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Resume of Decisions of the United States Supreme Court on Federal Criminal Procedure, A

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A RESUME OF DECISIONS OF THE UNITED STATES SUPREME COURT ON FEDERAL CRIMINAL PROCEDURE*

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EVIDENCE

The Fifth Amendment of the Constitution of the United States provides: "No person shall be . . . compelled in any criminal case to be a witness against himself."[1]

The Sixth Amendment provides: "In all criminal prosecutions the accused shall enjoy the right to a public trial . . . 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."[2]

For other phases of the rules of evidence one must look to acts of Congress and judicial decisions.[3]

Mr. Justice Story stated in 1827: "In general, the rules of evidence in criminal and civil cases are the same."[3a] Hence, in a particular case under an indictment under the slave-trade act of April, 1818, against the owner of a ship, testimony of the declarations of the master, being a part of the *res*, was evidence against the owner.

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*Earlier chapters of this resumé appear in (1941) 20 NEB. L. REV. 251; (1942) 14 ROCKY MT. L. REV. 105; (1942) 21 NEB. L. REV. 1; (1942) 30 KY. L. J. 360.

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1. For a discussion of the privilege against self-incrimination see Chapter 23 of this resumé.

2. As to the right to a public trial see Chapter 28 of this resumé; as to confrontation of witnesses see Chapter 20; and as to compulsory process for obtaining witnesses see Chapter 19.

3. See also 2 LONGSDORF AND NICHOLS, CYCLOPEDIA OF FEDERAL PROCEDURE (1929) §§486-608, and Volume 5, §§2215-2286; 9 HUGHES, FEDERAL PRACTICE (1921) §§7093-7137; BREWSTER, FEDERAL PROCEDURE (1940) §§1175-1210. Also dealing with the rules of evidence in criminal cases are UNDERHILL, CRIMINAL EVIDENCE (Niblack, 4th ed. 1935); ABBOTT, CRIMINAL TRIAL PRACTICE (Viesselman, 4th ed. 1939). Numerous phases of criminal evidence are dealt with in the AMERICAN LAW INSTITUTE CODE OF EVIDENCE (Tent. Draft 2, 1941), especially §§3-8, 11, 101, 105, 106, 201, 202, 203, 205, 208, 225, 303, 304, 411, 503, 605, 612, 617, 618, 621, 626.

3a. United States v. Gooding, 12 Wheat. 460, 469 (U. S. 1827). See in accord: Thompson v. Bowie, 4 Wall. 463 (U. S. 1867).

The line of cases dealing with the rules governing evidence in federal criminal cases have been of an interesting character. Of significance is an early American case concerning the competency of witnesses. The owner of property stolen on board an American vessel on the high seas is a competent witness, it was held, to prove the ownership of the property stolen, on an indictment against the person charged with the offence, even though he is also an informer and entitled to a part of the penalty or forfeiture. In cases of necessity where a statute could not be enforced unless the party interested was a witness, such person must be allowed to testify. The jury should however consider such testimony with care. Mr. Justice Story stated: "The rules as to competency of witnesses in criminal cases are not, exactly and throughout, the same in America as in England, although in most cases they concur."[4] He did not refer to any statute limiting the federal courts in their application of the rule of evidence in criminal cases.

Section 34 of the Judiciary Act of September 24, 1789, known as the Rule of Decisions Act, declares that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.[5] Mr. Chief Justice Taney held in 1851 in a leading case that this statute applied only to civil cases at common law. It did not apply to suits in equity. Nor did it apply to criminal cases. He stated that "it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offences against the United States. For this would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress."[6]

In the view of Mr. Chief Justice Taney, the English common law at the settlement of this country was not the guide either. Rather it is the state law as it existed in 1789. No statute expressly afforded a guide as to rules of evidence in federal criminal cases. He stated:

> "Nor is there any act of Congress prescribing in express words the rule by which the courts of the United States are to be governed, in the admission of testimony in criminal cases. But we think it may be found with sufficient authority, not indeed in direct terms,

4. United States v. Murphy, 16 Pet. 203, 210 (U. S. 1842).
5. 1 STAT. 92 (1789), 28 U. S. C. §725 (1934).
6. United States v. Reid, 12 How. 361, 363 (U. S. 1851).

but by necessary implication, in the acts of 1789 and 1790, establishing the courts of the United States, and providing for the punishment of certain offences. And the law by which, in the opinion of this court, the admission of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789."[7]

Section 29 of the Judiciary Act of 1789 fixed the method of summoning and selecting jurors as the method in force in 1789 in the respective states. From this the Chief Justice deduced that the "same principles were to prevail throughout the trial" including the admissibility of testimony. The deduction is possibly strained. Moreover, Section 29 had been repealed ten years before the opinion was written. An 1840 statute imposed on the federal courts the state rules from time to time in force.[8]

Forty-one years later it was held in *Logan v. United States*[9] that the competency of witnesses in the federal courts in a case tried in Texas was governed not by the statutes of the state framed since its admission to the Union, but by common law, which was the law of Texas at the time of its admission. Hence, a statute passed by the state legislature after admission rendering convicted felons incompetent witnesses did not apply in the federal courts. Instead, the federal court would apply a statute adopted by the Republic of Texas in 1836 applying to questions of evidence the common law of England.

In another case also decided in 1892, it was held that under a joint indictment, when a severance and separate trials have been ordered, one defendant, even though his case has not been disposed of, may testify in behalf of the prosecution on the trial of his co-defendant.[10] *A fortiori,* if separately indicted he would be a competent witness for the prosecution. The opinion failed to mention a Kansas territorial statute expressly adopting the common law of England. Under the *Logan* case this statute was controlling. The Court examined common law authorities without stating why such authorities were being relied upon. The Court went on to justify its decision

7. *Ibid.*

8. Act of July 20, 1840, 5 STAT. 394 (1840). A previous amendment referred the federal courts to state jury practice as of 1800. Act of May 13, 1800, 2 STAT. 82 (1800). The opinion of the court wrongly cited §29 as §20.

9. Logan v. United States, 144 U. S. 263 (1892).

10. Benson v. United States, 146 U. S. 325 (1892). The court distinguished United States v. Reid, 12 How. 361 (U. S. 1851) on the ground that there the right of the defendant to call his codefendant was involved, rather than the right of the prosecution.

"in the light of general authority and sound reason."[11] It pointed out that the trend of legislative and of judicial opinion had for the past half century been towards abolishing the common law disqualifications of witnesses, and that with this background it was easier to find the witness competent.

In 1911, the Supreme Court held that the wife of the accused is not competent to testify in the federal courts in his behalf.[12] The court simply cited *Logan v. United States.*[13] It reaffirmed the *Logan* case without mention of the *Benson* case.

In *Rosen v. United States,* Mr. Justice Clarke stated that the common law rules of 1789 were no longer to be applied as to the competency of witnesses.[14] He felt that the authority of the *Reid* case was shaken by the *Benson* case. He preferred the doctrine of *Benson v. United States,* that the court should decide "in the light of general authority and of sound reasoning."[15] A previous conviction of forgery, therefore, did not disqualify the person convicted from testifying on behalf of the government.

In the same year that the *Rosen* case was decided, Mr. Justice Holmes stated in another case: "It is argued that the court was bound by the rules of evidence as they stood in 1789. That those rules would not be conclusive is sufficiently shown by *Rosen v. United States.*"[16]

But this idea did not long prevail. The wife of the accused, it was held in a 1920 decision, could not testify in his behalf although her evidence was offered simply to contradict the testimony of particular witnesses for the government, who testified to certain matters as having happened in her presence.[17] The court pointed out that a wife's evidence was not admissible at the time of the first Judiciary Act, and that subsequent statutes were confined to civil actions.[18] This case seemed to return to earlier views as to the basis of rules of evidence. The *Rosen* case was not even cited in the brief of the defendant, not to speak of the government.

Even as recently as 1928, the law of the state of Washington at the date

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11. Benson v. United States, 146 U. S. 325, 335 (1892).
12. Hendrix v. United States, 219 U. S. 79 (1911).
13. 144 U. S. 263 (1892).
14. Rosen v. United States, 245 U. S. 467 (1918). Van Devanter and McReynolds, JJ., dissenting.
15. Benson v. United States, 146 U. S. 325, 335 (1892). The court also cited Logan v. United States, 144 U. S. 263-301 (1892).
16. Greer v. United States, 245 U. S. 559 (1918).
17. Jin Fuey Moy v. United States, 254 U. S. 189 (1920). There was in this case a state statute making the wife competent, though this was not noticed in the opinion of the Supreme Court. ROSE, FEDERAL JURISDICTION AND PROCEDURE (2d ed. 1922) §116.

of its admission was applied in letting in evidence obtained by wire-tapping.[19] The *Reid* and *Logan* case again seem to be regarded as authoritative.

But finally it was held in 1933 that the wife of one on trial in a federal court for a criminal offence is not incompetent as a witness in his behalf.[20] The earlier rule had been based on the interest of the spouse in the event.[21] In the absence of Congressional legislation the common law rules of evidence need not be enforced where conditions have fundamentally altered.[22] Present day standards of wisdom and justice may be applied.

In the latest case, one decided in 1934, it was reiterated that rules governing the admissibility of testimony in federal courts, in the absence of congressional legislation, are governed by common-law principles and not by local statute. The privilege attaching to communications between spouses presupposes relevant testimony, and should be allowed only when it is plain that marital confidence cannot otherwise reasonably be preserved.[23] When made in the presence of a third party, communications between spouses are usually regarded as not privileged because not made in confidence. Where a husband dictates to his stenographer a letter to his wife, the testimony of the stenographer, reading from her notes, as to a statement contained in the letter, is not privileged.

Most aspects of the subject of search and seizure have been treated elsewhere in this resume.[24] Only those touching directly on evidence will be

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18. The court cited Logan v. United States, 144 U. S. 263, 299-302 (1892); Hendrix v. United States, 219 U. S. 79, 91 (1911).

19. Olmstead v. United States, 277 U. S. 438, 469 (1928).

20. Funk v. United States, 290 U. S. 371 (1933) overruling Hendrix v. United States, 219 U. S. 79 (1911) and Jin Fuey Moy v. United States, 254 U. S. 189 (1920). McReynolds and Butler, JJ., dissented, while Cardozo, J., concurred in the result.

21. Jin Fuey Moy v. United States, 254 U. S. 189 (1920).

22. Funk v. United States, 290 U. S. 371 (1933), noted (1934) 14 B. U. L. REV. 75; (1934) 22 CALIF. L. REV. 448; (1934) 28 ILL. L. REV. 846; (1934) 19 IOWA L. REV. 488; (1934) 33 MICH. L. REV. 306; (1934) 18 MINN. L. REV. 893; 82 U. OF PA. L. REV. 406; (1934) 20 VA. L. REV. 590.

23. Wolfle v. United States, 291 U. S. 7 (1934), noted (1934) 22 CALIF. L. REV. 573; (1934) 22 GEO. L. J. 623; (1934) 10 IND. L. J. 182; (1934) 11 N. Y. U. L. Q. REV. 644; (1934) 12 TEX. L. REV. 473; (1934) 9 WIS. L. REV. 426; (1934) 43 YALE L. J. 849.

For discussions of evidence in federal criminal cases see Leach, *State Law of Evidence in the Federal Courts* (1930) 43 HARV. L. REV. 554, 555; Note (1934) 47 HARV. L. REV. 853; Hinton, *Rules Governing Competency of Witnesses* (1928) 22 ILL. L. REV. 545; Sweeney, *Federal or State Rules of Evidence in Federal Courts* (1933) 27 ILL. L. REV. 394; Ferguson and Callahan, *Evidence and New Federal Rules of Civil Procedure* (1936) 45 YALE L. J. 622. See also Thomas F. Green, *The Admissibility of Evidence Under the Federal Rules* (1941) 55 HARV. L. REV. 197.

24. See Chapter IX of this resumé.

discussed here. Even when there is a warrant conforming to the several constitutional requirements, if it is for the sole purpose of searching out evidence to be used against the owner of the seized articles, it is in violation of the Fourth Amendment.[25] The theory of this rule is that the amendment was aimed to prevent the government from compelling a person to furnish it with evidence that would enable it to prove his guilt. It is thus a safeguard of the privilege against self-incrimination guaranteed him by the Fifth Amendment. But the seizure is valid where the public is deemed to have an interest in them apart from their character as evidence. Thus, contraband such as counterfeit coin, burglar's tools and weapons, and implements of gambling may be seized.

A motion lies before trial to suppress documentary, or demonstrative evidence obtained as the result of an unconstitutional search and seizure. Such a motion before trial to suppress the evidence, or for a return of the property, ordinarily is necessary to enable the defendant to object to the admission on the trial as illegally obtained evidence.[26] There is an exception to this rule where there is no opportunity to present the matter in advance of trial.[27]

A federal district court has jurisdiction to entertain a motion for an order in a criminal proceeding initiated by the filing of a complaint before a United States commissioner and the issuance of an order of arrest by him, to enjoin the use as evidence of books and papers seized from the persons arrested, and to direct the return of such books and papers.[28] This is true since the commissioner is a mere officer of the court.

The protection under the Fourth Amendment against search and seizure does not extend to the secret tapping of one's telephone wires for the purpose of procuring evidence against him even when those acts violate the laws of the state in which they occur.[29] Telephone wires leading from one's house

25. Gouled v. United States, 255 U. S. 298 (1921); Boyd v. United States, 116 U. S. 616 (1885).

26. Segurola v. United States, 275 U. S. 106 (1927); BREWSTER, FEDERAL PROCEDURE (1940) 599.

27. Gouled v. United States, 255 U. S. 298, 305 (1921); Agnello v. United States, 269 U. S. 20, 34 (1925).

28. Go-Bart Importing Co. v. United States, 282 U. S. 344 (1931).

29. Olmstead v. United States, 277 U. S. 438 (1928), Holmes, Brandeis, Butler and Stone, JJ., dissenting. The case is noted in (1928) 27 MICH. L. REV. 78 and 927; (1928) 2 So. CALIF. L. REV. 171; (1928) 13 ST. LOUIS L. REV. 101; (1928) 77 U. of PA. L. REV. 139; (1928) 38 YALE L. J. 77; (1928) 13 MINN. L. REV. 58; (1931) 65 U. S. L. REV. 59; (1928) 7 TEX. L. REV. 159; (1928) 2 U. OF CIN. L. REV. 409. See ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 742-743; BREWSTER, FEDERAL PROCEDURE (1940) 550, 621-623.

are no part thereof for purposes of the Fourth Amendment. Thus a distinction is drawn between illegally obtained evidence and evidence obtained in violation of constitutional right. Congress may change the rule by direct legislation forbidding wire-tapping. Until Congress does so change, the common law rules of evidence prevail in a federal court sitting in a state where the common law rules prevailed before admission into the Union.

Evidence of federal officers to an interstate communication intercepted by tapping telephone wires is inadmissible because of the provisions of Section 605 of the Communications Act of 1934.[30] The effect of the statute was to overrule *Olmstead v. United States,*[31] which applied the common law rule. The word "person" in the statute included officers of the federal government.

Testimony obtained by utilizing information gained by wire-tapping is rendered inadmissible by Section 605 of the Federal Communications Act of 1934.[32] But such parts are admissible if knowledge of them has been gained from an independent source. The defendant has the burden of showing that the evidence was obtained improperly. If possible, the defendant should raise the question prior to trial. Intrastate, as well as interstate, telephone messages are within the interdiction of Section 605.[33]

Any reference by counsel for prosecution to the accused's failure to take the stand is improper under the Act of March 16, 1878,[34] providing that such failure "shall raise no presumption against the defendant."[35] The

30. Nardone v. United States, 302 U. S. 379 (1937), McReynolds and Sutherland, JJ., dissenting. For the statute see 48 STAT. 1103, 47 U. S. C. § 605 (1934).

31. Olmstead v. United States, 277 U. S. 438 (1928).

32. Nardone v. United States, 308 U. S. 338, (1939), McReynolds, J., dissenting. For the act see 48 STAT. 1103, 47 U. S. C. §605 (1934). The Nardone cases are noted (1940) 20 B. U. L. REV. 362; (1940) 9 BROOKLYN L. REV. 214; (1940) 25 CORN. L. Q. 445; (1938) 7 FORDHAM L. REV. 261; (1938) 6 GEO. WASH. L. REV. 326; (1940) 28 GEO. L. J. 550 and 789; (1940) 53 HARV. L. REV. 863; (1940) 34 ILL. L. REV. 758; (1938) 23 IOWA L. REV. 429; (1940) 25 IOWA L. REV. 669; (1938) 29 J. CRIM. L. 134; (1940) 30 J. CRIM. L. 945; (1940) 38 MICH. L. REV. 1097; (1938) 10 MISS L. J. 325; (1938) 16 TEX. L. REV. 574; (1938) 86 U. OF PA. L. REV. 436.

33. Weiss v. United States, 308 U. S. 34, (1939); noted (1940) 9 BROOKLYN L. REV. 214; (1940) 28 GEO. L. J. 789; (1940) 53 HARV. L. REV. 863; (1940) 34 ILL. L. REV. 758; (1940) 25 IOWA L. REV. 761; (1940) 18 N. C. L. REV. 229; (1940) 14 ST. JOHN'S L. REV. 412; (1940) 3 U. OF DETROIT L. J. 85.

34. 20 STAT. 30 (1878), 28 U. S. C. § 632 (1934).

35. Wilson v. United States, 149 U. S. 60 (1893). See also Dunmore, *Comment on Failure of Accused to Testify* (1917) 26 YALE L. J. 464; Knox, *Self-Incrimination* (1925) 74 U. OF PA. L. REV. 139; Hiscock, *Criminal Law and Procedure in New York* (1926) 26 COL. L. REV. 253, 258; Notes (1928) 37 YALE L. J. 955; (1939) 18 NEB. L. BUL. 204; (1940) 19 NEB. L. BULL. 201.

accused may object by taking an exception. The taking of exception is not confined to rulings on evidence or the interpretation of instruments. A number of states have passed similar statutes which have been similarly interpreted. A new trial should be granted.

Under the Act of Congress to the effect that the failure of an accused to testify "shall not create any presumption against him,"[36] the accused has an indefeasible right when he requests it to have the jury instructed by the court that his failure to testify does not create any presumption against him.[37] The Act of Congress, adopted March 16, 1878, freed the accused in a federal prosecution from his common law disability as a witness, but Congress coupled his privilege to be a witness with the right to have a failure to exercise the privilege not count against him. There was an implied direction to the judge to direct the jury on the subject.

The introduction in evidence of the indictment together with the admission of the accused that he is the person named therein, establishes a *prima facie* case, in the absence of other evidence, for the removal of the accused to the district in which the indictment was returned.[38]

To warrant a discharge in a federal removal proceeding, the accused must remove all reasonable doubt as to his commission of the offense, and the proof must be clear and convincing.[39] It is not enough that the magistrate believes the accused to be innocent. The hearing is not to be a preliminary trial, and if the prosecution shows probable cause, the commissioner is not to discharge the accused because on the other evidence he believes the accused to be innocent.[40] There is therefore no error in excluding evidence as to the innocence of the accused, where the commissioner finds that there were substantial grounds for the charge of guilt. No constitutional right is thereby violated.

Properly authenticated affidavits are not rendered inadmissible for the extradition to Canada of a fugitive from justice, because such affidavits were taken *ex parte* in the absence of the accused, and without opportunity for cross-examination.[41] The federal statute[42] should not be con-

36. 20 STAT. 30 (1878), 28 U. S. C. § 632 (1934).
37. Bruno v. United States, 308 U. S. 287 (1939), noted (1940) 38 MICH. L. REV. 1322; (1939) 28 GEO. L. J. 417; (1940) 3 U. OF DETROIT L. J. 101.
38. Gayon v. McCarthy, 252 U. S. 171 (1920).
39. Beavers v. Haubert, 198 U. S. 77 (1905).
40. United States *ex rel.* Hughes v. Gault, 271 U. S. 142 (1926), Brandeis, J., dissenting, on the ground of violation of the due process provision of the Fifth Amendment.
41. Bingham v. Bradley, 241 U. S. 511 (1916).
42. REV. STAT., § 5270 (1875), 18 U. S. C., § 652 (1934).

strued so as to require a foreign country to send its citizens to the United States to institute legal proceedings.

Mr. Justice Brown has asserted that "the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."[43]

The examination of witnesses before a grand jury need not be preceded by a presentment, indictment, or other formal charge.[44] In summoning such witnesses it is sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against such persons. A contrary rule might involve a betrayal of the secrets of the grand jury room. No written charge need be presented to the grand jury.

An indictment need not be quashed because the grand jury considered testimony of admissions by the prisoner which were obtained under circumstances which made them incompetent.[45] This is especially so where the evidence is in its nature competent, but is made incompetent by the circumstances. Mr. Justice Holmes has said: "The abuses of criminal practice would be enhanced if indictments could be upset on such a ground."[46]

Grand jury testimony is ordinarily confidential, but after the grand jury's functions are ended, disclosure is proper where the ends of justice require it.[47] Hence a transcript of the grand jury testimony may be used to refresh the recollection of a witness in the sound discretion of the trial judge.

In an early case, Mr. Chief Justice Marshall stated that a person might be committed for a crime by one magistrate upon an affidavit made before another magistrate. He stated that "before the accused is put upon his trial, all the proceedings are *ex parte*."[48] He further stated:

> "Although, in making a commitment, the magistrate does not decide on the guilt of the prisoner, yet he does decide on the probable cause, and a levy and painful imprisonment may be the consequence of his decision. This probable cause, therefore, ought to be proved

43. Hale v. Henkel, 201 U. S. 43 (1906).
44. *Ibid.*
45. Holt v. United States, 218 U. S. 245 (1910). The court cited United States v. Rosenberg, 7 Wall. 580 (U. S. 1869).
46. *Ibid.*
47. United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940).
48. *Ex parte* Bollman, 4 Cranch 75 (U. S. 1807).

by testimony in itself, legal, and which, though from the nature of the case it must be *ex parte*, ought in most other respects, to be such as a court and jury might hear."[49]

A warrant of arrest, issued by a United States commissioner having no seal of office, and not required by an act of Congress or state statute to be under seal, is not void for the omission.[50] There was no settled rule at common law invalidating warrants not under seal, unless the magistrate had a seal, or a seal was required by statute. Such a warrant is therefore admissible in evidence.

Under the Act of May, 1790, copies of the legislative acts of the several states, authenticated by having the seal of the state affixed thereto, are conclusive evidence of such acts in the federal courts.[51] No other finality is required than the annexation of the seal. In the absence of all contrary proof, it must be presumed to have been done by an officer having the custody thereof, and competent authority to do the act.

An instruction on reasonable doubt, that no attempt would be made to define it beyond saying that it was not an unreasonable doubt; that by a reasonable doubt they were not to understand that all doubt was to be excluded; that they were required to decide the questions submitted on the "strong probabilities" of the case, is not an improper instruction on reasonable doubt.[52]

The accused has a right to an instruction on the presumption of innocence when he requests it, even though correct instructions upon the question of reasonable doubt are given.[53]

It is not broadly true that the presumption of innocence is stronger than any other presumption except the presumption of sanity and of knowledge of the law.[54] If it were true, it would be impossible to convict in cases of circumstantial evidence since the gist of such evidence is that certain facts may be inferred or presumed from proof of other facts.

The Supreme Court upheld instructions as to the presumption of in-

49. *Ibid.*
50. Starr v. United States, 153 U. S. 614 (1894).
51. United States v. Amedy, 11 Wheat. 392 (U. S. 1826).
52. Dunbar v. United States, 156 U. S. 185 (1895). The court cited Hopt v. Utah, 120 U. S. 430, 439 (1887); Miles v. United States, 103 U. S. 304, 312 (1881).
53. Cochran v. United States, 157 U. S. 286 (1895). The court cited Coffin v. United States, 156 U. S. 432 (1895).
54. Dunlop v. United States, 165 U. S. 486 (1897). See comment (1925) 23 MICH. L. REV. 636; Sam Bass Warner, *Review of Decisions* (1924) 4 ORE. L. REV. 124, 126-135.

nocence and the definition of reasonable doubt in *Wilson v. United States.*[55] In this case, defendants' counsel proferred no request for instructions upon either subject prior to the delivery of the charge.

An act of Congress that makes proof of the possession of opium sufficient evidence to authorize the conviction of a person charged with knowingly concealing opium imported in violation of law, "unless the defendant shall explain the possession to the satisfaction of the jury," and which places on the defendant the burden of rebutting the presumption that the opium was imported subsequent to the date when the prohibition of its importation took effect, does not violate the Fifth Amendment.[56] A rational connection exists between the fact proved and the ultimate fact presumed.

The presumption of innocence with which an accused enters upon his trial may be overcome, not only by direct proof, but in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption.[57] This is already true as to many presumptions not resting on statute.

The right to a fair trial that due process gives includes immunity from conviction not based on evidence presented at his trial.[58] The defendant is presumed to be innocent, and the prosecution must prove his guilt. Congress may not declare an individual guilty or presumptively guilty of a crime, and substitute legislative fiat for fact in the determination of the guilt of the defendant. But to some extent Congress may create presumptions which regulate the burden of proof or operate as evidence. In its usual form, a statute of this kind provides that proof of one fact or group of facts shall constitute *prima facie* evidence of some other fact or facts. Where this presumption permits the triers of fact to treat the legislatively defined facts as evidence, due process requires that a rational connection exist between the fact proved and the ultimate fact presumed.[59] Some presumptions are not evidence in a proper sense but simply regulations of the burden of proof. Here, too, a rational connection is probably required. A statute placing on

55. Wilson v. United States, 232 U. S. 563 (1914). The court cited eight earlier Supreme Court decisions.

56. Yee Hem v. United States, 268 U. S. 178 (1925); ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 798.

57. The court cited Wilson v. United States, 162 U. S. 613, 619 (1896); Dunlop v. United States, 165 U. S. 486, 502, 503 (1897).

58. ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 798.

59. Casey v. United States, 276 U. S. 413 (1928). McReynolds, Brandeis, Butler and Sanford, JJ., dissented; noted (1928) 13 CORN. L. Q. 627; (1929) 2 So. CALIF. L. REV. 283 and 305.

a defendant the burden of proving facts particularly within his knowledge and hidden from discovery by the prosecution, is valid on that basis.

Proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. Such presumption exists even where the receipt of the letter subjects the person sending it to a penalty.[60]

Mr. Justice Story stated back in 1827 that the burden of proof rests on the prosecution "in all cases where a party stands charged with an offence, unless a different provision is made by some statute; for the general rule of our jurisprudence is, that the party accused need not establish his innocence; but it is for the government itself to prove his guilt, before it is entitled to a verdict or conviction."[61]

Where there is a reasonable doubt upon the issue of the defense of sanity it is to be resolved in favor of the accused.[62] The burden is on the prosecution to the end of the trial to prove all elements of the crime including sanity. The presumption of sanity merely authorizes the jury to assume at the outset that the accused is sane. But the presumption is rebuttable where the accused produces some contrary evidence.

Mr. Justice Holmes ruled in the 1908 case that it is correct to instruct the jury that the burden of proof as to sanity is upon the prosecution which must prove that fact beyond a reasonable doubt.[63] Until the defendant gives contrary evidence, the burden of proof is satisfied by a presumption arising from the fact that most men are sane.

The prosecution need not adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control. Thus affirmative proof of failure to register a still for the manufacture of alcoholic spirits or to give the bond required of distillers is not necessary to a conviction of thereby violating the internal revenue law.[64]

60. Hagner v. United States, 285 U. S. 427 (1932).
61. United States v. Gooding, 12 Wheat. 460, 471 (U. S. 1829). However, when the government has made out a *prima facie* case, the burden of proving evidence, as distinguished from the burden of proof devolves on the defendant. Agnew v. United States, 165 U. S. 36, 50 (1897).
62. Davis v. United States, 160 U. S. 469 (1895).
63. Battle v. United States, 209 U. S. 36 (1908).
64. Rossi v. United States, 289 U. S. 89 (1933). The court cited Wilson v. United States, 162 U. S. 613, 619 (1896); Dunlop v. United States, 165 U. S. 486, 502, 503 (1897).

Proof of the custody or control of a still is enough to give rise to an inference of lack of registration and failure to give bond which the defendant must overcome by proof.

Where the wife of the defendant testifies as a witness for the prosecution, but before such testimony, defendant's counsel requested the court to advise the witnesses that as defendant's wife she need not testify unless she so desired, which request was complied with, and no other objection was taken, and several other witnesses were then examined, the court need not grant the accused's motion to strike out the evidence of the wife as incompetent.[65] At common law an objection to the competency of a witness on the ground of interest was required to be made *before* his examination in chief.

In a perjury case it is not necessary for the prosecution to produce one or more living witnesses. Written testimony may be sufficient to establish the charge that the defendant made a false and corrupt oath.[66] The court did not conceive that it was changing any common law rule. Mr. Justice Thompson in dissenting stated:

> "If it falls within the proper province of the court entirely to dispense with the rule, and put the evidence in perjury upon the same footing as other criminal offenses, I should not be disposed to dissent from it; if, as a new rule, it was made to operate prospectively."[67]

The granting of a full and unconditional pardon by the President to a felon, even after service of sentence, restores his competency as a witness, even though the pardon recites that it was granted for the reason, among others, that the government wished his testimony in a pending case.[68]

A previous conviction of perjury does not disqualify the person convicted from testifying on behalf of the government.[69]

The decision of whether a very young boy, about five and one-half years old, has enough intelligence to be competent as a witness must rest primarily with the trial judge, and his decision will not be disturbed on review unless clearly erroneous.[70]

Where no doubt has been suggested as to the credibility of witnesses and

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65. Benson v. United States, 146 U. S. 325 (1892).
66. United States v. Wood, 14 Pet. 430 (U. S. 1840), Thompson, J., dissenting.
67. United States v. Wood, 14 Pet. 430, 444, 445 (U. S. 1840).
68. Boyd v. United States, 142 U. S. 450 (1892). The court cited United States v. Wilson, 7 Pet. 150 (U. S. 1833); *Ex parte* Wells, 18 How. 307, 315 (U. S. 1856); *Ex parte* Garland, 4 Wall. 333, 380 (U. S. 1867).
69. Rosen v. United States, 245 U. S. 467 (1918).
70. Wheeler v. United States, 159 U. S. 523 (1895).

the judge peremptorily withdraws this matter from the consideration of the jury, the defendant is entitled to a new trial.[71] It is doubtful whether evidence of an arrest only, not followed by a conviction, is competent to affect the credibility of a witness.

Where the trial court makes an order to a witness to withdraw while other witnesses are testifying, and such witness disregards the order, the trial court in its discretion need not exclude such witness, particularly where the objection is not made until after the witness has testified, other testimony has been given, and he is recalled in relation to another matter.[72] Contempt proceedings would lie against such witness. There could be comment to the jury because of his conduct. But he is not disqualified.

Evidence of the reputation of a man for truth and veracity in the neighborhood of his home is equally competent to affect his credibility as a witness, whether it is founded upon dispassionate judgment, or upon warm admiration for constant truthfulness, or natural indisposition at habitual falsehood.[73]

By the act of March 16, 1878, Congress made the defendant in any criminal case a competent witness at his own request.[74]

Where the defendant testifies as a witness in his own behalf, the court may make reference to the matter of credibility in its instructions to the jury and may remind it that interest in the result is a circumstance to be weighed in its determination.[75] It may not charge the jury directly or indirectly that it is not to be believed because it is the defendant.

Error in cross-examining the defendant as to prior misconduct having no tendency to connect him with the crime charged is not available on writ of error, where the witness denied such misconduct, and no attempt was made to contradict his denial. The Court stated it would not follow some contrary state decisions.[76]

An accused having admitted on cross-examination that she is addicted to the use of morphine, and stated that she last used it before coming into

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71. Smith v. United States, 161 U. S. 85 (1896). The court cited Allison v. United States, 160 U. S. 203 (1895); Starr v. United States, 153 U. S. 614; (1894); Hicks v. United States, 150 U. S. 442 (1893).
72. Holder v. United States, 150 U. S. 91 (1893).
73. Brown v. United States, 164 U. S. 221 (1896), three judges dissenting.
74. 20 STAT. 30 (1878), 28 U. S. C. § 632 (1934). Benson v. United States 146 U. S. 325 (1892).
75. Reagan v. United States, 157 U. S. 301 (1895). The court cited Hicks v. United States, 150 U. S. 442 (1893).
76. Sawyer v. United States, 202 U. S. 150 (1906).

the court room, may be further asked how often she uses it, and whether she has with her the implements to take the dose, although she has not put her character in issue, since such evidence has a material bearing on her reliability as a witness.[77]

A defendant has a right to cross-examination of a witness. It is reversible error not to allow defendant's attorney to ask the witness where he lives, even though such witness is in court in the custody of the federal authorities.[78] Among the permissible purposes of cross-examination are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood; that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. The rule that the examiner must indicate the purpose of his inquiry does not in general apply to cross-examination. Denial of reasonable latitude in cross-examination is prejudicial error. The extent of cross-examination as to an appropriate subject of inquiry is within the sound discretion of the trial court, which may exercise a reasonable judgment in determining when the subject is exhausted. The court need not protect the witness from being discredited, short of an attempted invasion of his protection from self-incrimination. The witness should be protected from questions aimed merely to harass, annoy, or humiliate him.

The extent of cross-examination rests in the sound discretion of the judge.[79] The testimony of private detectives, especially when uncorroborated, is open to the suspicion of bias; their cross-examination should not be curtailed unnecessarily, particularly when it has a direct bearing on the substantial issues of the case. In a prosecution based upon the sale, on each of three occasions, of unused portions of a round-trip railroad ticket, of which the testimony of private detectives who made the alleged purchases was the sole evidence and the defense was a suggested mistaken identity and alibi, it is prejudicial error to exclude on cross-examination questions aimed at showing mistaken identity and at testing credibility, relating to such ques-

77. Wilson v. United States, 232 U. S. 563 (1914). The court cited People v. Webster, 139 N. Y. 73, 87, 34 N. E. 730 (1893); State v. White, 10 Wash. 611, 613, 39 Pac. 160, 41 Pac. 442 (1895).

78. Alford v. United States, 282 U. S. 687 (1931).

79. District of Columbia v. Clawans, 300 U. S. 617 (1937); Glasser v. United States, 62 S. Ct. 457, 470 (1942).

tions as the acquaintance of the witness with defendant, and corroboratory details.

The rule allowing a witness to refresh his recollection by writings or memoranda is limited to matter reduced to writing contemporaneously with the transaction to which it relates. Hence, statements taken down as testimony before the grand jury, over four months after the occurrence to which they relate could not be used for that purpose.[80]

The use of a transcript of grand jury testimony to refresh the recollection of a witness rests in the sound discretion of the trial judge.[81] Material used to refresh the recollection of a witness must be shown to opposing counsel upon demand, if the material is handed to the witness. But where it is not shown to the witnesses, and appropriate procedure is adopted by the court to prevent its improper use, it is in the discretion of the trial court to refuse to permit counsel to inspect such material. But it would be reversible error deliberately to use material, in refreshing the recollection of witnesses for purposes not relevant to the issues, but only to arouse the passions of the jury. It would also be reversible error to introduce material as evidence under the pretext of using it merely to refresh the recollection of a witness. The error is not prejudicial where the testimony is merely cumulative, and the record is sufficient without such testimony to establish the crime. Hostility of the witnesses tends to favor the use of the refreshing testimony.

Hearsay evidence is incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who speak from their own knowledge.[82]

Where on a trial for murder, the attorney for the accused, such attorney having previously been a state attorney general who had made a report to the state governor containing statements purporting to have been made by defendants and connecting them with the crime, was put on the stand by the prosecution in rebuttal, and parts of this report were read to the jury, though the witness stated that the report was based on hearsay evidence, and the court instructed the jury that if they believed that the statements had been made to the attorney general they should consider them as evidence, this was ground for new trial, as submitting to the jury hearsay evidence.[83]

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80. Putnam v. United States, 162 U. S. 687 (1896), three judges dissenting (Fuller, C. J., Brewer and Brown, JJ.).
81. United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940).
82. Hopt v. Territory of Utah, 110 U. S. 574 (1884). The court quoted the view of Marshall, C. J. in Mima Queen v. Hepburn, 7 Cranch 295 (U. S. 1813).
83. Cook v. United States, 138 U. S. 157 (1891).

Where a defendant, who was the partner of deceased, about a week after the latter's disappearance, consulted an attorney, stating that deceased was missing, and that he had taken partnership funds with him, and inquired whether defendant could hold the partnership property as security for his share of the money, such consultation is privileged, and on defendant's trial for murder, it is error to permit the attorney to testify to defendant's statements on the theory that they showed a scheme to defraud the relatives of deceased, as such scheme was not at all manifest except on the assumption that the defendant committed the murder.[84] There would be a different rule if the defendant were being tried for the crime in furtherance of which the communication was made.

The refusal to exclude the jurors during counsel's argument over the admissibility of admissions alleged to have been made by the accused is not necessarily an abuse of the trial court's discretion.[85] Technically the offer of the evidence had to be made in the presence of the jury before any question of excluding them could arise. However, the more conservative course is to exclude the jury during the consideration of the admissibility of confessions.

Admissions by a defendant tending to establish guilt do not require corroboration where made prior to the commission of the alleged offence.[86]

In a case coming up from the Territory of Utah, the Court held that a confession voluntarily made is admissible, but it should not be given weight when it appears to have been made in consequence of inducements of a temporal nature held out by one in authority touching the charge preferred, or because of a threat or promise made by, or in the presence of such person, in reference to the charge. A confession made to an officer will not be excluded merely because it appears that the accused was previously in the custody of another officer.[87]

Where an accused makes self-incriminating statements in his preliminary examination, not under oath, but in answer to questions by the examining officers, they are not rendered inadmissible by the fact that the

84. Alexander v. United States, 138 U. S. 353 (1891).
85. Holt v. United States, 218 U. S. 245 (1910).
86. Warszower v. United States, 312 U. S. 342 (1941). The court cited, among others, WIGMORE, EVIDENCE (3rd ed.) §§ 2070, 2071. It also states in note 8: "*Cf.* Miles v. United States, 103 U. S. 304."
87. Hopt v. Territory of Utah, 110 U. S. 574 (1884). For a recent state court case where the confession was found not to be coerced see Lisenba v. People of State of California, 62 Sup. Ct. 280 (1941), Black and Douglas, JJ., dissenting.

accused did not have the benefit of counsel, and was not warned of his right to have counsel.[88] These facts simply go to the weight or credibility of the confession.

The extra-judicial confession of a third person, since deceased, that he had committed the murder with which the accused is charged, is not admissible in evidence in behalf of the accused.[89] It i sexcluded as hearsay. Mr. Justice Holmes for the dissenting judges pointed out that the hearsay rule is subject to the exceptions of declarations against interest, that a confession of murder is a strong case of a declaration against interest, and that such evidence is more convincing than a dying declaration let in to hang a defendant.[90] Moreover, he pointed out that the contrary English cases should not bind the United States.

A plea of guilty withdrawn by leave of court is not admissible on the trial of the issue arising on the substituted plea of not guilty.[91]

On a trial for murder, when there is admitted without objection as a dying declaration, a statement by deceased that he did not know who shot him, it is error to exclude evidence of a further statement, made immediately afterwards, that he saw those who shot him, and that accused was not among them.[92]

The ratification or repetition by deceased of his previous dying declaration is not admissible unless it is also shown to have been made in expectation of death.[93] Such evidence is not admissible as in rebuttal where defendant had not tried to prove any retraction of the original dying declaration.

Dying declarations are admissible in a proper case subject to such restrictions as govern their admissibility in general.[94] They are an exception to the rule that only sworn testimony will be received, the fear of impending death being assumed to be as powerful an incentive to truth as the obligation of an oath. The prosecution may show that a Catholic priest had been summoned and prepared the last rites for the declarant. Contradictory statements by the deceased at the time of making a dying declaration are admis-

88. Wilson v. United States, 162 U. S. 613 (1896).
89. Donnelly v. United States, 228 U. S. 243 (1913). Holmes, Lurton, and Hughes, JJ., dissenting.
90. He cited 2 WIGMORE, EVIDENCE (1904), §§ 1476, 1477.
91. Kercheval v. United States, 274 U. S. 64 (1927). Stone, J., concurred in the result. See notes (1931) 79 U. OF PA. L. REV. 484; (1941) 27 VA. L. REV. 703.
92. Mattox v. United States, 146 U. S. 140 (1892).
93. Carver v. United States, 160 U. S. 553 (1896).
94. Carver v. United States, 164 U. S. 694 (1897).

sible as testimony to impeach the declaration, whether competent as dying declarations or not.

To make out a dying declaration the declarant must have spoken without hope of recovery, and in the shadow of impending death.[95] Mere fear or belief are not enough; there must be a settled hopeless expectation that death is near. The declaration should not be admitted as a dying declaration if the occasion satisfies or should satisfy the judge that the speech was giving expression to suspicion or conjecture and not to known facts. The declaration is not admissible to negative the bent of deceased's mind to suicide where the real purpose is to offer as a dying declaration.

The extent to which a declaration by one conspirator is admissible against all is largely in the discretion of the court. Where it has been shown that defendants and others were in combination to carry on an expedition in violation of the neutrality law, declarations of those engaged in it explanatory of acts done in furtherance of the common project are admissible against all.[96]

Evidence of the good character of the defendant may be considered in connection with other evidence, to create a reasonable doubt of his guilt. It is not correct to charge that it can be considered only when the other evidence raises such a doubt.[97] The court stated that whatever the earlier view, the decided weight of authority today is in accord with that view.

Where defendants made no objection to the time or manner of a notice to produce certain letters or letter books, but declared that he never had any such letters, it is proper to allow a witness to give the contents thereof.[98]

Permitting the prosecuting attorney, on the ground of surprise at answers

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95. Shepard v. United States, 290 U. S. 96 (1933), noted (1934) 34 COL. L. REV. 175; (1934) 9 IND. L. J. 470; (1934) 25 J. CRIM. L. 119; (1934) 22 GEO. L. J. 622; (1934) U. OF PA. L. REV. 290; (1934) 9 WIS. L. REV. 196; (1934) 1 U. OF CHI. L. REV. 651; (1934) 9 NOTRE DAME LAWY. 256; (1934) 8 ST. JOHN'S L. REV. 360; the court cited Mattox v. United States, 146 U. S. 140 (1892); Carver v. United States, 160 U. S. 553 (1897); 3 WIGMORE, EVIDENCE (1904) §§ 1440-1442.

96. Wiborg v. United States, 163 U. S. 362 (1896). But declarations of one conspirator in furtherance of the object of the conspiracy made to a third party are admissible over the objections of an alleged co-conspirator who was not present when they were made only if there is proof from another source that he is connected with the conspiracy. Glasser v. United States, 62 S. Ct. 457, 467 (1942).

97. Edgington v. United States, 164 U. S. 361 (1896); BREWSTER, FEDERAL PROCEDURE (1940) 623.

There is no prescription of the good character of the defendant. Greer v. United States, 245 U. S. 559 (1918) (opinion by Holmes, J.).

98. Dunbar v. United States, 156 U. S. 185 (1895).

of a witness produced by him, to put leading questions, is within the sound discretion of the trial judge.[99]

A *subpoena duces tecum* is not invalid because it contains no *ad testificandum* clause, but simply directs a corporation, which could not give oral testimony, to produce books.[100] This clause is not essential to its validity, although it usually is present. The requirement to produce is separable from the requirement to testify. Where the documents of a corporation are sought, though the practice has been to subpoena the officer who has them in his custody there is no good reason why the subpoena should not be directed to the corporation itself.

A variance between the allegation in an indictment under the White Slave Act for obtaining the interstate transportation of women for immoral purposes, that such women were transported over a certain railway, and the proof which failed to show that such railway extended from the beginning to the end of the transportation, but did show that the tickets were purchased over another railway, is not fatal, or scarcely even error at all, where the indictment alleged that the former railway was a part of the latter railway and there was through transportation.[101] Such a variance is not much more than verbal, and does not even embarrass the defense.

An indictment charging a combining or conspiring to prevent manufacturing plants located in states other than there where accused's are located, from selling or delivering their building materials in and shipping the same to the place of location of accused, is sustained by evidence of a combination between manufacturers, contractors, and union employees by which the employees refuse to handle millwork produced by such foreign mills with non-union labor, the result of which is to increase the profit of all the conspirators, greatly reduce the business of the foreign mill and increase the cost of building.[102]

In general, the allegations of an indictment and the proof must correspond.[103] The reasons for this are the requirements that the accused shall be definitely informed as to the charges against him and that he should not be subjected to another prosecution for the same offence. Variance between pleading and proof is not material where the allegations and proof

99. St. Clair v. United States, 154 U. S. 134 (1894).
100. Wilson v. United States, 221 U. S. 361 (1911).
101. Hoke v. United States, 227 U. S. 308 (1913).
102. United States v. Brims, 272 U. S. 549 (1926).
103. Berger v. United States, 295 U. S. 78 (1935), noted (1935) 48 HARV. L. REV. 515.

substantially correspond, or where the variance is not of a character which could have misled the defendant at the trial, provided it is not such as to deprive the accused of his right to be protected against another prosecution for the same offense. Variance between an indictment charging a conspiracy involving several persons and proof establishing the conspiracy against some of them only is not material. Variance between an indictment charging a single conspiracy and proof of several conspiracies is material only where it has substantially injured the defendant. Variance between an indictment charging defendant with having conspired with certain others knowingly to alter counterfeit bank notes purporting to be issued by certain banks, and proof that defendant conspired with one of the persons named to pass such notes for a certain purpose, and that such one had conspired with the others to pass such notes for another purpose, is not ground for reversing a conviction.

A variance between the reasons charged in an indictment to have been employed by members of an alleged conspiracy in restraint of trade in violation of the Federal Anti-Trust Act and the means shown by the proof to have been utilized is not fatal.[104] Where an indictment charges various means by which a conspiracy is effectuated, not all of them need be proved.

Public policy forbids disclosure of an informer's identity unless essential to the defense set up by the accused, as, for example, where this turns upon an officer's good faith.[105]

The refusal to appoint an interpreter when the accused is testifying is not prejudicial error when it does not appear from the answers made by the witness that there was any abuse of the discretionary power lodged in the trial court.[106]

The opinion of a physician, after making a *post mortem* examination of the deceased, who died of a blow upon the head, as to the direction from which the blow was delivered, is admissible in evidence.[107] It is a matter for an expert, and did not have to be left to the jury.

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104. United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940). In United States v. Ragen, 62 Sup. Ct. 374, 379 (1942) it was held in a prosecution for attempting and conspiring to evade income tax of corporation, based on claim of declarations for purported commissions paid which actually constituted dividends, a variance between the indictment alleging that payments were actually dividends in their entirety, and proof indicating that some services were performed, involved no elements of prejudicial surprise.

105. Scher v. United States, 305 U. S. 251 (1938), noted (1939) 27 GEO. L. J. 330; (1939) 17 TEX. L. REV. 522.

106. Perovich v. United States, 205 U. S. 86 (1907). (Territory of Alaska).

107. Hopt v. Utah, 120 U. S. 430 (1887).

Ordinary rules control as to the admissibility of expert, and opinion, evidence in federal criminal cases.[108] The experts may state their opinions, or conclusions, as to a matter where the exact circumstances cannot be reproduced, or described to the jury, or where the data to establish given conditions cannot be shown.[109]

A non-expert witness cannot give his opinion formed since the commission of a crime, as to the accused's mental condition at the time of the crime, where his only knowledge was derived from his familiarity with the accused as a patron of the latter's barber shop.[110] However, this could be done where the opinion clearly appears to sum up a series of impressions received at various times. The latter should be done with caution.

On an issue as to self-defense in a murder case, evidence that the deceased was a larger and more powerful man than defendant, and that he had the general reputation of being a quarrelsome and dangerous person is competent, especially if his character in this respect were known to the accused.[111]

In a case coming up from the Territory of Utah it was held that in a trial for homicide, where the question whether the prisoner or the deceased began the encounter resulting in the death is in doubt, it is competent to prove threats of violence against the prisoner made by the deceased though not brought to the knowledge of the prisoner.[112]

In a case coming up from Alaska the court held, as to a defendant charged with murder, that testimony that more than a month before the homicide the accused threatened violence to another member of the same party and that there was similar conduct six months after the homicide, is inadmissible because the time is too remote, and because the facts do not show enmity to the person whom he killed.[113]

It is improper to admit evidence of other crimes committed prior to the crime being tried where there is no necessary connection and such evidence does not elucidate the issue before the jury.[114]

Where a defendant is charged with having issued a commission in the

108. BREWSTER, FEDERAL PROCEDURE (1940) 620.
109. United States v. Trenton Potteries Co., 273 U. S. 392 (1927).
110. Queenan v. Territory of Oklahoma, 190 U. S. 548 (1903).
111. Smith v. United States, 161 U. S. 85 (1896). The court cited Allison v. United States, 160 U. S. 203, 215 (1895); Wiggins v. Utah, 93 U. S. 465 (1876).
112. Wiggins v. People of Territory of Utah, 93 U. S. 465 (1876), Afford, J., dissenting.
113. Bird v. United States, 180 U. S. 356 (1901).
114. Boyd v. United States, 142 U. S. 450 (1892).

United States for a vessel to commit hostilities against a friendly nation, and the non-production of the instrument is satisfactorily accounted for, secondary evidence of its existence and contents may be shown. Mr. Justice Thompsen stated: "This is a general rule of evidence applicable to criminal as well as civil suits."[115] The rule as to the admission of secondary evidence does not require the strongest possible evidence, but only that no evidence should be given, which, from the nature of the transaction, presupposes there is better evidence of the fact attainable by the party.

Testimony of an accomplice is admissible in the federal courts even though it is not corroborated. A conviction may be sustained on the uncorroborated testimony of an accomplice, and a state statute to the opposite effect is not controlling.[116]

Objection to the admissibility of evidence must be specific and not merely general except that where the evidence is inadmissible and could not under any state of facts be rendered admissible, a general objection is sufficient to present the question on appeal.[117] While normally exceptions are necessary, it has been held that an exception need not be taken to the overruling of an objection to the introduction of evidence.[118] A failure to object or except does not necessarily preclude review.[119]

CONDUCT OF TRIAL: THE JUDGE AND THE PROSECUTING ATTORNEY

The Sixth Amendment confers upon an accused the right to both a speedy and a public trial "in all criminal prosecutions." The right to a public trial has received very little judicial construction. According to Professor Rottschaefer, it clearly prevents a trial held in complete secrecy, but the better doctrine is that it does not require the unrestricted admittance to the trial of any members of the public wishing to attend it to the full capacity of the court room.[120] In a state court case, Chief Justice Taft said that it was unnecessary to decide which of two views adopted in lower federal court decisions was correct.[121] The preservation of order in the court room,

115. United States v. Reyburn, 6 Pet. 352, 365 (U. S. 1832).
116. Caminetti v. United States, 242 U. S. 470 (1917). See note (1932) 30 MICH. L. REV. 1291.
117. Sparf v. United States, 156 U. S. 51 (1895).
118. Lucas v. United States, 217 U. S. 612 (1896).
119. Weems v. United States, 217 U. S. 349 (1910).
120. ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 793-794. See also BREWSTER, FEDERAL PROCEDURE (1940) 587; LONGSDORF AND NICHOLS, 5 CYCLOPEDIA OF FEDERAL PROCEDURE (1929) § 2289; 9 HUGHES, FEDERAL PRACTICE (1931) § 7067.
121. Gaines v. Washington, 277 U. S. 81, 85 (1928). Representing Professor Rottschaefer's view is Reagan v. United States, 202 Fed. 488 (C. C. A. 9th, 1913);

or the protection of the public morals, may make proper the exclusion of some part or all of the general public, but even that power may not be exercised if the defendant is thereby deprived of the presence, aid or counsel of any person whose presence might have been of advantage to him, or if he is in any other way prejudiced thereby.[122] But the decisions even in the lower federal courts are few, and they rely largely on state decisions. An accused may waive his right to a public trial. Possibly on the analogy of a state court case a mere oral order not entered nor executed excluding the general public from the court room is not unconstitutional nor prejudicial.[123]

The right to a speedy trial guaranteed by the Sixth Amendment is relative. Though it secures rights to a defendant, it does not preclude the rights of public justice, and hence is not violated by proceedings to remove a person under indictment in a given district to another district to answer an indictment there found against him.[124] It thus affords no immunity from arrest on another charge, and no right to any particular order of trials for separate offences.[125]

What law governs trial practice in the federal courts? In the leading case of *Frank v. Mangum,* a state court case, the court referred to an earlier federal court case, in which the trial practice was "regulated by the common law."[126]

The acts of a district judge acting *de facto* if not *de jure* cannot be collaterally attacked. This rule was applied to a case where another district judge acted first during the sickness and then after the death of the regular district judge.[127]

A person who has been convicted and sentenced by a *de facto* district judge, acting under color of office, and who is detained in custody under such sentence, cannot be discharged on *habeas corpus,* though the judge has

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contra: Davis v. United States, 247 Fed. 394 (C. C. A. 8th, 1917). In the former case it was held proper to exclude mere spectators from the court room. In the latter case it was held prejudicial error to exclude all persons except members of the bar, newspaper men, and relatives of the accused.

122. ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 793-794, citing Reagan v. United States, 202 Fed. 488 (C. C. A. 9th, 1913).

123. Gaines v. State of Washington, 277-U. S. 81 (1928).

124. Beavers v. Haubert, 198 U. S. 77 (1905) (opinion by McKenna, J.).

125. ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 793.

126. Frank v. Mangum, 237 U. S. 309 (1914). The earlier case was Lewis v. United States, 146 U. S. 370 (1892).

127. Ball v. United States, 140 U. S. 118 (1891). As to the conduct of the trial judge see 5 LONGSDORF AND NICHOLS, CYCLOPEDIA OF FEDERAL PROCEDURE (1929) § 2300; 9 HUGHES, FEDERAL PRACTICE (1931) §§ 7068, 7074-7075, 7082; BREWSTER, FEDERAL PROCEDURE (1940) § 1149.

no valid title to the office.[128] It is enough that the judge has jurisdiction of the offense and of the accused and that the proceedings are otherwise regular.

Congress may validly prescribe that one district judge may temporarily discharge the duties of that office in another district.[129] No constitutional provision restricts the authority of a district judge to any particular territorial limits. Congress has passed a number of statutes dealing with the subject. The district judge acting in another district may continue the term from day to day, like the regular judge.

The assignment of a judge of one federal district and circuit to duty in another district and circuit under statute[130] does not violate the right under the Sixth Amendment to trial in the district of the crime.[131] Such assignment does not destroy the old district of the place of the crime nor create a new one with undefined boundaries. Nor does it usurp the power of appointment and confirmation vested in the President and Senate.

Congress by an act of February 7, 1873, provided for the setting up of regular terms of the circuit court of the southern district of New York, exclusively for the trial and disposal of criminal business, and allowing $300 for the holding of each such term.[132]

Habeas corpus will not issue in favor of a person in custody under conviction of a federal court to review its holding that the affidavit of prejudice authorized by the Judicial Code of March 3, 1911,[133] could not be filed after the case had been tried and verdict rendered.[134]

Section 21 of the Judicial Code provides for designation of another judge where bias is shown.[135] The courts have been strict in insisting on the formal requirements of the affidavit, of its being filed within the specified time, and its being accompanied by a certificate of good faith, as well as on its sufficiency. The bias charged must be personal. But when the affidavit is formally adequate and sufficient in substance, the trial judge cannot pass

128. *Ex parte* Ward, 173 U. S. 452 (1899).
129. McDowell v. United States, 159 U. S. 596 (1895).
130. 38 STAT. 203 (1913), 28 U. S. C. § 22 (1934).
131. Lamar v. United States, 241 U. S. 103 (1916).
132. Benedict v. United States, 176 U. S. 357 (1900).
133. 36 STAT. 1087 (1911), 28 U. S. C. § 1 (1934).
134. Glasgow v. Moyer, 225 U. S. 420 (1912).
135. 36 STAT 1090 (1911), 28 U. S. C. § 25 (1934). See also 28 U. S. C. § 24 (1934) on interest or relationship of district judge.

as to the truth or falsity of the facts alleged. His retirement then becomes mandatory.[136]

Where, in a misdemeanor case, the verdict is received and sentence pronounced by another judge who had not presided at the trial, *habeas corpus* does not lie.[137] Article 3, Section 2, Clause 3 of the Constitution to the effect that the trial of all crimes shall be by jury does not require the continuous presence of the same judge throughout the trial until the final judgment. If there be any error, and the Court did not concede this, it does not make the judgment void, and it would be corrected by writ of error.

The absence of the judge from the federal district during a part of the deliberations of the grand jury does not invalidate the indictment.[138] Such an error is of a technical kind, and violates no constitutional guaranties.

In a case coming up from the Territory of Utah it was held that an allusion in the final argument by the prosecuting attorney, to the case as having been many times before the tribunals is not a ground for reversing a judgment even though a territorial statute provides that on a new trial the "former verdict cannot be used or referred to either in evidence or argument."[139] The prosecuting attorney withdrew his statement and the court directed the jury to ignore it.

On appeal there is likely to be no reversal for improper argument or conduct of the prosecution where no objection is made at the time of the argument, nor was the court requested to interrupt it or caution the jury against its force, and no exception was taken.[140] In the excitement of an

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136. Berger v. United States, 255 U. S. 22 (1921), Day, Pitney, and McReynolds, JJ., dissenting. This was an espionage case involving several defendants of German extraction. The judge had made hostile statements about persons of German extraction.

137. United States v. Valante, 264 U. S. 563 (1924). See comments (1941) 40 MICH. L. REV. 113; (1905) 5 COL. L. REV. 476; (1912) 12 COL. L. REV. 163; (1915) 29 HARV. L. REV. 83.

Trial by jury involves the basic element of trial in the presence of and under the superintendence of a judge having power to instruct the juries as to the law and advise them in respect to the facts. Patton v. United States, 281 U. S. 276 (1930) (opinion by Sutherland, J.).

In a state court the right to an impartial judge under the 14th Amendment due process provision was asserted. Tumey v. Ohio, 273 U. S. 510, 522, 523, 535 (1927).

138. Badders v. United States, 240 U. S. 391 (1916). The court cited Jones v. United States, 162 Fed. 417, 321 (1908), same case, 212 U. S. 576 (1908); Breese v. United States, 226 U. S. 1 (1912).

139. Hopt v. Utah, 120 U. S. 430 (1887). As to the conduct of the prosecuting attorney see 5 LONGSDORF AND NICHOLS, CYCLOPEDIA OF FEDERAL PROCEDURE (1929) § 2304.

140. Crumpton v. United States, 138 U. S. 361 (1891).

argument, counsel sometimes will make statements not fully justified by the evidence. This is not necessarily ground for new trial.

Where in a trial for murder in Arkansas, it appeared that the defendant had previously killed a negro in Mississippi and had been acquitted there, it was error for the court to allow the prosecutor, without rebuke, despite the protest of the defendant, to say that everyone knows from reading the newspapers that the trial of a white man for killing a negro in Mississippi is a farce, that defendant came from Mississippi stained with the blood of a negro, and that the killing of the negro was murder.[141] The trial judge should have rebuked the prosecutor, and directed the jury to allow the statement no weight. Even if the defendant had been convicted in Mississippi, that was no evidence of a murder in Arkansas.

The prosecuting attorney so acts as to warrant a new trial when in argument to the jury he comments unfavorably on the failure of the defendant in a murder case to have his wife in court, in order to afford witnesses an additional means of identifying him, she having been seen with him at the time and place of the murder, the wife being incompetent as a witness for or against her husband.[142] This is especially true where the defendant objects at the time to such comment. If the wife were a competent witness, the comment would be less objectionable.

Where, on a trial for improper use of the mails, the district attorney, in addressing the jury, said he did not believe there were twelve men to be found in Illinois, unless "they were brought up and perjured in advance, whose verdict I would not be willing to take" on the question of the obscenity of the publication, defendant excepted to their language, the court held it improper, and the attorney immediately withdrew it, the error, if any, was cured.[143]

On the trial of a Chinese inspector for extorting money from Chinese persons for allowing them to land, it was proposed by the defense to show that the defendant was assigned to the investigation of Chinese female cases, and that under him more females were sent back to China than at any other time.[144] The prosecuting attorney objected to this evidence, and remarked in the presence of the jury, that "no doubt every Chinese woman who did not pay the defendant was sent back." The statement was not

141. Hall v. United States, 150 U. S. 76 (1893).
142. Graves v. United States, 150 U. S. 118 (1893), Brewer, J., dissenting.
143. Dunlop v. United States, 165 U. S. 486 (1897).
144. Williams v. United States, 168 U. S. 382 (1897).

withdrawn, and the trial court overruled an objection to it. This was held prejudicial error.

Permitting the district attorney to ask a juror whether he has any conscientious scruples which would preclude him from rendering a verdict of guilty on circumstantial evidence "in a case where the penalty prescribed is death" is not error on the theory that the question should state "where the penalty prescribed may be death," even though the jury has an option as to the penalty.[145] This is particularly true where the defendant is not prevented from asking the question in the proper form. The mind of the juror could be reached as to his attitude toward capital punishment in cases based on circumstantial evidence.

An improper remark by the district attorney in summing up before the jury is not ground for reversal and new trial, where the court, on objection, held such remark to be improper, and the attorney withdrew it, and apologized for it.[146] The prosecuting attorney in the course of a murder trial, in speaking of the fact that during the time the murders were being perpetrated, one of the accused had testified that he drank some coffee, said: "A man, under such circumstances, who would drink coffee, ought to be hung on general principle."

In an opinion by Mr. Justice Holmes it was ruled that the court properly interrupts counsel for defendant to ask him to make an argument that does not tend to degrade the administration of justice, where counsel is appealing to race prejudice, and is asking the jury to believe a white man not on his oath before a negro who is sworn, adding that the jury can "swallow those niggers" if it wishes, but counsel will not.[147]

The conduct of the federal district attorney in a murder trial in characterizing as confessions certain alleged statements of the prisoner which were excluded because they were not freely made, does not require a reversal of the conviction, where the court told the jurors that they were to decide the case on the testimony of the witness and not on what counsel might say.[148] No new trial is to be granted.

The prosecuting attorney is acting improperly when he misstates the facts in his cross-examination of witnesses, in putting into the mouths of witnesses statements they had never made, in suggesting by his questions

145. Hardy v. United States, 186 U. S. 224 (1902).
146. Sawyer v. United States, 202 U. S. 150 (1906). The court cited Dunlop v. United States, 165 U. S. 486-498 (1896).
147. Battle v. United States, 209 U. S. 36 (1908).
148. Holt v. United States, 218 U. S. 245 (1910).

that statements had been made to him personally out of court in respect of which no proof was offered, in pretending that a witness had said something which he had not said and persistently cross-examining the witness on that basis, in assuming prejudicial facts not in evidence, and in bullying and arguing with witnesses.[149] Such error is not cured by sustaining objections to some of his questions, insinuations, and misstatements, and instructing the jury to disregard them, where the situation called for a stern rebuke and repressive measures, and it cannot be said that the evil influence on the jury was removed by the mild judicial action taken. A new trial must be awarded the defendant.

Improper insinuations and assertions calculated to mislead the jury, in the argument of the prosecuting attorney, in a prosecution for conspiracy to alter counterfeit bank notes, are ground for setting aside a conviction, where such misconduct was pronounced and persistent, and the case against the defendant was not strong, depending upon the testimony of an alleged accomplice with a long criminal record.[150] The prosecuting attorney is just as much under a duty to refrain from improper methods calculated to bring about a wrongful conviction as he is to use every legitimate means to bring about a just one.

Appeals by the prosecutor in a prosecution under the Federal Anti-Trust Act to class prejudice, though improper are not prejudicial, where the trial court warns the jury not to consider the facts creating such prejudice, where such appeal is merely incidental in a prolonged trial, and the case against the defendants is not so weak as to be affected thereby.[151] If the defendant wishes to raise the question on appeal, he must raise it below by objecting at the time.

The President has the power to remove a federal district attorney before the expiration of his four-year term.[152] The federal statute[153] providing for a four-year term is one of limitation and not of grant.

The employment of detectives by the defendant in a criminal case to shadow the jurors amounts to a contempt of court even though none of the persons engaged in such shadowing approached or communicated with a

149. Berger v. United States, 295 U. S. 78 (1935), noted (1935) 26 J. CRIM. L. 276; (1936) 34 MICH. L. REV. 1044.
150. Berger v. United States, 295 U. S. 78 (1935).
151. United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940). Two judges dissented.
152. Parsons v. United States, 167 U. S. 324 (1897).
153. REV. STAT. 767, 769 (1875), 28 U. S. C. §§ 481 and 484 (Supp. 1935).

juror, or attempted to do so, and though no juror may have been conscious of being under observation.[154] In a proceeding for contempt thereby, evidence of a practice of the Department of Justice to cause its officers to shadow jurors is rightly excluded as irrelevant, since two wrongs do not make a right.

Where two or more persons are jointly charged in the same indictment with a capital offense, they have no legal right to be tried separately without the consent of the prosecution, but such separate trial is a matter to be allowed in the discretion of the court. The court by Mr. Justice Story pointed out that no act of Congress dealt with the subject, and that therefore if the accused had any right "it must be a right derived from the common law, which the courts of the United States are bound to recognize and enforce."[155] The English practice of severance was based on the wish of the trial court to have a jury large enough to try the case. This early decision indicates that the general common law is looked to rather than the common law of any particular state.

A recent decision again repeated that it is within the discretion of the trial court to order all the defendants to be tried together.[156]

The trial court does not abuse its discretion in refusing to grant a motion for a new trial even in a capital case because the jury, being allowed to separate, read the local daily newspapers with articles about the case, while the trial was in progress.[157] Many states expressly allow the separation of the jury, even in capital cases. The mere fact of separation raises no presumption of prejudice or corruption.

A verdict should not be set aside because no oath was administered to the officer in charge of the jury, though good practice required it, where he as a deputy marshal had taken an oath some months before to perform the duties of his office, the jury were cautioned not to separate, nor allow any other person to talk with them, no evidence of prejudice being shown, and no objection to the lack of the oath being taken during the trial.[158]

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154. Sinclair v. United States, 279 U. S. 749 (1929), noted (1929) 28 MICH. L. REV. 199. The case came up on certificate from the Court of Appeals for the District of Columbia.
155. United States v. Marchant, 12 Wheat. 480 (U. S. 1827). For Story's opinion in the circuit court see 4 Mason 158 (C. C. Mass. 1826).
156. Stilson v. United States, 250 U. S. 583 (1919).
157. Holt v. United States, 218 U. S. 245 (1910).
158. Ball v. United States, 163 U. S. 662 (1896).

The court may not instruct the jury positively to find a defendant guilty.[159]

The accused should move that the jury be instructed to find for the defendant where the evidence is not sufficient to sustain a verdict.[160] However, the Supreme Court may still examine the record to see if there was any proof of a material element of the crime charged.[161]

The trial court properly refuses to instruct the jury to bring in a verdict of not guilty in a homicide case, on the theory that the *corpus delicti* has not been proved, although there were no witnesses to the homicide, and the identification of a partly burned body as that of the victim was not perfect, where, taking all the circumstances together, there is clearly enough evidence to warrant the jury in finding that such body was that of the deceased and that he had been killed by the defendant.[162]

In criminal cases the determination of the law is for the court, and not for the jury.[163]

Whether a particular place is within the boundaries of a state is not a question of law for the court, but a matter of fact for the jury to determine.[164] The description of a boundary may be a matter of construction belonging to the court, but the application of the evidence in the ascertainment of it as thus described with a view to its location is for the jury.

The question of whether or not evidence secured by means of a search warrant is admissible in a criminal prosecution by reason of the legality of its seizure is a question of fact and law for the court, and cannot be submitted to the jury for its determination.[165]

The trial judge is not obliged to adopt the exact language of the instructions requested.[166]

Where on the trial of an indictment for murder of an officer seeking to arrest the accused, involving the issue of self-defense, the judge in charging

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159. Sparf v. United States, 156 U. S. 51 (1895). The court cites United States v. Taylor, 3 McCrary 500 (C. C. Kans. 1882).

160. Clyatt v. United States, 197 U. S. 207 (1905), Harlan, J., dissenting.

161. The court cited Wiborg v. United States, 163 U. S. 632, 658 (1896).

162. Perovich v. United States, 205 U. S. 86 (1907). (Territory of Alaska).

163. Sparf v. United States, 156 U. S. 51 (1895). Gray and Stone, JJ., dissenting. See Howe, *Juries as Judges of Criminal Law* (1939) 52 HARV. L. REV. 582; (1932) 30 MICH. L. REV. 1303.

164. United States v. Jackalow, 1 Black 484, 487 (U. S. 1861).

165. Steele v. United States, 267 U. S. 505 (1925). The court cited Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 103 (1914); WIGMORE, EVIDENCE (2d ed. 1923) § 2550.

166. Sugarman v. United States, 249 U. S. 182 (1919); Holt v. United States, 218 U. S. 245, 253 (1910).

the jury, in strong terms, expressed indignation at the homicide, and urged argumentatively the necessity of vindicating and upholding the law, this was improper interference with the right of the jury to exercise an independent judgment.[167]

Mr. Chief Justice Fuller stated: "Where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so intermingled with inferences springing from forensic ardor that the jury are left without proper instructions, their appropriate province of dealing with the facts invaded, and errors intervene which the pursuit of a different course would have avoided."[168]

There is a line says Mr. Justice (later Chief Justice) White, separating "the impartial exercise of the judicial function from the region of partisanship where reason is disturbed, passions excited, and prejudices are necessarily called into play."[169]

The lack of discussion of the evidence in detail in the charge of the trial court is not a ground for reversal, particularly in the absence of any specific request for comment upon any special phase of the testimony.[170]

In a case in which the undisputed facts, as testified to by both the witnesses for the government and the defendant, show the latter's guilt, in telling the jury in effect to find the defendant guilty, the court does not commit reversible error so long as the jury was allowed the technical right to decide against the law and the facts.[171] If the defendant suffered any wrong, it was of such a purely formal character as not to afford, since the Act of February 26, 1919, a basis for reversing the judgment of the lower court. Four dissenting judges regarded this as improper coercion, and thought that the judge was usurping the function of the jury.

The remark of a federal trial judge in charging the jury on the fact that defendant while testifying wiped his hands, that such action is almost always an indication of lying, is prejudicial error.[172] It is not cured by adding that

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167. Starr v. United States, 153 U. S. 614 (1894).
168. Allison v. United States, 160 U. S. 203 (1895).
169. Hickory v. United States, 160 U. S. 408 (1896).
170. Stilson v. United States, 250 U. S. 583 (1919).
171. Horning v. District of Columbia, 254 U. S. 135 (1920), White, C.J., Day, McReynolds and Brandeis, JJ., dissenting. Dobie states that this case probably shows the extreme limit of the judge's power in instructing the jury. DOBIE, FEDERAL PROCEDURE (1928) 111.
172. Quercia v. United States, 289 U. S. 466 (1933), noted (1933) 13 B. U. L. REV. 710; (1933) 7 U. OF CIN. L. REV. 425; (1934) 22 GEO. L. J. 324; (1933) 2 GEO. WASH. L. REV. 103; (1933) 1 U. OF CHI. L. REV. 335; (1933) 40 W. VA.

the opinion so expressed is not binding on the jury and that if they do not agree with it they should find the defendant not guilty.

The trial judge is not, however, a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. In instructing the jury he is not limited to instructions of an abstract sort. He has the essential prerogatives of the trial judge as they were secured by the rules of the common law. His right to comment is not arbitrary but judicial. He may criticize, but not distort or mislead.

The power of a federal judge to express an opinion as to the guilt of the defendant should be exercised cautiously and only in exceptional cases. The judge may, in charging the jury, analyze and comment upon the evidence and express his views with regard to the testimony of witnesses and advise the jury with respect to the facts, but the decision of issues of fact must be fairly left to the jury. The power is improperly exercised in a case where one charged with violating a federal statute by refusing to answer questions put by an authorized revenue agent respecting matters in his federal income tax return based such refusal on the ground that to answer might subject him to prosecution under state law, even though such claim of privilege proved to have been without legal justification.[173]

The district court has the power to elicit the truth by an examination of the witnesses.[174] In a prosecution for conspiracy the court does not exceed its authority in asking a witness whether there had been a full disclosure of his connection with a certain still when he appeared before a certain judge, even though appearance was simply for the purpose of arraignment and no testimony was offered, where no one tried to explain to the court the nature of the appearance at the time of the questioning, and it was later brought out on cross-examination that appearance was only on arraignment and that there was no need for testimony on that day.

Conduct of Jury After Cause Finally Submitted and Verdict

It is proper to deny a motion for a new trial, where that motion raises for the first time the objection that the jury was permitted to take into the jury room the indictment, which contained an indorsement showing the

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L. Q. 79; (1933) 12 N. C. L. Rev. 59; (1934) 12 Tex. L. Rev. 234; (1934) 18 Minn. L. Rev. 441.

173. United States v. Murdock, 290 U. S. 389 (1933). Stone and Cardozo, JJ., thought that the circuit court of appeals erred in reversing the decision. The case is noted in (1934) 8 So. Calif. L. Rev. 46.

174. Glasser v. United States, 62 Sup. Ct. 457, 470 (1942).

conviction of the accused on a count thereof at a former trial.[175] This does not mean that it is good practice that such indorsements should be permitted to go to a jury, or that the fact of former conviction should be urged or referred to in the progress of the trial.

Where a bailiff tells the jury which is deliberating that this was the third person the accused had killed, that is prejudicial error. Mr. Chief Justice Fuller stated:

> "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 until their harmlessness is made to appear."[176]

A request joined in by counsel for the defendants that the jury be held in deliberation until they reach a verdict cannot be construed as a consent that the court communicate with the jury out of court and in the absence of defendants and their counsel.[177]

Even though the jury, after a day's deliberations, request a discharge because of inability to agree, the court may deny their request stating that he deemed the evidence so convincing that he could not understand their difficulty in reaching an agreement, where he stated in his general charge that they are the sole judges of the facts.[178] The court may discharge the jury where it is unable to agree.[179]

The jury though it has commenced its deliberation may return to the court room for further instructions, which then should not be of a misleading or incomplete nature.[180]

It is not error on the return of the jury into court for further instructions, to charge them that it is their duty to decide the case if they conscientiously can do so; that they should listen to each other's arguments with a disposition to be convinced; that if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reason-

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175. Holmgren v. United States, 217 U. S. 509 (1910). For other discussions of the problem of this chapter see 5 LONGSDORF AND NICHOLS, CYCLOPEDIA OF FEDERAL PROCEDURE (1929) §§ 2369-2398; 9 HUGHES, FEDERAL PRACTICE (1931) §§ 7159-7166; BREWSTER, FEDERAL PROCEDURE (1940) §§ 1225-1233; BYRNE, FEDERAL CRIMINAL PROCEDURE (1916) §§ 303-321.

176. Mattox v. United States, 146 U. S. 140 (1892).

177. Shields v. United States, 273 U. S. 583, 587 (1927). Solicitor General Mitchell advised the court that after a careful study of the record, the government was unable to find any satisfactory ground for opposing the petition for a writ of *certiorari* and that no brief in opposition would therefore be filed.

178. Simmons v. United States, 142 U. S. 148 (1891).

179. United States v. Perez, 9 Wheat. 579 (U. S. 1824) (opinion by Story, J.).

180. Spurr v. United States, 174 U. S. 728 (1899).

able one; and that, if a majority was for acquittal, the minority should consider whether they might not reasonably doubt the correctness of their judgment.[181] Jurors may change their opinions because of discussion in the jury room.

The trial court may recall the jury after they have deliberated for some time to ascertain their difficulties and assist them in solving them.[182] The time of such recall is in the sound discretion of the court.

Where separate indictments against different defendants are tried together, an instruction given to the jury, after they have been deliberating for three days without returning any verdict, that they may find a verdict of guilty as to all the defendants, or find some guilty and some not guilty, but that they cannot find a verdict as to some and disagree as to others, is ground for reversal of the conviction.[183] It amounts to coercion of the jury. A new trial lies.

The trial court ought not inquire of the jury, when brought into court because of their inability to agree, how the jury is divided, even though the scope of the question is confined to the proportion of the division without reference to how the jury stands with respect to conviction or acquittal.[184] Such knowledge is of no real value to the court. The court should confine itself to charging as to the propriety and duty of the jury fairly and honestly endeavor to agree. Such a practice might lead to improper influences.

The verdict in a conspiracy case is not coerced because after a long trial in which the jurors were not allowed to separate, and after deliberation for three days and nights without result, they were instructed, without objection, to consider the possibility of guilt of some of the defendants, following which the jury shortly thereafter convicted two of the four defendants, the court saying when giving such instructions that the law would not recognize a coerced verdict, and that he did not intend to prolong their deliberations unduly, and that, if, after another effort they could not agree upon a verdict, they would be discharged.[185]

It is reversible error for the trial judge to inquire, after a jury has for some time failed to agree, as to how they are numerically divided.[186] This

181. Allen v. United States, 164 U. S. 492 (1896).
182. Allis v. United States, 155 U. S. 117 (1894).
183. Bucklin v. United States, 159 U. S. 682 (1895).
184. Burton v. United States, 196 U. S. 283 (1905).
185. Hyde v. United States, 225 U. S. 347 (1912).
186. Brasfield v. United States, 272 U. S. 448 (1926), quoted (1927) 16 CALIF. L. REV. 325; (1927) 27 COL. L. REV. 756; (1927) 25 MICH L. REV 687; (1927) 2 WASH. L. REV. 133.

is the exertion of an improper influence on the jury, and cannot be effectively remedied after the harm has been done. The case will be reversed even though no exception was taken in the trial court.

For the statutes dealing with verdicts one should consult 18 U. S. C. A., Sections 565 through 567 (1934).

Where the first count of an indictment charged the defendant with having counterfeit coin in his possession with intent to defraud, and defendant by written plea indorsed on the indictment, admitted possession, but denied any intent to pass the same, or to defraud, and the jury returned a verdict of "guilty in the first count for having in possession counterfeit minor coin," this is a general, not a special verdict.[187] Hence, all except the words "guilty in the first count" may be rejected as surplusage and the verdict will stand. The court did not deny that a special verdict would be possible and proper, and quoted Blackstone's definition of a special verdict.

In 1817 the court passed on, without rejecting the validity of, a special verdict in a case coming up from the District of Vermont.[188] The special verdict submitted to the court two questions of statutory construction: (1) whether living fat oxen were articles and provisions of war; and (2) whether driving such oxen on foot was a transportation of such oxen. The accused was released by the court because of the answer to the second question, namely, that there was no transportation. In 1820, a special verdict on an indictment for piracy was upheld in an opinion by Mr. Justice Story in a case coming up from the federal circuit court from Virginia.[189] In 1836 in a case coming up from the federal circuit court of New Jersey the court took no exception to the use of special verdicts, though it found the special verdict defective as based on a defective indictment.[190]

The court seems implicity to have thought special verdicts valid, though it threw out as defective a verdict finding that an offense of robbery on a ship was committed by the accused at a place designated, but omitted to find that it was outside the limits of any state.[191] The court set aside the verdict and granted a new trial.

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187. Statler v. United States, 157 U. S. 277 (1895).

188. United States v. Sheldon, 2 Wheat. 119 (U. S. 1817). For discussion of special verdicts in criminal cases see (1934) 12 TEX. L. REV. 387; ORFIELD, CRIMINAL APPEALS IN AMERICA (1939) 16-17.

189. United States v. Smith, 5 Wheat. 153, 163 (U. S. 1820), Livingston, J., dissenting on another point. The special verdict is set out in 5 Wheat. 153, 154 (U. S. 1820).

190. United States v. Gardner, 10 Pet. 618 (U. S. 1836). The special verdict is set out in full.

191. United States v. Jackalow, 1 Black 484 (U. S. 1861).

A special verdict must find every fact necessary to support the conviction, hence must find the intent which is an ingredient of the crime charged.[192]

Sealed verdicts are admissible in the federal courts. Mr. Justice McKenna ruled that a sealed verdict returned in accordance with an agreement of counsel made in open court, in the presence of the defendant, might properly be received and recorded.[193]

In a case[194] involving a naval court-martial it was suggested by Mr. Justice Wayne that partial verdicts are known to the criminal law: the accused may be acquitted on one count and convicted on another. He may be found guilty of a lesser degree of the crime, as on a charge of burglary he may be found guilty of larceny, on murder of manslaughter, on robbery of larceny, and on battery of assault. So on a charge of desertion there is no want of jurisdiction to convict for attempt to desert.

On an indictment for murder, a verdict of "guilty" is sufficient, as referring to the single offense charged, although the jury had the power to find the accused guilty of a lesser offense included therein.[195] Some states, such as California, expressly provide by statute that a general verdict imports a conviction or acquittal of the offense charged in the indictment.

In a state court case the Court held that a verdict of "guilty" under an indictment for murder without specifying the degree of murder so as to enable the court to fix the proper punishment, there being three degrees of murder in the State of Wisconsin, did not render a sentence thereunder void so that *habeas corpus* would lie, but was merely erroneous.[196] There was no violation of the due process clause of the Fourteenth Amendment.

Where the evidence tends to show the commission of the crime charged, the court may instruct that there can be no conviction of an offense included in or less than the one charged.[197] Hence, in a given case it was held that

192. United States v. Buzz, 18 Wall. 125, 128 (U. S. 1873).

193. Pounds v. United States, 171 U. S. 35 (1898). The court cited Commonwealth v. Carrington, 116 Mass. 37 (1874). See comments (1932) 10 NEB. L. BULL. 341; (1936) 70 U. S. L. REV. 479.

194. Dynes v. Hoover, 20 How. 65, 79-80 (U. S. 1857).

195. St. Clair v. United States, 154 U. S. 134 (1894). The court cited 1 BISHOP, CRIMINAL PROCEDURE (2d. ed. 1872) § 1005a; WHARTON, CRIMINAL PLEADING AND PRACTICE (9th ed. 1889) § 747. For the federal statute dealing with verdicts for lesser offenses, originally enacted in 1872, see REV. STAT. § 1035 (1875), 18 U. S. C. § 565 (1934).

196. *In re* Eckart, 166 U. S. 481 (1897).

197. Sparf v. United States, 156 U. S. 51 (1895), Gray and Shiras, JJ., dissenting. REV. STAT. § 1035 (1875), 18 U. S. C. § 565 (1934) was construed as not changing this rule.

an indictment for murder would not warrant a verdict of manslaughter or of simple assault, the evidence showing murder.

Where an indictment contains several counts and there is no finding nor reference as to one count, in the verdict but a finding of guilty as to each of the other counts, this is "doubtless equivalent to a verdict of not guilty as to that count."[198]

Where an indictment contains several counts and a general verdict of guilty is found, this imports a conviction as to all counts.[199]

Where a defendant is tried under an indictment containing four counts each charging distinct crimes, and the jury rendered a verdict of guilty on three counts, but announced that they disagreed on the fourth, the verdict rendered is valid.[200] An indictment is not an indivisible unit; and there need not be agreement on every count. The verdict need not respond to every count in the indictment. Each count should be treated as a separate indictment. Where the jury disagree as to one count, retrial on that count would not constitute jeopardy.[201]

Where an indictment contains several counts, a verdict finding the defendant guilty upon several of them, and silent as to one, is equivalent to a verdict of not guilty on that count.[202]

In the case of *Carter v. McClaughey*, Mr. Chief Justice Fuller reviewed the earlier cases involving convictions on indictments containing several counts.[203]

A verdict on the trial of an indictment containing two counts which finds defendants "guilty on the . . . count of the indictment, and . . . on the . . . count of the indictment," will be regarded on writ of error as a general verdict of guilty upon both counts, where apparently a printed form was used in preparing the jury's verdict, when the accused did not object by motion for new trial, or motion in arrest of judgment, or on his *allocutus*.[204]

Even though the statute creating the crime of exporting certain goods

198. Dealy v. United States, 152 U. S. 539 (1894).
199. Ballew v. United States, 160 U. S. 187 (1895). The court cited Claassen v. United States, 142 U. S. 140, 146 (1891).
200. Selvester v. United States, 170 U. S. 262 (1898).
201. Gray, Brown and Shiras, JJ., dissented as to this, asserting that there would be jeopardy.
202. Jolly v. United States, 170 U. S. 402 (1898). The court cited Selvester v. United States, 170 U. S. 262 (1898).
203. Carter v. McClaughry, 183 U. S. 365 (1902).
204. O'Connell v. United States, 253 U. S. 142 (1920). The court cited Ballew v. United States, 160 U. S. 187, 197 (1895); Statler v. United States, 157 U. S. 277, 279 (1895).

provides for a penalty of a fine of four times the value of the goods intended to be exported, the jury need fix no valuation in order to enable the trial court to impose the proper fine.[205] Hence the finding as to value, referring to another object than was alleged in the indictment ("pot-ashes" instead of "pearl-ashes") may be regarded as surplusage, and the judgment on it will stand.

When a case is submitted to a jury on Saturday, their verdict of acquittal may be received and the jury discharged on Sunday.[206] The reception of the verdict is but a ministerial act, it is an act of necessity, and the observance of Sunday is promoted better than if the jury were kept together until Monday. A judgment of conviction cannot lawfully be entered on Sunday.

A federal statute[207] declares that any person who commits murder in any place or district under the exclusive jurisdiction of the United States shall suffer death. An act of July 15, 1897,[208] provides that in all cases in which the accused is found guilty of murder under the former statute, the jury may qualify their verdict by adding thereto "without capital punishment." The Supreme Court held that this latter provision authorized the jury to so limit their verdict in any case, without regard to mitigating circumstances, and that instructions confining the right to such cases were erroneous.[209]

The verdict of a jury, convicting two of the four defendants on trial for criminal conspiracy, and acquitting the others, cannot be impeached by the testimony of the jurors tending to show that such verdict was the result of a bargain, or was induced by coercion from the court.[210]

In general, in civil cases that jurors may not impeach their verdicts is the holding of a 1915 decision.[211] The court stated that in only three cases had this problem been before the Supreme Court. The question was raised, but not decided because not necessary for the determination of the case in *United States v. Reid.*[212] In *Mattox v. United States* such evidence was received to show that newspaper comments on a pending capital case had

205. United States v. Tyler, 7 Cranch 285 (U. S. 1812).
206. Ball v. United States, 163 U. S. 662 (1896).
207. REV. STAT., § 5339 (1875).
208. 29 STAT. 487 (1897), 18 U. S. C. § 567 (1934).
209. Winston v. United States, 172 U. S. 303 (1899).
210. Hyde v. United States, 225 U. S. 347 (1912). The court cited Wright v. Illinois & M. Tel. Co., 20 Iowa 195 (1866); and Gottlieb Bros. v. Jasper, 27 Kan. 770 (1882).
211. McDonald v. Pless, 238 U. S. 264 (1915).
212. United States v. Reid, 12 How. 361, 366 (U. S. 1851).

been read by the jurors.[213] There might be some cases where to exclude the testimony of the juror would violate the "plainest principles of justice." The most recent criminal case involving the question was *Hyde v. United States*.[214] As yet most American states apply the older rule. The older rule protects against tampering with jurors.

A verdict of guilty will be sustained when it cannot be said that there was no evidence to sustain the verdict. This was applied to the conviction of a companion of one operating an automobile in the illegal transportation of intoxicating liquor.[215]

A conviction upon a count of an indictment charging the maintenance of a liquor nuisance will not be set aside because of the acquittal of the defendant, upon the same evidence, upon other counts charging illegal possession and illegal sale—particularly where the evidence conflicted as to whether the sales proved to have been made in defendant's place of business were made by defendant in person.[216] Consistency in a verdict convicting on one count of an indictment and acquitting on others is unnecessary since each count is regarded as if it were a separate indictment, and acquittal on one charge of crime cannot be pleaded as *res judicata* of a different charge, though based upon the same facts.

Conviction of three defendants upon a count of an indictment charging the commission of murder with a pistol held by some one of them whose identity was to the grand jury unknown is not inconsistent with their acquittal upon other counts charging each of them with having fired the pistol.[217]

213. Mattox v. United States, 146 U. S. 140, 148 (1892).

214. Hyde v. United States, 225 U. S. 347 (1912). See also Clark v. United States, 289 U. S. 1, 12 (1933). See comment (1933) 11 NEB. L. BULL. 214, 216; (1926) 11 IOWA L. REV. 268; (1928) 6 N. C. L. REV. 315.

215. Segurola v. United States, 275 U. S. 106 (1927).

216. Dunn v. United States, 284 U. S. 390 (1932), noted (1932) 36 DICK. L. REV. 261; (1932) 45 HARV. L. REV. 931; (1932) 18 VA. L. REV. 553; (1932) 41 YALE L. J. 922. Butler, J., dissented. The opinion, by Holmes, J., was his last.

217. Borum v. United States, 284 U. S. 596 (1932). The question came up on certificate. The court cited Dunn v. United States, 284 U. S. 390 (1932).