilly, 116 U. S. 80, 29 L. ed. 544, 6 S. C. 291; Ex parte Morgan, 20 Fed. 298; Ex parte Brown, 28 Fed. 653.

[2] In re Strauss, 126 Fed. 327, 63 C. C. A. 99 (2d Cir.); Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501 (4th Cir.); Ex parte Dawson, 83 Fed. 306, 28 C. C. A. 681 (8th Cir.); In re White, 55 Fed. 54, 5 C. C. A. 29 (2d Cir.).

[3] Roberts *v.* Reilly, *supra;* Ex parte Smith, 3 McLean 121, Fed. Cas. No. 12968.

§ 654. [1] In re Chung Kin Tow, 218 Fed. 185; In re White, 55 Fed. 54, 5 C. C. A. 29 (2d Cir.).

§ 655. [1] Marbles *v.* Creecy, 215 U. S. 63, 54 L. ed. 92, 30 S. C. 32.

[2] Drew *v.* Thaw, 235 U. S. 432, 59 L. ed. 302, 35 S. C. 137.

§ 656. [1] Pierce *v.* Creecy, 210 U. S. 387, 52 L. ed. 1113, 28 S. C. 714.

rearrest if the discharge was on technical grounds of defective requisition papers, which can be remedied.[1]

§ 658. **Prior Right of Surrendering State.**

If the laws of the State on which demand is made have been put in force against the fugitive, and he is imprisoned there, the demands of these laws may first be satisfied, though this right may be waived.[1]

§ 659. **Penalty for Resisting Agent.**

"Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the State or Territory from which he has fled. And every person, who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year." [1]

§ 660. **Agent to Receive Accused.**

An agent appointed by the demanding State to receive the accused from the State surrendering him is not an officer of the United States.[1]

§ 661. **Fugitives from Justice — Philippine Islands.**

"The provisions of sections fifty-two hundred and seventy-eight and fifty-two hundred and seventy-nine of the Revised Statutes, so far as applicable, shall apply to the Philippine Islands, which, for the purposes of said sections, shall be deemed a Territory within the meaning thereof." [1]

§ 657. [1] In re White, 45 Fed. 237.

§ 658. [1] Taylor *v.* Taintor, 16 Wall. (U. S.) 366, 371, 21 L. ed. 287.

§ 659. [1] Act of February 12, 1793, c. 7, 1 Stat. L. 302.

§ 660. [1] Robb *v.* Connolly, 111 U. S. 624, 28 L. ed. 542, 4 S. C. 544.

§ 661. [1] Act of February 9, 1903, c. 529, § 2, 32 Stat. L. 807.