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

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ARRAIGNMENT

A federal statute provides that when any person is indicted for any capital offense, other than treason, a copy of the indictment must be delivered to him at least two days before the trial; and in case of treason three days before the trial.¹ This provision is mandatory so that a failure to comply is prejudicial error.² In 1927 this statute was amended to read:

"In each criminal case not provided for in Section 562 of this title the clerk shall furnish each defendant upon his request, a copy of the information filed or indictment returned against him, the fees for said copy and the certificate thereto, at the rates provided for by law to be taxed as costs; but such fees shall not be demanded of any such defendant unless and until by order, judgment, or decree of the court the costs in the case are assessed against him."³

In a case coming up from the District Court for Puerto Rico the Supreme Court ruled that the provision of the Organic Act of Puerto Rico of March 2, 1917,⁴ giving an accused a right to a copy of the information, did not confer such right without the payment of copying fees to the clerk, when the accused waives the reading of the information and pleads not guilty.⁵ In the absence of the latter element the Court felt he was entitled to a copy, since there are two languages in Puerto Rico.

* This paper is a portion of a book which is to appear shortly. Other portions appear in the Nebraska Law Review for September, 1941, and March, 1942, and in the Rocky Mountain Law Review for February, 1942.

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and a somewhat new criminal procedure was being put in effect there. The Court stated that the Federal Constitution had no similar provision.

In *Johnson v. United States* Mr. Justice McKenna stated: "There is no explicit provision in the laws of the United States describing what shall constitute an arraignment." He pointed out that in *Crain v. United States* the arraignment was considered as distinct from the plea and consisted of formally calling the accused to the bar for the purpose of a trial. He also pointed out that the word was used in the following federal statute as comprehensively descriptive of what shall precede the plea:

"When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf in the same manner as if he had not pleaded guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury."

In *Crain v. United States* the court held that there must be a plea and arraignment before trial duly entered of record. The dissenting opinion of Mr. Justice Peckham in that case was later adopted as a correct statement of the law in a state court case. The court expressly overruled the *Crain Case*, pointing out by Mr. Justice Day that in earlier days an accused had had but few rights in the presentation of his defense, he could not be represented by counsel, could not be heard on his own oath, and punishment of even trivial offenses was severe and shocking.

The record sufficiently shows that the indictment was read

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*Crain v. United States, (1896) 162 U.S. 625, 40 L.Ed. 1097, 16 S.Ct. 952.*


*Crain v. United States, (1896) 162 U.S. 625, 40 L.Ed. 1097, 16 S.Ct. 952.*

to the accused, assuming that information of the charge requires
a reading of the indictment, where, after reciting the presence
of the attorney for the United States, the defendant and the
defendant's attorney, it adds that "thereupon the defendant,
being arraigned upon the indictment, pleads thereto not guilty,
and for trial puts himself upon the country, and the attorney
of the United States doth the like."12

Mr. Justice Harlan thus described the nature of the plea of
not guilty:

"The plea of not guilty is unlike a special plea in a civil
action, which, admitting the case averred, seeks to establish
substantive grounds of defense by a preponderance of evidence.
It is not in confession and avoidance, for it is a plea that contro-
verts the existence of every fact essential to constitute the crime
charged."13

Leave to an accused to file a special plea in bar after a plea
of not guilty has been entered should be denied where the
matters set forth therein are mere matters of defense determin-
able under the general issue.14 A special plea in bar is appro-
priate where defendant pleads former acquittal, former convic-
tion or pardon.15

The defense of entrapment may be raised under a plea of
not guilty.16 The court may not itself grant immunity on the
basis of entrapment. The issue of entrapment to violate the
National Prohibition Act was for the jury. The defense is not
analogous to a plea of pardon or of autre fois conviction or
autre fois acquittal, since the two former assume guilt, while the
defense of entrapment is on the basis that the defendant is not
guilty. In net effect an exception is read into the statute when
the element of entrapment occurs. Justices Brandies, Stone and

12Johnson v. United States, (1912) 225 U. S. 405, 56 L. Ed. 1142,
32 S. Ct. 748.
13Davis v. United States, (1895) 160 U. S. 469, 40 L. Ed. 499, 505,
16 S. Ct. 353, 357.
14United States v. Murdock, (1931) 284 U. S. 141, 52 S. Ct. 63,
76 L. Ed. 210, 52 L. Ed. 1142, 56 L. Ed. 1142.
15The court cited 2 Bishop, New Crim. Proc., 2 ed., sections 742,
797, 805 et seq.
16Sorrells v. United States, (1932) 287 U. S. 435, 77 L. Ed. 413,
a separate opinion, and McReynolds, J., dissenting. See comments on
the case in 31 Mich. L. Rev. 1159; 17 Minn. L. Rev. 90, and 331; 41
Yale L. J. 1249; 42 Yale L. J. 803; 1 U. Chi. L. Rev. 115; 46 Harv. L.
Rev. 848; 11 Tex. L. Rev. 385; 23 J. Crim. L. 482. See Mikell,
Roberts objected to the latter as judicial amendment, and as giving no rule when an exception would be read into a given statute. They instead would admit the guilt of the defendant and rest the defense on the basis of public policy in protecting the purity of the administration of justice. Under their view the court may discharge the prisoner on a writ of habeas corpus, quash the indictment, or entertain and try a plea in bar. In fact, the power of the court goes further. At any stage of the case proof of entrapment should require the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty. If in doubt as to the facts it might submit the issue of entrapment to a jury simply for advice, which would not be binding on it.

In one case an accused had been sentenced to imprisonment in a prosecution for a misdemeanor, on his plea of guilty. Later during the same term of court he was brought into court and the judgment vacated, his plea of guilty withdrawn, and he was allowed to plead anew. He gave bond and his case was continued. In an action on the bail-bond which he had forfeited, the sureties raised the question of the right of the court to vacate the former judgment, and the Court sustained the right. Mr. Justice Miller stated:

"... All this took place during the same term of the court, and we see no reason to doubt that the court had power during that term, for proper cause, to set aside the judgment rendered on confession. This control of the court over its own judgment during the term is of every-day practice."

The court has power to accept a plea of guilty even in the felony case. On timely application the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear, or inadvertence.

The Criminal Appeal Rules adopted by the Supreme Court

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17 Bassett v. United States, (1869) 9 Wall. (76 U.S.) 38, 19 L.Ed. 548.
19 Hallinger v. Davis, (1892) 146 U.S. 314, 36 L.Ed. 986, 13 Sup. Ct. 105. This was held as to a state court case.
in 1934 deal with the time of making and decision of a motion to withdraw a plea of guilty and the effect of such a motion on the time for sentencing. Under Rule II (4):

"A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed."

Under Rule II (1) motions to withdraw plea of guilty are to be determined promptly. Under Rule I sentences are to be imposed "without delay" unless among other things a motion for withdrawal of the plea of guilty is pending.

It should be noted that the statutes permitting the Supreme Court to lay down rules for criminal appeal expressly provide:

"That nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed."

A plea of *nolo contendere* is an admission of guilt for the purpose of the case. The court is not, by merely accepting such a plea, prevented from imposing a sentence of imprisonment. The Prohibition Act of March 4, 1925 expressly recognized the plea.

A plea of *nolo contendere* has all the effects of a plea of guilty for the purposes of the case, although it does not create an estoppel. After such a plea is entered, a stipulation of facts cannot import an issue as to the sufficiency of the indictment, or an issue of fact upon the question of guilt or innocence.

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24 U. S. v. Norris, (1930) 281 U. S. 619, 74 L. Ed. 1076 and note. Defendant moved in arrest of judgment on the ground that on the face of the record he was not guilty of the crime charged.


After the plea nothing is left but to render judgment since no issue of fact exists and none can be made while the plea remains of record. All that is left is the question of punishment. As to the issue of guilt or innocence the plea is as conclusive as a plea of guilty. A plea of *nolo contendere* may be withdrawn by leave of court and one of not guilty entered.

**Double Jeopardy**

A plea of double jeopardy is a plea in bar, like the plea of pardon and of the statute of limitations. It would therefore be appropriate to deal with it under the heading of "Methods of Attacking Indictments or Informations." It is discussed here separately because of the considerable number of Supreme Court decisions on the subject.

Mr. Justice Holmes in interpreting the double jeopardy provision of the Fifth Amendment stated in a dissenting opinion:

"At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny. But I do not stop to consider or state the consequences in detail, as such considerations are not supposed to be entertained by judges, except as inclining them to one of two interpretations, or as a tacit last resort in case of doubt. It is more pertinent to observe that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried."

Where a defendant is indicted for robbing the mails and putting the life of the driver in danger, and the conviction and judgment pronounced extended to both offenses, Mr. Chief Justice Marshall ruled that no prosecution could be maintained.

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for the same offense, or for any part of it provided the former conviction was pleaded.27 The same rule governs the necessity of a plea of jeopardy as governs a plea of pardon.

Mr. Justice Clifford elaborately discusses the method of pleading a former conviction in his dissenting opinion in Coleman v. Tennessee.28 In general, the pleador should set forth the former conviction and judgment verbatim, and then proceed to allege: "As by the record thereof in the said court remaining more fully and at large appears, which said judgment and conviction shall remain in full force and effect, and not in the least reversed or made void." It must allege that the former trial was in a court having jurisdiction of the case and must set forth the substance of the record.

Pleas of former jeopardy and not guilty are not inconsistent, and may stand together, though the former must be disposed of first.29 Apparently the trial court could submit the plea of jeopardy to the jury with instructions to find the issue for the government.

A general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before verdict as insufficient in that respect, is a bar to a second indictment for the same killing.30 Of course the court must have jurisdiction of the offense and the accused. The verdict of acquittal need not have been followed by any judgment.

In a state court case the court held that the contention that a second conviction of a public officer for failing, on demand, to pay over certain public moneys deprived him of his liberty without due process of law in violation of the Fourteenth Amendment by twice subjecting him to jeopardy for the same offense, presented no judicial question which would sustain a writ of error, where the state court decided that the accused was not

29 Thompson v. United States, (1894) 155 U.S. 271, 39 L. Ed. 146, 15 S. Ct. 73.
30 Ball v. United States, (1896) 163 U.S. 662, 41 L. Ed. 300, 16 S. Ct. 1192. The court by Gray, J., reviewed the contrary English cases, and the earlier American cases.
FEDERAL CRIMINAL PROCEDURE

put in jeopardy by his prior conviction, because such conviction
was reversed on the ground that there had been no legal demand.
Mr. Justice Harlan stated:

"It is an established rule that one is not put in jeopardy if
the indictment under which he is tried is so radically defective
that it would not support a judgment of conviction, and that a
judgment thereon would be arrested on motion. So, where the
defense is that the accused was put in jeopardy for the same
offense by his trial under a former indictment, if it appears
from the record of that trial that the accused had not then or
previously committed, and could not possibly have committed,
any such crime as therein charged, and therefore that the court
was without jurisdiction to have rendered any valid judgment
against him,—and such is the case now before us,—then the
accused was not, by such trial, put in jeopardy for the offense
specified in the last or new indictment."31

A judgment dismissing an indictment on the ground that
the offense charged is barred by the statute of limitations is a
bar, irrespective of any question of former jeopardy to a
second prosecution under a new indictment for the same
offense.32 Likewise a judgment upon a demurrer would be a
bar to a second indictment in the same words. The quashing
of a bad indictment would not, however, bar a prosecution
upon a good one.

A plea of res judicata may be available in certain cases
where the plea of double jeopardy would not lie, where a final
judgment has been entered discharging a defendant who has not
been put in jeopardy.33 The same has been held where both a
criminal and a civil penalty are provided as punishments for
the same act and the issue has been finally determined by an
acquittal.34

31 Shoener v. Commonwealth of Pennsylvania, (1907) 207 U.S.
188, 195, 52 L.Ed. 163, 166, 28 S.Ct. 110, 113.
161, 37 S.Ct. 68, 3 A.L.R. 516.
33 The court cited Frank v. Mangum, (1914) 237 U.S. 302, 334,
59 L.Ed. 969, 983, 35 S.Ct. 582; Coffey v. United States, (1886) 116
161, 37 S.Ct. 68, 3 A.L.R. 516. See (1940) 24 Minn.L.Rev. 526,
556-561; Longsdorf and Nichols, Cyclopedia of Federal Procedure,
vol. 5, (1929), sec. 2112.
35Coffey v. United States, (1886) 116 U.S. 436, 29 L.Ed. 684,
6 S.Ct. 437.

L.J.—3
In a case coming up from the Philippine Islands the Supreme Court held that where the accused was convicted of assault and battery and subsequently the victim died, there was no jeopardy so as to prevent a prosecution for homicide.35

A person is not subjected to jeopardy merely by being arrested, subjected to a preliminary examination, and being thereupon discharged.36 Even when there has been an indictment found, followed by arraignment, pleading thereto, repeated continuances, and eventual dismissal at the instance of the prosecuting officer on the ground of insufficient evidence to hold the accused, it does not amount to jeopardy.37

In an interstate rendition case the Supreme Court pointed out that the mere arraignment and pleading to the indictment by the accused do not put him in jeopardy.38

It was perhaps implicit in an early case that discharging a jury previously impaneled to certify a case up from the old Circuit Court to the Supreme Court on division of opinion did not constitute jeopardy since the Court would not pass on a moot case.39

Even in a capital case the discharge of a jury from giving a verdict, without the consent of the accused, the jury being unable to agree, is not deemed to have put the accused in jeopardy. Mr. Justice Story stated:

"The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it would be

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38 Bassing v. Cady, (1908) 52 L.Ed. 540, 28 S.Ct. 392, 393. The court cited 1 Wharton, Criminal Law, sections 544, 590.
impossible to define all the circumstances which would render it proper to interfere."^40

There is no violation of the Fifth or Sixth Amendment where an accused is tried by the same jury which had been dismissed after a demurrer to the indictment had been overruled. The failure to impanel a new jury after the subsequent plea of not guilty did not deprive the accused of his right to a jury trial; nor did it constitute jeopardy.^41

Where the consolidation of fourteen indictments against the defendant had been directed, the jury impaneled and sworn, and the district attorney had made a statement of his case to the jury, and the court then discharged the jury, and rescinded its order of consolidation, and the accused was tried and found guilty on one of those indictments, against his protest and without his consent, this seems not to have been regarded as jeopardy.^42

There is no jeopardy shown where the jury was discharged without the consent of the accused, by the court, on its own motion, after the jury had deliberated forty hours and then announced in open court that they could not agree.^43

In a state court case the Court ruled that a plea of former jeopardy cannot be based upon the discharge of the jury for their inability to agree upon a verdict after considering the case from four o'clock in the afternoon until half-past nine in the morning of the succeeding day.^44

There is no jeopardy where the jury is discharged after the trial had begun, one witness having been examined, on the ground of the discovery that one member of the petit jury was disqualified since he had served on the grand jury which found the indictment.^45

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^40 United States v. Perez, (1824) 9 Wheat. (22 U.S.) 579, 580, 6 L. Ed. 165.
^42 Ex parte Bigelow, (1885) 113 U.S. 328, 28 L. Ed. 1005, 5 S. Ct. 542.
^45 Thompson v. United States, (1894) 155 U.S. 271, 39 L. Ed. 146, 15 S. Ct. 73. The court cited Logan v. United States, (1892) 144
Where, after evidence had been given on a trial for the prosecution, an affidavit was produced, alleging that a juror on his voir dire, falsely swore that he had no acquaintance with the accused, and a letter commenting on the affidavit was published in a newspaper and was read by members of the jury, the court could dismiss the jury and allow a new trial. 46

When a person has been found guilty of murder in the first degree with a mitigation of the penalty to life imprisonment in the verdict, he is not placed twice in jeopardy by an unqualified conviction for murder in the first degree with a penalty of death in a new trial upon a writ of error by the accused. 47

A civil action to recover taxes, which in fact are penalties, is punitive in character and barred by a prior conviction of the defendant for a criminal offense involving the same transactions. 48 Distinguishable is the situation where the proceeding is in one to forfeit property used in committing an offense. 49 The forfeiture is no part of the punishment for the criminal offense, and the jeopardy clause of the Fifth Amendment does not apply. 50

The accused may plead former jeopardy where the evidence necessary to ascertain the indictment at the second trial might have been given by the prosecution as to the indictment in the first trial. 51 The accused has a good special plea.

The defendant does not make out a plea of former jeopardy where it is shown that the offense for which he was formerly acquitted was an entirely distinct offense. Thus where the first


prosecution involved another ten dollar counterfeit note, even though evidence was given as to the second counterfeit note in the first prosecution, Mr. Chief Justice Marshall ruled against the accused, saying:

"The plea does not show that he had ever been indicted for passing the same counterfeit bill, or that he had ever been put in jeopardy for the same offense."

In a case coming up from the Territory of Utah it was held that the offense of cohabiting with more than one woman was inherently a continuous offense, having duration, and not an offense consisting of an isolated act. Thus numerous prosecutions may be barred, and habeas corpus may lie. Only one punishment may be inflicted for the same continuous act. Defendant should be able to plead in bar such punishment to prevent further punishment.

Merely because a statute provides that the indictment for using the mails to defraud may charge offenses to the number of three when committed in the same six calendar months and that the court shall give a single sentence, there is no intention to make a single continuous offense. Hence the defendant may be indicted and sentenced for three other offenses under the same statute, committed in the same six months. There can be no valid plea of former conviction in such a case.

The conviction of the defendant for the crime of unlawful cohabitation bars a prosecution for adultery when the latter offense is in fact a part of a continuous cohabitation with the woman named in the first indictment, even though the time of its commission is laid after the period during which the cohabitation was alleged to have continued. If a demurrer to such plea of former conviction is sustained, the defendant may be released on habeas corpus. There are many offenses as to which a conviction or an acquittal of a greater crime is a bar to a prosecution for a lesser one.

An acquittal upon a charge of having received the com-

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5 United States v. Rauderbusch, (1834) 8 Pet. (33 U.S.) 288, 290, 8 L. Ed. 948.
9 Ex parte Nielsen, (1889) 131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118.
Compensation forbidden by the statutes from a specified person, described in the indictment as an officer and employee of a corporation, will not sustain a plea in bar of a prosecution upon the charge of having received such compensation from the corporation, where the accused declined to plead further after his demurrer to the answer, alleging that the two offenses are not identical, was overruled. The same evidence would not sustain both indictments.

In a case coming up from the Philippine Islands, Mr. Justice Holmes held that treating as two different offenses assaults on two different persons is not under the Philippine Bill of Rights placing twice in jeopardy, even if these assaults occurred very near each other, in one continuing attempt to defy the law.

A plea of former jeopardy as to an indictment for murder cannot be based upon the fact, that upon the trial of two consolidated indictments for two other murders committed by defendant on the same day as the one charged in the indictment in question, he was found not guilty on the issue of insanity, which is the defense set up to such indictment.

In a case coming up from the Philippine Islands it was held not double jeopardy since the acts were not identical, where defendant was convicted of behaving in an indecent manner in a public place, open to public view, and later prosecuted for insulting a public officer by word or deed in his presence, although the acts and words of the accused set forth in both charges are the same. Each offense had an element not embraced in the other.

Each successive cutting into the different mail bags with intent to steal the mail therefrom by a person who in the same transaction tears or cuts successively a number of bags, is a distinct offense under Section 18961 of the Federal Criminal

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Proof of cutting one sack would not support the counts of an indictment or to cutting other sacks, and there was no such continuity of offense as to make the several acts charged against the defendant only one crime. The same rule has been applied where one offense was stealing postage stamps from a post office and the other was burglarious entry of a post office with intent to commit a larceny. The court stated that the jeopardy provision was not violated.

Congress may enact that each putting of a letter in a post office is a separate offense. An indictment in separate courts charging unauthorized sales of narcotics to different persons on different days in violation of statute does not charge merely a single crime. It does not amount to double jeopardy to prosecute for both the sale and the possession of the identical liquor.

Acquittal of the charge of making a false entry in the journal ledger of a Federal Reserve Bank under an act of Congress prosecuting any officer of a Federal Reserve Bank who makes any false entry in any book of the bank, is a bar to a prosecution for making a false entry in the customer's ledger, where both entries referred to the same transaction, were based upon the same draft, and were the correlated means of accomplishing a single fraud, if fraud there had been. But such acquittal is not a bar to a prosecution for making a false report of the condition of a Federal Reserve Bank, since the acquittal does not necessarily establish that the entries were true, but only that at the time the defendant was not guilty of an intent to defraud the bank and the examiners. The former judgment is res judicata as to the facts there involved, but it is not a former acquittal.

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Although a second sale of a narcotic drug is made to the same purchaser with no substantial interval of time between the delivery of the drug in the first transaction and payment for the second quantity sold the two sales are not a single continuing offense, but separate violations of the Harrison Narcotic Act. A single sale in violation of one requirement of the Harrison Act that sales shall be in or from the original stamped package, and another requirement of a written order of the purchaser to whom the drug is sold, constitutes separate offenses for each of which a penalty may be imposed, since each provision requires proof of an additional fact which the other does not.

In 1820 the Supreme Court seems to have thought that the sentence of either court, whether of conviction or acquittal, might be pleaded in bar of prosecution before the other. This was said in a case involving a state court-martial for violation of a state law as to state militia neglecting to serve when ordered by the President of the United States.

Former jeopardy in a federal trial is no defense against a state prosecution for the same act. This was applied to a state prosecution for harboring and secreting a negro slave arising before the Civil War.

Where a United States marshal, in state custody for an act done in furtherance of a law of the United States, is brought before a federal court by habeas corpus and discharged, he cannot later be tried in the state courts.

Apparently the doctrine of former jeopardy is applicable in court martial cases. In a case coming up from the Philippine Islands it was held that where a soldier in the American army was acquitted of the crime of homicide alleged to have

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been committed by him in the Philippines by a court-martial of the United States he could not be subsequently tried for the same offense in a civil court exercising authority in that territory as to crimes. The reason assigned was that the laws making that conduct punishable emanated from the same ultimate source.

Former jeopardy in a state criminal proceeding is no defense against a subsequent prosecution by the federal government for the same act which violated both a state and a federal statute. Congress could by express provision bar a federal prosecution after the state prosecution, if it chose to do so. The Fifth Amendment jeopardy provision applies only to prosecution in the federal courts. Former jeopardy in a federal criminal trial is no defense against a state prosecution for the same act violating both state and federal laws.

As between the Federal government and the Territory of Puerto Rico prosecution under one of the laws in the appropriate court will bar a prosecution under the other law in another court. However, the mere fact that Congress has passed a statute does not bar a territory from passing a statute on the same subject. Thus both might pass an anti-trust act, though prosecution under one act in one court will bar prosecution under the other act in another court.

**WITNESSES: COMPULSORY PROCESS, LIST OF WITNESSES**

The Sixth Amendment provides: “In all criminal prosecutions the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor.”

As Professor Rottschaefer has pointed out the case law construing the scope of this right is extremely meager. The

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80 Hebert v. Louisiana, (1926) 272 U.S. 312, 71 L.Ed. 270, 47 S.Ct. 103; Rottschaefer on Constitutional Law, (1939) 816.


82 Rottschaefer on Constitutional Law, (1939) 797. See also Longsdorf and Nichols, Cyclopedia of Federal Procedure, (1929),
right seems so essential to an adequate opportunity for an accused's presentation of his defense as to be required by the due process clause of the Fifth Amendment in any criminal proceedings to which the Sixth Amendment does not apply.

Neither the Sixth Amendment nor the federal statutes accord the right to the accused to be apprised of the names of the witnesses who appeared before the grand jury. Even in cases of treason and other capital offenses, the required list of witnesses is only of those who are to be produced in the trial.

Witnesses summoned to testify before a grand jury must answer any question within his knowledge concerning the matter under investigation subject to the privilege against self-incrimination. They are not concerned with the possible invalidity of the statutes under which the grand jury's investigation is conducted, and the consequent want of jurisdiction over the subject-matter, and they may not urge that objection to justify their contumacy in refusing to testify. If they do, they are guilty of contempt.

The First Judiciary Act regulated the mode of proof by examination of witnesses, and their duty to appear and testify was recognized. By Act of March 2, 1793, subpoenas for witnesses required to attend a court of the United States in any district might run into any other district. By Act of February 26, 1853, witnesses required to attend any term of the district court on the part of the United States may be subpoenaed to attend to testify; and under such process they shall appear before the grand jury or petit jury or both, as required.


by the court or the district attorney.\textsuperscript{83} By the same statute fees for the attendance and mileage of witnesses were regulated; and it was provided that where the United States was a party, the marshal, on the order of the court, should pay such fees. Statutes also require witnesses to give recognizances for their appearance to testify, and for detaining them in prison in default of such recognizance.\textsuperscript{84}

By statute\textsuperscript{85} the right to summon witnesses where the defendant is indigent is left to the discretion of the trial court. Such discretion is not reviewable in the Supreme Court.\textsuperscript{86}

The right to object to a witness in a capital case on the ground that his name was not furnished to defendant two days before the trial, as required by the statute,\textsuperscript{87} is waived by failure to object until after his examination in chief is closed, even if the omission was not before discovered since inquiry should have been made before.\textsuperscript{88}

The statutory\textsuperscript{89} right to a list of witnesses does not apply to witnesses introduced purely for rebuttal purposes.\textsuperscript{90}

Where in a capital case a list of witnesses and jurors must be delivered to the accused at least two days before the trial under the federal statute, a woman who has been married and divorced is not incompetent as a witness because she is designated in the list of witnesses by her maiden name, under which she had gone since her divorce some ten or twelve years ago.\textsuperscript{91} The list ought to contain the present names of the witnesses, which identify them. The purpose of the statute is to let the accused know who will testify against him, and the present law best does this. However, the use of the married name would

\textsuperscript{83} Chap. 80, sec. 3, 10 Stat. at L. 161, 169.
\textsuperscript{84} 28 U. S. C. A., sections 657-659.
\textsuperscript{88} Hickory v. United States, (1894) 151 U. S. 303, 38 L. Ed. 170, 14 S. Ct. 334.
\textsuperscript{90} Goldsby v. United States, (1896) 160 U. S. 70, 40 L. Ed. 343, 16 S. Ct. 216.
\textsuperscript{91} Bird v. United States, (1902) 187 U. S. 118, 47 L. Ed. 100, 104, 23 S. Ct. 42, 45.
probably not have helped in the particular case. Timely objection must be made to the use of an improper name.\textsuperscript{92}

The Act of July 3, 1926,\textsuperscript{93} providing for the subpoenaing in a foreign country upon service by an American consul of a citizen of the United States whose presence in a criminal prosecution in a federal court was desired, does not violate the due process clause of the Fifth Amendment.\textsuperscript{94} If the citizen disobeys this statute in the foreign country, he is punishable by a federal court. There is no violation of international law. He may be punished for contempt of court even though he is not present here if suitable notice and opportunity to appear and be heard are given, by the seizure of his property to satisfy a fine. This does not violate the Fourth Amendment. The fact that only the prosecutor may subpoena may not be challenged by a recalcitrant witness as violating the provision of the Sixth Amendment that an accused shall have compulsory process for obtaining witnesses in his favor.

**Right of Confrontation of Hostile Witnesses**

The Sixth Amendment grants to a defendant the right to be confronted with the witnesses against him. Its purpose is to protect him against secret and inquisitorial methods of trial, and to secure to him the privilege of sifting and testing the evidence against him by cross-examination of the witnesses.\textsuperscript{95} The introduction of evidence given by witnesses when the defendant has had no opportunity to cross-examine is clearly forbidden. For this reason a statute making the record of the conviction of one person of stealing given property conclusive evidence of the fact that property had been stolen in the prosecution of the receiver thereof is invalid.\textsuperscript{96} However, the admission of dying declarations is a well recognized exception to the general rule based on necessity and historical considerations.

\textsuperscript{92}The court cited Logan v. United States, (1892) 144 U.S. 263, 36 L. Ed. 429, 12 S. Ct. 617.


\textsuperscript{96}Kirby v. United States, (1899) 174 U.S. 47, 43 L. Ed. 890, 15 S. Ct. 574, Brown and McKenna, J. J., dissenting.
The right of confrontation secured by the Sixth Amendment did not originate with the Constitution. The Constitution merely recognized the common law right. The purpose of the Sixth Amendment was to continue and preserve such right and not to broaden it or disturb the exceptions. The basic exception to the rule has been thus stated by Mr. Justice Peckham:

"At common law, the right existed to read a deposition upon the trial of a defendant, if such deposition had been taken when the defendant was present and had an opportunity to cross-examine, upon proof being made to the satisfaction of the court that the witness was at the time of the trial dead, insane, too ill ever to be expected to attend the trial, or kept away by the connivance of the defendant." 

In a case coming up from the Territory of Utah it was held that where the absence of a witness is due to the defendant's own procurement, his rights were not violated by admitting proof of what such witness had stated on a former trial of the accused even though under a different indictment.

Where a witness for the prosecution in a murder case dies after the first trial, the reading in evidence on the second trial of a transcribed copy of the reporter's stenographic notes of his testimony is not forbidden by the confrontation rule. This is the rule prevailing in the state courts. The primary object of the constitutional provision was to protect against the use of depositions or ex parte affidavits, in lieu of a personal examination and cross-examination of the witness. Public policy favors an exception in the case stated. If the accused offers evidence to show that the witness later stated that his testimony was under duress and untrue, he must lay the usual foundation for impeaching testimony.

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79 Reynolds v. United States, (1878) 98 U.S. 145, 158, 25 L.Ed. 244. Field, J., thought that a sufficient foundation had not been laid for its introduction.


81 Shiras, Gray, and White, J. J., dissented on this point.
The right to confrontation is not infringed by permitting a deposition of a living witness to be read against the accused in an action brought to recover the value of merchandise forfeited to the United States by reason of his acts in violation of law.\(^1\) There is no right of trial by jury either as to the enforcement or forfeiture.

It violates the Sixth Amendment to present a deposition or statement of an absent witness taken at a preliminary examination at which the accused had an opportunity to cross-examine the witness, to be read at the final trial, when it does not appear that the witness was absent by the suggestion, connivance, or procurement of the accused, but it does appear that his absence was due to the negligence of the prosecution.\(^2\) The witness was a witness for the prosecution. He had been committed to jail without bail. A federal officer took him from jail after the trial of the case began, but did not place him in charge of another officer, but rather another governmental witness, with instructions to the latter to allow him to stay at a hotel at night with his family. On the very day he was called as a witness and within an hour of being called, he was in the corridor of the court house. But when called to testify, he did not appear.

In a state court case it was held that due process under the Fourteenth Amendment was not denied by the introduction in evidence, upon proof of non-residence, permanent abode, and inability to procure the attendance of a witness, of the deposition of such witness, taken upon the preliminary examination before a committing magistrate when defendant was present and their counsel was afforded opportunity to cross-examine.\(^3\) The case was not so different from that involving death, illness, or insanity of the witness. The court pointed out that the con-

\(^1\) United States v. Zucker, (1896) 161 U.S. 475, 40 L.Ed. 777, 16 S.Ct. 641. Professor Rottshaefer points out that there is language in this case which might be construed to hold that the right exists in all criminal prosecutions of whatever sort or degree. Rottshaefer on Constitutional Law, (1939) 792. But he points out, at p. 797, that if the phrase "criminal prosecutions" has the same meaning as it has in defining the cases in which the Sixth Amendment requires a jury trial, then the right of confrontation does not exist in the trial of misdemeanors and petty offenses.


\(^3\) West v. Louisiana, (1904) 194 U.S. 258, 48 L.Ed. 965, 24 S.Ct. 650. The court revived its earlier decisions, most of them in federal court cases.
frontation provision of the Sixth Amendment did not apply to state courts.

In a case coming up from the Philippine Islands the court held a Philippine appellate court could order the judge and clerk of the court below to supply the failure of the record to show whether the accused pleaded to the complaint and was present in court during the entire trial. This did not violate the provision in the Philippine Bill of Rights regarding confrontation of witnesses. The judicial officers involved were not witnesses.

Improper admission of hearsay evidence may violate the right of confrontation of witnesses. The admission in a prosecution for conspiracy of testimony by one conspirator of what another of them, since dead, told him during the progress of the conspiracy is not reversible error.

The purpose of the Sixth Amendment relating to the right to be confronted by witnesses is to continue and preserve the common-law right, and not to broaden or disturb its exceptions. And the admission in evidence against a defendant of letters with which he was not primarily connected is not error on the ground that they were hearsay, where they were placed before and answered by him.

The privilege of confrontation is not the same thing as the privilege of presence. The privilege of confrontation is limited to the stages of the trial when there are witnesses to be questioned. It has always been subject to exceptions, such as dying declarations or documentary evidence. The exceptions are not static but may be enlarged from time to time if there is no material departure from the rule.

In a case coming up from the Philippine Islands it was held that an inspection of the scene of a homicide, made by the trial

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judge in the presence of counsel for the accused, but in the
absence of the accused, did not violate the right to "meet the
witnesses face to face" secured by the Act of Congress of
July 1, 1902.\textsuperscript{110}

\textbf{CONTINUANCE}

There is no federal statute enumerating the grounds upon
which a continuance may or should be granted, nor the number
that may be granted.\textsuperscript{111} There are only court decisions, which
establish no absolute grounds.

Whether or not the trial should be delayed for several days
in order to grant defendant's application, made four days after
the trial began and just before he called his last witness, for
process for additional witnesses, to be served at the expense of
the government, is in the discretion of the trial court.\textsuperscript{112} Its
refusal is not ground for a new trial, especially when the addi-
tional evidence does not seem important.

In a state court case it was held that the fact that the short-
hand notes of the testimony taken on the preliminary examina-
tion had not been transcribed as provided for by state statute
was not ground for postponing the trial.\textsuperscript{113}

It has been held that it was within the court's discretion to
refuse a continuance on the ground that prior to the finding of
the indictment the defendant was in jail, and unable to prepare
his defense, and that he was informed that if further time was
given him there were witnesses whose names were not disclosed
in the application who could be produced to show his inno-
cence.\textsuperscript{114} Absence of material witnesses does not require the
granting of a continuance unless due diligence to procure their

\textsuperscript{110} Valdez v. United States, (1917) 244 U.S. 432, 61 L.Ed. 1242,
1248, 37 S.Ct. 725.
\textsuperscript{111} Brewster on Federal Procedure, (1940) 597. For other dis-
cussions of continuances see Longsdorf and Nichols, Cyclopedia of
Federal Procedure, vol. 5 (1929), sections 2196-2210; Hughes, Fed-
eral Practice, vol. 9 (1931), sec. 7066.
\textsuperscript{112} Crumpton v. United States, (1891) 138 U.S. 361, 34 L.Ed. 958,
11 S.Ct. 355.
\textsuperscript{113} Thiede v. Utah, (1895) 159 U.S. 510, 40 L.Ed. 237, 239, 16
S.Ct. 62.
\textsuperscript{114} Goldsby v. United States, (1895) 160 U.S. 70, 40 L.Ed. 343,
16 S.Ct. 216.
attendance is shown. What they would testify to must be shown.

In a state court case it was held that, although an accused may be entitled to adequate opportunity to prepare his defense, this does not entitle him under the Fourteenth Amendment to a continuance because of the absence of material witnesses residing in another state whose presence the court is powerless to enforce. A state may not compel the attendance of witnesses beyond the state. It is not bound to provide for the filing or using of depositions of each absent witness.

In a case coming up from Alaska is was held not an abuse of discretion to refuse a continuance to a defendant charged with a capital offense, on a showing by his affidavit of the absence of witnesses who would testify that he was not at the scene of the crime at the time named in the indictment as the date of its commission and would also explain the possession of money found on his person, when nothing had been disclosed to indicate that the possession of such money had any significance in connection with the charge, and the falsity of some of the statements in the defendant’s affidavit clearly appeared from the affidavits offered by the government in opposition to the motion. The court could give weight to the fact that the witnesses were engaged in prospecting, were men without settled abodes whose attendance at a later time might be hard to secure, and the longer the delay the harder it would be to secure the attendance of the witnesses. In this case the absent witnesses were on a vessel at sea or in California.

The discretion of the trial judge was not wrongly exercised in ordering jurors to be summoned to appear on the day following the one set for the hearing of a demurrer to an indictment, and, after overruling the demurrer on the day of hearing, in ordering the entry of a plea of not guilty on the next day, refusing a continuance, impaneling a jury, and setting down


the trial for the next morning. In a particular case, however, the facts may be such that the court should grant a continuance.

The discretion of the court in granting or denying a continuance is not reviewable except in case of clear abuse, especially where the absence of any bill of exceptions in the record prevents any showing of abuse.

NOLLE PROSEQUI

In an early case it was ruled that where a writ of error had been taken out to the Supreme Court, in an indictment found and tried in the circuit court, and a nolle prosequi was entered in the circuit court by order of the President of the United States, and a copy of the same was filed in the office of the clerk of the Supreme Court, and read in open court, the Supreme Court would on motion of the Attorney General dismiss the case.

In criminal proceedings the prosecution alone, and not the victim or injured party, have the right to control the whole proceeding and execution of the sentence. According to Mr. Justice Story even after verdict, the government may choose not to bring the party up for sentence.

A nolle prosequi may be of the entire indictment, or of one or more counts thereof. It is not an acquittal, and leaves the prosecution just as if no such count had been inserted in the indictment.

The District Attorney has absolute power to enter a nolle prosequi.

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123 For discussion of nolle prosequi see Longsdorf and Nichols, Cyclopedia of Federal Procedure, (1929), vol. 5, sections 2211-2214; comment, (1919) 13 Ill. L.Rev. 766; Winfield, Nolle Prosequi, (1884) 5 Crim.L.Mag. 1; comments, (1938) 112 A.L.R. 366.
125 Dealy v. United States, (1894) 152 U.S. 539, 38 L.Ed. 545, 14 S.Ct. 860.
prosequi. This is true at least at any time before the jury is impaneled for the trial of the case. Where a nolle prosequi to an indictment has been entered, and no new indictment has been returned within the statutory period of limitation, the case becomes moot. In that event the accused cannot appeal from an order discharging him pursuant to leave to enter a nolle. The defendant being discharged from custody is not legally aggrieved.

Privilege Against Self-Incrimination

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Inasmuch as this provision is necessary to the full enjoyment of personal security, liberty and private property it should receive a liberal construction to prevent any encroachment on the right secured. The privilege applies to civil as well as criminal proceedings. It applies to the production of books and papers of an incriminating nature as well as to oral testimony.

The privilege does not apply where the speech would not incriminate, as where the witness has been pardoned or where


Brewster on Federal Procedure, (1940) 598; Confiscation Cases, (1869) 7 Wall. (U.S.) 454, 457, 19 L. Ed. 196, 197.


the offense which his testimony discloses is barred by limitations.\textsuperscript{133} A tender of a pardon will not abrogate the privilege if the witness refuses to receive it.\textsuperscript{134}

Congress may compel the giving of testimony which will incriminate provided it accords the witness immunity from the consequences commensurate with the guaranty against self-incrimination afforded by the Fifth Amendment.\textsuperscript{135}

The Fifth Amendment extends its protection to a witness called to testify before a federal grand jury which is investigating alleged violations of the interstate commerce law.\textsuperscript{136} It is not limited to prosecutions against the witness himself.

The use before a grand jury as a basis for an indictment for perjury of certain exhibits impounded in the custody of the clerk of the court for future use, which were owned by the alleged perjurer, and which he had himself offered in evidence in litigation over a patent, in the success of which he was interested, does not constitute an unreasonable seizure, nor self-incrimination.\textsuperscript{137} The accused has voluntarily surrendered the evidence in question.

The use in evidence of letters voluntarily written by the accused after the crime, while he was in prison, and which came into the possession of the prison officials under established practice reasonably demanded to promote discipline does not violate the constitutional safeguards against self-incrimination or unreasonable searches and seizures.\textsuperscript{138}

The privilege against self-incrimination under the Fifth Amendment prevents the use in evidence against him of a person's involuntary confession.\textsuperscript{139} There is no federal statute governing the admissibility of confessions.\textsuperscript{140} The point that


\textsuperscript{135} Glickstein v. United States, (1911) 222 U. S. 139, 56 L. Ed. 128, 32 S. Ct. 71.

\textsuperscript{136} Counselman v. Hitchcock, (1892) 142 U. S. 547, 35 L. Ed. 1110, 12 C. Ct. 195.


\textsuperscript{138} Stroud v. United States, (1921) 251 U. S. 15, 64 L. Ed. 103, 40 S. Ct. 50; Rottschaefer on Constitutional Law, (1939) 742.

\textsuperscript{139} Bram v. United States, (1897) 168 U. S. 522, 18 S. Ct. 183, 42 L. Ed. 588; Rottschaefer on Constitutional Law, (1939) 802.

\textsuperscript{140} Brewster on Federal Procedure, (1940) 615.
the accused was under arrest at the time of confessing is not conclusive, but may be taken into account in determining whether or not the statement was voluntary. The statements were inadmissible where they were made to a police officer in the latter’s office, no other persons being present, after the accused had been stripped of his clothing, and after the officer had said to him that his co-suspect had made a statement that he saw him commit the act, and the officer further said he was satisfied that the prisoner had killed the deceased.

Voluntary statements made by a defendant before and after his preliminary examination are not made inadmissible against him, because the provisions of the statutes, with respect to statements pending an examination, were not complied with, although made to the magistrate who in fact conducted the preliminary examination. Such a holding was rendered in a case coming up from Alaska. It appeared that the accused was cautioned that he was under no obligation to make a statement; that it would be used against him if he made one; and that there was a proper time to make one if he so desired.

The admission in evidence at the trial of the testimony of the accused, voluntarily and understandingly given at the preliminary hearing, does not violate his privilege against self-incrimination, although he was not warned at the time that what he said might be used against him.

In a case coming up from the Territory of Alaska it was held that a deputy marshal may testify as to conversations between himself and the accused which were not induced by duress, intimidation, or other improper influences, but were perfectly voluntary.

In a case coming up from Puerto Rico the court held that where the question of the voluntary character of a confession is submitted to the jury at the request of the defendant, this is not reviewable error even though the proof as to the voluntary

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character was of such a preponderating character that the court would have been authorized in not submitting it to the jury.\textsuperscript{145}

A statement made by one accused of murder, after he has been subjected for seven days to almost continuous examination by police officers, which, on one occasion, continued throughout the night, during all of which time he was ill and in pain, such that the medical examiner testified that, to secure relief, he would have confessed to a capital offense—is not admissible upon his trial for murder.\textsuperscript{146} The court gave no precise reason for excluding the confession, except that it was not voluntary. It has been urged that other reasons are the compulsion forbidden by the Fifth Amendment and the doctrine of testimonial unworthiness.\textsuperscript{147}

In a state court criminal case it was held that due process under the Fourteenth Amendment was denied where the sole basis for a conviction and sentence is a confession by coercion, brutality and violence.\textsuperscript{148} It has been asserted that the same principle would also apply in defining what the due process clause of the Fifth Amendment requires in the case of federal criminal trials.\textsuperscript{149}

Where an accused takes the stand in his own behalf and voluntarily testifies for himself, he may not stop short in his testimony by omitting to explain inculpatory circumstances and events already in evidence in which he participated, without subjecting his silences to the inferences naturally to be drawn from them, and justifying comment by the court in his charge to the effect that the jury may take this omission into consideration in reaching a verdict.\textsuperscript{150} An act of Congress of March 16, 1878, permits the accused voluntarily to testify for himself.\textsuperscript{151}

One may waive his immunity from self-incrimination by

\textsuperscript{146} Ziang Sung Wan v. United States, (1924) 266 U.S. 1, 69 L.Ed. 131, and note, 45 S.Ct. 1.
\textsuperscript{147} Waite, Cases on Criminal Law and Procedure, (First ed., 1937), 618 note.
\textsuperscript{149} Rottschaefer on Constitutional Law, (1939) 812.
\textsuperscript{150} Caminetti v. United States, (1917) 242 U.S. 470, 493, 61 L.Ed. 442, 456, 37 S.Ct. 192, L.R.A. 1917, F. 502, Ann. Cas. 1917B, 1168. As the case indicates, the circuit courts of appeals have been in conflict.
\textsuperscript{151} 20 Stat. at L. 30, chap. 37, Comp. Stat. 1319, sec. 1465.
offering himself as a witness. He may then be required to answer all questions put to him within the legitimate bounds of cross-examination. An accused becoming a witness in his own behalf on a second trial of the case may be cross-examined as to why he did not become a witness at the first trial. The failure of an accused who becomes a witness on his own behalf to deny or explain evidence of incriminatory circumstances of which he may have knowledge may be the basis of adverse influence, and the jury may be so instructed.

In a case coming up from Oklahoma Territory Mr. Justice Holmes stated that compelling the accused to stand up and walk before the jury, and stationing the jury during a recess so as to observe his size and walk, even if regarded as error, as to which the court expressed no opinion, did not affect the jurisdiction of the court so as to justify relief by habeas corpus.

The extent to which the privilege against self-incrimination protects one against being compelled to submit to an examination of his person has been the matter of but few decisions. It does not prevent testimony that an accused had put on a particular blouse and that it had fitted him, which was given to prove that it was his, even though he had done so under duress. The Fifth Amendment was asserted not to require the exclusion of an accused's body as evidence when it might be material.

The privilege against self-incrimination does not protect the officer of a corporation in resisting the compulsory production before the grand jury under a subpoena duces tecum directed to the corporation, of the letter-press copy books of such corporation in his possession, because the contents thereof may tend to incriminate him, even though the inquiry before the grand jury was not directed to the corporation itself. The same is true where the subpoena is addressed to the officer.
Since the privilege against compulsory self-incrimination may be waived, it is essential that the question of the validity of the seizure of the objects which it is proposed to use in evidence be timely raised. It is timely raised by the making of a preliminary motion for the return of the seized articles, or where that is not reasonably possible, by a motion to exclude them as evidence when tendered for that purpose.\textsuperscript{158} The reason is that courts will not pause in criminal cases to determine collateral issues as to how the evidence was obtained.

The privilege against self-incrimination may not be relied on and must be regarded as waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it.\textsuperscript{159}

While a person may not invoke the privilege of self-incrimination to excuse his failure to make a Federal income tax return with respect to income derived from crime, he may invoke it to excuse the failure to answer any question on the return the answer to which might incriminate the taxpayer.\textsuperscript{160}

Although at one time there was some uncertainty, it has now been settled that the privilege conferred by the Fifth Amendment protects a person only against being required to disclose matters that could be directly or indirectly used against him in Federal criminal, penal or forfeiture proceedings.\textsuperscript{161} There is no privilege where the evidence might be used in a criminal proceeding brought by a state or another country.\textsuperscript{162}

\textbf{Presence of Defendant}

The Constitution does not in express language confer upon a defendant the right to be present at his trial on a charge in a


\textsuperscript{161} Rottschaefer on Constitutional Law, (1939) 804.

federal court.\textsuperscript{163} But it is broadly asserted that he has such a right if he is being tried for a felony or on a capital charge. The Sixth Amendment has been stated to be a source of the right without indicating what particular provision gives the right.\textsuperscript{164} In a state court case it has been intimated that the right to be heard which is guaranteed by due process includes the right to be present whenever the presence of the defendant bears a reasonably substantial relation to his opportunity to defend himself, but that it clearly does not go beyond that as a matter of due process.\textsuperscript{165} His rights are therefore not violated by denying him the right to be present at a view by the jury, in the presence of the judge and the accused’s counsel, of the premises where the crime of murder was alleged to have been committed. A view is not a trial nor a part of the trial nor is it evidence.

The right based on the Sixth Amendment, extends in the case of felonies and capital offenses, to every stage of the trial from the impaneling of the jury to the reception of the verdict.\textsuperscript{166} An accused who is in custody, or one charged with a capital offense may not waive this right, but one accused of a non-capital felony and not in custody may probably waive.\textsuperscript{167}

In a state court case it was pointed out that the privilege to confront one’s accusers and cross examine them face to face is assured to a defendant by the Sixth Amendment in the Federal courts.\textsuperscript{168} And the same case suggests that defendant be per-


mitted to be present at the examination of jurors or the sum-
ming up of counsel.\textsuperscript{169}

In a decision under the due process clause of the Fourteenth Amendment it was held that the right to be present is only with
respect to the trial court, and not the appellate court.\textsuperscript{170}

The Sixth Amendment does not apply to the trials of mis-
demeanors and petty offenses. Hence the right to be present at
such trial will perhaps be protected by the due process clause of
the Fifth Amendment, but only so far as his presence is neces-
sary to effectuate his right to be heard in defense of the
charge.\textsuperscript{171}

In a case coming up from the Philippine Islands the
Supreme Court held that as to a felony not capital, an accused
who was not in custody and who was present when the trial
began could waive his right to be personally present at every
stage of the trial.\textsuperscript{172} The voluntary absence of the defendant
at a time when his presence is not indispensable, coupled with
an express consent that the trial go on in the presence of his
counsel, is a waiver of his right to be present at every stage of
the trial. He was absent twice at a later stage of the trial, and
on these occasions two witnesses for the government were both
examined and cross-examined. In capital cases the right may
not be waived. If there be no waiver in felony cases, the accused
has a right to be present at every stage of the trial.

In Frank v. Mangum\textsuperscript{173} the majority opinion summarized
the holding of an earlier case Lewis v. United States\textsuperscript{174} as being
that it is a leading principle "pervading the entire law of
criminal procedure, that after indictment nothing should be
done in the absence of the prisoner"; and "that in the absence
of a statute, this right as it existed at common law must not be
abridged."

\textsuperscript{169} The court cited Lewis v. United States, (1892) 146 U.S. 370,
13 S.Ct. 136, 36 L.Ed. 1011.
\textsuperscript{170} Schwab v. Berggren, (1892) 143 U.S. 442, 12 S.Ct. 525, 36
L.Ed. 218.
\textsuperscript{171} Rottschaefer on Constitutional Law, (1939) 794. He cites the
state court case of Snyder v. Commonwealth, (1934) 291 U.S. 97,
54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575.
\textsuperscript{172} Diaz v. United States, (1912) 223 U.S. 442, 56 L.Ed. 500, 32
S.Ct. 250, Joseph R. Lamar, J., dissenting.
\textsuperscript{173} Frank v. Mangum, (1914) 237 U.S. 309, 59 L.Ed. 969, 35 S.Ct.
592, 592.
\textsuperscript{174} Lewis v. United States, (1892) 146 U.S. 370, 36 L.Ed. 1011,
13 S.Ct. 136.
In a case arising in the Philippine Islands it was held that an inspection of the scene of a homicide, made by the trial judge, but in the absence of the accused did not infringe his right to ‘meet the witnesses face to face’ under an act of Congress dealing with the Philippines. This is true where the judge in his inspection was not improperly addressed by any one, and did no more than visualize the testimony of the witnesses. The court spoke of the defendant having practically waived his right. The two dissenting judges thought that a view was a part of the trial.

A joint request by the prosecuting attorney and counsel for the accused made in the chambers of the judge without the presence of the accused, to hold the jury in deliberation until they should agree upon a verdict does not justify communications by the court to the jury in the absence of accused and his counsel, when the jury indicates a divergence of views with respect to the guilt of the several defendants. It is reversible error for the trial judge to respond in writing, in the absence of accused and his counsel, and without giving them an opportunity to be heard, to a written request by the jury for further instructions. The joint request originally made is not to be given an extended meaning. It is a ‘rule of orderly conduct of jury trial entitling the defendant especially in a criminal case to be present from the time the jury is impaneled until its discharge after rendering the verdict.’

A judgment of conviction of murder will be set aside if the record does not show that the defendants were present in court when it was entered, and were asked if they had anything to say why sentence should not be pronounced upon them. Mere presence of the attorney for the accused is not enough. There is no right to be present in the appellate court.

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\textsuperscript{177} Ball v. United States, (1891) 140 U.S. 118, 35 L.Ed. 377, 11 S.Ct. 761, 765.

\textsuperscript{178} Dowell v. United States, (1911) 221 U.S. 325, 55 L.Ed. 753, 31 Sup.Ct. 590.
objection that the accused was not present during the prosecution cannot be first urged after trial and a decision on appeal.179

WAIVER OF JURY TRIAL

An act of Congress of July 23, 1892,180 with respect to the District of Columbia, allowed the accused in open court to expressly waive trial by jury and request trial by the court. In a habeas corpus case the Supreme Court refused to find the act unconstitutional.181

The right to trial by jury granted under Article 3, Section 2, clause 3 and the Sixth Amendment, does not include petty offenses. This has been applied to a prosecution by information under a statute imposing a penalty of $50 for the sale of oleomargarine which has not been branded or stamped according to law.182 Misdemeanors punishable by small fine or short imprisonment are not crimes within the meaning of these constitutional safeguards. A jury trial might be waived as to petty offenses.

In 1930 it was held that a defendant in a felony case may waive his right to a trial by jury altogether or may consent to a trial by a jury of less than twelve.183 Possibly he could also waive the requirement of a unanimous verdict.184 For the waiver to be effective the consent of government counsel and the sanction of the court must be had, in addition to the express

180 27 Stat. at Large 261.
181 Ex parte Belt, (1895) 159 U.S. 95, 40 L.Ed. 88, 15 S.Ct. 987. For the history of the federal decisions see J. A. C. Grant, Waiver of Jury Trial in Felony Cases, (1932) 20 Calif. L.Rev. 132, 147-156.
and intelligent consent of the defendant. The court should exercise its discretion cautiously particularly as to grave offenses. The constitution does not make a jury jurisdictional, and Congress has conferred jurisdiction on the courts to act without a jury in case of waiver.

**TRIAL JURY: RIGHT OF, EXAMINATION, CHALLENGES, OATH**

Chapter Eleven of Title 28 of the United States Code entitled "Juries" contains four classes of provisions: (1) provisions applicable to grand jurors and to petit jurors in both civil and criminal cases;¹⁸⁵ (2) provisions applicable only to grand juries;¹⁸⁶ (3) provisions applicable only to petit jurors in civil and criminal cases;¹⁸⁷ and (4) provisions applicable only to petit juries in criminal cases.¹⁸⁸ This chapter is concerned primarily with the fourth class.¹⁸⁹

Article III, section 2, paragraph 3 of the Constitution provides that "the trial of all crimes, except in case of impeachment, shall be by jury". The Sixth Amendment provides that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury".

The trial by jury provisions of the federal constitution do not apply to an incorporated federal territory, such as the Philippine Islands, or Hawaii.¹⁹⁰ The right is not deemed a fundamental one.

Alaska has been so incorporated into the United States by treaty and by statutes, as to render in violation of the Sixth

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¹⁸⁸ 28 U.S.C.A., sec. 414 (mode of drawing jury in Indiana), 424 (number of peremptory challenges), 425 (peremptory challenges), 426 (grounds for challenges for cause in prosecutions for bigamy, polygamy, or unlawful cohabitation).

¹⁸⁹ For discussion see Longsdorf and Nichols, vol. 5, (1929), sections 2306–2341.

Amendment, an act of Congress providing that in trials for misdemeanors six jurors shall constitute a legal jury.191 Puerto Rico need not provide a jury trial as to the misdemeanor of libel.192 The jury system needs citizens trained to the exercise of the responsibilities of jurors.

One charged with having driven an automobile so as to endanger property and individuals has a constitutional right to a jury trial.193 The court stressed the nature of the offense as being the test. An act *malum in se*, indictable, at common law, and shocking to the general moral sense, would call for a jury trial.

The right of trial by jury secured by Article 3, section 2, clause 3 and by the Sixth Amendment, does not extend to prosecutions for petty offenses. The offense of engaging without a license in the business of a dealer in secondhand personal property is not one as to which there is a constitutional right to trial by jury.194 The fact that a statutory offense otherwise trivial and not a crime at common law, is punishable by imprisonment which may run for ninety days or by a fine up to $300, does not insure the right of jury trial, even though the defendant is not entitled to an appeal as of right. Possibly, severity of punishment alone may ultimately be held a sufficient basis for requiring the trial of an offense by a jury.195

The Sixth Amendment expressly requires the jury to be an impartial one. This would probably bar any legislation which would prevent a defendant from challenging jurors for causes going to their fairness and infallibility, but does not prevent Congress from excluding as grounds for challenges causes that do not go to these matters.196 A statute declaring employees of the Federal government and recipients of pensions

195 Such an inference is drawn from District of Columbia v. Clawans in Rottschaefer on *Constitutional Law*, (1939) 789.
196 Rottschaefer on *Constitutional Law*, (1939) 785.
or gratuities from the Federal government to be eligible as jurors in the District of Columbia does not violate the requirement for an impartial jury nor due process.\textsuperscript{197} The Court stated that it would have decided the same way even if such persons had been ineligible at common law. It stated in dictum that legislation making women qualified to serve as jurors would be valid though they were not eligible at common law.\textsuperscript{198}

Where the record shows a lawful and regular jury, an accused may not impeach and contradict this statement by showing that instead of twelve there were only eleven jurors.\textsuperscript{199} Habeas corpus will not lie. The proceedings of one district court within its jurisdiction cannot be impeached and re-examined collaterally by habeas corpus in the district court of another district.

In a state court case the Court held that the use of a struck jury even in a murder case was constitutional.\textsuperscript{200} Struck juries were not unknown to the common law, though perhaps not used in murder cases. Under the New Jersey statute the court could select from the persons qualified to serve as jurors ninety-six names, from which the prosecutor and defendant might each strike twenty-four and the remainder should be put in the jury box, out of which the jury should be drawn in the usual way. The court pointed out that the manner of selection was one calculated to secure an impartial jury. It stated that the purpose of criminal procedure is not to enable the accused to select jurors, but to secure an impartial jury. The court thought it immaterial that a reduced number of peremptory challenges was allowed.


\textsuperscript{198} The court cited Lyman v. United States (C.C.A., 9th, 1924) 297 F. 177, 178, 179; and Hoxie v. United States, (C.C.A., 9th, 1926) 15 F. (2d) 762. See also Glasses v. United States, (1942) 62 S.Ct. 457, 462.

\textsuperscript{199} Riddle v. Dyche, (1923) 262 U.S. 333, 43 S.Ct. 555, 67 L.Ed. 1009 (felony).

Prior to 1879 juries were under the statute, designated by ballot, lot, or otherwise according to the mode of forming such juries in the several states, and the courts were authorized to adopt rules conforming the method of Designating and impaneling juries to the laws and usages of the state. By the act of June 30, 1879, a new system was inaugurated. It was provided in substance that the names of not less than 300 persons should be placed in the jury box by the clerk of the court and a commissioner to be appointed by the court, who should be of opposite politics from the clerk, each to place one name in the box alternately, without reference to party affiliations.

Under the statutes when there is no petit jury available, the marshal or his deputy shall by court order return jurymen from the bystanders sufficient to complete the panel. The act of June 30, 1879, did not repeal this provision.

A venire may properly be issued after a term has begun, and it need not recite that the jurors are summoned for the trial of any particular case. A motion to quash such venire will not lie. Jurors need not be summoned before the term begins. The name of the particular person to be tried need not be inserted in the writ.

While the laws of the respective states as to qualifications and exemptions of jurors have been made controlling in the federal courts, the state laws as to designations and impaneling of jurors have not been so adopted, and are not binding on the federal courts, except as the federal courts adopt them by standing rule or special order.

Concealment or misstatement by a juror on voir dire exam-
ination is punishable as a contempt if its tendency and design are to obstruct the processes of justice.\textsuperscript{210} The oath of a contemnor is no longer a bar to a prosecution for contempt. A juror on the trial of a case which resulted in disagreement brought about by her vote for acquittal is guilty of contempt where on \textit{voir dire} she procures her acceptance as a juror by concealing matters which would have led to her being challenged, and by falsely testifying that her mind was free from bias. A talesman when accepted as a juror becomes a part or member of the court. The privilege from disclosure of jury deliberations does not apply to a juror who has procured her acceptance by misrepresentation and concealment.

In a case coming up from the Territory of Utah it was held that it was proper on \textit{voir dire} to interrogate the jurors as to their belief that the practice of polygamy was in obedience to the divine will and command.\textsuperscript{211} At common law this would have been ground for principal challenge of jurors of the same faith.\textsuperscript{212}

In a capital case where the jury is to fix the penalty, jurors who state on their \textit{voir dire} that they have conscientious scruples about the death penalty may be challenged by the prosecution.\textsuperscript{213} The prosecution may also challenge a person conscientiously believing that polygamy is rightful.\textsuperscript{214}

It is ordinarily proper for a trial court to refuse to permit a juror on his \textit{voir dire} to be asked as to his political affiliations.\textsuperscript{215}

The discretion of the court as to questions to be asked jurors on \textit{voir dire} examination is subject to the essential demands of fairness. The refusal of the court to accede to a request, on the trial of a negro charged with killing a white man, that jurors


\textsuperscript{211}Miles v. United States, (1880) 103 U.S. 304, 26 L.Ed. 481. For the statutes later enacted in 1882 see 28 U.S.C.A., sec. 426.

\textsuperscript{212}3 Blackstone, Commentaries, 303.

\textsuperscript{213}Logan v. United States, (1892) 144 U.S. 263, 36 L.Ed. 429, 12 S.Ct. 617, 628.

\textsuperscript{214}Reynolds v. United States, (1879) 98 U.S. 145, 147, 157, 25 L.Ed. 244. Miles v. United States, (1880) 103 U.S. 304, 310, 26 L.Ed. 481.

\textsuperscript{215}Connors v. United States, (1895) 158 U.S. 408, 39 L.Ed. 1033, 15 S.Ct. 951.
be interrogated as to racial prejudice, is reversible error. In a case coming up from the Territory of Oklahoma it was held that the right of the accused to object that a juror was disqualified because it appeared during the trial that he had been convicted of a felony, contrary to his statement on his voir dire, is waived by failure to raise the question until after the verdict. He must object at the time. This is particularly true when the court asked the counsel for the accused what they desired to do, and intimated that if the objection were pressed the juror would be excused, which meant that the trial would have to begin all over again, and counsel replied that they had nothing to say.

In a case coming up from the District of Columbia the Court ruled that the objection that the petit jury was not lawfully drawn should be taken at the trial, and not first raised on review in the Superior Court, particularly since the District of Columbia Code provides that no verdict shall be set aside for any cause which might be alleged as ground of challenge before a jury is sworn, except for disqualifying bias not then discovered or suspected.

There is no violation of the Sixth Amendment where the jurors are not drawn from the entire district, but one division thereof. This is shown by the contemporary construction placed on the Amendment by the Judiciary Act of 1789, expressly authorizing the drawing of the jury from a part of the district, and the continuous legislative and judicial practice from the beginning.

Aldridge v. United States, (1931) 283 U.S. 308, 75 L. Ed. 1054. The court stated that in "accordance with the existing practice, the questions to the prospective jurors were just by the court."

But the court agreed with an earlier one that bias arising out of political affiliations was too remote. See Connors v. United States, (1895) 158 U.S. 403, 15 S. Ct. 951, 39 L. Ed. 1033. Queenan v. Territory of Oklahoma, (1903) 190 U.S. 548, 47 L. Ed. 1175, 23 S. Ct. 762.


1 Stat. at L. 73, chap. 50.

The Sixth Amendment does not require that the grand and the petit jury be drawn from the entire district.\textsuperscript{224} Congress has provided that "jurors shall be returned from such part of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and was not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service."\textsuperscript{225} Whether or not the directions of the court should be in writing is not clear.

Possibly state rules are to be applied as to the matter of challenges for cause. There is no clear holding that they must be.\textsuperscript{226}

In a case coming up from the Territory of Utah it was held that when a challenge by the accused to a juror for bias, actual or implied, is disallowed, and the juror is then peremptorily challenged by the accused and examined, and an impartial juror is obtained in his place, no injury is done to the accused, if, until the jury is completed, he has other peremptory challenge which he may use.\textsuperscript{227}

The refusal of the trial court to sustain a challenge for cause will not be disturbed on appeal, where it appears from the examination of such juror that he had not talked with anyone purporting to know about the case of his own knowledge, that he had no opinion other than that derived from the newspapers, and that evidence would change it very easily, and he thought he could try the case solely on the evidence.\textsuperscript{228} The finding of the trial court should not be upset unless the error is manifest. It is not clear that the state court decisions on this question bind the federal trial court.

An erroneous ruling in a homicide case upon the defendant's challenge, of a juror for cause could not prejudice the accused where such juror was peremptorily challenged by the accused, and the accused was in fact allowed one or two more than the statutory number of peremptory challenges, and there is nothing in the record to show that any juror who sat upon

\textsuperscript{227} Holt v. People, (1887) 120 U.S. 430, 30 L.Ed. 708, 7 S.Ct. 614.
\textsuperscript{228} Holt v. United States, (1910) 218 U.S. 245, 54 L.Ed. 1021, 31 S.Ct. 2, 4.
the trial was in fact objectionable.229 The statute in such a case allows the accused twenty peremptory challenges.230

Experimental approaches to the corruption of a petit juror in the discharge of his duty, though before he was elected or sworn are, irrespective of failure or success, within the provisions of Section 135 of the Criminal Code,231 for the punishment of anyone who corruptly, or by threats of force, or by any threatening letter, shall endeavor to influence, intimidate, or impede any petit juror in the discharge of his duty.232

In 1790 Congress provided for granting certain peremptory challenges to the defendant,233 but no peremptory challenge was allowed to the prosecution.234

The Crimes Act of 1790235 provided for the right of peremptory challenge in capital cases. Mr. Justice Story asserted in 1827 as to joint trials that "this right, to the extent of the statute, must, in all cases, be allowed the prisoners, whether they be tried jointly or separately."236

The Act of Congress of July 20, 1840,237 was construed as giving the courts of the United States the power to make all necessary rules and regulations for conforming the impaneling of juries to the laws and usages in force in the state.238 This power included that of regulating the challenges of jurors, whether peremptory or for cause, except as to treason and other capital crimes. The act of 1790239 recognized the right of per-

233 1 Stat. at L. 119, chap. 9.
235 Chap. 9, sec. 29.
237 5 Stat. at L. 394.
239 1 Stat. at L. 119. This act gave the accused thirty-five challenges in treason cases and twenty in felony, which was the com-
emptory challenge in these cases, and therefore it could not be taken away from the courts. However, that recognition did not necessarily draw along with it the qualified right, existing at common law, of challenge by the prosecution. Therefore, unless the laws of the state, adopted by rule of court, allow it on behalf of the prosecution, it should be rejected, conforming to the state practice.

There being no act of Congress on the subject of the manner of impaneling and challenging jurors, the trial court can lay down its own rules. It may follow the state practice, but it is not bound to do so. Mr. Justice Shiras has stated that "all rules of practice must necessarily be adopted to secure the rights of the accused; that is, when there is no statute, the practice must not conflict with or abridge the right as it exists at common law."

On a murder trial the action of the court in compelling defendant to make his peremptory challenges of jurors in ignorance of the challenges made by the government, whereby he challenged two jurors who had also been challenged by the district attorney, is not ground for reversal, where defendant failed to except at the time, and did not object until after conviction, on motion for a new trial.

In the absence of a rule of court or a special order adopting the state law and practice to the contrary, the rights of the defendant are not infringed by requiring him to exercise his peremptory challenges from a list of qualified jurors not subject to challenge for cause, without having the peremptory challenges made by the government, although this may result in both parties challenging the same person. The government need not exercise its challenge first. The order of challenge is in the discretion of the trial court.

A local circuit court rule that a juror shall be challenged or accepted and sworn as soon as his examination is completed.


is not objectionable as embarrassing the exercise of the right of peremptory challenge.\textsuperscript{244}

The conditional or qualified right of challenge on behalf of the prosecution, which has the effect of setting aside a juror until the panel is exhausted, without assigning any cause, still existed in 1906, in those states where such practice obtained, despite the Act of March 3, 1865,\textsuperscript{245} and June 8, 1872,\textsuperscript{246} giving peremptory challenges to the prosecution, if such practice had conformably to the Act of July 20, 1840,\textsuperscript{247} been adopted by a court rule in the Federal courts.\textsuperscript{248} The prosecution has not exercised such right of challenge unreasonably where neither the prosecution nor the defendants had exhausted all their peremptory challenges when the jury was obtained.

In a capital case the accused has the right to be confronted with the panel of jurors, and to be present at the challenges.\textsuperscript{249} It is therefore reversible error for a federal judge to direct secret challenges to be made from separate jury lists, each side being ignorant of the challenges the other has made.\textsuperscript{250}

The offense of reselling smuggled goods\textsuperscript{251} was held in 1895 not a felony, so as to entitle the accused to ten peremptory challenges, although he is liable to be punished by fine and two years' imprisonment which may be inflicted in a state penitentiary, since the offense is subordinate to smuggling which is expressly declared by statute to be a misdemeanor, though the penalty is substantially the same.\textsuperscript{252} Today, the statutes provide that "all

\begin{footnotesize}
\textsuperscript{244} St. Clair v. United States, (1894) 154 U. S. 134, 38 L. Ed. 936, 14 S. Ct. 1002.

\textsuperscript{245} 13 Stat. at L. 500, chap. 86.

\textsuperscript{246} 17 Stat. at L. 282, chap. 333.


\textsuperscript{248} Sawyer v. United States, (1906) 202 U. S. 150, 50 L. Ed. 972, 26 S. Ct. 575. The court pointed out that the origin of the practice was stated by Field, J., in Hayes v. Missouri, (1897) 120 U. S. 68-71, 30 L. Ed. 578-580, 7 S. Ct. 350, 351.

\textsuperscript{249} The court also cited a dictum by Story, J., in United States v. Marchant, (1827) 12 Wheat. 480, 6 L. Ed. 700.

\textsuperscript{250} Lewis v. United States, (1822) 146 U. S. 370, 36 L. Ed. 1011, 13 S. Ct. 136, Brewer and Brown, J. J., dissenting on the ground that the inference of fact on which the decision is based were not justified by the record.

\textsuperscript{251} Reagan v. United States, (1895) 157 U. S. 301, 39 L. Ed. 709, 15 S. Ct. 610. The court cited Bannon v. United States, (1875) 156 U. S. 464, 39 L. Ed. 494, 15 S. Ct. 467 to the effect that the term felony is used to designate such offenses as were formerly punishable by death or forfeiture of the lands or goods of the offender.
\end{footnotesize}
offenses which may be punishable by death or imprisonment
for a term exceeding one year" are felonies and that "all other
offenses shall be misdemeanors."[252]

In a case involving a felony, such as robbing the mails,
under the federal statute[253] the defendant is entitled to ten
peremptory challenges. Hence when he is allowed only three as
for a misdemeanor, the verdict may be set aside and he is entitled
to a new trial.[254]

The constitutional rights of several defendants tried jointly
are not infringed by the requirement of a federal statute that,
in cases where there are several defendants, they shall be treated
as a single party for the purpose of peremptory challenges.[256]
There is nothing in the Constitution requiring Congress to grant
peremptory challenges in criminal cases, and the privileges
granted must be taken with the limitations placed upon its ex-
ercise. Treating the several parties as one has been the law as
far back as 1865.

Congress may reduce the number of peremptory challenges
of the accused.[256] At common law he had thirty-five, the stat-
ute of 22 Henry VIII, chap. 14, fixed it at twenty, and Congress
has reduced to ten in the cases of felonies other than treason
or capital offenses.[257]

Peremptory challenges to trial jurors are regulated by stat-
ute, which gives in capital cases the defendant twenty and the
United States six such challenges; in other felonies the defend-
ant has ten and the United States six; in all other cases, civil
and criminal, each party has three.[258] And several defendants
are treated as a single party for the purpose of challenges under
this statute.

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16 S. Ct. 961.
[255] Schaeffer v. United States, (1920) 251 U. S. 466, 64 L. Ed. 360;
Stilson v. United States, (1919) 250 U. S. 583, 63 L. Ed. 1154, 40
S. Ct. 28.
Compare language in Lewis v. United States, (1892) 146 U. S.
370, 38 L. Ed. 1011, 13 S. Ct. 136.
81 L. Ed. 78; Rottschaefer on Constitutional Law, (1939) 786. The
court cited Stilson v. United States, (1919) 25 A. U. S. 583, 586,
40 S. Ct. 28, 63 L. Ed. 1154, 1156
Where objection is taken that the petit jury were not sworn, such objection will not avail where the record discloses, on appeal, that the jurors were "called and impaneled" and "being selected and tried in the manner prescribed by law, the truth of and upon the premises to speak, and having heard the evidence, the arguments of counsel, and the charge of the judge, retired to consider their verdict, and upon their oaths to say."

259 The federal statutes today provide for the use of alternate jurors.

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