Criminal No. 475 Vol - 8

IN THE

DISTRICT COURT OF APPEAL

OF THE

STATE OF CALIFORNIA

IN AND FOR THE

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

M. A. SCHMIDT,

Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

RESPONDENT'S BRIEF

PART II.

LAW OF THE CASE.

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Filed this 22 day of Jan, A. D. 1917.

W. D. SHEARER, Clerk.

By_____, Deputy Clerk

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POINTS AND AUTHORITIES.

POINT 1.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT.

The motion of the defendant to set aside the indictment was based upon numerous grounds, only two of which are urged by him on his

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appeal. The first of these grounds is the assertion that the evidence produced upon the hearing of the motion shows without conflict that grand jurors disqualified by reason of bias and prejudice participated in the investigation of the case and in the finding of the indictment. The second ground is that an unauthorized person was present in the grand jury room.

We submit that neither of these grounds is tenable. They will be discussed in their order.

The proposition that the indictment should have been dismissed because disqualified grand jurors participated in the investigation of the case and in the finding of the indictment must be examined in two aspects. First, we submit that it was not open to the defendant, under the law as it existed when the motion was made, to move for the dismissal of the indictment upon this ground. Second, assuming that it was open to him to move on such ground, it was competent for the court to pass upon the affidavit of the defendant, and the answering affidavits of the people and pass upon the question of disqualification of jurors; and this it did; and there is nothing in the record to show any abuse of discretion or error on the part of the court in denying the motion.

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FIRST: IT WAS NOT OPEN TO THE DEFENDANT TO MOVE TO SET THE INDICTMENT ASIDE ON THE GROUND THAT THE GRAND JURORS WERE DISQUALIFIED.

The crime of murder charged in the indictment was committed on October 1, 1910. The indictment of the defendant and others was found and presented on the 5th day of May, 1911. At the time of the commission of the crime, the Penal Code of the state of California, contained the following provision:

> "Sec. 894. *Who may challenge the panel or an individual juror.* The people, or a person held to answer a charge for a public offense, may challenge the panel or a grand jury, or an individual juror."
>
> "Sec. 895. *Cause of challenge to a panel.* A challenge to the panel may be interposed for one or more of the following causes only:
>
> "1. That the requisite number of ballots was not drawn from the jury box of the county;
>
> "2. That notice of the drawing of the grand jury was not given;
>
> "3. That the drawing was not had in the presence of the officers designated by law."
>
> "Sec. 896. *Challenging grand juror.* A challenge to an individual grand juror may be interposed for one or more of the following causes only:
>
> "1. That he is a minor.
>
> "2. That he is an alien.
>
> "3. That he is insane.

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"4. That he is a prosecutor upon a charge against the defendant.

"5. That he is a witness on the part of the prosecution, and has been served with process or bound by an undertaking as such.

"6. That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging;

"(Preconceived opinion does not disqualify, when.) But no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety, provided it satisfactorily appear to the court upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him."

"Sec. 995. Indictment or information, when set aside on motion. The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases. If it be an indictment:

"1. Where it is not found, indorsed and presented as prescribed in this code.

"2. When the names of the witnesses examined before the grand jury, or whose depositions may have been read before

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them, are not inserted at the foot of the indictment, or indorsed thereon.

"3. When a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in section nine hundred and twenty-five.

"4. When the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror."

On March 22, 1911, the following statutes were passed, amending the foregoing sections of the Penal Code:

"Chapter 252, Laws of 1911, page 433:

"Section 894 of the Penal Code is hereby amended to read as follows:

"894. Before accepting a person drawn as a grand juror, the court must be satisfied that such person is duly qualified to act as such juror, but when drawn and found qualified, he must be accepted, unless the court, on the application of the juror, and before he is sworn, shall excuse him from such service for any of the reasons prescribed in Chapter 1, Title III, Part 1 (Sections 190–254) of the Code of Civil Procedure."

"Chapter 253, Laws of 1911, page 434:

"895. No challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand

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juror, unless when made by the court for want of qualification, as prescribed in the next preceding section.

"2. Sections 164, 896, 898, 899, 900 and 901 of the Penal Code are hereby repealed."

"995. The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

"If it be an indictment:

"1. Where it is not found, indorsed and presented as prescribed in this code.

"2. Where it appears by the testimony of the foreman or secretary of the grand jury that the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, are not inserted at the foot of the indictment, or indorsed thereon.

"3. When a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in section nine hundred and twenty-five."

By operation of the Political Code, section 323, these statutes took effect on the sixtieth day after their enactment. The indictment was found and presented May 5, 1911, and, therefore, prior to the time when these statutes took effect. On the 16th day of March, 1915, the defendant Schmidt filed a motion to set aside and quash the indictment, basing the

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same upon an affidavit made by him and upon the minutes, and so forth, of the court, and upon oral testimony to be adduced by the defendant at the hearing of the motion. (Cl. Tr. V. 1, p. 7; p. 21.)

On the 20th day of March, 1915, the people filed a motion to strike out certain portions of the affidavit of the defendant Schmidt (Cl. Tr. V. 1, p. 74), which motion was denied. On the 22d day of March, 1915, the people filed affidavits in answer to the affidavit of the defendant Schmidt. (Cl. Tr. V. 1, pp. 77, 79, 87.)

The defendant moved for leave to examine the grand jurors for the purpose of determining bias or prejudice, which motion was denied March 30, 1915. Thereafter, after arguments by counsel for the respective parties, and on the 8th day of April, 1915, the motion to set aside and quash the indictment was denied.

Defendant's counsel see fit to characterize the answering affidavits of the people as mere conclusions of law. We submit there is nothing in this suggestion, as will fully appear by the affidavits themselves. The defendant based his right to move to dismiss the indictment for bias of members of the grand jury upon the sole ground that the amendments to the Penal Code of March 22, 1911, were *ex post facto, quoad* the case at bar.

The proposition was that at the time the crime was committed, the defendant had a

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right of challenge to the panel and to individual jurors under the provisions of the Penal Code above quoted, existing before the amendments.

In order to have an adequate conception of the question it is necessary to clearly understand the change made by the amendments.

Before the amendments, section 894 provided "a person held to answer a charge for a public offense," might challenge the panel or an individual juror. There were then two classes of cases, one where a preliminary hearing was had on a charge against the defendant, the other where the defendant was indicted without preliminary charge or hearing. Subdivision 4 of section 995 provided for this second class of cases by giving the right to move to set the indictment aside "on any grounds which would have been good grounds for challenge."

The constitution of 1849, Article I, section 8, provided that "no person shall be held to answer for a capital or otherwise infamous crime * * * unless on presentment or indictment of a grand jury * * *."

The constitution of 1879 provides, Article I, section 8, that "offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commit-

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ment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county."

In the year 1907 it was held in the case of *Kitts* vs. *Superior Court,* 5 Cal. App. 462, at page 465, as follows:

> "Under the system in vogue in California prior to the adoption of our present constitution the only mode authorized for the inauguration of a prosecution of an ordinary felony charge was by indictment by a grand jury, a necessary prerequisite to which was a preliminary hearing of the charge by a magistrate and an order holding the accused to answer before said body. By that method of proceeding, the accused, having been held to answer, was expressly given by the law the right, and thus afforded an opportunity of interposing in open court a challenge to the panel of grand jurors or of examining them individually for the purpose of exercising any challenge of their right upon any ground prescribed by the statute to inquire into or act upon his case. Since the adoption of the present constitution, however, the procedure with regard to the initiation of prosecutions for felony is essentially different from the former manner of proceeding. Under our present system, as established by the constitution of 1879, and which it is safe to say is familiar to people generally, all offenses theretofore prosecuted by indictment may be prosecuted by information after an ex-

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amination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law. (Const., Art. I, Sec. 8.) The effect of this provision of the constitution is, as may readily be seen, that an indictment by a grand jury may be found for a felony without a preliminary examination of the charge by a magistrate, and the accused, therefore, deprived of an opportunity, as formerly accorded to him, of examining the inquisitors as to their general and special qualifications to act as such before they proceed to the examination of his case. The result is, in such a case, that the accused has but one remedy, which is exercisable only after the indictment is found and filed, and is in the nature of a motion to set it aside for certain specified reasons prescribed by section 995 of the Penal Code."

At the time the decision was rendered in the Kitts case the Penal Code, as adopted in 1872, stood unamended, and no change was made in the code until the amendments of 1911. By these amendments section 894 was radically changed. The right of challenge by the defendant was entirely eliminated, and the qualification of the panel and individual jurors was left to the sound discretion of the court which draws the jurors; and, as a consequence, subdivision 4 of section 995, providing for a motion to dismiss on grounds which would have

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constituted cause for challenge, was repealed. It will thus be seen that at the time the crime involved in the case at bar was committed, it was competent to indict the defendant without any preliminary charge. This was done, and, of course, the defendant had no right of challenge under the statute as it stood. The only change made by the amendments, therefore, was, to eliminate cause for challenge as a ground for a motion to set aside the indictment provided in subdivision 4 of section 995.

The people took the position that the amendment eliminating this ground of motion to set aside the indictment related solely to a matter of procedure, and was, therefore, not *ex post facto*; and that as the motion to dismiss was made after the amending act took effect, the defendant was not entitled to move to set the indictment aside on the alleged ground of disqualification of the panel or of individual grand jurors.

We submit that the right to move to set an indictment aside is purely statutory. It is purely a matter of procedure of the trial court after the finding of the indictment, and does not go to the substance of the offense, or alter the situation of the defendant to his disadvantage, at all, in relation to the offense or its consequences.

We submit that it is clear, upon authority, that this legislation is not obnoxious to the

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inhibition of the Constitution of the United States, Article I, section 10, or the constitution of the state of California, Article I, section 16, prohibiting the passage of *ex post facto* laws.

Many definitions have been attempted of the term *ex post facto* law, but the one which has met with the highest approval, and in more numerous instances than any other, is that which is given in the leading case of *Kring* vs. *Missouri,* 107 U. S. 221, in which Mr. Justice Miller, writing the opinion of the court, says, at page 227:

> "The first case in which this court was called upon to construe this provision of the constitution, was that of *Calder* vs. *Bull,* 3 Dall. 386, decided in 1798. The opinion was delivered by Mr. Justice Chase and its main purpose was to decide that the provision had no application to acts concerning civil rights. It, however, is important, as it discusses very fully the meaning of the provision in its application to criminal cases. It defines four distinct classes of laws embraced by the clause.
>
> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates the crime or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed.

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4th. Every law that alters the legal rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."

And he again says: "But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime; or increase the punishment or change the rules of evidence for the purpose of conviction. . . . . But it is not to be supposed that the opinion in that case undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable.

"Accordingly, in a subsequent case tried before Mr. Justice Washington, he said, in his charge to the jury, that an 'ex post facto law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage,' *United States* vs. *Hall,* 2 Wash. 366.

"He adds, by way of application to that case which was for a violation of the embargo laws: 'If the enforcing law applies to this case, there can be no doubt that, *so far as it takes away or impairs the defense* which the law had provided the defendant at the time when the condition of this bond

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became forfeited, it is ex post facto and inoperative.'"

The facts of the Kring case can not be better stated than in the language of the first paragraph of its head note, which is as follows:

> "A. was convicted of murder in the first degree, and the judgment of condemnation was affirmed by the Supreme Court of Missouri. A previous sentence pronounced on his plea of guilty of murder in the second degree, and subjecting him to an imprisonment for twenty-five years, had, on his appeal, been reversed and set aside. By the law of Missouri, in force when the homicide was committed, this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed, so that by force of its provisions, if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime. Held, that as to this case the new law was an ex post facto law, within the meaning of section 10, Article I, of the constitution of the United States, and that he could not be again tried for murder in the first degree."

It is not necessary to the purpose of this brief, to go further than to say that although the court was divided five to four, the majority held that the effect of the change made by the constitution of Missouri was twofold: first, to

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change the rule of evidence, and, second, to deprive the accused of a defense; and the gist of the decision is contained in the following language found at page 228:

> "In the case before us the constitution of Missouri so changes the rule of evidence, that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide is not received as evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment, for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction."

Whether we agree with the opinion of the majority of the court, or with the very learned and exhaustive dissenting opinions, which hold that the change made by the constitution was merely one of procedure; yet we must accept the majority opinion as the law laid down by the court; and still we find the basis of the opinion to be that the change in question was violative of two of the classes of cases enumerated in the opinion of Mr. Justice Chase, viz, it changes the punishment and alters a legal rule of evidence.

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The essence of this decision is that the court based its determination that the law was *ex post facto* upon its conclusion that it alters a rule of evidence and changes the punishment, and as will be seen by the reading of the entire decision, took away a defense which was open to the accused at the time of the homicide, neither of which involves a question of procedure, but all of which go to substantial rights.

Another leading case is that of *Hopt* vs. *Utah,* 110 U. S. 574.

In this case at the time the felony in question was committed, convicted felons were not competent witnesses in criminal cases. Subsequent to the commission of the crime, an act of the legislature of Utah was passed, making convicted felons competent witnesses in criminal cases. The gist of the decision is well stated in paragraph five of the head note, as follows:

> "A statute which simply enlarges the class of persons who may be competent to testify, is not ex post facto in its application to offenses previously committed; *for it does not attach criminality to any act previously done, and which was innocent when done, nor aggravate past crimes, nor increase the punishment therefor; nor does it alter the degree, nor lessen the amount or measure, of the proof made necessary to*

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conviction for past offenses. Such alterations relate to modes of procedure only which the state may regulate at pleasure, and in which no one can be said to have a vested right."

We quote from the opinion of Mr. Justice Harlan at pages 589–590:

"That decision proceeded upon the ground that the state constitution deprived the accused of a substantial right which the law gave him when the offense was committed, and, therefore, in its application to that offense and its consequences, altered the situation of the party to his disadvantage. *By the law as established when the offense was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree, and subjected to the punishment of death. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offense was committed.*

"But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be com-

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petent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed."

"*The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.* Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect to that offense be obnoxious to the constitutional inhibition upon ex post facto laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, *relate to modes of procedure only, in which no one can be said to have a*

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vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged."

In the case of *Duncan* vs. *Missouri,* 152 U. S. 377, we find the following:

"An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, *in relation to the offense or its consequences, alters the situation of a party to his disadvantage.*

"The prescribing of different modes of procedure, and the abolition of courts and the creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime are not considered within the constitutional prohibition."

The gist of this case is that at the time the offense charged was committed, a right of appeal from the judgment of the trial court to, and of review of judgment by, the Supreme Court of *five judges* existed. Subsequent to

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the commission of the offense, the constitution of the state of Missouri was so amended as to make the appeal reviewable by a division of the Supreme Court consisting of only *three judges*; and the defendant having been convicted, and appealed to the Supreme Court, the judgment of conviction was confirmed by only three judges. It is claimed by the defendant that the amendment of the constitution was obnoxious to the *ex post facto* provision of the federal constitution, in that it deprived him of a substantial right, *i.e., the right to have his appeal heard by five judges instead of three.* The Supreme Court, Mr. Chief Justice Fuller writing the opinion, held the contention not good. As will be seen from the following passage of the opinion, the decision of the court was upon the ground that the change in the number of judges who should review the judgment of conviction, from five to three, was not violative of the constitutional prohibition against *ex post facto* laws. At pages 382–383 Mr. Chief Justice Fuller says:

> "The argument seems to be that the constitution secured to plaintiff in error the right to have his case adjudicated on appeal by a Supreme Court of five judges, as provided by the state constitution at the time of the commission of the offense with which he stood charged, although his motion accepted the jurisdiction of a bench of seven,

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and he objects that that right was denied to him in the adjudication of his case by a court composed of three judges in accordance with the amendment. And he insists that the amendment is as to him obnoxious to the objections that it denies due process and the equal protection of the laws, and abridges his privileges and immunities in contravention of the fourteenth amendment. But the privileges and immunities of citizens of the United States, protected by the fourteenth amendment, are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; and there is no suggestion of deprivation in these regards except as covered by the point really pressed, that the amendment to the state constitution was, as to Duncan, *ex post facto,* and therefore void.

"It may be said, generally speaking, that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party

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to his disadvantage; (*Cummings* vs. *Missouri,* 4 Wall. 277; *Kring* vs. *Missouri,* 107 U. S. 221): but the prescribing of different modes of procedure and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition. Cooley Const. Lim. (5th ed.) 329.

"Accordingly, in *State* vs. *Jackson,* 105 Missouri 196, the precise questions sought to be raised here were decided by the Supreme Court of Missouri, at April term, 1891, of that court, adversely to the position taken by plaintiff in error, the case having been transferred to the court in banc in order that these questions, which were raised by motion for rehearing in division numbered two, where the judgment of the lower court had been affirmed (105 Missouri, 201) might be considered by a full bench. The case had been before the Supreme Court on two former occasions (95 Missouri, 623; 99 Missouri, 60), and the constitutional amendment in question was adopted after the appellant took his last appeal. The Supreme Court held that it could not 'be doubted that it was entirely competent for the people to adopt such a change in their organic law as to take away from this court as a whole all cognizance of criminal causes, and to confer such jurisdiction on a portion or division of this court, though less in numbers and different

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in personnel from this court as organized when the crime in question was committed;' and that the amendment was not contrary to the fourteenth amendment nor to section ten of article one of the federal constitution as applied to one convicted of murder, who had appealed before the amendment took effect."

In the case of *Gibson* vs. *Mississippi,* 162 U. S. 565, Mr. Justice Harlan, writing the opinion of the court, says at pages 588–590 as follows:

"The contention of the accused is that the constitution of the state (Sec. 283) required that the indictment against him should have been by a jury of the grand inquest organized as directed in the code of 1880, because that code was in force at the date of the murder charged to have been committed; and that the law upon that subject in the code of 1892 would be *ex post facto* if applied to his case.

"We perceive in these constitutional and statutory provisions nothing upon which to rest the suggestion that the accused was tried under a law that was *ex post facto* in its application to his case. At the time the homicide was committed no person was competent to be a grand or petit juror unless he was a qualified elector and able to read and write. This requirement was attended by an injunction that the legislature should provide by law for procuring a

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list of persons so qualified, and for drawing therefrom of grand and petit jurors for each term of the Circuit Court. Miss. Const. Sec. 264. And, as we have seen, it was further provided that all crime and misdemeanors and penal actions should be tried, prosecuted and punished as though no change had taken place until otherwise provided by law. Miss. Const. Sec. 283. It is clear that the provision in the constitution of 1890 prescribing the qualifications of grand and petit jurors became the law of the state immediately upon the adoption of the constitution, and that legislation was not necessary to give it effect; and that the provisions of the code of 1880 for the conduct of trials were superseded by those on the same subject in the code of 1892.

"It is equally clear that the provisions of the code of 1892 regulating the selection of grand and petit jurors were not *ex post facto* as to the case of Gibson, although they were not in force when the alleged homicide was committed. The requirement of the constitution of 1890 that no person should be a grand or petit juror unless he was a qualified elector and able to read and write did not prevent the legislature from providing, as was done in the code of 1892, that persons selected for jury service should possess good intelligence, sound judgment and fair character. Such regulations are always within the power of a legislature to establish unless forbidden by the constitution. They tend to secure the

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proper administration of justice and are in the interest, equally, of the public and of persons accused of crime. We do not perceive that the code of 1892, in force when the indictment was found, affected in any degree the substantial rights of those who had committed crime prior to its going into effect. *It did not make criminal and punishable any act that was innocent when committed, nor aggravate any crime previously committed, nor inflict a greater punishment than the law annexed to such crime at the time of its commission, nor alter the legal rules of evidence in order to convict the offender.* These are the general tests for determining whether a statute is applicable to offenses committed prior to its passage. *Calder* vs. *Bull,* 3 Dall. 386, 390; *Cummings* vs. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333; *Kring* vs. *Missouri,* 107 U. S. 221, 228; *Duncan* vs. *Missouri,* 152 U. S. 377, 382. *The provisions in question related simply to procedure. They only prescribed remedies to be pursued in the administration of the law, making no change that could materially affect the rights of one accused of crime theretofore committed. The inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial is always under legislative control, subject only to the condition that the legislature may not, under the guise of estab-*

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lishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against ex post facto enactments. In *Hopt* vs. *Utah,* 110 U. S. 574, 589, a statute that permitted the crime charged to be established by witnesses who by the law at the time the offense was committed were incompetent to testify in any case whatever, was adjudged not to be *ex post facto* within the meaning of the constitution, the court observing that such a statute did not increase the punishment nor change the ingredients of the offense nor the ultimate facts necessary to establish guilt, but related 'to modes of procedure only in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure.' *Hence it has been held that a general statute giving the government more challenges than it had at the time of the commission of a particular offense was constitutional. Walston* vs. *Commonwealth,* 16 B. Mon. 15, 39."

Again, in *Thompson* vs. *Missouri,* 171 U. S. 380, it was held that an act of the legislature providing that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or

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otherwise of the writing in dispute" was not an ex post facto law. Mr. Justice Harlan, writing the opinion of the court, says, at page 382:

> "The contention of the accused is that as the letters to his wife were not, at the time of the commission of the alleged offense, admissible in evidence for the purpose of comparing them with other writings charged to be in his handwriting, the subsequent statute of Missouri changing this rule of evidence was *ex post facto* when applied to his case.
>
> "It is not to be denied that the position of the accused finds apparent support in the general language used in some opinions."

After reviewing the cases of *Calder* vs. *Bull,* 3 Dall. 386, 390, and *Kring* vs. *Missouri,* 107 U. S. 221, he continues at page 383:

> "A careful examination of the opinion in *Kring* vs. *Missouri* shows that the judgment in that case proceeded on the ground that the change in the law of Missouri as to the effect of a conviction of murder in the second degree—the accused being charged with murder in the first degree—was not simply a change in procedure, but such an alteration of the previous law as took from the accused after conviction of murder in the second degree, that protection against punishment for murder in the first degree which was given him at the time of the commission of the offense. The

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right to such protection was deemed a substantial one—indeed, it constituted a complete defense against the charge of murder in the first degree—that could not be taken from the accused by subsequent legislation. This is clear from the statement in Kring's case that the question before the court was whether the statute of Missouri deprived 'the defendant of any right of defense which the law gave him when the act was committed so that as to that offense it is *ex post facto.*' "

The opinion then reviewed with approval the decision in *Hopt* vs. *Utah,* 110 U. S. 574, and the case of *Thompson* vs. *Utah,* 170 U. S. 343, and continues at page 386:

"At the present time, in *Thompson* vs. *Utah,* 170 U. S. 343, this court observed, generally, that a statute is *ex post facto,* which, by its necessary operation and in its relation to the offense or its consequences, alters the situation of the accused to his disadvantage. But it took care to add: 'Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed. And, therefore, it is well settled that the accused is not entitled to right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offense

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charged against him.' Cooley in his Treatise on Constitutional Limitations, after referring to some of the adjudged cases relating to ex post facto laws, says: 'But, so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it can not lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.' Cooley 9, p. 272.

"Applying the principles announced in former cases—without attaching undue weight to general expressions in them that go beyond the questions necessary to be determined—we adjudge that the statute of Missouri relating to the comparison of writings is not ex post facto when applied to prosecutions for crimes committed prior to its passage. If persons excluded, upon grounds of public policy, at the time of the commission of an offense, from testifying

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as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we can not perceive any ground upon which to hold a statute to be ex post facto which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed. The Missouri statute, when applied to this case, did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offense criminal that was not criminal at the time he committed the murder of which he was found guilty. It did not change the quality or degree of his offense. Nor can the new rule introduced by it be characterized as unreasonable—certainly not so unreasonable as materially to affect the substantial rights of one put on trial for crime. The statute did not require 'less proof, in amount or degree,' than was required at the time of the commission of the crime charged upon him. It left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state, as a condition of its right to take the life of an accused, must overcome the presumption of his innocence and establish his guilt beyond a reasonable doubt. Whether he wrote the prescription for strychnine, or

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the threatening letter to the church organist, was left for the jury, and the duty of the jury in that particular, was the same after as before the passage of the statute. The statute did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the state and the accused upon an equality; for the rule established by it gave to each side the right to have disputed writings compared with writings proved to the satisfaction of the judge to be genuine. Each side was entitled to go to the jury upon the question of the genuineness of the writings upon which the prosecution relied to establish the guilt of the accused. It is well known that the adjudged cases have not been in harmony touching the rule relating to the comparison of handwritings; and the object of the legislature, as we may assume, was to give the jury all the light that could be thrown upon an issue of that character. We can not adjudge that the accused had any vested right in the rule of evidence which obtained prior to the passage of the Missouri statute, nor that the rule established by that statute entrenched upon any of the essential rights belonging to one put on trial for a public offense.

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"Of course, we are not to be understood as holding that there may not be such a statutory alteration of the fundamental rules in criminal trials as might bring the statute in conflict with the ex post facto clause of the constitution. If, for instance, the statute had taken from the jury the right to determine the sufficiency or effect of the evidence which it made admissible, a different question would have been presented. We mean now only to adjudge that the statute is to be regarded as one merely regulating procedure and may be applied to crimes committed prior to its passage without impairing the substantial guarantees of life and liberty that are secured to an accused by the supreme law of the land."

The constitution of California, article 1, section 16, provides that "No *ex post facto* law shall ever be passed." In construing this section, the Supreme Court has uniformly held that statutes which relate to mere matters of procedure are not in conflict with it.

In the early case of *People* vs. *Mortimer*, 46 Cal. 114, the question was whether the court below erred in directing the counsel for the prosecution to open and close the argument to the jury, on the ground that such was not the practice at the time the crime was committed, and therefore the law providing this order of argument was ex post facto. After quoting

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section 6 of the Penal Code, the court says in its opinion, at page 118:

"The particular purpose intended to be accomplished by section six was to steer clear of any difficulty arising from the enactment of ex post facto laws, which are prohibited by the constitution of the United States. But laws changing the mere forms of procedure in a criminal action are not within this category.

"In his work upon Constitutional Limitations (p. 272) Judge Cooley states the rule to be that 'so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature; and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice and heard only by the courts in existence when its facts arose.'

"It is clear, therefore, that no constitutional difficulty would be encountered in requiring past offenses to be tried under new forms of procedure, and it is equally clear that, if such offenses are to be tried, only under the old forms, and later offenses under the new, it would or might, 'create endless confusion in legal proceedings.' We have had no opportunity to compare in

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detail the forms of procedure provided in the code with those which before existed; but if they are now substantially the same, they are liable to be varied by future legislation—in which event, if the construction now contended for is to prevail, offenses committed before the code took effect would be tried under one form of procedure, and later offenses under, it may be, a wholly different form of procedure.

"The next, or some subsequent legislature, may direct the grand or trial jury to be summoned or impaneled in a manner wholly different from that which formerly prevailed—in which event, on the theory of the defense, it would be incumbent on the court to provide two sets of grand and trial jurors—one to inquire into and try offenses committed before the code took effect, and the other to investigate and try offenses of a later date. Nothing short of the most imperative necessity would justify us in so construing section six of the Penal Code as to bring about this result. Nor do we think that either its purpose or language demands that we should so construe it. Its purpose clearly was to provide that offenses committed before the code took effect should be punished under the prior laws, and that those committed afterwards should be punished in pursuance of the code, thereby rendering it clear that the code was not amenable to the charge of being an ex post facto law. This being manifestly the end intended to be accom-

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plished by section six, the phraseology employed to express that intent must be construed, as required by section four, according to the fair import of its terms, 'with a view to effect its objects, and promote justice.' In order to effect the objects of that provision, and to promote justice, it is not necessary that we should adopt the construction now contended for; nor does the language of the section demand that we should so construe it. The phrase, 'may be inquired of, prosecuted and punished in the same manner as if this code had not been passed,' is and was intended to be equivalent to the phrase 'may be investigated, prosecuted and punished with like effect as if this code had not been passed,' and has no reference to the mere form of procedure at the trial."

In *People* vs. *Campbell,* 58 Cal. 243, the homicide in question was committed in August, 1879, when the constitution of the state provided that "no person shall be held to answer for a capital or otherwise infamous crime * * * unless on presentment or indictment of a grand jury." By the constitution, which took effect on the 1st day of January, 1880, it was provided that "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law."

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Pursuant to this latter constitutional provision, the legislature passed an act which took effect April, 1880, providing that "all public offenses triable in the Superior Court must be prosecuted by indictment or information, except as provided in the next section" (which latter section relates solely to the removal of certain municipal officers), and the claim on behalf of the defendant was that neither the constitution nor the act of the legislature was applicable to his case, because the homicide charged was committed before either of them became law, and that therefore the proceeding against him was null and void.

Morrison, C. J., writing the opinion of the court, says, at page 245:

> "We will first consider the question of power, and then the fact of intention. Mr. Cooley, in his work on Constitutional Limitations, page 331, says: 'But so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings, if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in

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existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure, though it can not lawfully, we think, in so doing, dispense with any of these substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorize the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute, calculated simply to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right.'

"The following examples are given by him in a note to page 332: 'The defendant in any case must be proceeded against and prosecuted under the law in force when the proceeding is had.' 'A law is not unconstitutional which precludes a defendant in a criminal case from taking advantage of remedies which do not prejudice him'; 'nor one which reduces the number of the prisoner's peremptory challenges'; 'nor one which, though passed after the commission of the offense, authorizes a change of venue to another county'; 'nor one which modifies, simplifies and reduces the essential allegations in a criminal indictment, retaining the charge of a distinct offense.' In support of the foregoing legal propositions, numerous authorities are referred

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to in the note. (See also *People* vs. *Mortimer,* 46 Cal. 114.)

"It is not an uncommon practice to change the number of grand jurors required to investigate criminal charges, but we have never heard the right of the legislature to make such changes questioned, neither has it ever been claimed that the charge must be investigated by the precise number of grand jurors of which that body was composed, at the time the act was committed.

"In the case of *Springfield* vs. *Hempden, Commissioners of Highways,* 6 Pick. 508, the Supreme Court of Massachusetts says: 'But there is no such thing as a vested right to a particular remedy. The legislature may always alter the form of administering right and justice, and may transfer jurisdiction from one tribunal to another.'

"Mr. Bishop, in his work on 'Statutory Crimes,' lays down the same doctrine. He says: 'There is no such thing as a vested right in any particular remedy.' (Sec. 178.)

"On principle and authority, we think, there can be no objection to the new remedy prescribed by the constitution and the act of the legislature. It was as competent to introduce the prosecution by information and to make the same applicable to past offenses, as it was to establish a new forum in which prosecutions for past offenses should take place.

"And on the question of intention we are equally clear. The constitution declares

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that 'all offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, or by indictment with or without such examination or commitment, as may be prescribed by law,' and the act passed to carry into effect the constitutional provision is, that 'all public offenses triable in the Superior Courts must be prosecuted by indictment or information.' Neither the constitution nor the act of the legislature, expressly or by legal inference, refers to future offenses only, but the terms of the constitution, as well as the act of the legislature, by their natural import and signification, apply to all prosecutions thereafter to take place, without reference to the time when the act was committed. We can see no good reason why an act previously committed must be prosecuted by indictment, and one subsequently committed may be prosecuted by indictment or information, and, in our opinion, there is nothing in the provisions referred to which would justify such a construction. We are, therefore, of opinion that the case is one in which an information was a proper mode of prosecution."

We respectfully submit that measured by the standards established by the foregoing authorities, the amendment of section 995, which is addressed merely to the grounds on which the trial court must set aside the indict-

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ment, is not *ex post facto,* and is applicable to the case at bar.

The indictment having been duly found, the question whether the defendant shall go to trial on it, or may move to set it aside, is clearly one of procedure. Unquestionably, under the authorities above cited, it would have been competent for the legislature to take away entirely the right to move to set the indictment aside. The reasoning of the cases is directly in point and conclusive. Taking away the right to move to set aside the indictment in no wise affects the merits of the case. The indictment is a mere "accusatory paper." It raises no presumption of guilt; its sole function is to bring the defendant into court upon a clear statement of the offense with which he is charged. The nature of the crime charged; the punishment attached to it; the evidence required to convict; the manner of producing such evidence; and the consequences of the offense; are none of them in the slightest degree affected by the allowance or disallowance of a motion to set the indictment aside before trial upon the merits. It is difficult to conceive of anything more strictly a matter of procedure. The preliminary steps of accusation and proof before the grand jury, and the finding and presentation of the indictment having all been had according to the law as it was when the offense was committed; and

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the consequences—the arrest, imprisonment and arraignment—all having resulted; the question whether the court will hear any preliminary motions or will require the defendant to proceed to his trial on the merits, is, we submit, so obviously a mere matter of procedure under the foregoing authorities, that further argument of the proposition is unnecessary.

THE APPELLANT'S PROPOSITION THAT EVEN THOUGH NOT EX POST FACTO, STILL THE AMENDMENT IN QUESTION CAN NOT BE GIVEN A RETROACTIVE EFFECT IS EQUALLY UNTENABLE.

At page 123 of appellant's opening brief, counsel says:

> "But even if this court should take the position that the amendment of 1911, which repealed subdivision 4 of section 995 of the Penal Code, was merely a change in procedure which could be made applicable to a prior offense without violating the constitutional prohibition of the passage of *ex post facto* laws—nevertheless, the defendant had the right upon his trial to the benefit of the law as it stood at the time of the indictment."

The argument is that section 3 of the Penal Code is identical with section 3 of the Code of Civil Procedure, which reads, " 'No part of it is retroactive, unless expressly so declared,'

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and that it has always been the law of this state that amendments to the code which do not expressly declare they shall be retroactive, can not be so construed." No case is cited in the brief which involves mere matter of procedure. The first case cited is *Bank of Ukiah* vs. *Moore,* 106 Cal. 673, which simply decided that an instrument purporting to mortgage chattels which were not among those recognized by the law as the subject of a chattel mortgage at the time the instrument was made, was no mortgage at all; that the recording of the instrument could not make it a mortgage; and that a subsequent amendment of the laws making the chattels mentioned in the instrument the subject of a chattel mortgage could not make it a mortgage; and that a subsequent amendment of the law making the chattels mentioned in the instrument the subject of a chattel mortgage could not validate the registration so as to constitute it a notice to the world. It requires nothing more than this statement of the case to show that it involved a question of property rights and contract relations. Defendant Gibson in the action having sold the property described in the instrument, and the purchasers having taken possession of the property, obviously, to deprive them of their property upon the ground that the amendment of the statute validated the recording of the instrument and consti-

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tuted it notice to these purchasers, would be to give a retroactive effect to the amending statute which would devest their vested rights. This, we concede, could not be done.

The second case cited, *Cook* vs. *Cockins,* 117 Cal. 140, simply held that where adverse possession was commenced before the law required payment of taxes, and was continued for the requisite five years, and prior to the expiration of the five years the statute was so amended as to require payment of taxes, the adverse possession was good and the amendment could not be allowed to invalidate it because prior thereto taxes had not been paid by him in possession. In other words, the party in possession having complied with the law, and made good his possession up to the time of the amendment, his possession for that period was a vested right of which he could not be ousted by an amendment adding to the acts necessary to constitute a good adverse possession.

The next case cited is, *People ex rel. Thorne* vs. *Hays,* 4 Cal. 127. In this case two judgments were recovered against the city of San Francisco upon contracts for the payment of money due and payable prior to the 20th of April, 1851. Executions were had upon the judgments and sales were made by virtue thereof by the respondent Hays, as sheriff, on the 30th of January and 2d of February, 1852,

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at which the relators became purchasers of a portion of the property. Certificates of sale were issued to them, but the sheriff refused to make his official deeds of conveyance of the property. An action was brought to compel a conveyance by the sheriff, and the defense was that the property in controversy was redeemed under the provisions of the Redemption Act of April 29, 1851. The court held that the plaintiffs' right to the deeds *were vested rights* which could not be devested by the Redemption Act which was passed subsequent to the vesting of these rights.

We quote a single passage in the opinion of Wells, J., found at page 133:

> "A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; *and in matters relating to contracts or property would violate every sound principle.*"

In the next case cited, *Seale* vs. *Mitchell*, 5 Cal. 401, the same question was involved and the Thorne case was followed, the second paragraph of the head note reading:

> "The statute allowing redemption of lands sold under execution, is inoperative as to those cases *where the debt upon which judgment and execution was obtained, was contracted before the passage of the act.*"

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We quote from the opinion of Heydenfeldt, J.:

> "In this case, the judgment given in evidence to sustain the plaintiff's title, *was rendered before the passage of the act providing for redemption,* and so it must fall within the principle of the case last cited. It was therefore unnecessary that the sheriff should have withheld the deed from the purchaser until the time the redemption expired, because there was no right of redemption."

Finally, the case of *Pignaz* vs. *Burnett,* 119 Cal. 157, cited and quoted by counsel for appellant, is clear and strong authority for our contention that retroactive effect is refused only to statutes which are *ex post facto,* or impair the obligation of contracts, or partly or wholly deprive of vested rights. In that case Temple, J., says, at page 160:

> "But it is no objection to the validity of a statute to say that it is retrospective in its operation. The question is, is the amendment an *ex post facto* law, or does it impair the obligation of contracts? and also, perhaps, whether it deprives any one of vested rights. If it does none of these things, it is no objection to it that it applies to pending cases or past transactions. * * * Existing laws, it is said, enter into and become part and parcel of contracts to which they are applicable. How obvious

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it is, therefore, that all should be able to contract obligations with knowledge of the laws which thus enter into them."

The action was for the foreclosure of a mortgage, and therefore involved contractual rights. From the language just quoted, it is evident that it was in the mind of the learned judge who wrote the opinion, that the contract in question was made by the parties to it with reference to the existing law conferring the right to appeal from a judgment in an action involving the contract.

It would certainly be remarkable to contend that a man may properly commit a murder with reference to the law existing at the time of its commission, prescribing that he could move to set aside an indictment found against him for murder upon some ground named in the statute. It would be equally absurd to say that he could claim that he had a vested right to such a motion or to any other mere form of procedure.

We submit that the rule in this state that statutes, whether amendatory of the codes or not, will not be given a retroactive effect, *relates solely to cases in which to give the statutes such effect would devest, partially or wholly, a vested right, or impair the obligation of a contract*; and that mere matters of procedure are not subject to the rule. The cases

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cited in appellant's brief are all civil cases. The proposition that they contend for is expressly negatived by the decisions in criminal cases in this state.

We again refer the court to the case of *People* vs. *Mortimer,* 46 Cal. 114, cited and quoted at page 271, *supra,* which holds that so far as matters of procedure are concerned, the Penal Code applies to cases of crime committed prior to its adoption, as well as those committed subsequent thereto. The language of the court is clear and unmistakable. After referring to sections 3, 4 and 6 of the Penal Code, the court says:

> "This being manifestly the end intended to be accomplished by section six, the phraseology employed to express that intent must be construed, as required by section four, according to the fair import of its terms, 'with a view to effect its objects, and promote justice.' In order to effect the objects of that provision, and to promote justice, it is not necessary that we should adopt the construction now contended for; nor does the language of the section demand that we should so construe it. The phrase, 'may be inquired of, prosecuted and punished in the same manner as if this code had not been passed,' is and was intended to be equivalent to the phrase 'may be investigated, prosecuted and punished with like effect as if this code had not

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been passed,' and has no reference to the mere form of procedure at the trial."

Even more pointed is the case of *People* vs. *Campbell,* 58 Cal. 243, cited at page 272, *supra.* This case relates to a radical change in the procedure prescribed for the prosecution of felonies. Before the adoption of the constitution of 1879 all ordinary felonies must be prosecuted by preliminary charge and hearing followed by indictment. After the adoption of the constitution, all ordinary felonies might be prosecuted by preliminary charge and hearing before a magistrate, followed by an information, or by indictment either with or without a preliminary hearing. The offense with which Campbell was charged was committed before the adoption of the constitution of 1879 and the enactment of the statute of 1880, and the court held that a proceeding on preliminary hearing and information was proper. In this case the court adopts the language of Judge Cooley:

"That, 'so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every

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case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose.' "

The amendments of 1911 are repeals of the provisions of the Penal Code assigning, as a ground for a motion to set aside the indictment, matters which would be cause for challenge to the panel or individual jurors. Neither of the statutes contains any provision saving the right to proceed under the sections of the code repealed to offenders whose crimes were committed before the amendments took effect; and we submit that it is clear on the face of the statute and the authorities above cited and quoted that the legislature had the power and intended to prescribe the mode of procedure established by the amendments, for all cases in which a motion to set aside the indictment was made subsequent to the taking effect of the amendatory statutes. In the case at bar the motion to set aside the indictment was made four years after the taking effect of the amendatory statutes; and the court properly applied the rule in existence at the time the motion was made.

And so we submit that as the amendatory statutes of 1911 are not *ex post facto,* and as they relate solely to a matter of procedure, and must therefore be given a retroactive effect,

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the court properly refused to set aside the indictment. *

SECOND: THE COURT PROPERLY DENIED THE MOTION TO SET ASIDE THE INDICTMENT ON THE GROUND THAT EARL ROGERS WAS PERMITTED TO APPEAR BEFORE THE GRAND JURY AND REPRESENT THE DISTRICT ATTORNEY IN THE INVESTIGATION OF THE CASE BY IT.

While it is true that the Penal Code provides that no person other than those specified in sections 925 and 926 is permitted to be present during the session of the grand jury, and also provides (section 995, subdivision 3) that the presence of a person during a session of the grand jury and when the charge embraced in the indictment is under consideration, except as provided in section 925, shall be ground for a motion to set aside the indictment; yet we submit that Earl Rogers was one of the classes of persons permitted by section 925 to be present before the grand jury.

Section 925 expressly provides that the district attorney may be present before the grand jury. It is conceded that a deputy district attorney may properly appear on behalf of the district attorney. He is, for all purposes, when so acting, the district attorney of the county. But it is claimed that at the time the charge involved in the case at bar was being

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Cases to be inserted in Respondent's Brief, Part II, p. 50, pursuant to leave of court granted on the oral argument, in opposition to the contention of Appellant's Reply Brief, at p. 10, that "The right to set aside an indictment exists independently of a statute"; that is, that the motion can be based on grounds other than those enumerated in Pen. Code, § 995.

People v. Colby, 54 Cal. 37;
People v. Schmidt, 64 Cal. 260;
People v. Goldman, 76 Cal. 328.

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examined into by the grand jury, the law only permitted the appointment of eleven deputy district attorneys, and there were no vacancies in this position, and therefore Earl Rogers could not be lawfully appointed a deputy district attorney or authorized to appear as such before the grand jury. On the hearing of the motion to set the indictment aside, Book 4 of Miscellaneous County Deputies was produced from the office of the county clerk of Los Angeles County, and the following original record of the appointment of Earl Rogers as a deputy district attorney was read into the record;

> "State of California, county of Los Angeles. ss: I, J. D. Fredericks, district attorney of said county, do hereby appoint Earl Rogers as a deputy district attorney. Witness my hand this 2d day of November, 1910. Signature, J. D. Fredericks. State of California, county of Los Angeles, ss: I hereby solemnly swear that I will support the constitution of the United States and the constitution of the state of California, and that I will faithfully discharge the duties of deputy district attorney, according to the best of my ability. Signature, Earl Rogers. Sworn to and subscribed before me this 2d day of November, 1910, C. G. Keyes, Clerk. Filed November 2d, 1910, C. G. Keyes, Clerk." (R. Tr. V. 102, p. 7905.)

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It should be said preliminarily that while much space is devoted in the opening brief to sharp criticism of the conduct of Earl Rogers before the grand jury, yet it is too well settled to require argument, and is in fact conceded at page 150 of the brief, that nothing of this sort can constitute ground for motion to set the indictment aside.

People vs. *Colby,* 54 Cal. 37;
In re Kennedy, 144 Cal. 634, 637;
People vs. *Goldensen,* 76 Cal. 328;
People vs. *Hatch,* 13 Cal. App. 521, 528, 529.

Counsel for appellant is in error in his statement at page 152 of the brief, that the power of the district attorney of Los Angeles County to appoint deputies is derived from section 4230, subdivision 7, of the Political Code.

Part IV of the Political Code is entitled, "Of the Government of Counties, Cities and Towns." It is a re-enactment of the County Government Act of 1897 as amended by the laws of 1907. Chapter III of this title is entitled "Qualification and Election of Officers." Section 4024 in this chapter provides:

> "Section 4024. *Appointment of Deputies.* Every county, township, or district officer, except a supervisor or judicial officer, *may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office.* Such

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appointment must be made in writing, and filed in the office of the county clerk; and until such appointment is so made and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy."

Chapter X of said title is entitled, "Salaries, and Fees of Office." Article I of this chapter is entitled, "Counties of the First Class (Los Angeles)." Subdivision 7 of section 4230 of this article, quoted in the brief by counsel, fixes the salary of the district attorney at $6,000.00 per annum, and then specifies the number of deputies which shall be allowed to the district attorney at the salaries specified for each of the several classes of deputies named.

We submit that the true construction of these sections is, that the district attorney is permitted to appoint as many deputies as he deems "necessary for the prompt and faithful discharge of the duties of his office," but can only make the number of such deputies specified in the foregoing subdivision 7 a charge upon the county. Obviously there is no inherent objection to the appointment by the district attorney of deputies to act in his place and behalf. Indeed, the inherent nature of his office is such that in a county of any but the smallest size, it would be impossible to administer the office in a manner to adequately serve the public without such deputies. This

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is the very foundation of section 4024—the *raison d'etre* of the section. The only limitation in which the county is interested is as to the amount of salaries which it shall be obliged to pay for the services of such deputies. If the district attorney sees fit to appoint more deputies than he can make a charge upon the county treasury, and compensate them for their services out of his salary, the county can certainly have no objection to that, and no reason can be suggested why he should not be permitted to so add to the efficiency of his force. To put it in another way, the provision of subdivision 7 of section 4230 is purely fiscal, and is not intended to limit the power of the district attorney to appoint as many deputies as he may need, provided the compensation for their services is not made a charge upon the county.

This was precisely what occurred in the case of Earl Rogers. No one at all familiar with the intricacy, the gravity, and the extent, of the investigation necessitated by the blowing up of the *Times* building and the slaughter of twenty-one of its inmates, can hesitate to say that the district attorney was not only warranted in securing the aid of an additional deputy, but would have signally failed in the performance of his duty if he had not done so.

Mr. Fredericks was called as a witness on

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the hearing of the motion to set aside the indictment, and testified as follows:

"Q. Isn't it a fact that Mr. Rogers, as we all concede here, appeared as a witness before the grand jury, and after he had testified there in the presence of Mr. McComas, that a request came to you from—either directly from some member of the grand jury, or from some other official requesting that you should appoint him as an attorney there to carry on the investigation?

A. I think they consulted with Judge Bordwell in regard to it, as those minutes show; I think in regard to the appointment—I will say this, if I did receive a request from any one to appoint him, it was from the grand jury. If I received any such request it was from the grand jury.

Q. What is your recollection as to whether you appointed him, either from—of your own choosing, your own selection?

A. There were two reasons for my appointment; one of them would be the reason you suggested there, if that was brought to my mind, probably had its influence. There was another reason, to wit, his intimate knowledge of the intricate facts in the case which would make it advantageous that he should place them before the jury himself, and that we should get before that jury everything that he knew. Now, just which one of the reasons

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> weighed heaviest with me, I don't know. I wanted to get before that jury everything that Rogers knew. I thought probably that was the best way to get it." (R. Tr. V. 102, pp. 7889, 7890.)

We respectfully submit that there is absolutely nothing in the point made by counsel that the appointment of Earl Rogers a deputy by District Attorney Fredericks, and his assignment to appear before the grand jury to conduct the investigation into the case of the blowing up of the *Times* building, was illegal. He had the power to make the appointment and made it in strict conformity with the requirements of the Political Code; Rogers duly qualified by taking the oath of office; and this was all in strict conformity with the "letter of the statute," which counsel, no doubt inadvertently, only half quotes.

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Point II.

No Error Was Committed by the Learned Trial Judge in Overruling the Defendant's Challenges to Veniremen for Cause. The Question of Qualification of a Venireman Rests in the Sound Discretion of the Court, and This Discretion Was Well Exercised in the Case at Bar.

In the opening brief, 29 pages are devoted to a somewhat one-sided discussion of the law covering the qualification of jurors, followed by 144 pages of partial quotations of the examinations of some 17 of the veniremen on the *voir dire.*

In the discussion of the law, authorities from other states, as well as California, are cited upon the proposition that defendant is entitled to be tried by impartial jurors. This is a fundamental and obvious proposition, and needs no authority to support it. The question whether or not the learned trial judge erred in denying a challenge for bias must be determined by the decisions of the state of California.

We respectfully submit that counsel has proceeded with a discussion of the law and its application to the several challenges in question upon a confused conception of the law as it

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is laid down in the Penal Code. It therefore becomes necessary to quote the statute and endeavor to ascertain its sound construction.

PROVISIONS OF THE PENAL CODE.

The qualification of veniremen to serve as jurors is prescribed by sections 1073 and 1076 of the Penal Code as follows:

"Sec. 1073. *Particular causes of challenge.* Particular causes of challenge are of two kinds:

"First. For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

"Second. For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which is known in this code as actual bias."

"Sec. 1076. *Stating causes of challenge.* In a challenge for implied bias, one or more of the causes stated in section ten hundred and seventy-four must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of section ten hundred and seventy-three must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public

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journals, or common notoriety; provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered in the minutes of the court or of the phonographic reporter."

These sections have remained unchanged since they were amended in 1874, and consequently the decisions of the Supreme Court and Courts of Appeal, construing them since that date, are in point. Section 1073, subdivision second, and section 1076 clearly deal with two different classes of cases.

With regard to section 1073, subdivision second, it is to be observed that the gist of the inquiry thereunder is as to "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." The question is not, whether the venireman has formed a previous opinion or expressed such opinion; but whether at the time of his examination on the *voir dire* there exists in him a state of mind which would prevent him from acting with entire impartiality and without prejudice. In other words, although the venireman may have

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adopted a theory or expressed his views upon the case, yet, unless it appears that this theory or these views amount to a fixed opinion which will prevent him from weighing the evidence impartially and without prejudice, it can not be said that there exists "a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice." It is a common thing for men to have theories and views, which they more or less freely express, upon unusual occurrences. As a rule these theories and views are mere surmises or suppositions, based upon rumor, or common gossip, or the consideration of other circumstances which do not constitute such evidence as the law permits a jury to receive and base its conclusions upon. It is only when such theories or views become *fixed convictions* that they amount to such an "opinion" as, in the eye of the law, disqualifies the holder of it to act as a juror. The question for the court to determine always is, whether the examination upon the *voir dire* shows that a theory or view in regard to the case, or either of the parties, held by a venireman, is the product of mere surmise or assumption, and is not an abiding conviction, or amounts to a real opinion which is fixed and abiding. If the court is satisfied that the venireman has

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formed a theory or expressed views with regard to the case, or either of the parties, which does not amount to a fixed and abiding opinion, then the next question for it to determine is, whether the theory formed or the views expressed have produced in the venireman a state of mind with reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice. If, upon a fair examination on the *voir dire,* the court is satisfied that the mind of the juror is open, that is, that he is ready and able to take the evidence adduced at the trial and weigh it fairly, impartially and without prejudice, then a challenge for cause should be denied. If, on the other hand, the court is satisfied that he has formed a real opinion which abides with him, then a challenge for cause should be allowed, except as provided in section 1076.

The second class of cases is covered by section 1076, and is where a venireman has "formed or expressed an opinion upon the matter or cause to be submitted" to the jury. Here the word "opinion" evidently means a fixed belief, something more than mere theory or view of the case. It denotes an abiding belief in regard to the case, or either of the parties. Section 1076 shows that the legislature recognized that such an opinion or abid-

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ing belief might be founded upon a personal examination of the facts of the case, or upon discussions of the case with persons claiming to know its facts, or upon personal connection with one or more transactions involved in the case, or other circumstances which would produce an abiding conviction; or it might be founded solely upon public rumor, statements in public journals, or common notoriety.

As to the first class of opinions, section 1076 leaves the general rule of law unchanged, that a venireman should be rejected who holds or has expressed such a fixed opinion; but as to the second class of opinions, the section provides that it shall not disqualify a juror, provided the court is satisfied, upon his declaration, that he can and will, notwithstanding such opinion, act impartially and fairly. In this class of cases, the question for the court is, whether the juror can set aside and disregard his opinion and examine the case *de novo,* precisely as if he had never formed or expressed the opinion.

It is well settled that it is in the sound discretion of the court, in both classes of cases dealt with by the code, to say whether the venireman is qualified to sit as a juror. In the first class, it is in the sound discretion of the court to say whether the venireman is in a state of mind in reference to the case, or either of

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the parties, which will prevent him from acting impartially; and in the second class, it is in the sound discretion of the court to say whether, notwithstanding the venireman has formed or expressed an actual opinion, he can set it aside, forget it—so to speak—and act impartially. It is also well settled that unless the evidence on the *voir dire* absolutely fails to sustain the ruling of the court, its denial of a challenge for bias will not be disturbed by an Appellate Court.

The decisions in this state are uniform upon the point that the question of whether or not a juror is biased is one of fact for the court to determine upon the entire evidence taken on the venireman's *voir dire.* Some brief extracts from the cases are quoted by counsel and a long excerpt is taken from the opinion in the case of *People* vs. *Helms,* in an attempt to justify their criticism of the learned trial judge in this case and their contention that the jurors mentioned in the brief were shown on their *voir dire* to be biased and the peremptory challenge against them should have been allowed; but we submit there is nothing in any of these cases which in the slightest degree tends to negative the construction of the two sections under question which we have above contended for. On the other hand, numerous very pointed passages are to be found in most of the cases cited by counsel sustaining our

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construction of the statute and showing clearly that the rulings of the learned trial judge were clearly within the law as laid down by the Supreme Court. For example, counsel cites *People* vs. *Loper,* 159 Cal. 6, and quotes nine lines from page 10 of the opinion, which states a general proposition which nobody would dispute, and which we submit has no possible application to the testimony of any of the veniremen referred to in the brief; but nothing is said in the brief with regard to the following passage in the opinion of Judge Melvin, which, we agree with counsel, is a masterpiece:

> "Two challenges were interposed to Theodore Linden, one based upon his supposed imperfect knowledge of English, and the other upon his admitted opinion which, according to appellant's attorneys, was fixed and was prejudicial to Loper. The first objection was one addressed particularly and peculiarly to the judgment of the trial court, and unless flagrant abuse of discretion clearly appears, rulings of that court on such a subject are seldom disturbed. We can not say upon reading the juror's answers to the questions propounded to him that he was so deficient in his knowledge of the English language that the court abused its discretion in refusing to entertain a challenge under subdivision 3 of section 198 of the Code of Civil Procedure. His opinion seems to have been based upon the most casual reading, and he

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said that he could try the case fairly and impartially, giving to the defendant the benefit of the presumption of innocence.

"The statements of those called for jury duty in this case seem quite typical of those given during the selection of a jury in any case about which there has been extensive comment in the daily journals. Almost every person called into the jury box had an opinion of defendant's guilt, based upon what he had read, and some of them stated that such opinion would require evidence for its removal. When, however, they were put to the test of their ability to try the case upon the evidence produced at the trial and uninfluenced by other considerations, each answered that he could and would, if chosen, act fairly and impartially. *It was the function of the trial court to determine the true state of mind of each member of the panel who was questioned touching his qualifications to serve as a juror.* Frequently there is a conflict between different portions of the testimony given during an examination on *voir dire,* due not always to the lack of candor on the part of the person examined but to his misunderstanding of the questions asked and of the duties of a juror, until such duties are explained by the court. *When such conflict occurs the trial court must decide, if possible, which of the answers most truly reveals the state of the talesman's mind. In other words, the questions generally presented are those of fact and not of law.* (*People*

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vs. *Ryan,* 152 Cal. 364; (92 Pac. 856); *People* vs. *Ochoa,* 142 Cal. 274, (75 Pac. 847); *People* vs. *Flannelly,* 128 Cal. 86, (60 Pac. 670); *People* vs. *Fredericks,* 106 Cal. 559, (39 Pac. 944).)"

The judgment in this case was reversed and a new trial ordered upon the sole ground that the court erred in receiving evidence of an alleged confession of the defendant, which was not voluntarily given, but appeared from the evidence to have been the result of coercion and threats. Far from being authority in support of the contention of appellant's brief, we submit that this case of *People* vs. *Loper* is strong authority in favor of our contention, that the question as to what is the state of a venireman's mind is one of fact for the trial court, and that the decision of the court will not be disturbed unless it clearly appears that there was no evidence to support the decision.

Following are the leading cases upon the point:

People vs. *Fredericks,* 106 Cal. 556, 559. The judgment in this case was affirmed. The court says in the opinion (p. 559):

"3. This court is only allowed to review an order denying a challenge to a juror upon the ground of actual bias when the evidence upon the examination of the juror is so opposed to the decision of the trial court that the question becomes one of law,

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for it is only upon questions of law that this court has appellate jurisdiction in criminal cases. (See concurring opinion in *People* vs. *Wong Ark,* 96 Cal. 129; *People* vs. *Wells,* 100 Cal. 227.) In this case the examination of some of the venire, who were subsequently unsuccessfully challenged upon the ground of actual bias by the defendant, discloses a state of facts which might well have justified the trial court in excluding them from the jury box. But the evidence of these various jurors taken upon their *voir dire* is not at all conclusive that they were disqualified from acting in the case. When the matter was submitted to the court for a decision upon the evidence taken, it can at least be said the question was an open one as to their disqualification. The evidence of each juror was contradictory in itself; it was subject to more than one construction. A finding by the court either way upon the challenge would have support in the evidence, and under such circumstances the trial court is the final arbiter of the question. For under such conditions the question presented to this court by the appeal is one of fact, and our power to hear and determine is limited to appeals upon questions of law alone. For these reasons the counsel's contentions in this regard furnish no material to justify a retrial of the case. Neither do we find any merit in the exception to the order of the court in the allowing his challenge to

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the panel." (Approved in *People* vs. *Evans,* 124 Cal. 210; *People* vs. *Owens,* 123 Cal. 487.)

People vs. *Scott,* 123 Cal. 434.

The judgment in this case was reversed, but not for error in ruling on the question of bias of a juror. The court says in the opinion:

"Objection is first made to the court's disallowance of challenges for actual bias, interposed by defendant to two of the jurors. While this court may review an order denying a challenge to a juror upon this ground, it may do so only when the question presented is one of law, over which questions alone this court in criminal cases has appellate jurisdiction under the constitution. A reading of the testimony taken upon *voir dire* discloses, as is usual, conflicting and contradictory statements by the jurors. They had formed opinions touching the guilt or innocence of the defendant. They would carry those opinions with them into the jury box. It would take evidence to remove them, nevertheless they could and would give to the defendant a fair and impartial trial. They could and would be governed by the law as delivered by the court, and by the evidence as received in court. It is the state of facts commonly presented where upon the question of bias the evidence would have justified a finding either way. Under such circumstances we are powerless to disturb the ruling of the trial court. (*People* vs. *Fredericks,* 106 Cal.

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554.) We recognize that with the increased facilities for the dissemination of news it is far more difficult than formerly it was to obtain a jury of men ignorant of the circumstances of the charge which they are called upon to try. But because of the attendant difficulty the judge should be the more careful to see that the jurors are in fact unprejudiced and unbiased, for it is as much a defendant's right today to be tried by such a jury as it was when Lord Coke delivered his now famous aphorism that a juror 'should stand indifferent as he stands unsworn.' But, unless the testimony adduced upon *voir dire* is so clear upon the question of actual bias that this court can say as matter of law that the juror is disqualified for that reason, we can not disturb the ruling of the trial court."

People vs. *Flannelly,* 128 Cal., 84, 86.

The judgment in this case was reversed, but not on the ground of error in ruling on challenges. The court says in the opinion:

"It is next insisted that challenges to certain jurors for actual bias should have been allowed. Whatever opinion these jurors had as to the guilt or innocence of the defendant was founded upon general rumors and statements in public journals. Under such circumstances, a large discretion is rested in the trial court and its ruling is only reviewed by this court in exceptional cases; for it is only when the evidence upon the *voir dire* examination of the juror pre-

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sents to this court a question of law that an exception to the disallowance of a challenge for actual bias may be reviewed. The facts shown here disclose a question in all materials identical with the one presented upon appeal in the recent case of *People* vs. *Fredericks,* 106 Cal. 554, where the point now made is considered with care; and it is there held that the question presented by the record is one of fact and not one of law, and, therefore, not within the appellate jurisdiction of this court."

People vs. *Ochoa,* 142 Cal. 268, 274.

Judgment in this case was affirmed and the court says in the opinion:

"It can not be said, as matter of law, that the juror was by this evidence conclusively shown to be biased. He did admit that he had an impression that the defendant was guilty, and that until he heard evidence to remove it that impression would remain, but it had generated no prejudice against the defendant, and would not prevent him from trying the case fairly. He was clear to the point that to find a verdict against the defendant he would require full proof by the prosecution. The evidence sustains the ruling of the court. (*People* vs. *Wells,* 100 Cal. 227; *People* vs. *Fredericks,* 106 Cal. 559; *People* vs. *Owens,* 123 Cal. 487.)"

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People vs. *Ryan*, 152 Cal. 364, 371.

The judgment in this case was affirmed. The court says in the opinion:

"During the examination of the jurors impaneled to try the case, three of them gave contradictory answers to repeated questions put to them upon the subject of their ability to disregard opinions as to the defendant's guilt, which they had formed from newspaper reports, and public rumor, and from the fact that he had been held for trial, and to decide the case upon the evidence alone. Many persons, competent as jurors, have not given much attention to such subjects, are inexperienced as witnesses, and are unable readily to comprehend the force and effect of the language in which such questions are couched, and they generally answer without reflection as to the effect of their own words. Such contradictions are by no means infrequent, if, indeed, they are not the rule, rather than the exception. The trial court must decide which of the answers most truly shows the juror's mind. It should, of course, be liberal in giving the defendant and the people the benefit of any doubts that may arise as to the fairness of the juror and his ability to lay aside preconceived impressions and should excuse the juror if such doubt is created. But where there are such contradictions its decision is binding upon this court. (*People* vs. *Frederick*, 106 Cal. 559, (39 Pac. 944); *People* vs. *Staples*, 149 Cal.

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450, (86 Pac. 895); *People* vs. *Ochoa,* 142 Cal. 274, (75 Pac. 847); *People* vs. *Flannelly,* 128 Cal. 86, (60 Pac. 670); *People* vs. *Evans,* 124 Cal. 210, (56 Pac. 1024); *People* vs. *Owens,* 123 Cal. 487, (56 Pac. 251); *People* vs. *Scott,* 123 Cal. 435, (56 Pac. 102).)"

To the same effect is the very recent decision in the case of the *People* vs. *Martinez,* 23 Cal. Appellate Decisions, 366, in which Hart, J., writing the opinion of the court, says at page 368:

"1. Objections by way of challenges for implied bias were interposed to the legal competency of four of the talesmen to serve as jurors in the case. These were jurors McKenzie, Grother, Guidici and Ohlsen.

"In reply to a question upon *voir dire* by the attorney for the defendant, McKenzie stated that the accused would be required to 'produce evidence in his favor to create a reasonable doubt' in his mind as to the defendant's guilt. Grother and Ohlsen, also replying to questions by defendant's counsel, made similar replies. Guidici affirmatively answered the following question propounded by defendant's attorney: 'If there was a reasonable doubt in your mind as to the guilt of the defendant would you presume, or indulge in any possibilities that he would be guilty, to overcome that doubt?' Each of the jurors,

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however, on being questioned by the district attorney, declared that, if accepted as a juror in the case, he would, in determining the question of the guilt or innocence of the defendant, be governed entirely by the evidence and the law as the court stated it to them; that he would, at all times, give the defendant the benefit of the presumption of innocence until his guilt was satisfactorily proved and acquit him if, after a full and fair consideration of the evidence by the light of the court's instructions upon the law, he entertained a reasonable doubt of his guilt. (1) 'Under this state of the record upon the question whether such jurors possessed such bias as would prevent them from trying the case fairly and impartially, it was for the court to determine that preliminary issue, and in all such cases the court's discretion will not be disturbed on appeal unless it appears that it has been abused.' (*People* vs. *Conte*, 17 Cal. App. 771, 777.) As was well said in *People* vs. *Ryan*, 152 Cal. 371, where the precise proposition under consideration was discussed: 'Many persons, competent as jurors, have not given much attention to such subjects, are inexperienced as witnesses, and are unable readily to comprehend the force and effect of the language in which such questions are couched, and they generally answer without reflection as to the effect of their own words. Such contradictions are by no means infrequent, if, indeed, they are not the rule, rather than

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the exception. The trial court must decide which of the answers most truly shows the juror's mind. * * * Where there are such contradictions its decision is binding upon this court,' citing a large number of cases. As is readily to be noted, the challenged veniremen in this case each made conflicting and directly contradictory statements as to the course he would pursue in the discharge of his duty as a juryman—one statement which would disqualify him and another which would make him legally competent to serve—and under these circumstances, it was, of course, with the trial court to decide, upon his examination as a whole, whether he was in all respects qualified to try the issue fairly and impartially. There is nothing upon the face of the record here indicating that in its decision in any of the instances referred to the trial court abused its discretion and, therefore, the conclusion of that court upon the question is conclusive upon this court."

The last utterance of the Supreme Court on this subject is in full accord with the foregoing authorities. The language of Shaw, J., in the opinion of the court, in the case of *People* vs. *Edwards*, 163 Cal., at page 756, makes it perfectly clear that in the final analysis the consideration of qualification of a venireman is addressed to the sound discretion of the trial court, and in the absence of obvious abuse of the discretion, the decision of that court is con-

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clusive. How could it be otherwise? The question what is the state of a juror's mind is one of fact. His state of mind is subjective, and is evinced not merely by what he says in his testimony but also by his demeanor on the stand. The position of the trial judge has always been necessarily recognized as a superior position for judging the veracity of witnesses and their credibility; and so the determination of this question of fact as to the state of a juror's mind with reference to his ability to act impartially and fairly is treated by the Supreme Court precisely as other questions of fact are treated; and the court has uniformly refused to disturb the decision of the trial court excepting in cases of obvious abuse of discretion.

In his opinion Judge Shaw says:

> "2. The juror McIntyre stated that he had talked with other persons, not witnesses, about the merits of the case and that from what he had read and heard he had formed an opinion as to the guilt or innocence of the defendant, that the opinion was so fixed that it would require evidence to remove it, and that it was founded entirely upon public rumor and what he had read, and that notwithstanding such opinion, he could and would, if sworn as a juror in the case, set aside the opinion and act entirely upon the evidence as introduced, and act fairly and impartially as a

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juror upon the evidence given. This qualified him as a juror under section 1076 of the Penal Code. The fact that some parts of his examination contained statements by him inconsistent with the above statement merely raised a conflict of evidence as to his state of mind. Upon such conflict the decision of the trial court is conclusive. (*People* vs. *Loper,* 159 Cal. 11 (Ann. Cas. 1912B, 1193, 112 Pac. 720); *People* vs. *Riggins,* 159 Cal. 117 (112 Pac. 862); *People* vs. *Ryan,* 152 Cal. 371 (92 Pac. 853).)

"It is suggested that it does not affirmatively appear, from the juror's testimony, that the persons to whom he talked about the case were not witnesses. On this point he was asked, 'Have you talked it over with any witnesses in the case?' His answer was 'Not that I know of; I don't know any of the witnesses, no.' The trial court might reasonably have understood that the last word 'No' was intended as a positive denial. Furthermore, he stated positively in answer to other questions that his opinion was founded entirely upon public rumor and what he had read. It is not claimed that he had read anything except public journals. The decision of the trial court upon this question of fact is, upon the authorities above cited, conclusive. The juror appeared to be fair and impartial in all other respects. The challenge was properly denied."

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We now come to an examination of the exceptions to the denial of challenges for cause to seventeen jurors in Appellant's Opening Brief.

In the light of the decisions above cited, we submit that it clearly appears upon an examination of each of the seventeen cases of alleged erroneous denial of challenges by the defendant for cause, there is not only no reason for holding that the court abused its discretion, but the evidence shows that the venireman was well qualified to act as a juror.

In every instance the objection of counsel for defendant went upon the claim that the juror had a preconceived opinion on one element of the *corpus delicti*, namely, upon the question whether the Times Building was blown up by gas or some other accidental means, or by dynamite or some high explosive placed in the building with criminal intent. There is not a suggestion anywhere as to any one venireman that he was not acting in entire good faith, testifying fairly and frankly, and absolutely without prejudice against the defendant. The sole objection in each instance was that the venireman had a preconceived opinion, more or less definite and fixed, that the explosion was caused by dynamite placed in the Times Building by J. B. McNamara.

As already stated, the passages quoted from the examinations of these seventeen veniremen

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are not complete. We deem it unnecessary to quote at length the portions of these several examinations omitted from the Appellant's Opening Brief, and shall confine ourselves to a statement of the gist of the evidence and refer to the pages of the transcript at which the passages relied on will be found.

George Alexander (Appellant's Opening Brief, p. 185; R. Tr. Vol. 1, p. 30). Testimony found at pages 37, 38, 49 and 73 of the transcript shows that the sole source of this venireman's information concerning the cause of the Times explosion was newspaper accounts. We submit that his testimony shows that the court was justified in finding that notwithstanding the views he might have formed from these newspaper reports, his state of mind was not such as to prevent him from acting with entire impartiality and without substantial prejudice to the substantial rights of either party, and that he could and would, notwithstanding such views, act impartially and fairly on the matters to be submitted to him. These are the tests of the statute.

W. W. Imbler (Appellant's Opening Brief, p. 187; R. Tr. Vol. 2, p. 92). It appears at page 128 of the transcript that Mr. Imbler knew nothing of the case excepting what he read in the newspapers; he was not here at the time of the explosion and had no views upon

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the case excepting such as were based on newspaper reports. He testified that he could and would lay these views aside; and examination of his testimony clearly justifies the decision of the court that there was nothing in his state of mind or in any views which he might have formed which would prevent him from acting fairly and impartially upon the matters to be submitted to him.

JACOB SQUIRE (Appellant's Opening Brief, p. 194; R. Tr. Vol. 6, p. 428). We refer the court to pages 432, 437, 438, 440, 441, 444, 445, 470. The testimony found in these pages shows that the venireman derived his information solely from the papers and general rumor and that his state of mind was such that he could fairly and impartially act upon the matters to be submitted to him, notwithstanding any views which he might have formed upon the information obtained from these sources.

While it is true, as stated in the appellant's brief, that Mr. Squire was not asked the specific question whether he could set aside any opinion which he had formed, yet he *was* asked the *equivalent* of that question. After he had fully explained his opinions with regard to the case (R. Tr. pp. 448–454; 464), he testified as follows (R. Tr. p. 470):

> "Q. Do you know of *any reason that might be in your mind, whether it has been*

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touched upon by Mr. Moore or not, which would prevent you sitting in this case *and rendering a true and impartial verdict according to the evidence as produced before you on the stand?*

"A. *I do not.*

"Q. *You feel that you could act fairly and impartially, do you?*

"A. *I do.*"

The court will perceive that the venireman's attention was drawn directly to *"any reason, * * * touched upon by Mr. Moore,"* counsel for defendant. This, of course, meant *any opinion of the venireman as to which Mr. Moore examined him.* He was asked by Mr. Moore whether his various so-called opinions were based on newspaper reports, public rumor and general notoriety; and he said they were. When he testified that he did not know of anything touched on by Mr. Moore which would prevent him from *"rendering a true and impartial verdict according to the evidence as produced before"* him *"on the stand,"* he fully satisfied the statute: The language of Penal Code, section 1076, is: "provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." We submit that the learned trial court was abundantly justified in denying this challenge.

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H. L. McCabe (Appellant's Opening Brief, p. 194; R. Tr. Vol. 8, p. 540). In addition to the pages of this venireman's testimony referred to in the brief, we refer the court to pages 560, 561, 562, 563, 564, 571, 572, 573. Notwithstanding the opinion which the venireman formed from the published confession of McNamara, it is clear upon his whole testimony that he was clear-headed, sound-headed, and open-minded, and perfectly fair and impartial. At page 573, line 1, we find him fully qualified under the statute:

> "Q. Would you lay aside such opinion that you may have, if you have one, and try this case from the evidence, as you will hear it produced here from this stand?
>
> "A. Yes, sir.
>
> "Q. And render a verdict according to the evidence?
>
> "A. Yes, sir."

It was for the court to say whether he was testifying truthfully; and there is nothing in the examination of this venireman on his *voir dire* which in the slightest degree tends to show any abuse of discretion or lack of good judgment on the part of the learned trial court in denying the challenge for bias.

Charles Hughes (Appellant's Opening Brief, p. 195; R. Tr. Vol. 11, p. 752). We call the attention of the court to pages 753, 754, 755, 757, 760, 761, 762, 763, 764, 766, 767, 768,

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771, and to the statement of the court at page 771, line 22, "I know what the Supreme Court has said. I don't need the statement of either side in regard to that. I want to get the various answers together. The Supreme Court says it is for the court to determine from all his answers,"—which shows the attitude of the learned trial judge to have been correct. The fact that the judge reserved his decision on this challenge until he had an opportunity to have the transcript written up and consider the entire testimony of venireman Hughes shows that he was acting with deliberation. Counsel is in error when he says that the court hesitated about denying this challenge. On the contrary, when the court had the entire examination before him he denied the challenge without any hesitancy; and we submit the examination of the juror shows that he was in a state of mind which would enable him to try the case fairly and impartially, upon the evidence, irrespective of any views which he might have formed of it upon the newspaper reports and common rumor.

L. E. Steinberger (Appellant's Opening Brief, p. 208; R. Tr. Vol. 13, p. 920). We call the attention of the court to pages 927, 928, 935, 936. Here again we say that it was for the court to say upon the testimony of this venireman whether he could lay aside any preconceived views or opinion which he may have

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formed of the case and act fairly and impartially upon the matters to be submitted to him as a juror; and the record abundantly justifies the decision of the court that he could.

EDWARD A. EATON (Appellant's Opening Brief, p. 217; R. Tr. Vol. 14, p. 940). We call the attention of the court to page 944, line 16, pages 945, 948, 949, 950, 952, 953. We submit that this testimony shows upon its face that the learned trial judge correctly decided that the venireman's mind was open and in a condition to fairly and impartially act upon the matters to be submitted to him as a juror independently of any views or opinion of the case which he might have previously conceived and there was no error in denying the challenge.

GEORGE L. LOUDEN (Appellant's Opening Brief, p. 257; R. Tr. Vol. 15, p. 993). We call the attention of the court to pages 1026, 1027, 1028, 1029, 1030. Certainly this testimony shows that the venireman was fair and frank and not only could but would pass fairly and impartially upon the evidence in the case and reach a verdict entirely irrespective of any views or opinion of the case which he might have previously formed. There is nothing in the testimony to show any abuse of discretion by the court that warrants the inference that he improperly denied the challenge.

R. J. ARATA (Appellant's Opening Brief, p. 261; R. Tr. Vol. 16, p. 1061). We call the

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attention of the court especially to pages 1082, 1091 to 1099, 1104, 1107, 1109. We submit that in this instance the court was correct in its decision that the venireman was in a state of mind which would not prevent him from acting fairly and impartially and that he was able to and did reach a verdict fairly upon the evidence irrespective of any views or opinion which he might have previously formed.

James B. Hunter (Appellant's Opening Brief, p. 267; R. Tr. Vol. 17, p. 1182). We call the attention of the court to pages 1190, 1191, 1192, 1198, 1199, 1212, 1213, 1214, 1216, 1217, and 1218.

Fred Monia (Appellant's Opening Brief, p. 275; R. Tr. Vol. 17, p. 1221; also R. Tr. Vol. 19, p. 1399). We refer the court to pages 1232, 1233, 1240, 1241, 1242, 1248, and 1249. While this venireman's answers were somewhat conflicting, yet, as is held in the authorities above cited, it was for the trial court to determine upon the entire evidence whether the juror could act fairly and impartially, and we submit that taken as a whole, the testimony fully justifies the decision of the court and denial of the challenge.

E. W. Lawrence (Appellant's Opening Brief, p. 285; R. Tr. Vol. 20, p. 1383). This testimony is quoted substantially at length in the brief, and we submit that it is very clear upon the face of it that the venireman had no

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information concerning the case excepting from newspaper accounts and general rumor, and that the trial court was correct in determining that he could and would lay aside any opinion or view of the case which he might have formed and act fairly and impartially upon the evidence submitted.

D. J. Hoge (Appellant's Opening Brief, p. 298; R. Tr. Vol. 27, p. 1891). We make the same comment upon the examination of this venireman on his *voir dire.*

T. C. Harvey (Appellant's Opening Brief, p. 307; R. Tr. Vol. 28, p. 1952). The same comment applies to the examination of this venireman on his *voir dire.*

Charles J. West (Appellant's Opening Brief, p. 311; R. Tr. Vol. 29, p. 1993). We call the attention of the court to pages 1994, 1995, 1996, 1997, 2001, 2002, and submit that the court properly determined that this venireman was qualified.

P. Whiting (Appellant's Opening Brief, p. 315; R. Tr. Vol. 31, p. 2197). We call the attention of the court to pages 2209, 2210, 2211, 2212, 2213, 2214, and submit that the court properly determined that this juror was qualified.

E. S. Rowley (Appellant's Opening Brief, p. 320; R. Tr. Vol. 32, p. 2239). We call the attention of the court to pages 2240, 2242, 2250, 2251, 2255, 2256, 2257, 2258, 2260, 2261, 2264,

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2265 and 2266, and submit that the court correctly determined that this juror was qualified.

It is to be remarked in passing that apparently the jurors Louden, Imbler, Hunter and West were satisfactory to the appellant after all, for neither one of these jurors was challenged peremptorily by him, although his challenges were not exhausted, but each was permitted by him to be sworn.

We have already adverted to the fact that the objection to each of these seventeen talesmen was based solely on the claim that he had an opinion on the single element of the *corpus delicti,* that the building was destroyed by dynamite, or other high explosive, placed in or about the Times Building with criminal intent. During the entire trial no other possible theory of the cause of the explosion was even hinted at, excepting that it was suggested by some questions put by counsel for the defendant that it might have been caused by printers' ink, or gas; but the record is absolutely devoid of anything bearing the semblance of evidence to support either of these theories. Indeed, in view of the description of the construction and arrangement of the Times Building and its condition after the explosion, and in view of the testimony of the experts—Doctor Koebig, found in volume 40, p. 2938, and volume 41, p. 2968 (R. Tr.); Mr. Mulholland, volume 41,

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p. 3006, and volume 42, p. 3023 (R. Tr.); and Mr. Garbutt, volume 39, p. 2820, and volume 40, p. 2873 (R. Tr.)—these suggestions were obviously so utterly ridiculous that they were abandoned by the defendant, and the record is a demonstration that no other cause could possibly account for the character and extent of the destruction of the Times Building than the discharge of a large quantity of high per cent dynamite or some other high explosive. When to this evidence is added the evidence of the finding eighty per cent dynamite on the morning of the explosion at the house of Mr. Zechandelaar, and at the house of General Otis a dress-suit case containing a high explosive which was discharged when the suit-case was cut open; the evidence of the purchase of eighty per cent dynamite by Schmidt and J. B. McNamara and its transportation by Schmidt, Caplan and McNamara in the launch Peerless and the caching of it in the vacant house in San Francisco, a short time before the destruction of the Times Building; the proof becomes so conclusive that no sane man could doubt for a moment the truth of J. B. McNamara's confession; and in the face of all this evidence, even if it could be said that technically the judge had erred in passing upon one or more of the challenges for actual bias founded upon the supposition that veniremen had formed an

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opinion which would affect their weighing of the evidence and their verdict, still the error could not possibly have prejudiced the defendant; because there not only was no evidence in the slightest degree contrary to such, if any, opinions, but the uncontradicted evidence was overwhelmingly conclusive that the Times Building was destroyed by dynamite. There can be no question that the gas theory was injected into the examination of the talesmen on their *voir dire* to cloud the issue, and that the gas theory and suggestions of possible explosion of printers' ink were injected into the cross-examination on the trial for the same purpose. When suggestions of such a character are made in a case absolutely bare of any conditions which could in the remotest way support them, there can be no other reason for making them than the hope of clouding the issue and raising some sort of vague doubt in regard to the *corpus delicti*. While we deny emphatically that there is anything in the examination of any of the seventeen talesmen referred to in the opening brief which warrants the inference that they held opinions as to the cause of the destruction of the Times Building which would interfere in any way with their fair and impartial action upon the evidence submitted to them, yet we say that, assuming for argument's sake, that either of

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them did hold an opinion which might embarrass him in dealing with conflicting evidence on this point, it would be a travesty to say that his acceptance as a juror prejudiced the defendant; for there was not only no conflict in the evidence on the cause of the destruction of the Times Building, but the evidence showing that it must have been dynamite placed in the building with criminal intent amounted to a demonstration. There was absolutely no evidence of any other possible cause of the disaster.

We close this point with the assertion that the learned trial judge was eminently fair in his conduct of the examination of talesmen on their *voir dire*, and his rulings on challenges for actual bias were sound.

Point III.

The Evidence of Overt Acts Perpetrated in the East and Other Parts of the Country Was Properly Admitted. The Blowing Up of the Times Building Was Not the Object of the Conspiracy, but Only an Overt Act Committed in Furtherance of the Conspiracy.

Counsel for the defendant made a strenuous and persistent effort throughout the trial of this case to induce the court and jury to adopt the theory that the blowing up of the Times Building was in no way connected with the

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conspiracy to compel, by intimidation and force, the employers of labor throughout the United States to adopt the closed-shop policy, but was the object of a conspiracy between persons with whom the defendant Schmidt had no connection. They have continued in this effort in their Opening Brief, and have devoted much space to discussion of their proposition that it was error for the court to admit the evidence of the numerous overt acts committed in furtherance of the conspiracy in the eastern and other parts of the United States. They cite numerous authorities upon the rule governing the admission of evidence of other criminal acts than the one which is the subject of the indictment, which need no further comment than to say that they have no application to the case at bar. Counsel not only do not deny that the evidence adduced abundantly proved a heinous conspiracy, but eloquently admit that to be the fact. They ask what that has to do with the blowing up of the Times Building. They say M. A. Schmidt was indicted for the murder of Charles Haggerty and nothing else; and that conceding that a conspiracy was formed and in furtherance thereof some seventy-seven dynamiting jobs were done by the conspirators throughout the United States, these facts have no materiality or relevancy upon the question of Schmidt's guilt of that murder. It is perhaps not matter

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for surprise that counsel should have conceived and attempted to establish this theory; but it is quite inexplicable that they should have persisted in the statement that the theory of the prosecution was that the sole object of the conspiracy was the blowing up of the Times Building.

The theory on which the prosecution tried the case at bar is that the officers and numerous members of the International Association of Bridge & Structural Iron Workers, in violation of the fundamental laws of the Association, and the rights of its respectable rank and file, entered upon a conspiracy to divert the machinery and funds of the Association to a lawless attempt to force upon the employers of the United States the adoption of the closed-shop policy, and in furtherance and execution of this conspiracy to destroy the plants, structural material and work in course of construction of employers who refused to submit, by means of dynamite, nitroglycerin or other explosives, and by other acts of depredation, such as are illustrated by the dropping of the arm of the Scherzer drawbridge into the river by George Davis and his associates on February 3, 1908, at Pelham, N. Y. (See Ante, Resp. Brief, Part I, p. 39); that, having become emboldened by the success of their operations throughout the East and Middle West, the conspirators turned their attention to the Pacific Coast and

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began their depredations in Seattle, Washington, Oakland and Los Angeles; and that the blowing up of the Times Building was planned and executed just as the other seventy-seven explosions proved to have been committed by them were planned and executed, in furtherance of the conspiracy to force the closed-shop policy upon the employers of labor of the country.

In the opening statement of facts of this brief we have shown that the conspiracy had its inception with the declaration of a strike against the American Bridge Company in 1905; and we have sketched the progress of its execution down to and including the blowing up of the Times Building. We have shown that the system adopted was the employment of certain reckless members of the International to dynamite or otherwise destroy the property of employers, and to pay them for each job done out of the funds of either some local union or of the International. We have shown that the president and executive committee of the Association were kept constantly advised by J. J. McNamara, its secretary-treasurer, of the jobs done or to be done by the dynamiters; and that these dynamiters were required to forward to McNamara clippings describing the various explosions and other depredations caused by them. The existence of the conspiracy and the system adopted in its

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execution are so clearly demonstrated by the evidence introduced, that even counsel for the defendant were convinced and could not deny the facts.

A brief examination of the evidence will show very clearly the connection between the blowing up of the Times Building and the object of the conspiracy and its execution by the conspirators.

It will be remembered that Eugene A. Clancy was member of the executive committee for the Pacific Coast. (Ante Resp. Brief, Part I, p. 124.) On April 1, 1906, we find him writing from San Francisco to John J. McNamara at Cleveland, as follows:

> "The A. B. Co. has 2 jobs here one 1500 tons one 342 tons this is the small bank job I did not know who had it.
>
> "The reason I did not leave for the north Mc was that the Santa Cruz job started Fri with some big snake that was pushing for them in the East some few years ago he has it contract he is starting to erect his camp that is why I stayed here for awhile as yet I had my ticket bought. I leave for Santa Cruz tomorrow. We gave this fellow that is going to try and do this Santa Cruz job a merry time last week, he was trying to rent some tools and engines but we blocked him at every turn. The contractors here are with us with the exception of one and dont worry we will get him. Well Mc this fellow's name is (Lee) and leave it to us an

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Lee we will give him a merry time the trouble has just begun in this section of the country The District Council has taken a stand against McCarthys action and we are going to have a dam warm time here. The A. B. Co Mahoney, and McCarthy is going to get there bumps as sure as your name is Joe. * * * * Well Joe this is all for this time but we are going to spend some money here in the next week so you will here from me soon."

(Ante, Resp. Brief, Part I, pp. 34, 35.)

Again in 1907 we find Clancy, together with John J. McNamara and Patrick Dugan, meeting Mr. Von Spreckelsen, in an effort to induce him to abandon the open-shop policy. His refusal to do so was followed by the ruthless destruction of his work in progress in Indianapolis. (Ante, Resp. Brief, Part I, p. 72.)

On March 10, 1907, Clancy wrote from San Francisco to McNamara with regard to Steve Davern who had been complaining to him that he had not been paid for a job (Ante, Resp. Brief, Part I, p. 126), and on March 29, 1907, McNamara replies to this letter, from Indianapolis. (Ante, Resp. Brief, Part I, pp. 126, 127.)

October 6, 1907, McNamara, in New York, wrote to each member of the executive committee with regard to requests which had been

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made from locals for money to aid in prosecuting the work. He says,

> "Clancy & Webb favor making donation of $200 to No. 11 if investigation will bear out their statements, Clancy & I have decided to have Webb make investigation tomorrow."
>
> (Ante, Resp. Brief, Part I, p. 128.)

October 26, 1909, Clancy wrote to McNamara referring to his recent visit to Salt Lake and certain work there of which Dick Jones was the boss, in which he says,

> "Dick Jones the boss shook hands with me and left the job, but they are nothing to it but open shop all over he says and Frisco he has nothing there. Seattle and Portland open shop and they think they are nothing to it."
>
> (Ante, Resp. Brief, Part I, p. 129.)

On November 22, 1909, McNamara wrote from Indianapolis to Munsey at Salt Lake City, saying:

> "I have not had a word from Clancy since he returned to Frisco."
>
> (Ante, Resp. Brief, Part I, p. 130.)

On April 26, 1910, McNamara wrote from Indianapolis to Clancy at San Francisco, saying:

> "How is everything in the Golden Gate City? Have you taken up any of the matters referred to you by the Executive Board

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as yet, namely: investigation of conditions at Portland, Seattle and Los Angeles? * * * *

Your friend from 'Slowtown' is still on the go. I understand he has been sending you some newspaper clippings. Have you received any from him recently?"

On May 1, 1910, President Ryan, at New York, wrote to McNamara, at Indianapolis, asking,

"What has Clancy done or recommended in regard to organizing work at Los Angeles Has he sent in a report since he returned home"

(Ante, Resp. Brief, Part I, p. 131.)

May 4, 1910, McNamara wrote from Indianapolis to Clancy at San Francisco, stating that he had received a letter from President Ryan, asking what report Clancy had made, and referring particularly to Los Angeles.

(Ante, Resp. Brief, Part I, p. 132.)

May 29, 1910, Clancy wrote to President Ryan:

"I am going to Los Angeles Tue Eve the letter you wrote me about it I had received a few from there myself I also have been receiving many from Seattle to come there on the reinforcing and help them get it I received word that one of our men in Spokane is doing the work on a 14 story job with laborers he took a transfer to No. 14

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I am going north at the end of June and put in some time there if it is satisfactory to you our election takes place in June. I could then get away for a few weeks. I hear Cassidy is still howling about us in Portland. I received a telegram from the J. R. Bowles Co for a bunch of shop men for Portland he has an open shop there I have not sent them. I have met this fellow and he is a very nice man but he will do no business with Cassidy well Frank this is all for today wishing you continued success I am Yours sincerely

E. A. CLANCY.

P. S. Well Pop the next time I hope to see you I will be a member of the Knights of Columbus I was voted in last Tuesday eve. I am very much pleased over it.

GENE."

(Ante, Resp. Brief, Part I, pp. 132, 133.)

It is evident from the foregoing correspondence that President Ryan and Secretary-Treasurer McNamara had determined to get busy on the coast in the execution of the conspiracy. Clancy was their trusted man here and they were urging him to make a report on conditions in Seattle, Portland and San Francisco.

Finally Clancy reached Los Angeles and after five days wrote to John J. McNamara from Los Angeles on the 3d of June, 1910.

"I have been here 5 days now and they have started here the greatest strike any

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part of the country had in a long time. *all the shop men of the Union Iron Works and Baker Iron Works are quitting and we are about to start a new local here. the structural Men on the outside are coming in great 14 of them from one job is coming up tonight* all the Machinists Molders Pattern Makers are out and they are helping each other fine. The State Building Trades Council have a man here A. Johansen he used to be with the Wood Workers in Chicago also Stewart Reid of Chicago. *Now Joe what we want here is Hockin the greatest opportunity is here now.* I can not stay here Joe it is impossible but I have things going fine. Frisco is behind this move heart and soul and we are going to put some money in here the State Council is going to put on assessment on so you see that means weekly so now is the time. The Painters Teamsters the Carpenters have a man here all ready I mean the Carpenters have now the Painters & Teamsters and the Iron Workers will have men here and all the other Trades also the Plumbers have a man here also *I wish I could stay Joe but Hockin is the man take it up with Ryan at once the best man for the position. I hope Frank is at the office when this arrives so he will send Hockin at once* I leave here tomorrow night for Frisco hoping you and

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Frank takes action on this at once I beg to remain

Yours Sincerely

E. A. CLANCY.

P. S. will send a full detail report tonight.

GENE."

(Ante, Resp. Brief, Part I, pp. 133, 134.)

It will be remembered that Hockin was one of the most active men in charge of dynamiting work. The utmost significance lies in the fact that at the time when the strike was on in Los Angeles, which Clancy characterizes as "The greatest strike any part of the country had in a long time," and which involved the iron works of Los Angeles, Clancy should have been so anxious to have this man Hockin sent on. Evidently the leaders of the conspiracy regarded this as a psychological moment to begin active work on the coast, and Clancy believed that if a man of Hockin's type was sent out, he could accomplish their purpose of terrorizing and forcing the employers here. On June 7th Clancy wrote from San Francisco to McNamara,—

"On my visit to Los Angeles I beg to report the following. * * * * we are going out for Funds in this city and I knew we are going to get it the Fight is on in Los Angeles and we are going to win * * * * *The Iron Worker never had a better chance to do what they have been wanting to do in that city so I again say send Hockin*

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at once it means 200 men to us he will make his salary if not in money in good for the Iron Worker."

(Ante, Resp. Brief, Part I, pp. 134, 135.)

On the same day McNamara wrote to Ryan, stating Clancy's anxiety that Hockin be sent to Los Angeles and quoting a telegram from Clancy to him:

"Los Angeles. Leave here for Frisco. Hockin should be sent here. Important. Men coming in local fast."

The expression in Clancy's letter,—

"The Iron Worker never had a better chance to do what they have been wanting to do in that city so I again say send Hockin at once it means 200 men to us he will make his salary if not in money in good for the Iron Worker,"—

(Ante, Resp. Brief, Part I, p. 135),

is pregnant with meaning. *What had the iron workers been wanting to do in Los Angeles? We answer, precisely what they had been doing all over the country, namely, employ dynamite to force the closed-shop policy upon the employers of Los Angeles.*

On June 10, 1910, Ryan wrote from Chicago to McNamara at Indianapolis, disapproving of the proposition to send Hockin to Los Angeles and saying,—

"It appears to me that Clancy should be able to find a man in California who would

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be capable of doing the necessary work in and about Los Angeles."

(Ante, Resp. Brief, Part I, p. 136.)

On June 25th, McNamara wrote to Clancy at San Francisco the following letter:

"Just a line from Indianapolis relative to our St. Louis friend J. H. Barry. When I took up the matter with him of his going West to Los Angeles to assist in some organizing work, he signified his willingness to make the trip. * * * *

"I received a letter from him in this morning's mail in which he stated positively that he would make the trip, but that he would need some little time to clean up a few matters that he had in hand at the St. Louis end that he did not want to drop at the present time. I am very glad that Brother Barry has signified his willingness to go into the matter, for I do not know of a better selection and I feel positive that everybody in Los Angeles and on the Coast will be pleased with your choice and feel positive in saying in advance that Jack will deliver the goods."

(Ante, Resp. Brief, Part I, pp.136, 137.)

To this letter Clancy replied July 5, 1910,

"Dear Sir & Bro I am glad that J. H. is going to come west I know he is the proper man he has had a long experience in organizing work further he is a good

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mech they will give him a job at once let me know when he is going to start west."
(Ante, Resp. Brief, Part I, p. 137.)

He followed this up by a letter, July 12th, to McNamara, in which he says:

"Say what about Barry is he started yet he ought to be here soon we need him on that work drop me a line and let me know what is doing."
(Ante, Resp. Brief, Part I, p. 138.)

At this juncture O. A. Tveitmoe joined in with a letter of July 26, 1910, (Ante, Resp. Brief, Part I, pp. 138–140) speaking in glowing terms of the strike in Los Angeles and requesting funds.

On August 2, 1910, Clancy again wrote from San Francisco to McNamara,—

"Joe what about Barry has he gone South yet. I got a letter from Lewis today he did not see Barry as yet I left orders with him if he showed up to tell him to go to Los Angeles."
(Ante, Resp. Brief, Part I, p. 140.)

As we have shown in our opening statement of facts, Barry finally refused to go and it was decided to send J. B. McNamara.

It is unnecessary to repeat here the testimony of Ortie McManigal with regard to the description by J. B. McNamara of his infernal machine, composed of battery, tattoo junior

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clock and electric connections, which we have already given in the opening statement of facts. (Ante, Resp. Brief, Part I, p. 101.) We simply direct the attention of the Court to the fact that before coming to the coast, J. B. McNamara had put the device in use himself, and others of the conspirators had also used it in producing explosions. We again refer to the conversation between J. J. McNamara, J. B. McNamara and McManigal of the 15th of July, 1910, in which McNamara stated that he was going to the coast to give it a "damned good cleaning up," and remarked to McManigal, "I wish you could go along with me," and J. J. McNamara replied, "No, nothing doing; I will have to have one of you fellows here, *so if there is anything comes off out on the Coast, that I can have an echo in the East,* and besides that, I have got four or five jobs in sight now, and I could keep you busy around here." (Ante, Resp. Brief, Part I, p. 121.) At the same time J. B. McNamara picked up a telegram from J. J. McNamara's desk and handed it to McManigal, with the explanation that the signature "Gene" meant "Eugene Clancy, business agent of the local in San Francisco." This telegram is People's Exhibit 23, and reads,—

> "San Francisco, Calif. July 11-12 1910 Mr. J. J. McNamara 422 American Centl Life Bldg, Indpls Ind. Lay Clancy

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Vaughan Elected delegat *has Jim left for here if not have him come at once* will I go North if you say I will go wire me at once. Letter follows give Ryan my regards received letter about Sheet Metal Workers decision and it was fine."

(Ante, Resp. Brief, Part I, p. 122.)

Thereupon, J. B. McNamara discussed with J. J. McNamara the route he should take and the best way to buy his ticket and whether he should buy a round-trip ticket, saying,—

"Well, supposing I get picked up on the Coast there; I will have this return ticket in my pocket, *that will direct right back here to Indianapolis.*"

J. J. McNamara replied,—

"When you get down to the depot, you can talk the matter over down there, and see which way. Maybe you can sell the ticket after you get out there. When you get out to San Francisco, *you get in touch with Clancy, and he will introduce you to the bunch out there and you take your instructions from Clancy,* and you will probably be gone three or four months. In the meantime, let me hear from you once in a while."

(Ante, Resp. Brief, Part I, pp. 164, 165.)

In a subsequent conversation between McManigal and J. J. McNamara, the latter showed McManigal a postal card in the handwriting of J. B. McNamara, post marked,

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"Seattle, Wash.," containing the quotation, "The best of friends must part," and signed in the handwriting of J. B. McNamara, "J. B. Brice."

(R. Tr. Vol. 76, p. 5798; Ante, Resp. Brief, Part I, p. 143.)

Again, at a subsequent conversation, J. J. McNamara, in his office at the headquarters, showed McManigal a card signed, "J. B. Brice," and containing the language,—

"Which it now reads, 'Times for the news; *it will read News for the Times.*'"
(Ante, Resp. Brief, Part I, p. 143.)

The date of this conversation was September 29, 1910. Allowing four days' course of post, from Seattle to Indianapolis, this postal card must have been written sometime prior to September 25, 1910. We again refer to the letter from H. W. Pohlman, business agent of the iron workers at Seattle, to J. J. McNamara, under date of August 15, 1910, saying, among other things:

"Clancy was here for 4 days & has made some impression. * * * We had a good meeting & Clancy gave a good talk & I also had him address the Bldg. Trades. * * *

"*Clancy met his man here* after waiting a week for him & he being in here every day. I understand the situation & why you wanted to reach him."

(Ante, Resp. Brief, Part I, p. 141.)

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This evidence leaves no doubt whatever in the mind that J. B. McNamara met Clancy at Seattle to take his instructions from him and meet some of the "bunch."

(Ante, Resp. Brief, Part I, p. 132.)

They must have commenced the work of giving the coast a "damned good cleaning up" promptly, for Harry Brandt, on behalf of the People testified that on August 31, 1910, between ten and eleven o'clock at night, the Lyon Building, under construction by Stone & Webster at Seattle, was dynamited, and that Stone & Webster were operating open-shop at the time.

(Ante, Resp. Brief, Part I, pp. 143, 170.)

The witness A. Kendall testified that on August 20, 1909, the mill of the Pacific Mill & Lumber Company, at Oakland, was blown almost entirely to pieces; that he had been running open-shop and having much trouble with the unions.

(Ante, Resp. Brief, Part I, p. 169.)

And Schmidt told Vose that he had been at Seattle with J. B. McNamara and had blown up a building there which was being constructed, the Lyon Building, or Club Building: that they had afterwards blown up a building in Oakland.

(Ante, Resp. Brief, Part I, pp. 170, 171.)

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We submit to the Court that the foregoing passages of testimony and correspondence demonstrate the fact that J. J. McNamara, who was the acting head of the conspiracy, from its inception in 1905, down to the time when the Times Building was blown up, *deliberately planned with President Ryan and Eugene Clancy to send a dynamiter to the coast to carry on the work of the conspiracy there; and that J. B. McNamara,* the brother of J. J. McNamara, *and the inventor of the then well-known infernal machine which could be set to explode hours after it was placed in a building, and thus give the dynamiter abundant time to be hundreds of miles away and prove an alibi,* was the man selected to clean up the coast thoroughly. When J. J. McNamara instructed J. B. McNamara to get in touch with Clancy and take his instructions from him and meet the "bunch" through him, he gave no special instructions as to where the work should begin or what employers it should include, but left that to the discretion of Clancy. And it is rank nonsense to say that the attack upon General Otis and the Times Building and Mr. Zeehandelaar was first thought of after J. B. McNamara reached the coast, or to deny that these outrages were a part of the overt acts which were being committed throughout the country in furtherance of the dynamiting conspiracy. No better evidence could be desired of what

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had been rankling in the breasts of these officers and managers of the International for years back than the following extracts from the official organ of the International, introduced in evidence at the trial.

In the Bridgemen's Magazine for October, 1907 (People's Exhibit 498; Cl. Tr. Vol. 3, p. 1389 *et seq.*) is a full report of the annual convention of the International which opened Monday, September 16, 1907, with F. M. Ryan, of Chicago, Ill., president, and Eugene A. Clancy, of San Francisco, Cal., first vice-president. On the first day of the convention, first vice-president Clancy submitted a report which contains, among other things, the following:

> "*I paid a short visit to Seattle* and found things in good condition, with the exception of the light iron work, which the laborers and lathers are doing. *It would be well for the incoming Executive Board to have some one visit that city in regard to this class of work. I visited Los Angeles, and as I have often reported, it is one of the worst non-union towns in the country,* but I must say the Iron Workers at present is one of the banner unions in that city. The carpenters are at outs with each other and work with any and everybody. Our Business Agent there had just been elected manager of the Building Trades Headquarters, which will

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be of great assistance to our local in that city."

(People's Exhibit 498; Cl. Tr. Vol. 3, p. 1438.)

And on the 6th day of the convention, delegate Nilsson *reported on behalf of Local 51, Los Angeles, Cal.,* the following:

"Delegate Nilsson *reported that conditions were far from satisfactory. A large number of men employed as structural iron workers were not members of the organization.* A year ago the membership was 12, now it is 100. This increase was brought about by the work of the individual members.

"At the present time there is considerable ornamental work going on.

"Delegate Nilsson reported that owing to the fact that the employers of Los Angeles belong to the Citizens' Alliance and kindred organizations, it was a hard matter to organize the building trades. *The employers perfected their organizations first and the workingmen of southern California are consequently contending against great odds.*

"Local No. 51 has been granted the reinforced concrete work by the building trades council. Delegate Nilsson stated that No. 51 was in need of financial assistance. *He also reported that a move was on foot to start an organizing campaign, and hoped*

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that the International Association would co-operate."

(People's Exhibit 498; Cl. Tr. Vol. 3, p. 1439.)

On the same day he introduced resolution heretofore quoted (Ante, Resp. Brief, Part I, pp. 144, 145), *denouncing in virulent terms the Los Angeles Times as the "Leading opponent of the so-called 'open-shop'"; and as "the most unfair, unscrupulous and malignant enemy of organized labor in America."*

On the eighth day of the convention this same delegate Nilsson, of Los Angeles Local No. 51, presented the following resolution:

"Resolution No. 20, by Delegate Nilsson, Local No. 51.

"*In view of the fact that it is extremely difficult to maintain an organization in Los Angeles,* on account of the mild climate, which attracts great numbers of working people, especially during the winter months, many of whom are delicate in health and often require aid from the local union there, and because of said peculiar natural conditions, *the enemies of organized labor have boldly published the fact that they mean to make said city their headquarters, and by determined and well-financed opposition, crush to death all labor unions and make Los Angeles a model 'scab' city, and an example of encouragement to our enemies in other cities, and in view of the further fact that there is a broad and*

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ever-increasing field for steel and reinforced concrete work throughout the whole Southwest, with Los Angeles as the center of operations; and in view of the still further fact that Local Union No. 51 has made, and is still making, heroic efforts to hold her own, and control of this rich field for the international association, and be in a position to reap the iron workers' share of the benefits of the proposed universal campaign of organization planned by a majority of the labor unions of Los Angeles and endorsed by many of the internationals:

"Be it Resolved, That this International Association of Bridge and Structural Iron Workers, in 11th Annual Convention assembled, donate the sum of ———— to Local Union No. 51, *and also morally assist in any campaign of organization entered into in Los Angeles* by the various international associations."

(People's Exhibit 498; Cl. Tr. Vol. 3, p. 1442.)

The Court certainly must have observed, in reading the statement of facts in this brief, that the system pursued by the leaders of the conspiracy was to wait for the opportune moment in the situation of its proposed victims and then strike relentlessly. Eugene Clancy was familiar with this system, having been in the conspiracy from its inception, and was quick to realize the general disturbance be-

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tween labor and capital on the coast in 1910 as the psychological moment in which to send some such dynamiter as Hockin, or Barry, or J. B. McNamara, to the coast to carry on the warfare with dynamite, and otherwise, as had been done for nearly five years all over the country. Olaf A. Tveitmoe also recognized the importance of striking a blow at this time. Hence we have the urgent demands from Clancy to send Hockin or Barry out here, and his anxious inquiry whether "Jim" had left for the coast, after he learned that J. B. McNamara was to be sent. The reports and resolution above quoted ring with hatred for the Times and open-shop employers on the coast; *and they appear in the record of the proceedings of the convention of 1907—three years before the Times Building was blown up.* We advert again to the fact that the object of the conspiracy was not to vent spite against one or more enemies of the International Association of Bridge and Structural Iron Workers, but was to carry on a determined warfare against the open-shop policy, and, by means of dynamite and other persuasive forces, compel all employers throughout the United States to substitute the "closed-shop" for the "open-shop."

Can any sane man say that the employers in Seattle, in Oakland, and in Los Angeles, or General Otis, the proprietor of the Los Angeles

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Times, or Harry Chandler, its manager, or Mr. Zeehandelaar, secretary of the Merchants & Manufacturers Association, were any less in the minds of the leaders of this conspiracy than the American Bridge Company, or the McClintock-Marshall Company, or the Phœnix Bridge Company, or poor old Mr. Von Spreckelsen were? Is it possible that the Los Angeles Times, characterized on the floor of the International convention as not only "the leading exponent of the so-called 'open-shop,' but it is the most unfair, unscrupulous and malignant enemy of organized labor in America," was forgotten, as the leaders of the conspiracy became emboldened, and the blowing up of the Times was a mere chance thought with J. B. McNamara after he reached here to give the coast, "A damned good cleaning up?"

With this clear demonstration from the record that the blowing up of the Los Angeles Times Building was an overt act committed in furtherance and execution of the conspiracy to force the "closed-shop" policy upon the employers of the United States, we now come to an examination of the law fixing the responsibility of all the conspirators for all the overt acts done in furtherance of it; and of the rules of evidence governing the proof of the existence of the conspiracy and the connection of the defendant with it.

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The theory of the prosecution may be briefly outlined as follows:

FIRST: THE INDICTMENT CHARGES THE DEFENDANT, M. A. SCHMIDT, WITH MURDER, IN THE LANGUAGE OF THE STATUE. THE PROOF DEMONSTRATED THAT J. B. MCNAMARA WAS GUILTY OF MURDER IN THE FIRST DEGREE.

SECOND: THE MURDER COMMITTED BY J. B. MCNAMARA WAS INCIDENTAL TO THE COMMISSION OF AN OVERT ACT—IN FUTHERANCE OF THE CONSPIRACY TO COMPEL EMPLOYERS TO ADOPT THE "CLOSED SHOP."

THIRD: THE DEFENDANT SCHMIDT PARTICIPATED IN THE COMMISSION OF THIS OVERT ACT AND WAS, THEREFORE, GUILTY OF MURDER IN THE FIRST DEGREE.

FOURTH: TO PROVE THE CONSPIRACY IT WAS NECESSARY AND PROPER TO PROVE ALL THE OVERT ACTS OF THE CONSPIRATORS, AND IN THIS CONNECTION TO PROVE ALL THE DECLARATIONS AND ACTS OF THE CONSPIRATORS RELATING TO THE CONSPIRACY AND IN FURTHERANCE OF IT.

FIFTH: PROOF OF THE CONSPIRACY AND SCHMIDT'S PARTICIPATION IN THE BLOWING UP OF THE TIMES BUILDING AS AN OVERT ACT THEREOF WAS ESSENTIAL TO PROOF

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OF SCHMIDT'S GUILT OF THE CRIME OF MURDER CHARGED IN THE INDICTMENT.

These propositions completely meet the argument of the Defendant's Opening Brief in support of the claim that admission of proof of the overt acts committed in the East in furtherance of the conspiracy was error, and they will be here separately discussed.

FIRST: J. B. MCNAMARA COMMITTED MURDER IN THE FIRST DEGREE WHEN HE DYNAMITED THE TIMES BUILDING AND TWENTY-ONE OF ITS OCCUPANTS.

The provisions of the Penal Code defining murder, which are pertinent to the case at bar, are as follows:

"Sec. 187. Murder is the unlawful killing of a human being, with malice aforethought.

"Sec. 188. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"Sec. 189. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration or

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attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder in the first degree; and all other kinds of murders are of the second degree."

The elements essential to a conviction of J. B. McNamara of murder in the first degree are, therefore:

1. The killing of Charles Haggerty with malice aforethought.

2. Circumstances attending the killing, which show an abandoned and malignant heart; from which malice is implied.

3. A wilful, deliberate and premeditated killing.

It is clear from the evidence that J. B. McNamara must have known that at one o'clock, the hour for which he set his infernal machine, there would be a large number of human beings in the Times Building performing their duties as employees of the Times Publishing Company. It was proved that there were in fact upward of one hundred persons there at the time. It can avail the defendant nothing to say that McNamara's intention was simply to destroy the Times Building, for the law presumes that he intended all of the usual and natural consequences of his act when he placed his infernal machine in "Ink Alley," and set it to explode at one o'clock in the morning. This is fundamental law.

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It is provided by the Penal Code (sec. 1102), "the rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code."

The Code of Civil Procedure provides (sec. 1963)—

> "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * *
>
> "3. That a person intends the ordinary consequence of his voluntary act."

As early as 1882, the Supreme Court applied this presumption in the case of

People vs. *Cadd,* 60 Cal. 640.

We quote from the opinion (pp. 640–641):

> "The charge is as follows: * * * 'The defendant is accused of making an assault with intent to rob one Harrison Bemis. The accused is presumed to be innocent until the contrary is established. In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence. As to this intent, you must arrive at that from his acts and conduct, and the circumstances in the case. No man can look into the mind of another and read it like a book. But there are certain presumptions of law regarding a man's intent, by which you should be governed. These are, that an unlawful act was done

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with an unlawful intent. Also, that a person intends the ordinary consequences of his voluntary act. These presumptions are by law satisfactory, if uncontradicted, but may be contradicted by other evidence. The effect of these rules is, that when the doing of an act, which, if coupled with a guilty intent, would be a violation of law, is proven, the burden of showing that the act was done without a guilty intent, is usually thrown upon the accused.' * * * The Court stated the law to the jury clearly and correctly."

This case is cited by Mr. Abbott in his "Trial Brief," p. 679, in support of the following text:

"The presumption that every person intends the natural and probable consequences of his own acts is alone sufficient to justify the jury in inferring criminal intent, where specific intent is not required to be shown."

Greenleaf lays down the principle:

"For though it is a maxim of the law, as well as the dictate of charity, that every person is presumed innocent until he is proved guilty; yet it is a rule equally sound that every sound person must be supposed to intend that which is the ordinary and natural consequence of his own purposed act."

3 Greenleaf Ev. (15 Ed.), Secs. 13, 14.

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He cites in support of his text the case of *People* vs. *Munn,* 65 Cal. 211.

The following appears in the opinion of the court in *People* vs. *Munn:*

> "The language of Chief Justice Shaw in the case of *Commonw.* vs. *Webster,* 5 Cush. 305, is as follows: 'This rule is founded on the plain and obvious principle that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own act.' "

The Court of Appeals of New York has stated the rule as follows:

> "Deliberation and premeditation essential to constitute murder in the first degree may be inferred from the killing itself unless done under such circumstances as to preclude the existence thereof, since it must be held that a person intends the natural and necessary consequences of his act.
>
> "The question of deliberation and premeditation is properly submitted to the jury where the weapon used and the character of the wound justify the inference that the accused intended to take life.
>
> "It is also said in *People* vs. *Conroy* (97 N. Y. 62): 'In capital as well as other cases, it must be held that a person intends that which is the natural and necessary consequence of an act done by him, and unless the act was done under circumstances

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which preclude the existence of such an intent, the jury had the right to find, from the result produced, an intention to effect it.' "

People vs. *Schmidt,* 168 N. Y. 568.

The same court again pronounces the rule in the case of *People* vs. *Chiaro,* as follows:

"Defendant's counsel contends further that the judgment lacks support essential to its legality, in that the evidence does not tend to prove any motive or intent on the part of defendant to kill Keene. The facts constituting the transaction were evidence of both motive and intent. The rule that a person intends that which is the natural and necessary consequence of his acts accords with sound reason, and is applicable to capital cases."

People vs. *Chiaro,* 200 N. Y. 316.

The rule is forcibly asserted by our own Supreme Court in the following cases:

People vs. *Doyell,* 48 Cal. 94;
People vs. *Foren,* 25 Cal. 364;
People vs. *Olsen,* 80 Cal. 122;
People vs. *Suesser,* 142 Cal. 354, 366.

In the Suesser case the court goes so far as to hold that where one with malice aforethought attempts to kill one person and accidentally kills another person, it is murder in the first degree.

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The case of *People* vs. *Olsen* is so apposite that we here quote from the opinion of the court, written by Works, J.:

> "It is stated in the instructions that evidence had been introduced for the purpose of showing that the defendants had entered into a conspiracy to commit the crime of grand larceny in stealing and driving away horses and mules claimed to have been in the possession of the deceased, and that in carrying out the conspiracy, for the purpose of accomplishing the object, one or more of the defendants killed the deceased. What the evidence was, or what it proved, or tended to prove, we do not know, as the evidence is not in the record, and in the absence of such knowledge, we do not know that the instruction was wrong, conceding that it would have been wrong in any state of the evidence.
>
> "We do not clearly understand counsel's objection to the instruction, and for that reason give it in full: 'The defendants were being tried for the crime of murder, and not for that of grand larceny, and the instruction was given for the purpose of showing their liability as conspirators, and in this respect it was erroneous. What the court intended to say was, that if a number of persons conspire together to commit a felony, and in the prosecution of the common design take the life of another person, etc., and so it must read. In order to make one person liable as a conspirator

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for the acts done by another, the act done "must be the ordinary and probable effect of the wrongful act especially agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of or foreign to the common design." '

"It is true, the defendants were not being tried for grand larceny or conspiracy; but the fact that the graver crime charged against them was the result of a conspiracy to commit another crime, and the attempt to carry it out, were material for the jury to consider. Conceding that the act done must have been the 'ordinary and probable effect of the wrongful act especially agreed on,' the evidence on which this instruction was founded may have shown that to have been the case. But whether it did or not, the instruction only goes to a case where the conspiracy to commit a felony, and the attempt to commit it, are shown, and the murder is committed in the prosecution of the common design, the blow being inflicted by one of the defendants, the others being present aiding and abetting. This conclusively shows that the court was not instructing the jury as to the presumption in the supposed case of counsel where the greater crime was, or might have been, 'a fresh and independent product of the mind of one of the conspirators outside of and foreign to the common design.' The instruction stated the law correctly. (Pen. Code, sec.

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192; 2 Thompson on Trials, sec. 2204; *State* vs. *Shelledy,* 8 Iowa, 485, 495, 505.)

"Counsel claim that it is only in the class of homicides enumerated in section 189 of the Penal Code to which the law superadds the intent to kill. In this counsel are mistaken.

"The section referred to provides what shall constitute murder in the first and second degrees. The instruction relates to the intent to kill. The mere act of killing, and the circumstances surrounding it, may be, and may have been in this case, sufficient to show that the killing was intentional and felonious. But in order to show that the killing was such as to constitute the act murder, it was competent to show that it was done in the commission or attempt to commit a felony, whether such felony was committed or attempted as the result of a conspiracy or not. (*People* vs. *Doyell*, 48 Cal. 94; *People* vs. *Foren*, 25 Cal. 364.) And where the killing is the result of the commission or the attempt to commit a felony, whether it be one of those named in section 189 of the code or not, the law attached the felonious intent accompanying the crime contemplated to the act of killing, and constitutes it murder. Thus in *People* vs. *Foren, supra,* it is said: 'The common law measures an act which is *malum in se* substantially by the result produced, though not contemplated, holding the doer of the act guilty of the thing done in the same manner as if it were specially in-

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tended, though not always guilty of the crime committed in the same degree. (Rutherford's Institutes, b. 1, c. 18, sec. 11.) On this principle, if one intending to murder a particular person attempts to shoot him, but missing his mark shoots another, or in an attempt to poison one another accidently loses his life by means of it, it is murder in the first degree. (1 Bishop's Crim. Law, secs. 255, 257.)'

"And in *People* vs. *Doyell, supra*: 'To establish the malice aforethought, however, the specific intent to kill need not be proved. To constitute a crime, there must be a joint operation of act and intention. But the common law measures an act which is *malum in se* substantially by the result produced, though not contemplated, holding the doer of the act guilty of the thing done in the same manner as if it were specially intended, though not always guilty of the crime committed in the same degree. (*People* vs. *Foren*, 25 Cal. 365.) Whenever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder. (Acts of 1850, p. 220, sec. 25; 2 Bishop's Crim. Law, 741.) In such homicides the law superadds the intent to kill to the original felonious intent, and estops the criminal from denying the further intent thus imputed. The thing done, having proceeded from a corrupt mind, is to be viewed the same, whether the corruption is of one particular form or another. (Rutherford's Insti-

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tutes, c. 18, sec. 9; 1 Bishop's Crim. Law, 411.)

" 'The amendment (of 1856) of the act of 1850 "concerning crimes and punishments" did not change the law of murder done in the attempt to commit a felony. It only prescribes a severer punishment where the murder is committed in the attempt to perpetrate arson, rape, robbery or burglary (on account of the enormity of those offenses), than where it is committed in carrying out any other felonious design. * * *

" 'But besides those committed in the perpetration of felonies, a large number of homicides have been adjudged murder where the specific intent to take life does not appear or does not exist. Thus where the killing is involuntary, but happens in the commission of an unlawful act, which, in its consequences, naturally tends to destroy life, it is murder; so if the intent to kill is not made apparent, but the killing is unlawful, and not done in the heat of passion, or the specific intent to take life not appearing, all the circumstances show an abandoned and malignant heart. In these and in like cases, the malice aforethought is implied, the law attributing to the slayer the intent to kill, although such intent is not made manifest as a fact.' "

We submit that notwithstanding Charles Haggerty was probably unknown to J. B. McNamara, that fact can not relieve him of guilt.

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As we have before remarked, McNamara must have known that in all probability many human beings would be in the building at the time his infernal machine exploded, and the law presumes that he knew Charles Haggerty would be there and be killed by the explosion. It requires no argument to satisfy the court that J. B. McNamara must have had an abandoned and malignant heart when he in cold blood wiped out twenty-one human lives. It requires no argument to satisfy the court that he killed Haggerty and the other twenty employees in the Times Building deliberately and with malice aforethought. So we say that under the law J. B. McNamara was guilty of murder in the first degree as an incident to his part in the blowing up of the Times Building, which was one of many overt acts in the conspiracy of officers and members of the International Association of Bridge and Structural Iron Workers to compel the adoption of the "closed-shop" by criminal acts of violence.

SECOND: THE MURDER COMMITTED BY J. B. MCNAMARA WAS INCIDENTAL TO THE COMMISSION OF AN OVERT ACT IN FURTHERANCE OF THE CONSPIRACY TO COMPEL EMPLOYERS TO ADOPT THE "CLOSED-SHOP."

We have already given the court an outline of the evidence which shows beyond a peradventure that J. B. McNamara was sent out to

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the coast by the conspirators to carry on the work of the conspiracy. (Ante, Resp. Brief, Part I, pp. 93–113.)

J. J. McNamara's instructions to J. B. McNamara to get in touch with Clancy, who would introduce him to the "bunch," and to take his instructions from him, were followed by J. B. McNamara when he got in touch with Clancy at Seattle and together with Schmidt produced an explosion there, and later went to Oakland and with Schmidt produced an explosion there; and in his considerable stay in San Francisco, during which time he assisted Schmidt in the purchase, transportation and caching of the dynamite, which he used on October first to blow up the Times. All the details of the evidence point so unerringly to the fact that the blowing up of the Times was an overt act committed in furtherance of the conspiracy, that the jury would have stultified itself had it not found the fact accordingly.

THIRD: THE DEFENDANT, SCHMIDT, PARTICIPATED IN THE COMMISSION OF THIS OVERT ACT AND WAS, THEREFORE, GUILTY OF MURDER IN THE FIRST DEGREE.

We have already traced in detail the movements of Schmidt in conjunction with J. B. McNamara. (Ante, Resp. Brief, Part I, p. 166–239.) J. B. McNamara registered at the Argonaut Hotel under the name of J. B.

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Brice on the 5th of August, 1910. (Ante, Resp. Brief, Part I, p. 168.) In the month of August explosions were produced by himself and Schmidt at Seattle and at Oakland. (Ante, Resp. Brief, Part I, pp. 168, 169.) September 4, 1910, McNamara rented a room from Mrs. Ingersoll in San Francisco, going under the name of Brice; and immediately Schmidt got in connection with him over the telephone. September 18th, McNamara and Schmidt registered at the Argonaut Hotel under the names of Brice and Perry, and were assigned to room 366. (Ante, Resp. Brief, Part I, p. 171.) From this time on they were frequently seen together in San Francisco, and at times in company with Eric Morton, Olaf Tveitmoe, and a man by the name of Gray. (Ante, Resp. Brief, Part I, p. 179.) During the summer of 1910, Schmidt visited Los Angeles, and on his return to San Francisco had a conversation with one Brown, in the course of which he said to Brown that he had been to Los Angeles, and, further,—

> "They are having an awful time down there, they are beating men up down there * * * they won't give a union man no chance there at all. It is a regular Otis town they are running. *There is something going to happen to him pretty soon.*"
>
> (Ante, Resp. Brief, Part I, p. 179.)

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During this summer and fall Schmidt worked for Anton Johannsen, and was seen on Sundays with Johannsen, Belle Lavin, and Eric Morton, at Corte Madera. (Ante, Resp. Brief, Part I, p. 180.) Schmidt's presence in Los Angeles during this summer is demonstrated by his post office orders for change of delivery address from San Francisco, general delivery, to Los Angeles, general delivery, June 15, 1910, and from Los Angeles to San Francisco, August 4, 1910 (Ante, Resp. Brief, Part I, pp. 181, 182); also by the testimony of Mrs. Stewart that she saw him at the Chapman Hotel, Los Angeles, where he went under the name of Perry, and he was also at the house of Johannsen at the beach during this summer. (Ante, Resp. Brief, Part I, p. 183.)

It is unnecessary to more than mention Schmidt's advertisements in the Call and Examiner for a launch (Ante, Resp. Brief, Part I, pp. 188, 189), *shown conclusively by comparison with the telegram he wrote after his arrest while en route to Los Angeles to have been in his handwriting* (Ante, Resp. Brief, Part I, p. 190); the order for the powder and receipt therefor, also shown by comparison to be in his handwriting (Ante, Resp. Brief, Part I, pp. 224, 239); the hiring of the launch "Pastime" by Schmidt and McNamara; the purchase of the letters "P-E-E-R-L-E-S-S," used to change the name of the launch; the identifi-

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cation of Schmidt by the Giant Powder Company's employees; the delivery of the powder by Mr. Phillips, at Giant, and Phillips' positive identification of Schmidt, J. B. McNamara and Caplan, as the men who received the powder and loaded it on the launch, which then bore the name "Peerless" (Ante, Resp. Brief, Part I, pp. 191–208; 216–224; 225–252); and the purchase of the tarpaulin by Caplan and the discovery of it covering the boxes of dynamite from the Giant Powder Company, in the house, 1662 Nineteenth Avenue, San Francisco, where they had been cached (Ante, Resp. Brief, Part I, pp. 209–215); the appearance of J. B. McNamara at the Times Building at three o'clock in the morning of September 30, 1910, in a pretended quest for employment (Ante, Resp. Brief, Part I, pp. 185, 187); the finding of the dynamite and one of J. B. McNamara's infernal machines attached to it at the house of Mr. Zeehandelaar, and a package of high explosive which was discharged upon cutting open the suit case containing it, near General Otis' house (Ante, Resp. Brief, Part I, pp. 253–267); and the positive identification of the dynamite found at Mr. Zeehandelaar's house as a part of the powder delivered by Mr. Phillips of the Giant Company to Schmidt, McNamara and Caplan.

We submit that it is rarely that such a com-

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plete chain of circumstances is found in tracing the perpetration of crime as were found in this case leading up to the identity of J. B. McNamara, Schmidt and Caplan as the persons who planned and carried out the destruction of the Times Building. It is important to remember that J. B. McNamara came to the Coast under the instructions of J. J. McNamara, the leading spirit in the INTERNATIONAL conspiracy, to give it a "damned good cleaning up"; and that pursuant to J. J. McNamara's instructions he immediately got in touch with Eugene Clancy, for years a member of the Executive Board of the International and its First Vice President; and that at the time of J. B. McNamara's departure, J. J. McNamara refused to permit Ortie McManigal, principal dynamiter among the conspirators, to accompany him, saying:

> "I will have to have one of you fellows here, *so if there is anything comes off out on the coast, that I can have an echo in the East,* and besides that, I have got four or five jobs in sight now, and I could keep you busy around here."
> (Ante, Resp. Brief, Part I, p. 121.)

Too much stress can not be laid upon the fact that on this errand of furtherance of the conspiracy on the Coast, J. B. McNamara was to take instructions from Eugene Clancy, who

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would introduce him to the "bunch." *The scheme was to have McNamara introduced by Clancy to those of his associates on the Coast whom he could count on to aid McNamara in his acts of intimidation and depredation. The fact is that Schmidt and Caplan were singled out to assist McNamara.* It is not conceivable that after McNamara and Schmidt got together in San Francisco they did not talk over the purpose of McNamara's errand and its connection with the nation-wide conspiracy to compel employers to adopt the "closed-shop" policy. It would be contrary to human nature for a man to come to the Coast on such an errand, with instructions to meet the "bunch" by introduction from one of the chief conspirators and not talk the whole situation over with this conspirator and those of the "bunch" whom he selected to aid in the furtherance of the conspiracy. There can be no question that McNamara discussed with Schmidt the progress which the conspiracy had made in other parts of the country, the success he had met in the use of his clock-and-battery infernal machine, and the necessity of carrying on the good work on the Coast. It follows that when Schmidt assisted McNamara in producing the explosions in Seattle and Oakland, *he knew that he was aiding in the furtherance and execution of the general conspiracy;*

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that when he aided McNamara in the purchase, transportation and caching of the dynamite, he knew that he was aiding in the furtherance and execution of the general conspiracy, and that when he said to Mr. Brown in San Francisco, a short time before the Times Building was blown up, that they were running an Otis town in Los Angeles and something was going to happen to Otis soon, he knew that the dynamite was to be used by J. B. McNamara for the destruction of the Times Building, in furtherance and execution of the general conspiracy.

It is well-settled law that in order to establish the fact of a conspiracy it is not necessary to show a meeting and actual agreement of the conspirators to commit the crime. The fact may be inferred from all the circumstances tending to show the common intent.

People vs. *Lawrence,* 143 Cal. 148;
People vs. *Donnolly,* 143 Cal. 394;
People vs. *Eldridge,* 147 Cal. 782;
People vs. *Kauffman,* 152 Cal. 331;
Ryan vs. *U. S.,* 216 Fed. 13.

In the case of *People* vs. *Lawrence,* 143 Cal. 148, in which Lawrence and another were charged with the murder of one McCarty, it appeared by the evidence that Lawrence and a number of others had conspired to rob McCarty and one Mize, and while they were en-

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gaged in furtherance of the common purpose, McCarty was slain by some one of the party. Lorigan, J., in the opinion of the court, says:

> "It was not necessary to support proof of the conspiracy to show that the parties met and actually agreed to jointly undertake the perpetration of the robbery. From the secrecy with which unlawful undertakings of that character are adopted it would, in almost all instances, be impossible to make such proof, so that in prosecutions which involve proof of a conspiracy it may be proved by facts and circumstances sufficient to satisfy the jury of its existence, and the weight and sufficiency of that evidence to prove such a conspiracy is a matter for the jury."

In the case of *People* vs. *Donnolly*, 143 Cal. 394, Donnolly, Buckley, Moran and Duncan were jointly charged with murder of one Rice, while a strike of the City Front Federation was pending in the city of San Francisco. It was the theory of the state that these men had conspired to take the life of Rice, who had refused to join the strike. Van Dyke, J., writing the opinion of the court, says:

> "The ultimate fact here, of course, was the conspiracy on the part of the defendant with the other parties named in the commission of the crime, *but it was not necessary in order to establish that fact to prove that the parties met and actually agreed to*

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jointly undertake such criminal action. From the secrecy with which unlawful undertakings are adopted it would be generally impossible to make such proof by direct testimony. Evidence is indirect as well as direct,—consisting of inferences and presumptions,—*and it is code law that upon the trial of a case evidence may be given of any facts from which the facts in issue are presumed or are logically inferable*; and the jury, by the exercise of their judgment or reason, warranted by a consideration of the usual propensities or passions of men, may make such deductions or draw such inferences from the facts proven as will establish the ultimate fact or facts in issue. (Code Civ. Proc., secs. 1826, 1831–1832, 1870 (subd. 15), 1957–1960.)"

In the case of *People* vs. *Eldridge,* the defendant was indicted for the murder of W. L. Cotter, a prison guard at Folsom. The evidence showed that a conspiracy was hatched between the convicts to escape from prison, to which defendant was a party, and that he was in the general assault made upon prison officials at the time. Lorigan, J., writing the opinion of the court, says:

"It is, however, insisted by appellant that there was not sufficient evidence produced before the jury to show that Myers was a party to the conspiracy, or was conversant with its object or purpose, the claim

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of appellant's counsel being (to state his position as he assumes it) that there was nothing in the evidence to show but that Myers 'was acting independently, taking advantage of the melee to vent a grudge on Mr. Chalmers or Mr. Cotter, and that Mr. Cotter received a death wound at that time.'

"*While it is true, as contended by counsel for appellant, that there was no direct evidence of any express agreement entered into by Myers to join with the defendant and the others in their unlawful scheme to escape, still it was not essential that there should be evidence produced before the jury of such express agreement, in order to establish the fact that he was a party to the conspiracy. It is competent to prove that one was a party to a conspiracy for the commission of crime by circumstantial as well as by direct evidence. That a conspiracy to commit crime was explicitly or formally agreed to is rarely capable of being proved by direct evidence, and must be developed from such circumstances as reasonably tend to prove its existence.* As these criminal combinations are uniformly entered into in secret, and hence are rarely susceptible of direct proof, the law, on account of the necessity of the case, has deemed it wise and proper that circumstantial evidence of their existence should be permitted."

The principle under discussion could not be better stated than it was by Judge Anderson in his charge to the jury in the case of *United*

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States vs. *Ryan and others,* tried in Indianapolis, and familiarly known as the "dynamite conspiracy case." It will be remembered that some forty of the officers and members of the International Association of Bridge and Structural Iron Workers were indicted by the Federal Grand Jury at Indianapolis, Indiana, for a conspiracy to carry explosives on passenger trains, in violation of the act of congress prohibitory thereof. Although the indictment in the case at bar is not for conspiracy, but for a murder resulting from an overt act committed in furtherance of a conspiracy, *yet the law governing the proof of the conspiracy is the same in this case as if the indictment had been for the conspiracy itself.* Ryan, Eugene Clancy and others appealed from the judgment of conviction to the Circuit Court of Appeals, Seventh Circuit. The judgments were affirmed as to Ryan, Clancy and all but one or two of the other defendants (216 Fed. 13). We quote from the charge of Judge Anderson, at page 18:

> "To constitute a 'conspiracy' it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, in words or in writing, state what the unlawful scheme is to be, or the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or

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more persons, in any manner, or through any contrivance come to a mutual understanding to accomplish the common and unlawful design. Where an unlawful end is sought to be effected, and two or more persons, actuated by a common purpose of accomplishing that end, work together in furtherance of the unlawful scheme, such persons become conspirators, although the part which any one of them is to take in the conspiracy is a subordinate one, or is to be executed at a remote distance from the other conspirators.

"In determining the question of the existence of a conspiracy, you will take into consideration the relation of the parties to one another, their personal and business association with each other, and all the facts in evidence that tend to show what transpired between them at or before the time of the alleged combination as well as the acts performed by each party subsequent to such alleged combination in respect to the subject-matter of the alleged conspiracy; and from these facts and circumstances you will determine whether a combination in fact existed, and whether such combination was illegal in its inception, or became illegal at any subsequent time.

"A conspiracy is rarely, if ever, proved by positive testimony. When a crime of high magnitude is about to be committed by a combination of individuals, they do not act openly, but covertly and secretly. The purpose of the combination is known

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only to those who enter into it, and their guilt can generally be proved only by circumstantial evidence. The common design is of the essence of the charge, and this may be made to appear when the defendants steadily pursue the same object, whether acting separately or together, by common or different means, all leading to the same unlawful result.

"In determining the question of the formation or existence of the conspiracy, the acts and declarations of the persons accused may, among other circumstances, be considered by you. Statements of one, and in some instances, of two or more of the defendants in the absence of the other defendants, and conversations with some of the witnesses on the part of one or more of the defendants in the absence of the others, have been given in evidence. The individual letters and telegrams of different defendants have also been introduced. These declarations, statements, and communications tend to show the existence of the alleged conspiracy and the alleged connection of the persons making the same therewith. Acts or declarations of individual defendants are not to be considered by you as affecting any other defendant, unless you find from the evidence the existence of such conspiracy, that such other defendant was a member thereof, and that such acts were done and such declarations were made in pursuance of the common

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purpose set out in the indictment and to effectuate the same. The same rule applies to the acts and declarations of persons, if any, who may be shown by the evidence to have joined in the conspiracy, but who are not named as defendants in the indictment."

Error was assigned by the appellants as to the following instructions:

"(7) For error in each of the following instructions given to the jury: 'The indictment charges a continuing conspiracy. The law considers that whenever any of the co-conspirators does any act to effectuate the common design the parties to the conspiracy renew, or, to speak more properly, they continue, their agreement, and this agreement is renewed or continued as to all whenever any one of them does any act in furtherance of their common design. Any person who, after a conspiracy is formed, and who knows of its existence, joins therein by some act intentionally done in furtherance of its object, becomes as much a party thereto from that time on as if he had originally conspired.'

"And the following, to wit: 'If you find from the evidence that, in order to carry out the purposes of the International, the defendants, or two or more of them, entered into a conspiracy to destroy with dynamite and nitroglycerine the property of the American Bridge Company and other open

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shop concerns, or the structures which they were erecting in various states of the Union, and if you find that such conspiracy to destroy such property included as a necessary step in the accomplishment of such destruction the unlawful transportation of dynamite and nitroglycerine upon the vehicles of common carriers engaged at the time in the transportation of passengers from a place in one state to a place or places in another or other states of the United States, and if you further find that such destruction of property was accomplished by explosions of dynamite and nitroglycerine in various places throughout the United States, and that the dynamite and nitroglycerine with which such explosions were produced were as a matter of fact transported from state to state in suit cases and carrying cases upon the vehicles of common carriers, engaged at the time in the carrying of passengers, as averred, then you will be authorized to find that a conspiracy was formed to transport dynamite and nitroglycerine unlawfully, as charged in the indictment.' "

The court sustained the instructions in the following language:

"The instructions given by the court on submission of the issues to the jury are preserved as an entirety in the bill of exceptions (Record, vol. 4, pp. 3677–3692), and no exceptions appear thereto, aside from

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the two paragraphs quoted in the statement of facts which precedes this opinion. Thus review is neither sought nor authorized of other instructions so submitted, *but reference to the context of the paragraphs challenged is authorized, as of course, and we have examined the entire charge in that view. Its precision, correctness, and thoroughness in the instructions which are unchallenged, are notable, in effect as follows: That the various essential propositions of law involved in the issues are well pointed out and defined in clear language, not open to doubt of their meaning for application to the evidence*; that limitation of the issues to the specific charges of the indictment was directed in plain terms, alike unmistakable in definition of the issues; that all references to the evidence were not only dispassionate, but exceedingly fair throughout the charge; that the jury were carefully instructed and cautioned as to the sole purpose and bearing of the evidence relating to the International Association and destruction of property in the long course of the strike referred to, and that neither that association nor the rights of 'organized labor' were on trial; and that they were further charged, in express terms, that 'the defendants are not on trial for causing the various explosions, and the consequent loss of life and property throughout the United States' in evidence.

"*In the light of instructions thus given, we are of opinion that the criticisms urged*

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against the two paragraphs in question are unfounded, and that error is not well assigned thereupon."

It being clear that the court properly submitted to the jury the question whether, upon the evidence, Schmidt joined the conspiracy with full knowledge of its purposes and was instrumental in the blowing up of the Times Building, which was an overt act in the conspiracy; and that the jury were justified in finding that he did join the conspiracy and participate in the blowing up of the Times Building, it remains to consider the rule of law *that Schmidt was in legal contemplation guilty of the murder which J. B. McNamara committed.*

In the first place, we submit that it matters not whether Schmidt was present and actually aided McNamara in placing the infernal machine or not. The rule is that where a general conspiracy to commit crimes of a certain class is shown, each conspirator is deemed guilty of every such crime committed in pursuance and furtherance of the conspiracy by any of the conspirators, though he was not present and did not participate in the particular crime, or crimes, committed.

People vs. *Brown*, 59 Cal. 345;
People vs. *Collins*, 64 Cal. 293;
People vs. *Majors*, 65 Cal. 138;
People vs. *Lovren*, 119 Cal. 88;

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People vs. *Eldridge,* 147 Cal. 782;
People vs. *Woods,* 147 Cal. 265;
People vs. *Raber,* 168 Cal. 316.

While we submit there is no escape from the inference that Schmidt not only knew of the general conspiracy and joined it, and knew when he aided in procuring, transporting and caching of the dynamite, that J. B. McNamara intended to use a portion of the dynamite to blow up the Times Building and attempt to blow up the residences of General Otis and Mr. Zeehandelaar; yet, if the view were taken that he simply joined the conspiracy and aided McNamara in procuring and caching the dynamite, to assist him in overt acts which he intended to commit, still Schmidt would be criminally liable for the blowing up of the Times Building.

It is, further, well settled that where a conspiracy is proven, each conspirator is deemed guilty of any crime committed in the doing of an overt act in the conspiracy by any conspirator, though such crime was no part of the object of the conspiracy, if the commission of it could reasonably have been anticipated as a consequence of the commission of the overt act.

People vs. *Brown,* 59 Cal. 345;
People vs. *Collins,* 64 Cal. 293;
People vs. *Olsen,* 80 Cal. 122;

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People vs. *Lawrence,* 143 Cal. 148;
People vs. *Vasquez,* 49 Cal. 560;
People vs. *Holmes,* 118 Cal. 444;
People vs. *Carson,* 155 Cal. 164;
People vs. *Kauffman,* 152 Cal. 331;
People vs. *Wood,* 145 Cal. 659;
People vs. *Woods,* 147 Cal. 265;
People vs. *Creeks,* 170 Cal. 360.

In the recent case of *People* vs. *Kauffman,* 152 Cal. 331, Sloss, J., in the opinion of the court, says, at page 334:

> "The theory of the people was that the killing of Robinson was an act committed in furtherance of a common design or conspiracy by the six defendants to commit an unlawful act, and that therefore Kauffman, as one of said conspirators, was criminally responsible for such killing, although he took no active part in the attack upon Robinson.
>
> "There is no dispute about the rules of law governing the criminal liability of each of several parties engaging in an unlawful conspiracy or combination. An apt statement of them, abundantly supported by authority, is to be found in 8 Cyc. 641, in the following language: '*The general rule is well settled that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecu-*

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tion of the common design for which they combine. In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. Nevertheless the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design. * * * The contention of the appellant is that the unlawful combination or conspiracy embraced only the proposed burglary at the cemetery, and that when this project was abandoned by reason of the discovery of an armed guard on the premises, the conspiracy or common design was at an end, and that anything done thereafter was the individual act of the party doing it. If, as matter of law, it can be said that the criminal combination embraced no more than this contemplated burglary, and that the shooting of Robinson was not within the reasonable and probable consequences of the common unlawful design, it would follow that no case was made out against the appellant. *But whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh*

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and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury. (*Bowers* vs. *State,* 24 Tex. App. 542; (5 Am. St. Rep. 901; 7. S. W. 247); *Spies* vs. *People,* 122 Ill. 1, 642 (3 Am. St. Rep. 320, 12 N. E. 865; 17 N. E. 898)); *and if there be any evidence to support the finding of the jury on this question, its determination is conclusive.* In this case the people contended that the evidence justified the jury in finding that the common plan or design in which Kauffman and his co-defendants had engaged included not only the breaking into the safe but also the protection of themselves and each other from arrest and detection while going to and coming from the scene of the proposed burglary, and that any act committed by any of them in the course of such going or coming for the purpose of resisting arrest and preventing consequent detection might be found to be within the scope of the common design or plan. *Treating the extent of the conspiracy as a question of fact, the trial court submitted the question to the jury, giving them the following instruction:*

" 'If you find from the evidence in this case that the defendant and others entered into a conspiracy to commit a burglary and that in connection with such a criminal purpose they had agreed to resist arrest and interference going to the scene of the proposed crime and returning therefrom and

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that being confederated together for the felonious purpose of such burglary and resistance to the civil power of the state—even to the extent of taking human life—and that in furtherance of such a conspiracy one of the conspirators killed Officer Eugene C. Robinson, then it will be your duty to convict the defendant of the crime of murder *because the law holds that all who entered into such a conspiracy, assumed to themselves as a body the attribute of individuality, rendering whatever was done by one of the conspirators in furtherance of that design the act of all.'*

"Was there evidence justifying the jury in finding that the conspiracy extended to the extent indicated in this instruction? This court has in effect answered this question in the affirmative in *People* vs. *Woods*, 147 Cal. 265 (109 Am. St. Rep. 151; 81 Pac. 652). That was the appeal of Woods, one of the defendants jointly charged with Kauffman, from a judgment upon a conviction of murder of the first degree. The evidence, which is set forth with some fullness in the opinion of the chief justice, was substantially the same as that presented in this case. In the opinion in the Woods case it is said (page 271): 'The court was not only justified in overruling the objections to the testimony regarding the conspiracy upon the ground above set forth, but upon the further ground that upon the evidence—circumstantial and direct—the jury would have been justified in conclud-

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ing that a part of the common design was to resist arrest by the use of the pistols with which the defendants armed themselves. (*People* vs. *Pool*, 27 Cal. 572.) Pistols are not used for breaking into a safe; their purpose is to kill those who interfere to prevent a burglary or arrest the perpetrators.'

"It is argued that the decision in the Woods case is not applicable to the facts here presented, because in that case it appeared that Woods himself had fired upon Robinson and had inflicted the fatal wound. *But the court was considering the admissibility of testimony regarding acts of parties other than Woods. This testimony was admissible only upon the theory that these parties and Woods were so-conspirators, and in holding that the evidence was properly introduced, it was material to the decision to hold that upon the evidence the alleged conspiracy might have been found by the jury not to have terminated. If such conspiracy was still existent at the time of the shooting, the result that Kauffman was responsible for acts done by any of the conspirators follows as truly as did the conclusion that evidence of the acts of co-conspirators was admissible against Woods.*

"But if we were to regard the question as a new one, we have no doubt of the correctness of the views expressed in the former case. The jury was certainly justified in believing that the division of the

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band into two parties of three was decided upon on the homeward as on the outward journey for the purpose of lessening suspicion, and that to all intents and purposes the six were going home together. Five of them were armed with deadly weapons, and several of them—Kauffman among others—had on their persons burglars' tools. For their own protection against the consequences of their felonious enterprise it was necessary that these tools should not be discovered upon them by any officer of the law. Adding to this the consideration suggested by the court in *People* vs. *Woods*, namely, that pistols are used by burglars not for breaking into safes but for preventing interference with the criminal design or arrest by those who may discover its existence, and the further fact that there is evidence here to the effect that Kauffman himself had endeavored to secure a pistol before starting on the journey, we think it clear that there was ample evidence to justify the jury in finding that the common design or conspiracy embraced not only the actual burglary at Cypress Lawn Cemetery, but the protection of the party from arrest or interference on their way to and from the scene of the proposed crime. * * *

"We have, however, carefully examined the transcript and find in it no prejudicial error. The instructions given by the court were full and contained an accurate definition of the law applicable to the case. In-

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structions requested by the defendant and refused were for the most part based upon the theory that as matter of law the alleged conspiracy must be held to have terminated when the conspirators abandoned the plan of breaking into the safe at Cypress Lawn Cemetery. *As we have already said, the question whether or not the conspiracy had then terminated was one of fact for the jury. Many objections to testimony were based upon the same untenable theory, and the others were equally without merit.*"

In the case of *People* vs. *Creeks*, 170 Cal. 368, which was conspiracy to escape from the State Prison at Folsom, Angellotti, C. J., states the rule at page 374:

"The conspiracy included as a part of the joint purpose the accomplishment of something admittedly unlawful and a felony,—namely, the escape of Phelps. Of course there is no force whatever in the suggestion that defendant could not, by reason of his status as a prisoner for life in a state prison, be held as a principal under the provisions of section 31 of the Penal Code. The conspiracy likewise included the commission by defendant of the felony defined by section 109 of the Penal Code, which provides that 'any person who wilfully assists * * * any prisoner confined in any prison or jail * * * to escape, or in an attempt to escape from such prison or jail * * * is punishable as provided in

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section 108 of the Penal Code, viz: by imprisonment in the state prison not exceeding ten years and by a fine. The wilful killing of any person standing between defendant and Phelps and the consummation of their escape was an ordinary, probable, and natural consequence of the execution of their common design.

"The law applicable in such cases is well stated in *People* vs. *Kauffman,* 152 Cal. 331, 334 (92 Pac. 861), where it is substantially said that under the well-settled rule of law governing the criminal liability of each of several engaging in an unlawful conspiracy or combination, if several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. It was further said: 'In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the common design for which they combine.' Of course, as said in the case just referred to, if one member of the party departs from the original design as agreed on by all the members and does an act which was not only not contemplated by those who entered into the common purpose, 'but was not in

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furtherance thereof, and not the natural or legitimate consequence of anything connected therewith, the person guilty of such act, if it was itself unlawful, would alone be responsible therefor.' But there is no reasonable basis in the evidence for the application of this doctrine here. Not only was the killing of any officer or guard standing between defendant and Phelps and their escape a probable and natural consequence of their plan to escape, as that plan is shown by their acts and conduct, but the evidence shows quite clearly that their plan contemplated the overcoming of Drewry and Kerr by such force and to such an extent as was necessary at the very place where they attacked them, and these men having been rendered powerless to resist them or impede their movements, their subsequent escape through the gates in to the yard. Under such circumstances, Creeks would be equally guilty with Phelps of the murder of Drewry, even if he did not personally inflict any wound on him, for under the law the acts of Phelps in the matter were the acts of the defendant also. The verdict of the jury in this regard is not only sufficiently sustained by the evidence, but we do not see how any other verdict could have been given. (See, also, *People* vs. *Ford,* 25 Cal. App. 388, (43 Pac. 1075).)"

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The language of the learned Chief Justice that, "the willful killing of any person standing between defendant and Phelps and the consummation of their escape was an ordinary, probable, and natural consequence of the execution of their common design," may well be paraphrased in the case at bar as follows: The willful killing of any employee in the Times Building, standing between J. B. McNamara, M. A. Schmidt and David Caplan and the consummation of their purpose to blow up the Times Building, was an ordinary, probable and natural consequence of the execution of their common design. In other words, it being morally certain that the explosion of McNamara's infernal machine would kill someone in the Times Building, the death of any such person was an ordinary, probable and natural consequence of the execution of the common design to blow up the building. Under all the decisions, Schmidt was equally guilty with McNamara of the killing of the deceased, Charles Haggerty.

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FOURTH: TO PROVE THE CONSPIRACY IT WAS NECESSARY AND PROPER TO PROVE ALL THE OVERT ACTS OF THE CONSPIRATORS, AND IN THIS CONNECTION TO PROVE ALL THE DECLARATIONS AND ACTS OF THE CONSPIRATORS RELATING TO THE CONSPIRACY AND IN FURTHERANCE OF IT.

It has been held many times that a conspiracy is peculiarly one of the class of facts which can seldom be established by direct evidence. In the very nature of the case, the common design can only be shown by circumstantial evidence, and a conviction may rest solely on such evidence.

People vs. *Pool*, 27 Cal. 573;
People vs. *Geiger*, 49 Cal. 643;
People vs. *Bentley*, 75 Cal. 407;
People vs. *Bentley*, 77 Cal. 7;
People vs. *Lane*, 101 Cal. 513;
People vs. *Daniels*, 105 Cal. 262;
People vs. *Van Horn*, 119 Cal. 323;
People vs. *Gregory*, 120 Cal. 16;
People vs. *Rodley*, 131 Cal. 240;
People vs. *Donnolly*, 143 Cal. 394;
People vs. *Wood*, 145 Cal. 659;
People vs. *Eldridge*, 147 Cal. 782;
People vs. *Woods*, 147 Cal. 265;
People vs. *Carson*, 155 Cal. 164;
People vs. *Stokes*, 5 Cal. App. 205;
People vs. *Kizer*, 22 Cal. App. 10.

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It follows that all the circumstances bearing in any way on the fact of a conspiracy, or upon the acts done in pursuance thereof, may be proved, to show the fact of the conspiracy and, in the particular case, the intent of a defendant who has been indicted for a crime incidental to and flowing from the commission of an overt act in furtherance and execution of the conspiracy.

People vs. *Pool,* 27 Cal. 573;
People vs. *Bentley,* 75 Cal. 407;
People vs. *Bentley,* 77 Cal. 7;
People vs. *Lane,* 101 Cal. 513;
People vs. *Daniels,* 105 Cal. 262;
People vs. *Childs,* 127 Cal. 363;
People vs. *Rodley,* 131 Cal. 240;
People vs. *Donnolly,* 143 Cal. 394;
People vs. *Wood,* 145 Cal. 659;
People vs. *Carson,* 155 Cal. 164;
People vs. *Zimmerman,* 3 Cal. App. 84;
People vs. *Stokes,* 5 Cal. App. 205.

The order of proof of a conspiracy is in the sound discretion of the court. Therefore, evidence of acts and declarations of alleged co-conspirators may be received before the fact of conspiracy is attempted to be proved.

People vs. *Fehrenbach,* 102 Cal. 394;
People vs. *Daniels,* 105 Cal. 262;
People vs. *Van Horn,* 119 Cal. 323;
People vs. *Gregory,* 120 Cal. 16;

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People vs. *Compton,* 123 Cal. 403;
People vs. *Rodley,* 131 Cal. 240;
People vs. *Donnolly,* 143 Cal. 394;
People vs. *Carson,* 155 Cal. 164;
People vs. *Stokes,* 5 Cal. App. 205.

Fault is found, somewhere in the opening brief, with the trial court for admitting evidence of acts and declarations of the conspirators in this case before the fact of the conspiracy had been established; but the rule above stated is so well settled that no further comment upon this point is needed. We submit that in view of the vast extent of the evidence necessary to prove the people's case, the court could not, with due regard to speed, the convenience of witnesses, and the expense of obtaining their presence and testimony, have pursued any different course from that which it did pursue, and that the learned judge showed eminent fairness and soundness of judgment in this respect.

Counsel apparently concede that it is proper to prove the acts and declarations of all co-conspirators in order to establish the fact of a conspiracy, but take exception to the admission of proof of certain acts and declarations of the conspirators in the case at bar, on the ground that they do not come within the rule, because they are mere narrations of past acts.

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The Code of Civil Procedure provides:

> "Sec. 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * *
>
> "6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy."

Examination of a multitude of authorities shows the rule to be that where one of a number of conspirators narrates acts connected with the conspiracy or quotes declarations of his co-conspirators, after the object of the conspiracy has been accomplished, or at a time when he is in no way engaged in the prosecution or furtherance of the conspiracy, such narration or quotation is improperly received in evidence. But when the conspirator is conferring with one or more of his co-conspirators with the purpose to commit further acts in execution of the conspiracy, whatever he narrates at such time, or whatever declarations he quotes at such time, is admissible in evidence. So long as the conspiracy is alive and its purpose has not been accomplished, all that the conspirators do in the way of counselling or scheming to carry it out may be proved. If this were not so, the language of the Code,—"the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy,"—would be meaningless.

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A few illustrations of the application of the rule are all which the limits of this brief will permit.

In the case of *People* vs. *Collins,* 64 Cal. 293, the head note reads:

> "It is not error to admit in evidence against a defendant charged with murder, the acts and declarations of a co-conspirator *in a design to commit robbery generally,* when the killing for which the defendant is indicted resulted from a robbery committed in pursuance of such design."

And Ross, J., in the opinion of the court, says:

> "The first point made for the defendant is that this testimony of Crumm was inadmissible. We do not think so. It not only went to corroborate the confession, but it was good as independent testimony of the conspiracy to perpetrate robberies formed by Collins, Thorne, and Crumm in the first place, and its subsequent continuation by Collins and Thorne. The conspiracy, according to the testimony, contemplated the robbing of stages and their passengers whenever and wherever opportunty offered. The law holds each party to it responsible for the acts of each co-conspirator done in pursuance and furtherance of the common design, which extends to the consequences which might reasonably be expected to flow from carrying into effect the unlawful combination. *There was, therefore, no error in*

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admitting in evidence against Collins, the acts and declaration of Thorne, in relation to the gun with which the murder was committed."

In the case of *People* vs. *Geiger*, 49 Cal. 643, the defendant and one Alexander were jointly indicted for the murder of Strong. On the trial one Blair testified on behalf of the prosecution that about January 1, 1874, he had a conversation with Alexander when Geiger was not present. The defendant objected to the conversation because it was "*res inter alios acta.*" The objection was overruled, because evidence had been introduced by the prosecution tending to show a conspiracy between Geiger and Alexander. Blair then testified that Alexander said: "Here is the damned old bitch up on the hill here: (referring to Mrs. Strong) we can't turn any sheep outside without her running, dogging, and killing them; that she was a bad woman, and would burn your fences or buildings if she was mad at you, and he did not think it was any more harm to kill such a damned old bitch than a dog; that she was not fit to live among white people."

Crockett, J., writing the opinion of the Court, says (p. 649):

> "We think there was sufficient evidence of the conspiracy between Alexander and the defendant to justify the Court in admitting in evidence the declaration of the

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former, made previous to the alleged killing. The question of conspiracy was then submitted to the jury, with instruction to disregard the declarations of Alexander, unless the conspiracy was satisfactorily proved. This was the proper practice. * * *

"The eighth instruction was to the effect that if Alexander and the defendant had conspired to perpetrate an act of violence upon Mrs. Strong, the jury might consider the declarations made by Alexander in respect thereto, and 'draw the same conclusions from them as if made by Geiger.' In other words, the conspiracy to commit the act of violence being proved, the declarations of Alexander are to be treated as the declarations of Geiger. They are to have no greater or less weight than if Geiger himself had made them. If the two had conspired to commit an assault and battery upon Mrs. Strong, it would have been competent on the trial of an indictment for murder against them to prove the conspiracy to commit the assault and battery, as tending to show their hostility toward her. The conspiracy being proved, the declaration of either conspirator in respect to the assault and battery would be competent evidence against the other, as tending to show in a greater or less degree his animosity toward the deceased. It would be for the jury to determine how much weight, if any, was due to such evidence. But we think the instruction states the law correctly."

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In the case of *People* vs. *Gregory,* 120 Cal. 16, Gregory was charged, with others, with the murder of Littlefield. Gregory was tried separately and convicted. Garoutte, J., after stating that the case was peculiarly one of circumstantial evidence, says in the opinion of the Court (p. 19):

> "It is claimed that the trial court committed error in the admission of certain evidence. The objections of the defendant are based largely upon the admission of declarations of Vinton, Laycock, Hayden, and possibly others of the eight men who were at the house of Hayden upon the day of the murder, and whom we deem the evidence sufficiently locates as conspirators organized to kill Littlefield. These declarations were made during an interval of three or four months prior to the meeting at Hayden's house, and were testified to by various witnesses. As for example, 'Vinton said it would be a good time to hang Littlefield, and Hayden was satisfied to go and wanted witnesses to go with him.' In talking to Vinton about hanging Littlefield, 'Laycock said he would count over who would go, and enumerated Vinton, Laycock, Watkins, Hayden, Lynch, and the witness.' Hayden said: 'We'll have to do something with those fellows. There is no use taking the law to them. We'll have to do something else.' In a general conversation between Crowe, Vinton, Gregory, and Hayden, 'they said if they could not con-

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vict him by lawing and they did not think there was much use trying in Mendocino county, they would hang him.' *While some of these declarations were made in the absence of the defendant, still they were admissible as showing the very inception and creation of the conspiracy. As a general rule, a conspiracy can only be established by circumstances. These men were all friends. Littlefield was a common enemy. His taking off occupied their minds. They deemed it a necessity, and these conversations with each other as to the means to be used and the parties to participate in the killing were matters square to the issue. These things went on for months. The opportunity for the killing was the one thing lacking, and that presented itself upon the twenty-seventh day of September by the wounding of Vinton.* Whatever the cause of that wounding, we are not now concerned."

In the case of *People* vs. *Rodley,* 131 Cal. 240, defendant was indicted for perjury charged to have been committed in connection with the probate of a forged will.

"The theory of the prosecution is that the defendant committed the crime charged to assist the purpose of a conspiracy entered into between himself, Mrs. Houseworth, and J. M. Garner, to the end that Mrs. Houseworth might succeed to the estate of one A. Fuller, deceased, by means of a false and forged will. The perjury is charged to have been committed by de-

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fendant, as a pretended subscribing witness, at the probate of the will. The alleged will was shown to be in the handwriting of Mrs. Houseworth, and she was by the terms thereof to have received all the property and estate of deceased except a thousand dollars; said estate being about thirty-two thousand dollars in value. The accomplice, Garner, pleaded guilty to the charge of perjury, and thereafter, at the trial of defendant, he testified in substance that he and defendant signed the will together in the presence of each other, and without the request or presence of Fuller, in the summer of 1898, and several months after the death of said Fuller; that defendant persuaded him to sign by saying there was five thousand dollars in it for each of them; and that after they had both signed defendant wrote the attesting clause in above their signatures. * * *

"It is shown that Fuller died on or about October 18, 1897; and that defendant testified at the hearing in the matter of the probate of said alleged will that he signed the will as a subscribing witness on August 3, 1897, in the presence of Fuller and Garner, and that Fuller then and there declared that he had signed the will and requested defendant and Garner to sign as witnesses. H. T. Batchelder, county clerk of Butte county, testified that in February, 1898, he had two conversations with defendant: that in the first one defendant asked him if he

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was acquainted with Fuller's signature, and on his replying that he thought he was, defendant asked him if he would be willing to certify to it if he knew it to be Fuller's signature. Defendant did not at that time exhibit any document, but said: 'If you could be certain that it is his will it would be to your interest in the sum of three thousand dollars.' In the second conversation had also in February, 1898—the date of which is fixed by letter from defendant—the defendant exhibited the identical will which was subsequently filed for probate and concerning which defendant gave the alleged false testimony; the witness read the same over once or twice; the defendant asked him if he thought that was Fuller's signature, to which he replied, 'I think not, doctor'; the defendant then said, 'You wouldn't be willing to sign it as a witness?' and Batchelder answered that he would not; that he had signed but few wills, and those always upon invitation. * * *

"It appeared from the evidence that Mrs. Houseworth and said Garner were also witnesses at the probate of the will; that the testimony of the latter as to the facts surrounding the witnessing of the will was substantially the same as that of the defendant. Mrs. Houseworth presented the will for probate October 19, 1898, in her petition stating that she believed it was in the handwriting of the deceased, Fuller, and at that hearing she testified that she

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had received the will from one H. Carmack on October 17, 1898, and that she never saw the document before that date. *In May, 1898, as testified at the trial by one J. B. Swearingen, Mrs. Houseworth stated to him that she had a will that Mr. Fuller had left her and she had received it in a letter handed her by a Mr. Fimple; that it did not have any witnesses to it and the lawyers told her it needed two witnesses; 'and so all they will have to do is to write on a piece of paper that they had signed it at Fuller's request and sign their names to it and attach it to the will.' '"Now," she said, "I want you to sign as one of the witnesses; Dr. Rodley has agreed to sign it for one, and I have agreed to give him five thousand dollars to sign it, and I will give you the same. I would not offer you any less than I agreed to pay Mr. Rodley."'* * *

"6. *It was competent to put in evidence the testimony of Mrs. Houseworth and Garner given at the hearing of the probate matter, as well as the conversation of the former with the witness Swearingen wherein she attempted to persuade said Swearingen for five thousand dollars to subscribe as a witness to the alleged will of the already deceased Fuller, for the reason that all these acts and declarations, taken in connection with the acts and declarations of defendant, tended strongly to show that the defendant, Mrs. Houseworth, and Garner were each working to accomplish one common criminal purpose. Such concert of action on their part would be evidence*

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tending to establish a conspiracy between them by the circumstantial method, which is usually the only way a conspiracy can be established. (*People* vs. *Bentley,* 75 Cal. 407). Before it was sought to put in evidence the conversation of Mrs. Houseworth with Swearingen it had been shown that the will was false and fictitious and had been written by Mrs. Houseworth, and that she was, according to its terms, the beneficiary thereunder, and that the defendant had been endeavoring by improper means to secure a witness to the will after the death of the pretended testator. This was sufficient proof of conspiracy between the defendant and Mrs. Houseworth to make the declaration and acts of the latter done in course of carrying out the common criminal design competent evidence against the former. (*People* vs. *Lovren,* 119 Cal. 88.) *Much evidence tending to establish the conspiracy was introduced after the declarations of Mrs. Houseworth, and taking all the evidence on this subject together, the conspiracy is made to appear beyond any doubt. The order of the proof was in the sound discretion of the trial court, and we see no abuse of such discretion.* (*People* vs. *Daniels,* 105 Cal. 262; *People* vs. *Fehrenbach,* 102 Cal. 394.) *It is particularly urged that the conspiracy could not be proved by the declarations of Mrs. Houseworth, reference being had, doubtless, to her declaration that the defendant was to receive five thousand dollars for wit-*

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nessing the will. There was no objection made to the particular portion of the conversation referred to above, but the objection was general to the whole of it. Much of the conversation was competent evidence beyond any question, and if defendant desired those portions of it which tended only to show that the defendant was a party to the conspiracy excluded he should have moved to strike out those portions." * * *

"That portion of Swearingen's testimony wherein he details a conversation with Mrs. Houseworth, in which she sought to induce him not to testify before the grand jury that she had offered him five thousand dollars to sign a will as a witness, was properly admitted because the conspiracy and its purpose was not then accomplished. The object of the conspiracy was to 'loot' the estate of the deceased Fuller; the perjury of defendant and the others in the probate proceeding was only one step to this end. It had been necessary before this to fabricate a will, and it was still necessary for the conspirators to avoid detection, keep themselves out of the state prison, and keep up the deception that they were practicing on the probate court in order to realize anything from their crimes; and it was with these ends in view, no doubt, that Mrs. Houseworth approached Swearingen on the subject of his testimony before the grand jury. We think, therefore, that what she said and did in that connection

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was in furtherance of the purpose of the conspiracy, and does not come within those cases which exclude the acts and declaration of one conspirator, done and made after the 'common criminal design' is accomplished or abandoned, as against his co-conspirator. (*Carter* vs. *State,* 106 Ga. 372; *Byrd* vs. *State,* 68 Ga. 661; *Scott* vs. *State,* 30 Ala. 503; *People* vs. *Opie,* 123 Cal. 294. See, also, *People* vs. *Ward,* 77 Cal. 113; *People* vs. *Winters,* 125 Cal. 325; *O'Neal* vs. *State,* 14 Tex. App. 582; *McFadden* vs. *State,* 28 Tex. App. 241; *Allen* vs. *State,* 12 Lea. 424.)"

Counsel cite a number of instances of claimed error in the admission of "*testimony as to statements made by various members of the Eastern conspiracy which were not and could not be declarations in furtherance of the conspiracy, but which were mere narratives of past events.*" (Appellant's Opening Brief, p. 563.) We may say, in passing, that *it is inaccurate to talk about the "Eastern conspiracy." The acts proved were, it is true, mainly committed in the eastern part of the country, but the evidence shows that many were committed in the Middle East and in the West. The conspiracy was nation-wide.* We submit that not a single one of the statements or declarations made by the members of this conspiracy and admitted in evidence was "mere nar-

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rative" in the sense in which the term is used by counsel. *Every one of them was made by a conspirator to a co-conspirator, or, in a very few instances, to a non-conspirator, while the conspirator making such statement or declaration was either actively engaged in or planning some overt act in furtherance of the conspiracy.* Take, for example, the first instance mentioned, of the conversation between Dugan and Hockin, found at page 563, *et seq.*, of the Brief. Prior to this testimony, Dugan had testified that he was the business agent of Local No. 22, at Indianapolis. (R. Tr., Vol. 50, p. 3698.) He was a delegate to the annual convention of the International at Detroit, in September, 1906, and a member of the Constitution Committee. (R. Tr., Vol. 50, p. 3707.) He was also a member of the Auditing Committee of the International of which Hockin was also a member. (R. Tr., Vol. 50, p. 3710, 3711.) As member of this committee it was his business to investigate the purposes for which the funds of the International were being expended, and we find him inquiring into the expenditure of $1,500 for a defense fund for killing a watchman. (R. Tr., Vol. 50, p. 3716.) And objecting to the sending of eight thousand dollars defense fund to the local council in New York City. (R. Tr., Vol. 50, p. 3719.) He also objected to the payment of

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$265.00, or $285.00, on the Detroit explosion, for the reason that "there was just a trick pulled off in Indianapolis, it only cost $25.00. I said, 'if Local 22 can pull off a trick for $25.00, I think Local 25 should.' "

Further comment upon the testimony here objected to is not necessary than that it clearly relates to the system of paying for "jobs" pulled off by the conspirators in furtherance of the conspiracy. The conversations were had between the conspirators when the conspiracy was still in progress and execution, and these conversations were just as much in furtherance of the conspiracy as the jobs themselves were, for the very reason that they pertained to the system of carrying on the work, as well as its progress.

The next instance complained of is found at page 577 of the Opening Brief. It was a conversation between the witness Eckhoff and J. B. McNamara, in which McNamara endeavored to induce Eckhoff to dynamite an elevated railroad structure under erection by the Reiter-Conley Company, at Cincinnati. The testimony shows that Eckhoff went with McNamara to look over the work and refused to do the job on the sole ground that the work was too well guarded. McNamara subsequently dynamited the work and paid Eckhoff seventy dollars for his share, treating it as a joint job

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and enjoining silence upon Eckhoff. At the time he paid Eckhoff the money, McNamara showed him a newspaper containing an account of the explosion, and remarked, "We have some money coming now."

This testimony was clearly admissible, as showing the attempt of McNamara, who was a dynamiter actively engaged in the work of the conspiracy, to enlist Eckhoff in the work, and, also, as evidence of the acts of McNamara in preparing to "pull off the job," *and, further, as illustrating the enforcement of the system established by J. J. McNamara, requiring newspaper evidence of the doing of a job as a basis for payment of the man who did it.* All of the conversations between J. B. McNamara and Eckhoff admitted in evidence bore the same relation to the conspiracy. We submit that these conversations were no less pertinent than were the conversations between Mrs. Houseworth and the witness Swearingen, in which Swearingen related how she sought to induce him not to testify before the grand jury; or, her endeavor to induce Swearingen to become a witness on the forged will; which were held admissible in the case of *People* vs. *Rodley, supra.*

The same is true of the conversation between Eckhoff and J. B McNamara (Opening Brief, p. 578), to the effect that McNamara wanted

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to shadow Miss Mary Dye, on the ground that she "had opened his brother's private mail and knew too much." The purpose for which McNamara made this request is obvious enough. Undoubtedly both he and J. J. McNamara feared that Miss Dye might make disclosures of facts concerning the conspiracy, which would be highly damaging. Certainly this was quite as admissible as the proof that Mrs. Houseworth tried to induce Swearingen not to appear before the grand jury. We can not repeat too often that counsel seem to have lost sight of the fact that the conspiracy was still in full operation, and the persons whose conversations were objected to were actively engaged in scheming out its execution. Secrecy from and protection against disclosures were, of course, highly important in the furtherance of the conspiracy; and the employment of Eckhoff by J. B. McNamara to shadow Miss Dye was a fact clearly relevant and from which the jury would be justified in drawing an inference.

The same principles apply to all of the instances mentioned in the brief from page 578 through page 587. On page 587 objection is made to the admission of McManigal's testimony concerning the conversation with J. B. McNamara, in which the latter said he was "going out to the Coast and give them a

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damned good cleaning up." This was but a portion of what transpired in the office of J. J. McNamara, at the International headquarters at the time of this conversation. It is but necessary to remind the Court that J. B. McNamara was sent to the Coast in compliance with urgent requests from Executive Member Clancy, and that this scene in J. J. McNamara's office is a most important link in the connection between the operations of the dynamite conspirators in the East and their operations on the Coast.

THE AUTHORITIES CITED BY COUNSEL IN SUPPORT OF THE FOREGOING OBJECTIONS ARE NOT IN POINT.

At pages 588 to 600 of their brief, counsel attempt to sustain their objections to testimony hereinabove discussed, by the citation of certain authorities, which, however, upon examination are, we submit, not applicable to the case at bar.

They first cite the case of *Thomas* vs. *U. S.*, 17 L. R. A. (n. s.) 720, and quote at some length from the opinion of Judge Sanborn. It is rather unfortunate for their contention that this was not the opinion of the court in the case. While Judge Sanborn's opinion is a concurring opinion as to the result, yet upon the point argued in counsel's quotation therefrom, it is

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a dissenting opinion. The majority of the court did not agree with Judge Sanborn.

The case of *People* vs. *Irwin,* 77 Cal. 504, is unquestionably good law but not in the least conflicting with the many authorities which we have cited *supra* to the effect that all the declarations and acts of all the conspirators done or made while the conspiracy was alive and in furtherance of it or relating to it are admissible in evidence.

In the *Irwin* case the declarations held to have been improperly admitted were mere expressions of opinion and conclusions based thereon of the deceased that Prewitt, one of the alleged conspirators was going to join with the others to hound him. No attempt whatever was made to connect Irwin with the conspiracy. The most that was done was to show that he had attended meetings held by certain of the conspirators, but he took no part in them, and was not present at the last meeting when it was resolved to kill the deceased. The language used by the court and quoted by counsel correctly states the law, but was clearly *obiter.* Of course, the agreement made subsequent to the killing, by certain of the conspirators, to hang the defendant's body upon a tree had not the remotest connection with the conspiracy and could not properly be proved.

So, in the case of *People* vs. *Aleck,* 61 Cal.

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137, the error complained of was the admission of a confession made by one of the alleged conspirators after the killing. The court correctly held that the object of the conspiracy being accomplished, the confession was not admissible. The opinion in the case contains a strong statement of the law and is in perfect harmony with the large body of cases which we have cited.

From the "*Anarchists' Case,*" 12 N. E. 865, counsel select but a portion of a very pointed paragraph. The opinion in this case is a masterpiece and will be referred to later. At page 980 Magruder, J., says:

> "*It is also objected that some testimony was admitted as to conversations with the defendant Spies which were merely narrative of what had been or would be done.* It is undoubtedly the law that, after a conspiracy is established, only those declarations of each member which are in furtherance of the common design can be introduced in evidence against the other members. Declarations that are merely narrative as to what has been done or will be done are incompetent, and should not be admitted except as against the defendant making them, or in whose presence they are made. *The utterances of the defendant Spies, whether in his paper, his speeches, or his conversations, were in furtherance of the purposes and objects of the conspiracy in which he was engaged. If testimony*

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as to expressions used by him, that are not of the character here indicated, has crept into the record, it is so inconsiderable that it could not have in any way injured the other defendants. We think this point was sufficiently guarded by the trial judge in his rulings and in his instructions."

The portions underscored are omitted by counsel from their brief. The passage is a clear and concise statement of the rule; and we say of the testimony animadverted upon by counsel in the case at bar what the learned judge said of the testimony of Spies. All of the conversations and utterances of the various persons to whom the testimony relates occurred while they were in the active prosecution of the conspiracy. With but few exceptions they occurred between the co-conspirators themselves and formed a part of their scheming and machinations. As to these few exceptions, while the declarations were made to strangers, yet they were made in connection with acts being done in furtherance and execution of the conspiracy. We do not know of a single instance in which anything not strictly admissible crept into the record, and we are sure that the court will say, upon examination of this voluminous record, *that the learned trial judge abundantly guarded the point by both his rulings and instructions.*

The case of *Samples* vs. *People*, 13 N. E.

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536, involved an alleged conspiracy to commit a single criminal act. The rule is undoubtedly properly applied by the court to the testimony of a stranger to remarks by one of the alleged conspirators which were not shown to have been made at the time when he was performing any act in the conspiracy, or to have any connection whatever with its execution. As the court say:

> "It will be observed that it is not pretended that Uriah was, at the time he is alleged to have made the statement testified to by this witness, doing any act tending to produce an abortion, or to cause anyone else to do so."

And we add, it is not pretended that the conversation testified to was between the conspirators. It can hardly be contended that if Uriah had told his co-conspirators, before the object of the conspiracy was accomplished, that he had procured the medicine, that such statement would not have been admissible.

The same criticism is to be made of all authorities from other jurisdictions cited by counsel. In the case of *People* vs. *Smith,* 151 Cal. 619, nothing can be found at all inconsistent with the authorities which we have cited, or the application of them for which we contend. The general rule is clearly and well stated by the court. Its application to the case

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is equally clear. The declaration of Fred Smith, made while the fight in which the deceased was killed, was on, and after the first shot had been fired, to a mere by-stander, "I knew he was going to get it," was obviously not made either in preparation for the killing or to carry it out. Whatever part the brother may have had before the deceased was attacked, at the time he made the remark he was neither aiding nor abetting his brother, nor taking any part whatever in the conflict; and when he expressed the opinion to a by-stander that he knew the deceased was "going to get it," those remarks could not possibly be binding upon the brother. The case was properly decided, but does not come within a mile of the case at bar.

Many other errors on the part of the trial court are assigned in connection with the admission of evidence. It will be found upon examination that in every instance there was sufficient proof to go to the jury, and it was for them to say what weight should be attached to the facts. There is, however, one matter upon which great stress is laid, and which can be disposed of in a few words. At page 657 of the brief counsel object to the admission in evidence of the suit case of J. B. McNamara found in the checking room at the ferry station at San Francisco, and also to the admis-

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sion of the various articles contained therein. The suit case was positively identified by Mrs. Ingersoll, and it was, of course, for the jury to say whether or not she was to be believed.

The contents of the case were as follows:

A tattoo alarm clock.

A small tin can.

A coil of black fuse.

A box of Dupont blasting caps.

A piece of brass plate.

A small string attached to a brass bar.

Two little brass bars with a handle on them and several screws.

A copy of the San Francisco Post, dated Saturday, October 1st, 1910.

Two copies of the San Francisco Chronicle, of date, Saturday, October 1st, 1910.

As to these newspapers, counsel cite numerous authorities to the effect that, as a general rule, articles in newspapers are not competent to prove the truth of the statements therein contained. We admit this to be the rule, and that there is plenty of reason for the rule. But these papers were not introduced for the purpose of proving the truth or falsity of any facts therein contained, but as highly probative of the identity of the person who placed them there, and recent connection with the conspiracy. The purchase of these papers by J. B. McNamara was in strict compliance with the rule already adverted to many times, estab-

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lished by J. J. McNamara, requiring the perpetrators of dynamiting jobs to produce newspaper clippings descriptive of the explosions, as a basis for being paid for producing them. (Ante, Resp. Brief, Part I, pp. 63, 80, 93, 117, 118, 119.)

We again call particular attention to the occasion when Hockin refused to pay McManigal for his job at Mount Vernon, Illinois, because there were no newspaper reports of it (Vol. 74, p. 5651); and also J. B. McNamara's statement to Eckhoff that there would be some money coming to them, when he showed him the newspaper report of the job on the elevated railroad. (Ante, Resp. Brief, Part I, p. 172.) As to the admissibility of the other articles found in the suit case, we submit that they were admissible because they were all of the class of implements which the dynamiters were using. It is pertinent to refer to McManigal's testimony (Vol. 74, p. 5642), in which he relates J. B. McNamara's demonstration to him of the infernal machine invented by him. McNamara went to McManigal's house in Chicago,

> "and had a small parcel with him wrapped in newspaper, and he unwrapped it, there were two infernal machines made up; he demonstrated to me as to how they would work, and later then he went into the kitchen and attached it to the door bell up over the door in the kitchen,—my wife was

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there doing up the supper work, evening work,—and when the alarm went off and it formed a circuit, it rang the door bell.

"Q. State, in a general way, as to what these infernal machines were.

"A. It consisted of a little Tattoo Junior clock, alarm clock, with a dry cell battery attached to a piece of board, about 18½ inches long and about 3½ inches wide, wired fast to this board on the alarm key, a piece of brass soldered there, and around in an extension shape and on the bolt is a little piece of brass bolted there, and had a little angle on to it, and a wire running from the little brass bolt around to one of the posts in the battery, in connecting the fulminating cap to the brass, the center post of the battery, to any part of the clock, and the cap put into dynamite or glycerin, or any other explosive, that when the alarm releases it, comes around and tacks onto this little piece of brass there, it releases the switch, the magnetism in the battery goes through the clock into the fulminating cap and causes the explosion."

In the case of *People* vs. *Wood*, 145 Cal. 659, Wood was convicted of murder in the first degree, committed while he and twelve other convicts were attempting to escape from Folsom Prison. Shaw, J., in the opinion of the court, says:

"The several exhibits taken from the camp on Manzanita Hill were properly ad-

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mitted in evidence. They consisted of tin cans, a spoon, a barley sack, a hat, and various other articles *commonly found about a camp.* Their presence at the camp after the party using them had departed indicated a hasty departure, and supported the theory of the prosecution that the convicts had been surprised at their camp, and immediately after the shooting had departed without gathering up these articles. In addition to this reason, as several of them were identified as having been previously in the possession of the defendant, they were competent as evidence that the defendant was himself present on that occasion."

The logic of this language is the logic of the case at bar. It having been proved conclusively that J. B. McNamara was the inventor of the tattoo alarm clock and battery infernal machine; that one of these machines was found connected to a charge of dynamite at the house of Mr. Zeehandelaar on the same morning that the Times Building was blown up; and that *prior to his coming to the Coast* to give it a "damned good cleaning up," J. B. McNamara had invented and put in use his infernal machine; certainly the presence of a tattoo alarm clock, a coil of black fuse, a box of Dupont blasting caps, a piece of brass plate, a small string attached to a brass bar, two little brass bars with a handle on them and sev-

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eral screws, was proper evidence to place before the jury, as tending to connect McNamara with the Times Building outrage and the attempt on the residences of Mr. Zeehandelaar and General Otis. These are the very circumstances by which crimes of this character are proved.

We again quote from the opinion of Magruder, J., in the *"Anarchists' Case,"* page 979:

> "It is also objected that the trial court allowed bombs and cans containing dynamite, and prepared contrivances for exploding it, which had been found under sidewalks and buried in the ground at certain points in the city, to be introduced in evidence. Among these were the bombs hidden by Lingg and Seliger under the sidewalk on Sigel street, and those given by Lingg to Lehmann, and buried by Lehmann near Ogden Grove, and those given by Lingg to Thielen, and found on the latter's premises. As specimens of the kind of weapons which Lingg and his associates were preparing, and as showing the malice and evil heart which the intended use of such weapons indicated, the introduction of bombs made by him was not improper. The jury had a right to see them, and compare their structure with the descriptions of the bomb that killed Degan, with a view of determining whether Lingg was the maker of the latter or not. As to the fact that some of these bombs and cans, like

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those shown to the American group during their drill, were found burned near Wicker Park,—one of the designated meeting places where certain of the armed men were to gather on Tuesday night,—this was a circumstance proper to be considered by the jury in determining the nature and character of the conspiracy, and its connection with the events of Tuesday night. As to the suggestion that these things may have been placed where they were found, by other parties than those connected with the conspiracy herein described, it was for the jury to say whether, under all the circumstances, any others than the members of that conspiracy had undertaken to make such weapons, or knew anything about them."

The limits of this brief will not permit a further detailed discussion of the alleged errors of the trial court. We have examined them all with care, and are satisfied that the court will find no prejudicial error in them. Indeed, in a case in which nearly eight thousand pages of testimony were taken, between six and seven hundred exhibits were produced, upwards of three hundred witnesses were examined and some twelve weeks were consumed in the trial, it is remarkable that the learned trial court so completely avoided error; and we submit that for ability, and, if anything, overcautious fairness to the defendant, the

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trial of this case will stand out as a monument to the humane administration of justice in criminal cases in the State of California.

FIFTH: PROOF OF THE CONSPIRACY AND SCHMIDT'S PARTICIPATION IN THE BLOWING UP OF THE TIMES BUILDING AS AN OVERT ACT THEREOF WAS ESSENTIAL TO PROOF OF SCHMIDT'S GUILT OF THE CRIME OF MURDER CHARGED IN THE INDICTMENT.

In concluding this third point of the brief, we advert to the proposition of the Opening Brief, that there is nothing in the evidence which connects Schmidt with the blowing up of the Times Building and murder of Charles Haggerty. The argument is that, assuming Schmidt did assist in purchasing, transporting and caching dynamite in San Francisco, yet there is nothing to show any guilty knowledge on his part of the purpose for which the dynamite was to be used, and particularly that part of it was to be used in blowing up the Times Building. We submit that the evidence to which we have already called the attention of the court was sufficient to warrant the jury in finding that Schmidt did know that a part of the dynamite was to be used in the Times outrage; but the District Attorney could not have justified a failure to introduce the evidence of the conspiracy, of which the blowing up of

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the Times Building was an overt act, and the evidence which clearly points to Schmidt's connection with that conspiracy. In a case of the gravity of the case at bar, it is the duty of the prosecuting officer to present to the jury all available evidence which tends in any way to show guilty knowledge or motive of the defendant. Admit the existence of the conspiracy, and Schmidt's connection with it, and the motive for his aiding J. B. McNamara in procuring the explosive with which to destroy the Times Building becomes at once apparent. Whether the conspiracy did exist, and whether the destruction of the Times Building was an overt act in furtherance of the conspiracy, and whether the defendant Schmidt joined the conspiracy, are questions of fact which it was the bounden duty of the District Attorney to present to the jury; and it was for the jury to say, upon all the evidence, whether these facts were proved to them beyond a reasonable doubt. The existence and scope of the conspiracy were facts susceptible of proof only by circumstantial evidence, a large portion of which consisted necessarily of the acts and declarations of the conspirators done and made in furtherance of the conspiracy. Their meetings, consultations, discussions of what had been done and was to be done, had, while they were in active pursuit of the conspiracy, were facts vital to the estab-

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lishment of its existence, object and scope. We have cited numerous cases fully covering the rules of evidence governing proof of the conspiracy and its execution, decided by our supreme court and courts of appeal, and quoted from the opinions; and we now close with several leading cases decided by the Supreme Court of the United States and the Supreme Court of Massachusetts.

United States vs. *Kissel,* 218 U. S. 601.

This was an indictment for conspiracy in restraint of trade in refined sugar among the several states of the Union, that is to say, to eliminate free competition and prevent all competition with the American Sugar Refining Company, one of the defendants, by a would-be competitor, the Pennsylvania Sugar Refining Company.

Mr. Justice Holmes, in the opinion of the court, says at page 607:

> "The indictment charges a conspiracy beginning in 1903, but continuing down to the date of filing. It pretty nearly was conceded that if a conspiracy of this kind can be continuous, then the pleas in bar are bad. Therefore we first will consider whether a conspiracy can have continuance in time.
>
> "The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the *continuando*

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may be disregarded and a plea is proper to show that the statute of limitations has run. Subsequent acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplates future acts or that the results of a successful conspiracy endure to a much later date does not affect the character of the crime.

"The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States* vs. *Irvine,* 98 U. S. 450. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in

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business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.

"The means contemplated for the exclusion of the Pennsylvania Sugar Refining Company were the making of a large loan by the American Sugar Refining Company through Kissel to one Segal and the receiving from him of more than half the stock of the Pennsylvania Company with a power of attorney to vote upon it, Segal not knowing that the American Company was behind Kissel. The loan was to be for a year, but the American Company was to use the power of voting to pre-

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vent the Pennsylvania Company from going on with its business, and, as Segal was dependent largely upon the returns from that company for means of repaying the loan, he was to be prevented from repaying it and the control of the Pennsylvania Company retained until it should be ruined and finally driven from business. It is alleged that the loan was made and that a vote was passed that the Pennsylvania Company refrain from business until further order of the board of directors. Now of course it well may be that the object was so far accomplished by this vote that the conspiracy was at an end; but a vote upon pledged stock that might be redeemed was not necessarily lasting, and further action might be necessary to reach the desired result. The allegation that the conspiracy continued down to the date of the indictment is not contradicted by the vote. Furthermore, as we have said, the only question here is whether the plea of the statute of limitations is good.

"Taking it that the conspiracies made criminal by the act of July 2, 1890, may have continuance, we are of opinion that the pleas are bad. * * *

"The discussion at the bar took a wider range than is open at this stage. It hardly is necessary to explain that we have nothing to say as to what evidence would be sufficient to prove the continuation of the conspiracy, or where the burden of pleading or proof as to abandonment would be.

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We deal only with a naked and highly technical question, when once the possibility of continuation is established, and as to that we cannot bring ourselves to doubt.

"To sum up and repeat. The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency is not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue and not by a special plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise more than three years before July 1, 1906, will be open and unaffected by what we now decide."

Hyde vs. *United States,* 225 U. S. 347, 32 U. S. Supr. Ct. Rep. 793.

Hyde and others were convicted of the crime of conspiracy. The head note of the case reads in part as follows:

"4. A conspiracy to acquire fraudulently school lands from the states of California and Oregon, and to corrupt or use the officers of the General Land Office to make or facilitate their selection, under the act of June 4, 1897 (30 Stat. at L. 11, Chap. 2), in exchange for other public lands, continues, so far as the statute of limitations

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is concerned, so long as any overt acts are done by any of the conspirators in furtherance of the conspiracy.

"5. Some affirmative action to disavow or defeat the purpose of a continuing conspiracy to defraud the United States, contrary to U. S. Rev. Stat. Section 5440, U. S. Comp. Stat. 1901, p. 3676, must be taken by a conspirator in order to prevent the overt acts of any of his associates from continuing him in the conspiracy, so far as the statute of limitations is concerned. Mere failure further actively to participate is not sufficient."

Mr. Justice McKenna, writing the opinion of the court says at page 802 (Supr. Ct. Rep.):

"The fifth, sixth, seventh and eighth assignments of error invoke the statute of limitations in behalf of Hyde and Schneider.

"The plea of the statute as affected by overt acts was considered in *United States* vs. *Kissel,* 218 U. S. 601, where it was declared that a conspiracy may be a continuing one, and the doctrine is applicable to the case at bar unless there is something special in the facts regarding Hyde and Schneider which constitutes a defense as to them. This is asserted. It is contended that the relation of Schneider to the conspiracy was only that of one rendering service as a servant of his master (Hyde), in consideration of the salary paid to him by his master, and that he had not within three

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years before the finding of the indictment participated in any way in the carrying out of the master's scheme, the subject of the conspiracy. And from this it is contended the question arises whether Hyde is not also entitled to the protection of the statute of limitation in so far as he is charged with conspiring with his employee Schneider.

"But the fact that a salary was paid by one to another would not preclude a conspiracy between them. It might, indeed, mark a more humble criminal desire, and one which preferred a certain reward rather than take chances in the success of a criminal enterprise, and it was certainly not inconsistent with a full and active participating in the scheme. Indeed, Schneider, in a confession which we shall presently refer to, stated that a salary and the certainty of employment was his inducement.

"The government contends that there was such participation originally and to a time within the statute, and that there is nothing to show a repudiation of or withdrawal from the conspiracy by him before 1902, when he made a partial disclosure of the conspiracy to the Government. But upon this the Government frankly says it cannot rely for an affirmance of the judgment, in view of the charge of the court to the jury.

"The court charged the jury in substance

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that if Schneider had engaged in the conspiracy 'back of the three year period' and the conspiracy contemplated that acts should be done from time to time through a series of years until the purposes of the conspiracy should be accomplished, although he, Schneider, did not do anything within the three year period but 'remained acquiescent, expecting and understanding' that further acts should be performed, they, if performed, would be his acts 'and would have the same effect against him as if he had done them himself. He would still be acting through his colleagues. He might be playing his part by keeping still as much as he did formerly by acting.'

"The contention of the defendants is that the statute begins to run from the last overt act within three years from the formation of the conspiracy within which there was *conscious participation.* (Italics ours). The Government makes the counter contention that however true this may be as to accomplished conspiracies it is not true of one having continuity of purpose and which contemplated the performance of acts through a series of years. And that such a distinction can exist, we have seen, is decided and illustrated in *United States* vs. *Kissel.* And necessarily so. Men may have lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished

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or having a distinct period of accomplishment is different from one that is to be continuous. If it may continue it would seem necessarily to follow the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the latter time he remains an agent during all of the former time. This view does not, as it is contended, take the defense of the statute of limitations from conspiracies. It allows it to all, but makes its application different. Nor does it take from a conspirator the power to withdraw from the execution of the defense or to avert a continuing criminality. It requires affirmative action, but certainly that is no hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at first moment of his confederation, and consciously through every moment of its existence. The successive overt acts are but steps toward its accomplishment, not necessarily its accomplishment. This is the reasoning of the *Kissel* case stated in another way.

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As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance. Until he does withdraw there is conscious offending and the principle of the cases cited by defendants is satisfied.

"But it is contended that under the instructions of the court Schneider was involved in criminality by overt acts done not only after he had ceased to be in Hyde's employment in any capacity, but after he had disclosed that there was a conspiracy against the Government. It was testified by Woodford D. Harlan that disclosure of frauds had come through one J. A. Zabriskie, he, however, knowing nothing about the matters except as informed by Schneider. The matter was referred to an agent who reported conversations with Schneider giving detailed information of the frauds and the manner by which they were accomplished. This report was received at the General Land Office in November, 1902. It does not appear what became of the report. The recollection of the witness was that he saw the report first, and he testified that he took it to the clerk who was distributing the mail, but for what purpose it does not appear. He never saw it again until one day during the trial. He, however, wrote to Benson about it, and after having seen weekly statements of certain special agents who were investigating the Schneider charges, he notified Benson. This seems to have been in March, 1903. Later,

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in October and November, 1903, he also wrote Benson at the suggestion of Detective Burns.

"There are overt acts charged subsequent to the disclosure made by Schneider, and it is contended that by the instruction embodied in the Seventh assignment of error Schneider was continued in the conspiracy by overt acts committed after his disclosure to the agent of the Land Department had been communicated to the Commissioner of the General Land Office.

"The instruction to which this effect is attributed is as follows:

"'Now if he (Schneider) had stood by that and had gone on and disclosed all he knew about the matter, and said: "I will have nothing more to do with this matter," nothing that could have been done by the others after that could affect him at all. He would have been out of it; he would have repudiated it. As bearing on the effect of what he did there if you find he did it, you are to consider what he did afterwards. If, after having made this disclosure as far as he did, he shut his mouth and said: "I will not say anything more about this matter; the Government shall not get anything more out of me," that is not an act by him in furtherance of the conspiracy, but it is a piece of evidence to be considered by you as bearing on the question whether he was acquiescent—what his attitude of mind toward the conspiracy was.'

"The instruction does not sustain the

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contention based upon it. The court submitted to the jury the effect of repudiation, and whether it was adhered to, as evidence of Schneider's further participation in the conspiracy by the overt acts done subsequent to the date of his disclosure. Acts prior to that time are within the principles we have announced, and the only question under the instruction is whether there was an acquiescence which embraced the later acts, and this, we think, under the circumstances, was for the jury to determine."

Commonwealth vs. *Stuart*, 207 Mass. 563.

The indictment was of a number of defendants for *conspiracy to unlawfully deprive owners of small stores or business enterprises of their property by inducing them to exchange the property for worthless security;* and, after they had been thus cheated of their property, to keep them at peace and inactive until the booty had been disposed of by the conspirators.

Sheldon, J., in the opinion of the court, says at page 567:

"The defendant concedes that the acts and declarations of one conspirator, made in pursuance of the common object while the conspiracy is still pending, may be proved against all the conspirators; but he contends that this evidence was incompetent because the statements were made by Gaffney after the transaction with White had been completed, when the object of the

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conspiracy had been attained as to him, and so that they were the mere declarations of one conspirator, not a party to the trial (Gaffney, though indicted, had died before the trial took place), and were narrative statements of past events and not in any way relevant against the defendant. 1 Greenl. on Ev., Section 111. Stephens Digest of the Law of Evidence, Art. 4. But this contention is based upon too narrow a view of the scope of the conspiracy which was claimed by the government and which the evidence tended to show. Its object was not simply to lure the owners of small stores or business enterprises into parting with their property in exchange for a worthless promise backed by equally worthless security; it was part of the scheme also, after the vendors had been thus cheated, to keep them at peace and inactive until the booty acquired from them had been disposed of and the conspirators had been thus enabled to enjoy the fruits of their unlawful enterprise. All the statements of Gaffney, the admission of which was excepted to, could be found to have been made while the conspiracy was still pending and in furtherance of its criminal object. Accordingly the evidence was competent. *Commonwealth* vs. *Waterman,* 122 Mass. 43. *Commonwealth* vs. *Clancy,* 187 Mass. 191, 196. *Commonwealth* vs. *Brown,* 14 Gray, 419.

"Even if the declarations had been made

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after the paramount object of the conspiracy had been attained and had related merely to the concealment and safe disposal of the property which had been obtained by its execution, there is sufficient authority for saying that they might have been put in evidence against fellow conspirators not present when they were made. But we need not spend time upon this consideration, as it is merely a development of that already stated. It is enough to refer to a few of the cases in which it has been applied. *Commonwealth* vs. *Scott,* 123 Mass. 222. *Commonwealth* vs. *Smith,* 151 Mass. 591. *Commonwealth* vs. *Devaney,* 182 Mass. 33, 35. *People* vs. *Mol,* 137 Mich. 692 and 4 A. & E. Ann. Cas. 960. *State* vs. *Taden,* 42 Minn. 253. *Card* vs. *State,* 109 Ind. 415. *Scott* vs. *State,* 30 Ala. 503, 509. Other cases are collected in 12 Cyc. 438, 439.

"3. The testimony of Lindauer as to Gaffney's other declarations made to him was competent for the same reasons.

"4. The testimony of one Griffin as to his business relations with Stuart was competent. The jury could find that the transactions testified to were a part of the general unlawful scheme in which Stuart and his confederates were engaged. They were not, or rather the evidence indicated that they were not, independent acts of wrongdoing, as in *Commonwealth* vs. *Jackson,* 132 Mass. 16. That case is explained and the rule for cases like the one at bar is stated in *Commonwealth* vs. *Clancy,* 187 Mass. 191, 196,

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and *Commonwealth* vs. *Blood,* 141 Mass. 571, 576. See also *Commonwealth* vs. *Lubinsky,* 182 Mass. 142; *Commonwealth* vs. *Smith,* 163 Mass. 411, 417, 418. That this evidence may have tended incidentally to show the commission by Stuart of other specific crimes is no objection to its being received for the purposes for which it was competent, to show the intent with which he acted and the scope and character of the conspiracy into which he had entered and in furtherance of which these particular acts could be found to have been committed. Nor was it material that Griffin and Joyce were not included in the indictment. *Graff* vs. *People,* 208 Ill. 312, 319. *People* vs. *Smith,* 144 Ill. App. 129, 159, affirmed in 239 Ill. 91. *People* vs. *Fehrenbach,* 102 Cal. 394. That Griffin was apparently a confederate of Stuart does not affect his competence as a witness. *Bean* vs. *Bean,* 12 Mass. 20. Nor do we find that Griffin testified to the contents of the deed given to him. His testimony that the land in Walpole was directed to the real location of the land, not to what was said about it on the deed.

"5. For the reasons already stated, it was competent to prove the dealings of Ramsey and Nutt with Yuill. The testimony was not made too remote by the fact that it related to a transaction in 1903. *The conspiracy was a continuing one.* It might be found that it began as early as 1901, and continued, though with the addition of some

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new confederates, into 1906. The exception to the testimony of these witnesses can not be sustained.

"6. The defendant had no right of exception to the ruling that Lindauer might testify in re-direct examination that he relied on the statements of Stuart and Gaffney as to the value of the land which he had been persuaded to take as security for the price of his restaurant. The order of the evidence was wholly in the discretion of the judge. The evidence was material. (*Commonwealth* vs. *O'Brien,* 172 Mass. 248, 254; *Commonwealth* vs. *Drew,* 153 Mass. 588, 595), because it was one of the objects of the conspiracy to palm off worthless security upon sellers by false assurances of its value.

"7. The deeds of the Walpole land from Faust to Griffin and from Griffin to Barnes were properly admitted. This land was intended to be used, it could be found, as security in the fraudulent purchases intended to be made. The deeds afforded competent evidence of acts done by two of the alleged conspirators in furtherance of the common design. Faust was one of the defendants named in the indictment. Griffin, as we have seen, could be found to have joined in the conspiracy.

"8. The foreclosure of the first mortgage upon the property on which Walton had taken a second mortgage as security for the price of his restaurant was a fact competent to be proved. It tended to show that

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the property was exhausted in payment of the prior incumbrance, and so to support the contention of the government that the security was worthless from the beginning. The mortgagee's deed was competent to prove the fact of the foreclosure. It does not appear that the deed was allowed to be used as evidence of the truth of the recitals made therein.

"9. The parts of Ferguson's testimony which were excepted to cannot be said to have been incompetent. In substance he testified that in 1901 he was made a victim of Stuart and others in a transaction which might be found to have been in furtherance of the alleged conspiracy, and to indicate that this was then under way. * * * "

These cases, in no uncertain terms, lay down the rule that a conspiracy is an entirety, a continuing crime, and that each of the conspirators is liable and chargeable for all the overt acts in the conspiracy, whether committed prior to a given overt act which is the subject of an indictment or subsequent thereto. Once a conspiracy, always a conspiracy, is the doctrine of the cases; and once a conspirator always a conspirator, unless it be affirmatively shown by the conspirator that he has abandoned it, is also a doctrine of the cases.

And so we say that evidence of overt acts perpetrated in the East and other parts of the country was properly admitted by the learned

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trial judge; for the blowing up of the Times Building was not the object of the conspiracy but only an overt act committed in furtherance thereof, and the defendant Schmidt having joined the conspiracy, the evidence was admissible to establish it. Indeed, the Court could have gone much further and instead of limiting the proof of overt acts to such as were committed prior to the destruction of the Times Building, could have admitted proof of all overt acts to the very end of the operations of the conspirators. It certainly argues no unfairness toward the defendant or willingness to prejudice his rights that the court did so limit the proof.

POINT IV.

THE ATTACK UPON THE INTEGRITY AND FAIRNESS OF THE LEARNED TRIAL JUDGE AND THE DISTRICT ATTORNEY, UNDER THE HEADING "MISCONDUCT," IS UTTERLY UNJUSTIFIABLE.

Counsel ask a reversal of the judgment in this case for what they see fit to term "Misconduct of the Trial Judge," at page 691 of the brief.

Their attack upon the Court does not require much attention. It will be sufficient to answer one or two of their criticisms. Any one familiar with the long record in this case, and who sat daily throughout the trial, can not but

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admire the self-poise, good judgment and earnest endeavor of the judge to give the defendant a fair and impartial trial. It certainly speaks well for the success of his efforts that counsel have only been able to pick out half a dozen instances of alleged misconduct, all of which, upon examination, are found to be of a most trivial nature.

We submit that there is no force in the criticism of the language of the Court quoted at page 694 of the Brief. The remark here animadverted upon was not made to the jury and it may well be doubted whether they heard it. But the segregation of this remark from its context is *grossly unjust*. We quote the testimony and remarks of counsel which elicited the remark of the Court referred to. (R. Tr., Vol. 62, p. 4794.) The incident occurred on redirect examination of the witness Cook. The witness had testified on direct examination that the entries in the register of the Hotel Argonaut were in the handwriting of Hockin. Mr. Noel was examining the witness as to the whereabouts of Hockin at the time the registrations were shown to have been made. The witness testified that he could state on what date Hocking left, ostensibly to go to the International Convention, if he had his day-book or

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record of his expenditures, after which the following occurred:

"THE COURT: Is this material, Mr. Noel, what day he started for the convention?

"MR. NOEL: It is material, your Honor, to show he could not have been at San Francisco at the time those signatures were written.

"MR. HARRIMAN: Then, he is trying to impeach his own witness.

"MR. NOEL: Not at all. We are trying to straighten out the testimony that came out through a trap into which the witness was led.

"MR. MCKENZIE: We resist the idea I trapped any witness. I was very fair with the witness. I showed him everything and this jury will be the judges of whether I treated him fairly.

"THE COURT: I don't think that is warranted from the evidence at all.

"MR. NOEL: I didn't regard it as offensive.

"MR. MCKENZIE: *That is the danger of a special prosecutor—blood-hunter—$5,000 a life.*

"MR. NOEL: I don't think I ought to have to make any motion to the last language with respect to which your Honor could hear.

"THE COURT: I don't think there is, and I don't think that the language that you used to Mr. McKenzie—

"MR. NOEL: I apologize to the court for

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any seeming discourtesy. Sometimes it is not proper to characterize the matter.

"MR. MCKENZIE: I shouldn't have said it, but I had provocation and I apologize to your Honor.

"THE COURT: Mr. McKenzie treated this witness very fairly. The witness was mistaken in identifying the signatures, the same as anybody else might be in the identification of signatures. It was asked him for the purpose of identifying the signatures; that is all.

"MR. NOEL: I might have done it gently.

"THE COURT: Don't let it occur again."

The Court will see that Mr. McKenzie made a *brutal attack* upon Mr. Noel, as a special prosecutor, using the language, "blood-hunters—$5,000 a life." The language of the Court quoted in the Brief is only a partial quotation, and was obviously used by the Court in an endeavor to pacify counsel and negative the idea suggested by Mr. Noel that the witness had been led into a trap by Mr. McKenzie.

We submit that if the jury did hear it, they could not possibly have construed it as an attempt of the Court to pass upon the weight of the evidence.

The Court will remember that the registration, "F. A. Perry" was compared by the experts Carlson, Wood and Wocher with the defendant Schmidt's telegram, the established

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standard of his writing, and pronounced to be unquestionably in his handwriting; and that the signature "J. B. Brice" was compared by the same witnesses with a proved standard of J. B. McNamara's handwriting, and declared by them to be unquestionably in McNamara's handwriting. (R. Tr., Vol. 93, p. 7223; Vol. 64, pp. 4843, 4847, 4850; Vol. 65, pp. 4840, 4884, 4885.)

At page 696 of the Brief another passage is quoted from the testimony. We submit that a bare reading of this passage shows that the Court was not suggesting to the jury that they should or would believe the witness, or conclude that the case was made for the purpose suggested, but that if they did conclude that it was made for that purpose, they would do so without the assistance of the conversation which the District Attorney sought to introduce. We submit that when the magnitude and overwhelming character of the evidence establishing the conspiracy in this case is considered, the foregoing incident is trivial and entirely negligible, even assuming that the jury heard the remark of the Court.

People vs. *Bene*, 130 Cal. 159.

People vs. *Wong Bin*, 139 Cal. 60-65.

The case at bar differs radically from any of the cases cited by counsel. In the first place, the proof in the case at bar was of a long series

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of overt acts and declarations in furtherance of a great conspiracy. No single item of evidence like those picked out by counsel could possibly control the conclusion of the jury upon the whole mass of evidence. Nor could the comment of the Court on any single feature of the case, unless it were one of paramount importance, possibly prejudice the minds of the jury. The authorities cited are in no way pertinent. In the case of *People* vs. *Conboy,* 15 Cal. App. 97, there was an obvious attempt on the part of the Court *to force a verdict against the defendant.* It appears at page 700 of the Brief that the Court so regarded the situation, for we find in the opinion, "These remarks amounted to a plain intimation that the Court thought the evidence in the case warranted the verdict of guilty, and that the jury should so find." This certainly is not the situation presented in the case at bar.

We dismiss this subject, in the firm belief that the Court will attach no importance whatever to the criticism of counsel.

Counsel also ask a reversal of the judgment in this case for what they see fit to term "Misconduct of the District Attorney," at page 709 of the Brief.

Careful analysis of the argument to which they take exception shows clearly that the District Attorney was well within his rights.

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It is said in the Brief (p. 709):

> "In this case the defendant took the stand in his own behalf. He was not cross-examined by the prosecution."

And it is further said at page 718:

> "If the prosecution had desired to question the defendant *as to any of the matters later referred to by the District Attorney in his argument,* they would have had a perfect right to do so. *The defendant, by his testimony, had let down the bars. He had opened for inquiry the entire subject of his connection with the case.*"

The general rule laid down by the Supreme Court under section 1323 of the Penal Code can not be better stated than in the case of *People* vs. *Gallagher,* 100 Cal. 466, 476:

> "By offering himself as a witness he waived all objection to his constitutional right to claim exemption from giving testimony against himself upon all the matters about which he should volunteer to testify, and as to those matters he opened the door for the most searching investigation by cross-examination as to the accuracy of his testimony as fully as any other witness who might have given the same testimony. The right of cross-examination affords the most effective mode of testing the accuracy or credibility of a witness, and should not be restricted beyond the requirements of the statute. It was not the intention of the legislature to give to a defendant the oppor-

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tunity of making any statement upon his direct examination which he might choose, in reference to the issue before the Court, and to preclude the prosecution from showing out of his own mouth that such statement is false."

This case is cited with approval by Chief Justice Beatty in the opinion of the Court in *People* vs. *Dole*, 122 Cal. 486, 491, from which we quote:

"The question here is a very different one, viz., whether, when an accused person, testifying in his own behalf, has offered an explanation of circumstances tending to incriminate him, he may be asked on cross-examination whether he has not done, or omitted to do, something which it might be thought he would probably have done, or omitted to do, if his explanation was true. Such was the course pursued in this case. Defendant testified that he won the check from Adams in the presence of King, and he was asked if he stated that fact to the arresting officer, or to the officers of the prison. He admitted that he did not, and it was for the jury to determine whether or not his conduct was consistent with his testimony. *Counsel for appellant contend for the extreme proposition that because he did not testify on his direct examination in regard to his conduct at the time of and subsequent to his arrest, therefore he could not be cross-examined as to that matter.*

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But the rule of cross-examination is not so restricted. Any fact may be called out on cross-examination which a jury might deem inconsistent with the direct testimony of a witness, *and a defendant testifying in his own behalf is in this respect put upon the same plane with other witnesses.* (*People* vs. *Gallagher,* 100 Cal. 475.) The Superior Court did not err in this matter."

In the very recent case of *People* vs. *Creeks,* 170 Cal. 368, Angellotti, C. J., uses the following language at page 378:

"The well-settled rule in this state as to cross-examination of a defendant is stated in *People* vs. *Gallagher,* 100 Cal. 475 (35 Pac. 80). While a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, if he offer himself as a witness 'he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief.' (Pen. Code, sec. 1323.) The statute places no limitation or restriction upon the extent or character of his cross-examination 'as to all matters about which he was examined in chief,' and upon these matters he may be cross-examined as fully as any other witness. '*Any question which would have the tendency to elicit from him the whole truth about any matter upon which he had been examined in chief, or which would explain, or qualify, or destroy the force of his direct testimony, whether*

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it be to give the whole of a communication or transaction of which he had given only a part, or to show by his own admission that he had made contrary statements given in his direct testimony, and thus throw discredit upon them, would be legitimate cross-examination.' Again in *People* vs. *Dole*, 122 Cal. 486, 491 (68 Am. St. Rep. 50, 55 Pac. 581), it was said by the late Chief Justice Beatty, a majority of the Court concurring in his views, that 'any fact may be called out on cross-examination which a jury might deem inconsistent with the direct testimony of a witness, *and a defendant testifying in his own behalf in this respect put upon the same plane with other witnesses.'* "

An illustration of the extent to which cross-examination of a defendant may be carried, in detail, very apposite to the case at bar, is found in *People* vs. *Rozelle*, 78 Cal. 84. Works, J., in the opinion of the Court, says, at pages 91, 92 and 93:

"The defendant was examined as a witness in his own behalf, and denied, in general terms, that he aided, abetted, counseled, or encouraged the commission of the offense charged. On cross-examination, a letter was shown him, and he was asked whether it was in his handwriting. Objection was made that it was not a proper cross-examination. The objection was overruled. The defendant then declined to

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answer, on the ground that it would have a tendency to degrade his character, and no answer was required of him. It is said in the briefs that the letter was subsequently proved to be in his handwriting, and admitted in evidence; but as the contents of the letter shown the defendant were not disclosed, we do not know from the record before us that it is the same. *But conceding the letter, finally introduced, to have been the one about which the defendant was questioned, we are clear that the court committed no error in overruling the objection. The defendant had denied explicitly that he had committed the offense charged. The letter introduced in evidence contained statements tending to contradict this denial, and to show that he had perpetrated the crime.* If the witness had not been the defendant on trial, there could be no question as to the competency of the evidence on cross-examination, as it tended directly to contradict his evidence in chief. It is contended that because he was the defendant on trial, a different rule must prevail; that the cross-examination must, under the code, be confined to the subject-matter of the examination in chief. The code provides: 'Section 1323. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief.'

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"The impression seems to prevail that the section quoted has the effect to confine the examination of a defendant to narrower limits than in the case of any other witness. We do not so understand it. He can only be cross-examined as to matters about which he was examined in chief. The rule is precisely the same as to any other witness. So far as other witnesses are concerned, however, the court is allowed some discretion as to the extent and scope of the cross-examination that might not be allowed in case of the defendant. But no such question arises here. It must be remembered, also, that the fact that a defendant offers himself as a witness as to a particular matter does not give the prosecution the right to make him a witness for the people and examine him generally. (*People* vs. *O'Brien,* 66 Cal. 602.) The questions put must be in cross-examination, and can go no further. *It is contended by counsel that the defendant was not asked about a letter in his examination in chief, and therefore it was not a 'matter' about which he could be cross-examined. This would be giving the statute a construction so narrow as in many cases to cut off, almost entirely, the important right of cross-examination.*"

The most casual reading of the testimony of defendant Schmidt, set forth in full in the

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Opening Brief, shows that counsel are correct in the statement,

> "If the prosecution had desired to question the defendant *as to any of the matters later referred to by the District Attorney in his argument,* they would have had a perfect right to do so. The defendant, by his testimony, had let down the bars. He had opened for inquiry the entire subject of his connection with the case."

Sight must not be lost of the exact inhibition of section 1323 of the Penal Code. The section reads:

> "Sec. 1323. Defendant. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. *His neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding.*"

The first clause of this section is based upon the provision of Article I, section 13 of the Constitution of California,

> "No person shall * * * be compelled, in any criminal case to be a witness against himself";

and the reason that the second clause of the section is not violative of this provision of the

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Constitution is that when the defendant offers himself as a witness and testifies, he is, as to the matters concerning which he testifies a volunteer and in no sense compelled. The inhibition of this section is in the nature of a corollary to the first clause embodying the inhibition of the Constitution; for, it is obvious that if the penalty of animadversion upon his failure to testify, and the inference to be drawn therefrom by a jury, could be imposed upon him, the protection intended to be given him by the Constitution would in many if not all cases be nullified. This analysis of the philosophy of the rule of section 1323 clearly points out the limitations of the inhibition. *It is the defendant's neglect or refusal to be a witness, which the statute says shall not be used against him.* It is strange logic, indeed, which says that if the defendant *does* testify he may be fully and exhaustively cross-examined upon all the matters as to which he testifies; *but, so testifying, his failure to fully and fairly narrate a given transaction as to which he testifies cannot be commented upon.* Then here we find the reason for the rule as laid down in the cases above quoted, that the cross-examination must be strictly such, and cannot be extended to any subject matter not touched upon by the testimony in chief; and here we also find the reason for the rule laid down in these cases,

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that when the defendant testifies upon any subject matter, he places himself in the same position as that of any other witness.

Another point requires notice before we examine the arguments of the District Attorney referred to in the Opening Brief.

It is usual and approved practice for the prosecution in arguing a criminal case to a jury to review the proof adduced on behalf of the People, and comment upon the fact that no witness has been produced to contradict a given fact, or that no evidence of any kind has been produced to contradict such fact, which the prosecution claims to have been established by its proofs. This is true even though the witness not called is a co-defendant.

It will be sufficient to call the attention of the Court to the following authorities upon the propositions above discussed.

In the case of *People* vs. *Mead,* 145 Cal. 500, cited in the Opening Brief, Shaw, J., in the opinion of the Court, says:

> "4. There is the usual claim that the rights of the defendant were prejudiced by misconduct of the district attorney in his closing argument. *The misconduct consisted in commenting upon the alleged failure of the defendant to deny that the woman who was placed in the house of prostitution was his wife.* Section 1323 of the Penal Code declares that the neglect or

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refusal of the defendant to be a witness can not be used against him on the trial. It may be conceded that under this section in general it is not proper for the district attorney to comment on the effect of the failure of the defendant to testify upon any subject connected with the trial, *although he may have been a witness and may have testified on other subjects. But the record in this case does not show that the defendant failed to testify on the subject, as his counsel claims.* There had been testimony on the part of the prosecution satisfactorily showing that a legal marriage ceremony had been performed between the defendant and the witness Gertrude Mead, and that they had thereafter lived together after the manner of husband and wife. This was sufficient prima facie proof that they did sustain that relation. *The defendant, while he did not testify expressly on the question whether or not they had been actually married, did testify to several circumstances which would justify the inference that they were living together meretriciously, and not as husband and wife.*" * * *

"Under this very equivocal testimony of the defendant himself, if there was any contention on the part of the defense that the defendant was not her husband, *there was no impropriety in the district attorney commenting upon the fact that he had made no express denial of the fact.* If the jury

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should take one of the possible inferences, the effect would be, that he had, by his testimony as a whole, denied by implication that she was his wife. If the other inference were adopted, the effect would be that his testimony would be considered as an admission of their marital relations. *The prosecution was justified in calling the attention of the jury to the vague character of his testimony on the subject, and the absence of an explicit denial.*"

In the case of *People* vs. *Ye Foo,* 4 Cal. App. 730, 743, 744, Cooper, P. J., in the opinion of the Court, says:

"There was no error in the reference of the district attorney to the failure of Wong Dock, who was jointly charged with defendant, to testify in the case. No reference was made to the failure of the defendant to testify, and no reason occurs to us why the remark was not legitimate argument as to a codefendant. The law does not exempt a defendant, who is jointly charged, from being a witness either for or against his codefendant. (*Ex parte Stice,* 70 Cal. 51; *People* vs. *Plyer,* 121 Cal. 163.) If such codefendant should be called, and should refuse to testify on the ground that his evidence might tend to incriminate himself, that would be a different question. Wong Dock was a competent witness, and was in the county jail, and subject to the process of the court. He could have been

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called by the prosecution or by the defendant. The cases cited by defendant were most of them where the law, under which the decision was rendered, makes the wife, or husband, or co-defendant, an incompetent witness. Of course, if the law were such that Wong Dock was prohibited from being a witness the cases cited would apply, and there would be much reason for following them. * * *

"That it is not error for a prosecuting attorney to refer to the fact that a co-defendant has not been called to testify has been held in *State* vs. *Mathews,* 98 Mo. 125, (10 S. W. 144, 11 S. W. 1135). (See, further, *State* vs. *Millmeier,* 102 Iowa, 692, (72 N. W. 275); *United States* vs. *Candler,* 65 Fed. 308; *Commonwealth* vs. *McCabe,* 163 Mass. 98, (39 N. E. 777); *Commonwealth* vs. *Clark,* 14 Gray, 367; *Hall* vs. *State* (Tex. Cr.), 22 S. W. 141.)"

In *People* vs. *Ruef,* 14 Cal. App. 617, it was said:

"It is claimed that the attorney for the people was guilty of such misconduct in his argument to the jury as to call for a reversal of the case.

"During such argument he referred to the fact that the attorney for the United Railroads was not called as a witness; that the attorney was the party who handled the money; that if the transaction was honest and fair, he should have been placed upon the stand by the defendant to explain

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it. The attorneys for the defendant assigned the remarks as misconduct, and excepted to them. Then some discussion arose, the district attorney claiming that such comment had been held not to be error in *People* vs. *Yee Foo,* 4 Cal. App. 730 (89 Pac. 450). The district attorney remarked that he did not desire to make any claim that he was not entitled to make, whereupon counsel for defendant said: 'If there is any damage done, you have done it. Go on with the argument.' After the above remark the court made no ruling as to the matter, and the district attorney was allowed to proceed. It would seem that the defendant's attorney, by the remark, waived a ruling upon the question; but it is sufficient to say that it was expressly held in the Yee Foo case that it was not error for the district attorney to refer to the fact that a co-defendant had not been called as a witness. The reasons for the rule, and the authorities in support of it, are there fully given, and it is useless to here repeat them."

Let us now examine the argument of the District Attorney complained of in the Opening Brief, in the light of the foregoing principles of law, and the testimony which the defendant Schmidt gave.

The first alleged misconduct of the District Attorney occurred in the argument of Mr.

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Noel, and is pointed out at page 718 of the Opening Brief. The language is:

> "Although this defendant some months ago entered a plea of not guilty, again to-day he takes the stand and utters a plea that he is not guilty; he has added nothing to his plea made some months ago; he has taken nothing from it, except that he has failed to explain—
>
> "Schmidt has been down here on his own mission; he hasn't told you what he was doing here; he hasn't informed you of any mission in this city of Los Angeles."

Examination of Schmidt's testimony at page 710 of the Opening Brief shows that he testified that he was in Corte Madera the latter part of November and the first part of December, 1909, where he remained until the first part of May or the latter part of April, 1910,—six months, maybe seven. From there he went to Mission street (San Francisco), remaining until the last week in June; and from there *he came to Los Angeles,* where he remained three weeks, or possibly four, staying at the house of a friend on Central avenue. Under the authorities above cited and quoted, Schmidt having testified to his visit to Los Angeles in the summer of 1910, where he stayed from about the last week in June about four weeks, it would have been clearly competent for the District Attorney to cross-ex-

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amine him as to the purpose of his visit, and all the details of what he did while in Los Angeles; and it was equally proper for the District Attorney to comment upon his failure to give a full account of his visit to Los Angeles. Indeed, the District Attorney could have properly gone further and commented upon the fact that Schmidt did not contradict the testimony of the witness Brown (quoted at page 153 of this Brief), in which Schmidt referred to his visit to Los Angeles, and said:

> "They are having an awful time down there, * * * they are beating men up down there * * * they won't give a union man no chance down there at all. *It is a regular Otis town they are running. There is something going to happen to him pretty soon.*"

Schmidt testified that he returned to San Francisco from Los Angeles, and his conversations with persons in San Francisco at that time concerning his visit to Los Angeles would have been proper matter of cross-examination.

At page 719 of the Opening Brief, counsel further object to the comment of Mr. Noel,—

> "And no witness has appeared here to deny the handwriting of McNamara, wherever it appeared, and no witness has appeared here to deny that Schmidt receipted for the powder—that the handwriting in the order for the powder is his; to deny

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that the handwriting in the want ads are his, and all of those mute evidences, mute and certain evidences of the identity of this murderer stand uncontradicted excepting by the plea of not guilty made in court some months ago, and made again here to-day under solemn circumstances."

It will be observed, in the first place, that Mr. Noel did not argue to the jury that Schmidt had not denied any of these things, but simply stated that no witness had appeared and denied them. But, in the second place, as appears from his testimony, page 712 of the Opening Brief, Schmidt testifies to his meeting with Brice at 2410 Mission street; his conversations with him; his further meeting with him at a saloon at 20th and Mission streets (p. 713); and at that time he did not know Brice was traveling under an assumed name. We submit, under the rule laid down by the above cases, it would have been entirely proper for Mr. Noel to comment to the jury on the fact that Schmidt did not deny that the name "J. B. Brice," in the register of the Argonaut Hotel, was in the handwriting of J. B. Brice.

And, further, on page 713 is found Schmidt's testimony that he did not travel under an assumed name when he was in California and was never at the Argonaut Hotel; that he was never at the office of the Giant Powder Com-

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pany in the Kohl Building, San Francisco, or at its office anywhere; and did not rent a boat known as the "Pastime" or "Peerless." Under the authorities, it would have been proper cross-examination to ask Schmidt if the name "F. A. Perry" on the register of the Argonaut Hotel was not in his handwriting, and if the signature to the receipt for the powder was not in his handwriting, and if the order for the powder was not in his handwriting, and it would have been equally competent for Mr. Noel to comment to the jury on the fact that Schmidt did not deny that these various writings were in his hand.

At page 720 of the Opening Brief counsel object to the argument of Mr. Woolwine,—

> "Don't you know that if his record had been clean, and if he had not been in hiding all this time, that they would have brought witnesses here to tell you he had worked other times during that five years? Isn't that absolutely common sense? You can't get away from a proposition like that, if you were assailed in this manner, if your attorneys, if they didn't show where your movements were—
>
> "Well, why didn't they bring witnesses here? Why didn't they bring witnesses here to account for this fellow having done something besides flee and masquerade and hiding out, except the one witness, and he came from Brooklyn. Where in the world

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was he the balance of the time? And the echo answer 'where?' We don't know and we will never find out. You know why they didn't bring witnesses to tell what he was going,—

"You don't want to hear it, but a man has a right to make a defense, and I say to you again, let them make all the objections that they please, that they didn't bring any witnesses here to account for where this man had been all these years, except the bare eighteen months."

At page 714 Schmidt testifies that he left California on the 7th of October, 1910, which was six days after the destruction of the Times Building. He then gives a partial account of his movements and occupation down to the time when he met Donald Vose in New York City, in which latter place he worked about eighteen months previous to his arrest. Having entered upon the facts of his departure from San Francisco after the blowing up of the Times Building, and his movements and occupation down to the time of his arrest, it would have been perfectly proper for Mr. Woolwine to have cross-examined him as to the minutest details of his whereabouts and occupation during all that time; and as he testified (p. 715) that he changed his name at Chicago and had never before at any time gone under any other name than "Schmidt," it

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would have been perfectly competent to have cross-examined him regarding the other aliases which the evidence adduced by the People showed him to have assumed. And it was just as competent for Mr. Woolwine to comment on the fact that he failed to account for his whereabouts or conduct during the balance of the five years which elapsed from the time he left San Francisco to the time he was arrested in New York. Nothing could be clearer than that Schmidt, having undertaken to explain to the jury where he went to and what he was doing, and when he changed his name and why he did it, and stopped there, the District Attorney had the right to comment to the jury upon the fact that he failed to tell them where he was or what he was doing for some three years and four months of the time when, according to the evidence adduced by the People, careful search was being made for him all over the United States and in Europe. We further say, that as Schmidt vouchsafed to give an account of his meeting and conversations with Donald Vose Meserve in New York, it would have been proper for Mr. Woolwine to comment upon the fact that Schmidt did not contradict the testimony of Meserve to the effect that Schmidt told him that General Otis and his paper, the Times, were the worst enemies of organized labor in the United States. It was for that reason they wanted to blow up

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the Times Building, and that they also intended to kill Otis; get him out of the way. That they didn't gain much by blowing up the building as long as Otis was living yet; the only thing they gained was getting rid of these twenty men that were in there, and that he was sorry there was not more of that brand in there at the time. That there had been three other explosions to come off and he mentioned the homes of Chandler, Zeehandelaar and Otis. That he and Caplan had bought the dynamite, 500 pounds of dynamite, at the Giant Powder Works, and that they had a launch called the "Pastime" that they had used to carry this dynamite across the bay. (Ante, Resp. Brief, Part I, p. 294.)

The trouble with the argument of the Opening Brief on this subject is, that counsel fail to see the force of the fact which they admit, that Schmidt by his testimony, "had let down the bars, had opened for inquiry the entire subject of his connection with the case," and "if the prosecution had desired to question the defendant as to any matters later referred to by the District Attorney in his argument they would have had a perfect right to do so." Having thus waived all right to object, and laid himself bare for attack, it was, under all the authorities, optional with the District Attorney to attack him by way of cross-examination, or by way of comment upon his failure

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to contradict or explain the facts proved by the prosecution against him.

We respectfully submit that there is nothing in the somewhat hysterical attack of counsel upon the learned Trial Judge and District Attorney for "Misconduct."

POINT V.

The Court Instructed the Jury Correctly. There Was No Error in the Instructions Complained Of in the Opening Brief.

Counsel have seen fit to segregate certain instructions given to the jury and assign them as prejudicial errors. The rule that the entire charge must be read together in passing upon the correctness of those several parts is too familiar to require the citation of authorities. We submit that, taken as a whole, the instructions of the learned Trial Court to the jury are comprehensive, complete and accurate; and they state the law with the utmost fairness to the defendant.

The first instruction complained of is found at page 737 of the Opening Brief (Cl. Tr., Vol. 1, p. 233) as follows:

> "*Conspiracy—Common Object.*
>
> "The Court instructs the jury that if you believe from the evidence that the defendants named in the information, or any two of them, pursued by their acts the same object, whether by the same means or by

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different means, so as to complete it with a view to the attainment of the same object, the jury will be justified in the conclusion that such defendants so pursuing the same object were engaged in a conspiracy to effect that object."

This is a clear statement of the law in the language of Greenleaf, quoted with approval by Searls, C. J., in the case of *People* vs. *Bentley,* 75 Cal. 407, 409; and it should be read in connection with the further instruction of the Court, found in the Cl. Tr., Vol 1, p. 235:

"You are further instructed that the law defines a conspiracy to be an agreement or understanding between two or more persons that they will commit an unlawful act; that is, that they will combine together to accomplish by the united action a criminal or unlawful purpose, or a purpose which is not in itself criminal or unlawful, by criminal or unlawful means. In other words, a conspiracy is a criminal partnership, the design and object of which is to do an unlawful act or series of unlawful acts, or to do a lawful act or a series of lawful acts, by unlawful means.

"In this connection, you are instructed that where a criminal conspiracy has been formed, each of the persons forming the same is liable for each and all of the acts. and bound by the declarations of each and all of the conspirators, done or made in pursuance and furtherance of the said conspiracy, while the said conspirator is a

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member of the said conspiracy; and every person who enters into and becomes a party to the said conspiracy after the formation thereof, and adopts the said conspiracy and its purposes and objects, becomes liable for each and all of the acts, and is bound by each and all of the declarations, of each and all of the other conspirators, done or made from the time of the formation of such conspiracy, and while he is a member thereof, in pursuance and furtherance of the said conspiracy."

We submit that these instructions, read together, could not possibly leave the jury in doubt that the "purpose" intended by the Court was a criminal purpose.

The second instruction complained of in the Opening Brief is found at page 739 there. (Cl. Tr., Vol. 1, p. 243.)

"You are further instructed that the formation and existence of a criminal conspiracy is one of the class of facts which can seldom be established by direct evidence. In the very nature of the case, such common design can rarely be shown by direct evidence, and can only be shown by circumstantial evidence; and, therefore, a finding of the formation and existence of such a conspiracy may stand upon circumstantial evidence only, if, upon the whole of such evidence, the jury is satisfied beyond a reasonable doubt of the formation and ex-

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istence of the said conspiracy. Therefore, in determining the question of the formation and existence of a conspiracy it is proper to take into consideration the relation of the parties to one another, their personal and business associations with each other, and any and all facts in evidence which may tend to show what transpired between them at or before the time of the alleged combination or agreement, or which tend to show what transpired between them, or any of them, thereafter in relation thereto, as well as the acts performed, and the declarations made, by each party subsequent to such alleged combination or agreement, in respect to and in pursuance and furtherance of the alleged conspiracy; and from these facts and circumstances to determine whether a combination or agreement did in fact exist and whether the same was illegal in its inception, or became illegal at any subsequent time. When a grave crime is about to be committed by a number of persons, conspiring together, they do not usually act openly but covertly and secretly. They do not usually publish their intentions, but they conceal them: and hence it is seldom possible to obtain direct evidence thereof, and the establishment thereof may depend solely upon proof of the circumstances surrounding the alleged conspirators, including their acts and declarations. The purpose of the combination is usually known only to those

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who enter into it and their guilt can generally be proved only by circumstantial evidence. The common design is the essence of the fact, and this may be shown by the steady pursuit of the alleged conspirators of the same object, whether they act separately or together, or by the same or different means, provided all lead to the same unlawful result."

Examination of this instruction shows that it is purely introductory, and carefully restricted to abstract statements, and accurately states the law as laid down by many decisions. In fact, it is based on the similar instructions given by Judge Anderson to the jury on the trial of the conspirators implicated in the conspiracy involved in the case at bar, and upon language of the Supreme Court of this state, found in a number of leading cases. The instructions of Judge Anderson will be found in this Brief. (Ante, Resp. Brief, Part II, pp. 137–142.)

We call the attention of the Court to the following passages from opinions of the Supreme Court, which, we submit, wholly sustain the instruction in question.

In the case of *People* vs. *Bentley*, 75 Cal. 407, Searls, C. J., in the opinion of the Court, says:

"A conspiracy, like most other facts, may be proved by circumstantial evidence. Indeed, it is not often that the direct facts

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of a common design, which is the essence of a conspiracy, can be proven otherwise than by the establishment of independent facts, bearing more or less remotely upon the main central object, and tending to convince the mind reasonably and logically of the existence of the conspiracy."

In the case of *People* vs. *Daniels,* 105 Cal. 262, Haines, C., in the opinion of the Court, says:

"Evidence had been given tending to prove a conspiracy, but it was not necessary that the conspiracy be actually shown to have been formed before the declarations of either of the conspirators can be proven. If the conspiracy is not ultimately proved, such declarations must be disregarded; but generally conspiracies can not be proved as an independent fact, such as the execution of a promissory note, but are shown from circumstances, some testified to by one witness and others by other witnesses. It is largely in the discretion of the court as to how much evidence of the existence of the conspiracy shall be required before receiving evidence of the acts and declarations of one of the alleged conspirators in the absence of the other. The evidence objected to was properly received."

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In the case of *People* vs. *Gregory,* 120 Cal. 16, Garoutte, J., in the opinion of the Court, says:

> "As a general rule, a conspiracy can only be established by circumstance."

In *People* vs. *Donnolly,* 143 Cal. 394, Van Dyke, J., in the opinion of the Court, says:

> "The ultimate fact here, of course, was the conspiracy on the part of the defendant with the other parties named in the commission of the crime, but it is not necessary in order to establish that fact to prove that the parties met and actually agreed to jointly undertake such criminal action. From the secrecy with which unlawful undertakings are adopted it would be generally impossible to make such proof by direct testimony. Evidence is indirect as well as direct,—consisting of inferences and presumptions,—and it is code law that upon the trial of a case evidence may be given of any facts from which the facts in issue are presumed or are logically inferable; and the jury, by the exercise of their judgment or reason, warranted by a consideration of the usual propensities or passions of men, may make such deductions or draw such inferences from the facts proven as will establish the ultimate fact or facts in issue."

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In *People* vs. *Eldridge,* 147 Cal. 782, 783, Lorigan, J., in the opinion of the Court, says:

> "While it is true, as contended by counsel for appellant, that there was no direct evidence of any express agreement entered into by Myers to join with the defendant and the others in their unlawful scheme to escape, still it was not essential that there should be evidence produced before the jury of such express agreement, in order to establish the fact that he was a party to the conspiracy. It is competent to prove that one was a party to a conspiracy for the commission of crime by circumstantial as well as by direct evidence. That a conspiracy to commit crime was explicitly or formally agreed to is rarely capable of being proved by direct evidence, and must be developed from such circumstances as reasonably tend to prove its existence. As these criminal combinations are uniformly entered into in secret, and hence are rarely susceptible of direct proof, the law, on account of the necessity of the case, has deemed it wise and proper that circumstantial evidence of their existence should be permitted."

In *People* vs. *Lawrence,* 143 Cal. 148, Lorigan, J., in the opinion of the Court, says:

> "It was not necessary to support proof of the conspiracy to show that the parties met and actually agreed to jointly undertake the perpetration of the robbery. From the secrecy with which unlawful

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undertakings of that character are adopted it would, in almost all instances, be impossible to make such proof, so that in prosecutions which involve proof of a conspiracy it may be proved by facts and circumstances sufficient to satisfy the jury of its existence, and the weight and sufficiency of that evidence to prove such a conspiracy is a matter for the jury."

The next instruction complained of is found at page 741 of the Opening Brief (Cl. Tr., Vol. 1, pp. 246, 247):

"There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eyewitness to the commission of the crime, and the other is proof in testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant and which is known as circumstantial evidence. Such evidence may consist of statements by defendant, plans laid for the commission of the crime, in short any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it less reliable than the other class of evidence. A man may as well swear falsely to an absolute knowledge of the facts as to

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a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow."

It is sufficient to say that this instruction is taken literally from the case of *People* vs. *Morrow,* 60 Cal. 142, 143, 146, in which it is upheld, and is approved, after a learned and elaborate discussion of it. The language therein

"There is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence."

is approved by Belcher, C., in *People* vs. *Urquidas,* 96 Cal. 239, 241; this language, together with the further language,

"A man may as well swear falsely to an absolute knowledge of the facts as to a number of facts, from which, if true, the facts on which guilt or innocence depends must inevitably follow,"

is expressly approved in *People* vs. *Howard,* 135 Cal. 266, 272. The case of *People* vs. *Vereneseneckockockhoff,* 129 Cal. 497, cited in support of counsel's objection, with long quotation therefrom, it will readily be seen has no application to the instruction in question, upon the most cursory examination of it. It appears

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from the passage of this opinion found at page 504, in which Beatty, C. J., says:

> "I approved the opinion of Judge Sanderson in the Cronin case. It is true I sustained two instructions copied from that case, but those instructions were very different from the instructions under review. The jury was not there told that circumstantial evidence is *not likely to be fabricated*";

that it was this feature of the instruction which met the disapproval of the Chief Justice. Certainly no such thing can be found in the instruction in the case at bar. Counsel naively say, at page 751:

> "The charge made by the Trial Judge in this case is open to precisely the same objection as the charge in the Verenese-neckockockhoff case. The wording of the instruction in the two cases is not identical, but its substance is the same. In each case the jury was told that there was nothing in the nature of circumstantial evidence that rendered it less satisfactory than direct evidence and that one might be as easily fabricated as the other."

We submit that there is a wide difference between suggesting that it is as easy to fabricate direct as circumstantial evidence, and the statement that circumstantial evidence is not likely to be fabricated. But there is a further

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trouble with this comment of counsel, namely, it is in direct conflict with the three decisions of the Supreme Court above cited, which have never been criticised or modified in any way.

The next instructions complained of are found at page 751 of the Brief (Cl. Tr., Vol. 1, pp. 248 and 259) as follows:

> "You are further instructed that the general rule applicable to cross-examination of a witness is, that he may be cross-examined as to any facts and circumstances connected with matters testified to by him in his direct examination. The defendant, by offering himself as a witness, waives his constitutional right to claim exemption from giving testimony against himself upon all matters about which he has volunteered to testify and as to those matters the law opened the door for the most searching investigation by cross-examination as to the accuracy of his testimony as fully as any other witness who might have given the same testimony."
>
> "You are instructed that section 1323 of the Penal Code reads as follows: 'A defendant in a criminal action or proceeding can not be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness can not in any manner prejudice him nor be used against him on the trial or proceeding."

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This instruction is based upon the following language in the case of *People* vs. *Gallagher,* 100 Cal. 466, 476:

> "By offering himself as a witness he waived all objection to his constitutional right to claim exemption from giving testimony against himself upon all the matters about which he should volunteer to testify, and as to those matters he opened the door for the most searching investigation by cross-examination as to the accuracy of his testimony as fully as any other witness who might have given the same testimony. The right of cross-examination affords the most effective mode of testing the accuracy or credibility of a witness, and should not be restricted beyond the requirements of the statute. It was not the intention of the legislature to give to a defendant the opportunity of making any statement upon his direct examination which he might choose, in reference to the issue before the court, and to preclude the prosecution from showing out of his own mouth that such statement is false."

This case is cited with approval on this point in the case of *People* vs. *Dole,* 122 Cal. 486, 491. And again, in the very recent case of *People* vs. *Creeks,* 170 Cal. 368, 378.

So much for the instruction marked "(a)." As for instruction "(b)," it states the law as laid down in the statute, and counsel cite as authority for their assertion that it was error to

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give this instruction, *People* vs. *Emmons*, 13 Cal. App. 487. This is certainly surprising; for in that case the defendant did not take the stand, and the gist of the decision is that it was error to comment on what the statute would have permitted to be done by way of cross-examination if he had taken the stand. We have no quarrel with the law of this case; but it has obviously no possible application to the case at bar, for the reason that the defendant Schmidt did take the stand and testify in his own behalf. He, having taken the stand, the failure of the People to cross-examine him certainly could not render it prejudicial to him to quote the section; for it might well be that the inference of the jury would be that cross-examination would elicit nothing favorable to the People's case.

The next instruction complained of is found at page 753 of the Brief (Cl. Tr., Vol. 1, p. 249):

> "You are instructed that it is the law that higher evidence would be adverse from the production of inferior evidence, that is to say, that where a party produces evidence which is evidently inferior concerning any fact attempted to be proved, it is your duty to presume that higher evidence of that fact would be adverse or against the party producing it."

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The objection urged against this instruction is that it is out of place. Presumably counsel mean that it had no application to this case. They rely on the case of *People* vs. *Cuff*, 122 Cal. 589, in which the court say that while the instruction is correct as an abstract proposition of law, it was out of place, and therefore it was prejudicial to give it.

The instruction correctly states the law and we submit that it was applicable to the evidence in the case at bar.

We refer the court to the testimony of "Curly" Grow, Andrew Gallagher and Scharrenberg, with regard to the expenditure of funds raised in connection with the strike in Los Angeles in 1910 and the discrepancy of six thousand dollars for which no vouchers were produced, although counsel for defendant alleged that they were in the custody of the witness Gallagher in a safe deposit box in San Francisco. (Ante, Resp. Brief, Part I, pp. 148, 149.) We further advert to the check for a thousand dollars which appeared in the account of Olaf Tveitmoe, and the attempt to prove the disposition of this check by Scharrenberg instead of producing the check which he pretended to have seen drawn against the thousand dollars. Clearly the suppression of these vouchers and this check warranted the

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Trial Court in instructing the jury in the language of the statute concerning the production of evidence of an inferior nature; and we dismiss this matter without further comment.

The next instruction complained of is found at page 755 of the Brief (Cr. Tr., Vol. 1, pp. 253, 254) as follows:

> "You are further instructed that, if you believe from all the evidence that a conspiracy was formed to compel the discontinuance of the 'open shop' policy by the employers of labor, and that any one or more of the members of such conspiracy did in pursuance and furtherance thereof, explode dynamite or nitroglycerin at, in, under or near the building occupied and used for the publication of the Los Angeles Times, with the purpose of injuring or destroying said building, at a time when persons employed in and about the publication thereof were in the said building and when any one or more of said persons might be killed by such explosion, and that the said deceased Charles Haggerty was at the time in said building, and was in fact killed by said explosion, then the said conspirator and all other persons who were co-conspirators with him at the time that he caused the said explosion are guilty of murder of the said Charles Haggerty, and that the same is murder in the first degree."

But little comment is needed upon the criticism in the Brief of this instruction. In the

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course of their animadversions upon it, counsel say, "It requires no citation of authorities and it should not require any argument to show that the foregoing instruction is not a correct statement of the law." This is a very usual cry, when no authorities can be cited and no argument is available.

The gist of the instruction is that if the jury believe that a conspiracy was formed to compel the discontinuance of the "open-shop," and that the Times outrage was committed in pursuance and furtherance thereof, then all the conspirators were liable criminally for the death of Charles Haggerty; and such killing was murder in the first degree. The clear import is that if the jury find that a conspiracy was formed to compel the discontinuance of the "open-shop" by unlawful acts of violence, of which the Times explosion was one, then all the conspirators are equally liable. We refer the Court to the authorities on this point cited in Point III, *supra,* which fully cover it. We also refer the Court to the authorities contained in the same point, to the effect that though the killing of Haggerty was not the prime object of the overt act of blowing up the Times, yet it being a result reasonably to be expected from the explosion of a large quantity of 80 per cent nitroglycerin in the building at the time for which the infernal machine

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was set by J. B. McNamara, his killing was murder in the first degree. Both of these propositions are fully discussed in Point III, and have long been well-settled, fundamental law.

The next instruction complained of is found at page 758 of the Brief (Cl. Tr., Vol. 1, pp. 261, 262) as follows:

> "The flight of a person immediately after the commission of a crime, or after a crime has been committed with which he is charged, *is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight according to the circumstances of the particular case.* Evidence of flight is received, not as a part of the *res gestae* of the criminal act iself, but as indicative of a guilty mind; and if you believe from the evidence in this case that the deceased, Charles Haggerty, was killed as charged in the indictment, and that immediately after such killing the defendant fled from the State of California *for the purpose of avoiding arrest for the commission of or participation in said crime,* it is a circumstance to be weighed by you as tending in some degree to prove a consciousness of guilt. It is not sufficient of itself to establish the guilt of the defendant, but the weight to which that circumstance is entitled is a matter for you to determine in connection with all the other facts and circumstances called out in this case."

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This instruction is in substance identical with the instruction in *People* vs. *Bushton*, 80 Cal. 160, 163, 165, excepting that it is more favorable to the defendant than the instruction in the Bushton case. We call the attention of the Court to the language of the instruction in the case at bar,—"and that immediately after such killing the defendant fled from the State of California *for the purpose of avoiding arrest for the commission of or participation in said crime.*" This is added to the instruction in the Bushton case. The decision in the Bushton case has never been overruled or in any wise criticized, and stands as the law today.

The above instruction, found at pages 261 and 262, Volume I, of the Clerk's Transcript, is immediately followed by another instruction, which we quote (Cl. Tr., Vol. 1, pp. 262, 263):

> "You are instructed that whereas the departure of the defendant from the State of California at a time shortly after the date of the alleged offense may be considered by you with other evidence in determining the question of the guilt or innocence of the defendant, yet although it be established beyond all reasonable doubt by the prosecution that the defendant actually fled from the State of California after the date named in the indictment, this fact does not raise any legal presumption of guilt,

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and can only be considered by you as throwing some light upon the condition or state of mind of the defendant as bearing upon the question of whether or not he entertained a guilty knowledge. And you are further instructed in relation to this that the conduct of the defendant, if it has been proven to you, after the date of the alleged commission of the crime charged, is to be presumed by you to be innocent, unless the contrary appears to you beyond any reasonable doubt. You are instructed further in this connection that the mere fact of the departure of the defendant from the State of California at the time indicated is not sufficient evidence upon which to connect the defendant with the commission of, or with knowledge of, the crime charged in the indictment."

While we submit that the first instruction standing alone would have been sufficient and a sound statement of the law, yet coupled with this second instruction, it is difficult to conceive how a defendant's right could be more fully protected by the instruction of the court with regard to the consideration by the jury of evidence of his flight.

In the light of the two instructions given in this case at bar, the statement of counsel that the meagre instruction in the Gee Gong case is practically the same as the instruction of

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the court in the case at bar is unwarranted and plainly incorrect.

The next instruction complained of is found at page 761 of the Brief (Cl. Tr., Vol. 1, p. 272) as follows:

> "The jury are instructed that in order to convict the defendant upon circumstantial evidence, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that they be inconsistent with any other reasonable conclusion. It is not sufficient that the circumstances proven coincide with, account for, and render probable the hypothesis sought to be established by the prosecution, but they must exclude, to a moral certainty, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty."

Counsel say that the Court refused to give this instruction, but forget to say that the Court assigned as the reason for such refusal that it was given elsewhere. We find on inspection of the instructions that the point was fully covered in another place.

We call the attention of the Court to the latter part of the instruction found in Cl. Tr., Vol. 1, p. 238, as follows:

> "And you are further instructed in this regard that if you have any reasonable doubt as to whether whatever the defendant may have done, or may have been proven

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to have done, in connection with the offense alleged, was done as a member of said conspiracy, it is your duty to resolve such reasonable doubt favorably to this defendant and to dismiss from your mind any consideration of the evidence which has here been offered by the People relating to an alleged conspiracy."

And we also call the attention of the Court to the following instruction (Cl. Tr., Vol. 1, p. 238):

"You are instructed that it is the duty of the prosecution in connection with their claim that a conspiracy existed as aforesaid, to prove said conspiracy just as they would be compelled to prove any other crime, that is to say, to establish the necessary elements of the crime of conspiracy and all of them beyond all reasonable doubt, before you can consider at all any of such evidence."

And to the instructions given later (Cl. Tr., Vol. 1, pp. 247, 248) as follows:

"*You are further instructed in connection with circumstantial evidence, that where the chain of circumstances leads to two opposite conclusions, the one of which is entirely consistent with the guilt of the defendant and the other of which is consistent with the innocence of the defendant, it is your bounden duty to find in favor of the defendant and to acquit him.*"

"I further instruct you, that to warrant

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a conviction on circumstantial evidence, each fact in any chain of facts from which the defendant's guilt is to be inferred must be proved by the same weight, degree, and the force of evidence as if it were the main fact of the defendant's guilt itself. All of such facts must be consistent each with all of the others, *and with the defendant's guilt, and all taken together must be so strong as to exclude, to a moral certainty, every reasonable hypothesis but that of the defendant's guilt.*

"You are further instructed that in so far as the prosecution relies upon circumstantial evidence to establish the guilt of the defendant, to authorize a conviction on circumstantial evidence, each of the circumstances should not only be consistent with the defendant's guilt, but they must be inconsistent with any other rational conclusion or reasonable hypothesis, and such as to leave no reasonable doubt."

"You are instructed that with respect to circumstantial evidence the proof offered by the prosecution must be consistent, not only with the guilt of the defendant, but it must be inconsistent with any other rational theory."

We not only insist that these instructions dispose of the objection of counsel as utterly without merit, but that the objection does not fairly deal with the Trial Court or this Honorable Court. Finally, the last instruction

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complained of is found at page 764 of the Brief (Cl. Tr., Vol. 1, p. 277) as follows:

> "And in this connection you are instructed that every presumption in a criminal case must yield to the presumption of the innocence of the defendant. That presumption of the innocence of the defendant it has been held by the Supreme Court of this state is the only presumption which shall prevail or stand in a criminal case."

Counsel say the Court refused to give this instruction. This is true, but the refusal was because the subject matter was fully covered elsewhere. We refer the Court to the following instructions (Cl. Tr., Vol. 1, p. 230):

> "You are instructed that the indictment on file here charging the defendant and others with the crime of murder, also charges the crime of manslaughter. That is to say, it is for the jury to find, first, whether or not the defendant is guilty of murder in the first degree, and if they have a reasonable doubt as to this, it is their duty to resolve that doubt favorably to the defendant. Secondly, it is the duty of the jury to ascertain whether the defendant has been proven guilty beyond all reasonable doubt of murder in the second degree, and if the jury entertains a reasonable doubt as to this, it is its duty to resolve that doubt favorably to the defendant. And thirdly, it is the duty of the jury to find whether the defendant has been proven

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guilty beyond all reasonable doubt of the crime of manslaughter, and if the jury is in reasonable doubt as to whether the defendant is guilty of manslaughter, it becomes then their duty to find the defendant not guilty. In this connection, you are instructed that if any member of the jury shall entertain a reasonable doubt of the defendant's guilt, it is his bounden duty to vote not guilty and not be led into the rendition of a compromise verdict. The crime of manslaughter is defined to be the unlawful killing of a human being without malice, and you are instructed that no malice can be presumed where the facts show that manslaughter has been committed."

"And you are further instructed in this regard that if you have any reasonable doubt as to whether whatever the defendant may have done, or may have been proven to have done, in connection with the offense alleged, was done as a member of said conspiracy, it is your duty to resolve such reasonable doubt favorably to this defendant and to dismiss from your mind any consideration of the evidence which has here been offered by the People relating to an alleged conspiracy."

(Cl. Tr., Vol. 1, p. 231.)

"You are further instructed that even though after hearing all of the testimony you are satisfied that a conspiracy, such as it is claimed by the prosecution, actually existed, it is nevertheless the law that the *defendant is presumed* not to have been

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either a participant in such conspiracy, or a member thereof."

(Cl. Tr., Vol. 1, p. 239.)

"The jury is instructed that the defendant is presumed to have an ordinarily fair character for the trait in issue in this case, to wit, a fair character for peace and quiet. This presumption is to be considered by you as going to the question of whether a defendant is guilty or not guilty and if after hearing all the evidence in the case you are not satisfied beyond all reasonable doubt that the prosecution has proven him guilty of the offense charged, this presumption of good character should prevail, and you must find the defendant not guilty."

(Cl. Tr., Vol. 1, p. 268.)

"A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal."

(Cl. Tr., Vol. 1, p. 271.)

We submit that these instructions fully and fairly advised the jury of the presumptions in favor of the defendant. We further submit that the instruction requested does not correctly state the law for the reason that it is too broad. For example, we have already shown by abundant authority that a man is presumed to intend the natural and usual consequences of

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his voluntary act. That is to say, it being shown that J. B. McNamara placed his infernal machine in the Times Building and set it for a time when it must certainly destroy life, the law presumes that he intended to take life, and the life of Charles Haggerty, who was employed in the Times Building at the time. The crime charged in the indictment is murder, not the conspiracy, and not the mere malicious act of blowing up the Times Building; and the presumption of innocence of the defendant of murder can not stand against the presumption that J. B. McNamara intended the killing of Haggerty, because that was an ordinary and usual result of such an act as he voluntarily committed when he blew up the Times Building. And we have shown that Schmidt, being one of the conspirators, and the Times outrage being an overt act in furtherance and execution of the conspiracy, the same presumption which the law raises as to McNamara, of the intention to kill Haggerty, is applicable to Schmidt. This single instance is sufficient to destroy the universal affirmative of the defendant's argument against the refusal of the Court to give the instruction requested. To have given the instruction would clearly have resulted in confusing the jury with regard to this very instruction which we have instanced,

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of the presumption of the law that a man intends the natural consequences of his voluntary act.

We further submit that the authorities cited to this proposition in the Opening Brief do not sustain the position of counsel. And so we say, that fairly read, in the light of the decisions of the Supreme Court and District Courts of Appeal of this State, the instructions given by the learned Trial Court were full, complete, accurate and eminently fair to the defendant.

POINT VI.

EXAMINED WITH REFERENCE TO BROAD GENERAL PRINCIPLES AND THE AIM OF OUR FUNDAMENTAL LAW AND OUR COURTS IN APPLYING THAT LAW IN CRIMINAL CASES, THE RECORD IN THIS CASE PRESENTS AN EXCEPTIONAL INSTANCE OF PROTECTION OF THE RIGHTS OF A DEFENDANT CHARGED WITH A HEINOUS CRIME CONNECTED WITH A WICKED CONSPIRACY, AUDACIOUSLY AND DEFIANTLY EXECUTED. IF ANY ERROR CREPT INTO THE RECORD, IT WAS ENTIRELY INCONSEQUENTIAL IN THE FACE OF THE OVERWHELMING PROOF OF THE DEFENDANT'S GUILT.

It has been the effort of this brief to give the Court as concise a view of the testimony

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establishing the conspiracy hatched among officers and members of the International Association of Bridge and Structural Iron Workers to force upon employers of the United States the closed shop policy, as the size of the record and the importance of the case would permit.

The jury sat patiently through many weeks of trial and, owing to the firmness and deliberateness of the presiding judge, were enabled to receive the testimony and weigh it calmly and dispassionately. The case was presented to them by the Court in instructions which are full and fair and give the defendant the benefit of every presumption to which the law entitled him, upon the theory that the blowing up of the Times Building on October 1, 1910, was but one of a long series of overt acts of violence and depredation done in pursuance and furtherance of the conspiracy.

It is now the province of this Court to pass upon the record in the light of Article 6, Section 4½, of the Constitution and, if we may paraphrase the recent decision in *People* vs. *O'Brien,* 165 Cal. 55, cited in the opening brief, if it appears to the satisfaction of the Court that the result was just and that it would have been reached if any error which the Court may discover had not been committed, to refuse the

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defendant a new trial. Surely no mere technical considerations will avail the defendant to escape the verdict of his peers and the judgment of the law.

Respectfully submitted.

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