Crim. No. 475.

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.

APPELLANT'S REPLY BRIEF.

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Filed this_____day of January, 1917.

_____, Clerk.

By_____, Deputy Clerk.

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APPELLANT'S REPLY BRIEF.

In the opening brief for the appellant we urged numerous grounds for a reversal of the judgment of conviction. Each of these grounds was stated separately and was supported both by quotation from the transcript and by citation of authorities. Many of the contentions urged in our opening brief are not even mentioned by counsel for the People in the brief which they have filed, and we assume, therefore, that

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they concede the correctness of our position in regard to the matters which they have not mentioned or discussed. We take this position for the reason that we do not believe that the conscientious and somewhat ultra-industrious counsel for the People would have foreborne to answer any argument, the validity of which they did not concede. It may be well therefore at the outset, to restate in the briefest possible form the grounds for reversal which were urged by us in the opening brief for the appellant, stating in each case whether or not the Attorney General has discussed or attempted to answer the same. We adopt this method for the reason that it would obviously be vain repetition to reiterate something said in our opening brief which counsel for the People either cannot or will not answer.

The grounds for a reversal of the judgment of the trial court which were set forth in our opening brief are as follows:

(1) That the trial court erroneously refused to set aside and quash the indictment against the defendant by reason of the actual bias of each and every one of the members of the grand jury against the defendant. In this connection we contended that the amendment of 1911 which repealed Subdivision 4 of Section 995

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of the Penal Code was and is *ex post facto* as to a prior offense.

(Discussed in Respondent's Brief.)

(2) That an unauthorized person, namely, Earl Rogers, a private attorney employed by private interests, was allowed and permitted, contrary to the provisions of Section 925 of the Penal Code, to be present in the Grand Jury Room during the presentation of the evidence and the deliberations of the inquisitorial body, and by his acts, advice and demeanor influenced the grand jurors in the finding of the indictment against the defendant, and that upon that ground also the trial judge should have granted the defendant's motion to quash and set aside the indictment.

(Discussed in Respondent's Brief.)

(3) That the trial court improperly denied challenges for cause interposed to some seventeen of the trial jurors.

(Discussed in Respondent's Brief.)

(4) That the trial court committed error of the most flagrant and most prejudicial nature in allowing the prosecution to prove that some seventy different crimes of violence had been committed in other portions of the United States by persons other than the defendant, prior to the time of the destruction of the

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Times Building; it not being shown that the defendant ever took part in any of these crimes or that he had any knowledge of their commission.

(Discussed in Respondent's Brief.)

(5) That the court erred in admitting in evidence a certain package containing explosives, which was found at the house of F. J. Zeehandelaar, secretary of the Merchants and Manufacturers' Association of Los Angeles upon the day following the destruction of the Times Building.

(This is not discussed in Respondent's Brief. The Attorney General mentions the evidence of the finding of the Zeehandelaar package. (Respondent's Brief, Vol. 1, Pages 5 to 7.) He does not in any manner whatsoever discuss the question of its admissibility.)

(6) That the court committed error in permitting testimony to be given as to the finding of the explosive at the house of General Harrison Gray Otis upon the day following the destruction of the Times Building.

(Not discussed in Respondent's Brief.)

(7) That the court committed error in admitting in evidence the contents of the suit case alleged to belong to J. B. McNamara which was found at the Ferry Building in San

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Francisco, nearly four months after the destruction of the Times Building and the death of the deceased.

(Discussed in Respondent's Brief.)

(8) That the trial court committed error in permitting hearsay evidence to be given of the narrative or anticipatory declarations of alleged co-conspirators.

(Discussed in part and partly ignored.)

(9) That the trial court was guilty of misconduct during the cross-examination of Mrs. Faust, one of the witnesses for the prosecution, when, in sustaining an objection to a question asked of the witness as to whether she had discussed her testimony with the District Attorney, the court said, *"The District Attorney has a right to talk to a witness without having an inference drawn from that fact."*

(Not discussed in Respondent's Brief.)

(10) That the court restricted in an unwarranted manner the cross-examination of Ortie McManigal, a self-confessed accomplice and felon, which was designed to show that he was testifying by reason of immunity from prosecution, hopes of reward, and actual money paid him, which the witness had characterized

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as *"just a gift."* (See Appellant's Opening Brief, 602-612).

(Not discussed in Respondent's Brief.)

(11) That the trial court refused to permit counsel for the defendant to ask the witness Ashworth, an important witness for the prosecution, who had testified that he saw Schmidt and McNamara together in San Francisco, whether he had not demanded compensation at the rate of $25 per day for testifying.

(Not discussed in Respondent's Brief.)

(12) That the trial court unjustly, improperly and to the manifest prejudice of the defendant, restricted the cross-examination of Mrs. Lena Ingersoll, particularly on the subject of the compensation which she was receiving from the prosecution. (Appellant's Opening Brief, 613-624).

(Not discussed in Respondent's Brief.)

(13) That the trial court refused to allow counsel for the defendant to cross-examine the witness Bruce McCall, from whom it was alleged that Schmidt had procured the dynamite, as to whether he was not stretching his testimony favorably to the prosecution by reason of the fact that the company which employed him

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feared prosecution for violating the law relative to the registry of sales of explosives.

(Not discussed in Respondent's Brief.)

(14) That the court refused to allow counsel for the defendant to ask the witness Meserve, who was a self-confessed spy in the employ of the Burns Detective Agency and who gave testimony which under the plain provisions of the Code it was the duty of the jury to view with caution, whether he had not made statements to the effect that he expected to receive a portion of a reward of $5000 which had been offered for the apprehension of the defendant.

(Not discussed in Respondent's Brief.)

(15) That the court erred in admitting in evidence the scrap of conversation between Schmidt and McNamara overheard by Mrs. Ingersoll.

(Not discussed in Respondent's Brief.)

(16) That the court erred in permitting the witness Mrs. Ingersoll, over the objection of counsel for the defendant, to testify as to the arrival of J. B. McNamara at her house twenty-four hours after the explosion and as to the conversation which she had with him. (Reporter's Transcript, pages 6413 to 6430. Appellant's Opening Brief, pages 638-646.) We showed that such evidence, tending to show the

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That the amendment of 1911 to Section 995 of the Penal Code is a mere change of procedure which did not deprive the defendant of any substantial right which existed at the time that the amendment went into effect and that it is not, therefore, as to him or others similarly situated, an *ex post facto* law. In the Attorney General's Brief (Vol. 2, page 255b), we read as follows:

> "We submit that the right to move to set an indictment aside is purely statutory. It is purely a matter or 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."

When the Attorney General contends that the right to set aside an indictment is purely a statutory right he has fallen into a very grave error. The right to set aside an indictment exists independently of a statute. A court of general jurisdiction by reason of its inherent power to regulate and control its own process, and to prevent the same from being abused, has the right, independently of any statute, to quash or set aside an indictment. As was said by the great Justice Story in *United States* v. *Coolidge,* 2 Gall., 364, "It is of the highest importance that no citizen be tried until he has been regu-

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larly accused by the proper tribunal. *Every indictment is subject to the control of the court.*" The principle that an indictment may be quashed and set aside by the court to which it is presented, even though there be no statutory ground for such a procedure, is clearly and convincingly advocated and discussed in *People* v. *Brickner,* 15 N. Y. Sup., 528, from which we quote the portion applicable to this question:

> "The motion to set aside the indictment is made upon the grounds—First, that there was no legal evidence before the grand jury to support it; and, second, that material illegal evidence was received by the grand jury. It is objected by the people that a motion to set the indictment can be made only on the grounds specified in Section 313 of the Code of Criminal Procedure, and that the court has no power to set aside an indictment for any other reasons. If that be so, of course this motion must be denied. It is necessary, therefore, to inquire into the power which the court has over the findings of the grand jury. *At common law, the courts had uniformly held that they had the power to set aside or quash an indictment on motion, not only for defects of form, but also for errors and irregularities which were made to appear by extrinsic evidence. I have been able to find no case in which the power has been denied.* Whether or not, however, the power will be exercised, is largely, if not entirely, a matter of discretion. It is quite clear, too, that at common law the courts had asserted

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the power and their duty to set aside indictments when it was made to appear that they had been found without evidence, or upon illegal or incompetent testimony. *U. S.* v. *Coolidge,* 2 Gall., 364; *People* v. *Restenblatt,* 1 Abb. Pr., 268; *People* v. *Briggs,* 60 How. Pr., 17. The reason was given by Judge Story in the case first cited above. He says that "it is of the highest importance that no citizen be tried until he has been regularly accused by the proper tribunal. Every indictment is subject to the control of the court," and when it has been found irregularly, and upon the mere statement of a witness without oath, it should be set aside. The power to control its own process, and to regulate proceedings in furtherance of justice, and to avoid oppression and persecution, is inherent in the courts, and every part and portion of the court is subject to its exercise. No reason is perceived why the grand jury alone should be free from this control. While, as a rule, that body is so composed that the rights of citizens and of the people are safe in its hands, yet instances are not unknown where it has been moved by improper motives, and controlled by improper prejudices, and where its members lent themselves to wicked violations of their oaths. It would be an evil day, indeed, if any body, which has the power in secret, and almost uncontrolled, to pass upon the rights of citizens, should be entirely free from supervision, no matter what its action was or how it was brought about. It has been said, to be sure, that the grand jury are the judges of the fact and the law. If by that it is meant that the grand jury, upon a case presented to them,

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have the power, and it is their duty, to determine the facts and apply the law, it is undoubtedly true. But if it be meant that their determination is not subject to review until the indictment found by them shall be brought to trial, if it is formally correct, it is not the law. In the case cited Judge Earl says nothing of the kind. His words: "It (the grand jury) was clothed with power to determine the facts and the law, and we know of no way to review its determination, unless it be by motion to quash the indictment or in arrest of judgment." *People* v. *Dimick,* 107 N. Y., 13, 34, 14 N. E. Rep., 178. It will be noticed that he necessarily implies the right and duty of the court to review the action of the grand jury in a proper case. I can conceive of no greater evil than that of a temporary body of inquisitors sitting in secret, which may at their will, upon such evidence as they choose to receive, or without any evidence, subject any citizen to the disgrace of a public arrest and accusation for a heinous crime and the expense of a trial. In view of the influences which may sometimes be brought to bear upon grand juries, and the peculiar motives which may sometimes sway them, not a few of the States of the Union have done away with the institution, rather than to run the risk of its evils. In all the States a serious question has arisen whether it should not be abolished, and its retention has been caused more by the difficulty of finding a substitute for it than by any desire for its continued existence. If it were to be known that this body was not under the supervision of the courts, I have no doubt that in no long

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time some substitute would be found for it, which would not be subject to some of the objections. The Code has not taken away the power which the court formerly possessed over indictments, but has rather enlarged it. Section 671 provides that the court may, in furtherance of justice, dismiss the indictment. The power given by this section may be exercised upon the application of the district attorney or on the motion of the court, and I have no doubt that, as the power is to be exercised in furtherance of justice, the court may act either upon its own motion, or at the suggestion of an *amicus curiae,* or upon the request of the defendant, if he can make it appear that a proper case exists. As the court has the power to act of its own motion, certainly the fact that the situation which calls upon it to act is brought to its notice by the defendant does not take away the power. Section 313 does not limit the power of the court to set aside the indictment. Before the Code, it was discretionary with the court whether or not to entertain the motion for such relief for any reason. 1 *Archb. Crim. Pr.,* 102. The objections specified in that section could be taken only by motion to quash or in arrest of judgment. 1 *Colby, Crim. Law,* 265-386; 1 *Archb. Crim. Pr.,* 102, 178. But, with reference to the findings and presentation of the indictment, the Code has provided, by Section 313, that defects or irregularities in those particulars must be attacked by motion to set aside, and the right to make the motion is given to the defendant absolutely, and as to those matters it is no longer in the discretion of the court, because the Code says that where

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those defects are made to appear the court must set aside the indictment. The section does not refer to motions to set aside the indictment on other grounds than those stated, but it changes the rule of the common law by giving to the defendant the legal right to move on these grounds, at the time stated, and at no other time, and taking away the discretion formerly resting with the court whether to entertain the motion or not. The section contains nothing in terms taking away the right to move on other grounds. There is a reason for mentioning these grounds in the desire to regulate the motion based upon them. Hence, the rule applies that, when there is a special reason for mentioning one subject in a statute, the omission to mention some other subject does not exclude it. *Suth. St. Const.,* No. 329. The legislature has required the grand jury to receive none but legal evidence. *Code Crim. Proc.,* No. 256. It has limited the way in which that evidence may be given (*Id.,* No. 255), and it has forbidden them to indict without evidence which proves the crime so that a trial jury would convict (*Id.,* No. 258), which evidence proves the charge beyond a reasonable doubt (*Id.,* No. 289). Before the Code, if these rules were violated, the indictment might be set aside on motion, as we have seen; and the limit to the right of the court to quash the indictment for want of evidence was that if there was some competent testimony the weight of it was for the jury (*People* v. *Strong,* 1 Abb. Pr., N. S. 244), whereas, if there was no testimony, the court would quash, as was done by Judge Story in *U. S.* v. *Coolidge, supra.* It must be noticed, however, that

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the requirement of a certain amount of evidence was not then statutory, as it is now, and that the testimony before the grand jury could not then be presented to the court on motion, as it can now, when it is taken by a stenographer. If the motion to set aside cannot now be made for the violation of the rules of the sections cited above, the defendant has no remedy for it, and that surely opens the way to evils not to be endured. So far as the decisions of the courts go since the Code, there has been no case denying the power of the courts to set aside the indictment, on motion, for causes other than those specified in Section 313. The first case cited to that point is *People* v. *Gas Light Co.,* 5 N. Y. Supp., 19, decided by the Court of General Sessions of New York. The motion was made before the defendant was arraigned, by counsel who appeared specially for that purpose. The recorder held that for that reason the motion must be denied, as well as upon the further ground that it was not founded upon any of the grounds specified in the section. *Code Crim. Proc.,* No. 313. But he does not consider the question whether the motion can be made upon other grounds, nor does he attempt to decide it. The *dictum* of Judge Andrews in *People* v. *Petrea,* 92 N. Y., 128, 145, is not controlling. The case had been decided on the merits, and what was thrown in at the end of the opinion was not necessary to its determination. In such a case it has been said: 'It is only upon points necessarily involved in the determination of causes that the judgments, even of the highest appellate courts, furnish authoritative adjudications.'

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Wibert v. *Railroad Co.,* 12 N. Y., 245, 252 (Denio, J.). The weight of adjudication is certainly that the motion to set aside may be made upon other grounds than those stated in Section 313. *People* v. *Clements,* 5 N. Y. Crim. R., 288; *People* v. *Singer, Id.,* 1; *People* v. *Sellick,* 4 N. Y. Crim. R., 329; *People* v. *Moore,* 65 How. Pr., 177; *People* v. *Haines,* 1 N. Y. Supp., 55; *People* v. *Price,* 2 N. Y. Supp., 414; *People* v. *White,* 6 N. Y. Crim. R., 145, note; *People* v. *O'Reilly,* Mon. O. & T., Oct., 1890; *People* v. *Clark,* 14 N. Y. Supp., 642. There is no doubt that the motion may be made upon the ground that there was no evidence to support the indictment. *People* v. *Clark, supra.* The opinion of Judge Story upon that subject has been quoted. It may properly be supplemented by that of the general term of the Supreme Court, which has said that it is the duty of the court to guard the personal rights of the citizen against the consequences of so dangerous a precedent as that of sustaining or favoring an indictment the finding of which is unwarranted by the proof. *People* v. *Hyler,* 2 Parker, Crim. R., 570, 578, sub. nom. *People* v. *Baker,* 10 How. Pr., 567. The objections formerly made to entertaining the motion on this ground were that the evidence was usually so imperfectly taken that the court could not be certain that it had before it all that was presented to the grand jury, and upon which it acted. That objection is now obviated because all the evidence given to the grand jury is taken by a stenographer, and in this case it is presented to the court. As but one side of the case is heard, there can be no conflict of evidence to reconcile, and

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> I cannot see why the court, upon such a motion, is not in a position to decide with substantial accuracy. The rule of the law is that none but legal evidence shall be received (Section 256), and that the grand jury shall not find an indictment unless legal evidence before them is such as in their judgment would warrant a conviction by a trial jury (Section 258); that is, would prove the defendant guilty beyond a reasonable doubt (Section 389). See *People* v. *Hyler,* 2 Parker, Crim. R., 570. If the evidence is such that, if any possible aspect of it, a conviction might be had, the indictment should stand. But if it is so weak that the court upon the trial would, upon the same evidence, feel called upon to advise an acquittal, under Section 410, the indictment should not stand."

While it is true that in California a defendant cannot insist as a matter of right that an indictment returned against him on insufficient evidence should be set aside, nevertheless the courts of this State have not denied the power of a Superior Court to do so in the interest of justice and in the exercise of its own inherent power. The Brickner case is not only authoritative for the foregoing proposition but it discusses convincingly, and in a far more forceful manner than could we, the importance of the right of a citizen to be secure from malicious or unwarranted indictment. Even though the legislature of this State by the

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amendment of 1911 has taken from persons who have been indicted for crime the right to move to quash an indictment because of the bias and prejudice of the grand jurors who returned it, nevertheless the law of the State of California still recognizes that the right to a fair and impartial grand jury is a *substantial right* which every citizen possesses. Section 903 of the Penal Code still provides that the following oath must be administered to the foreman of the grand jury:

> "You, as foreman of the grand jury, will diligently inquire into, and true presentment make of all public offenses against the people of this State committed or triable within this county of which you shall have or can obtain legal evidence. You will keep your own counsel and that of your fellows and of the government and will not except when required in the due course of judicial proceedings disclose the testimony of any witness examined before you, nor anything which you or any other grand juror may have said, nor the manner in which you or any other grand juror may have voted on any matter before you. *You will present no person through malice, hatred or ill will* nor leave any unpresented through fear, favor or affection or for any reward or the promise or hope thereof; but in all your presentments you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, so help you God."

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In other words, notwithstanding the repeal of the provision which gave an indicted person the right to have an indictment set aside because it was returned by a prejudiced grand jury, it is and was under the law of this State the right of every citizen to a fair and impartial grand jury. Accordingly the amendment of 1911 abolished a *substantial right* when it took from a defendant indicted for crime and who had not been previously held to answer, the right of insisting upon his discharge because the inquisitorial body were prejudiced against him.

As we have previously indicated, none of the cases cited in Respondent's Brief are decisive authority either for or against the position taken by the appellant with reference to the amendment in question. We believe, however, that insofar as they are authority at all they support the position of the appellant rather than of the respondent. In that behalf we respectfully call the attention of the court to the following language taken from one of those cases:

> "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

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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 subsequent protections with which the existing law surrounds the person accused of crime* are not considered within the constitutional prohibition."

Duncan v. *Missouri,* 152 U. S., 377.

Is not the right to have one's conduct investigated by fair and impartial persons, who will not present him through malice, hatred or ill-will, a substantial right? Is not the right to move to set aside an indictment because the presentment was made by reason of hatred and ill will also a substantial right? Is not, therefore, a law which does away with such right, a law *ex post facto* as to prior offenses?

Respondent has signally failed to answer our argument that even if the statute in question is not *ex post facto,* it is not, under the plain provisions of the Code, retroactive, and therefore it had no application to proceedings pending at the time that it went into effect. The right of the defendant to move to set aside the indictment obviously accrued when the indictment was returned, and the subsequent passage of an amendment which took away that right was

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clearly inoperative in his case. Once more we call the attention of the court to the case of *San Francisco and Oakland Terminal Railways* v. *Superior Court,* 172 Cal., 541, which was cited by us in our opening brief. In that case a similar question was involved, and as the discussion therein contained is extremely interesting, we shall quote in full the opinion of Chief Justice Angellotti:

> "This is a procedure in mandamus to compel respondents to hear and determine on its merits a motion for a new trial regularly made by petitioner in an action in said superior court, in which one Theo. C. Forrester is plaintiff and petitioner is defendant. The alleged ground of respondents' refusal to act is that its power to pass on said motion has expired by reason of the provisions of Section 660, Code of Civil Procedure, as amended August 8, 1915. The matter has been submitted for decision on a demurrer to the petition.
>
> "The case of Forrester against petitioner was tried with a jury and a verdict rendered in favor of Forrester for $8500 on June 29, 1915. Judgment was entered on said verdict on June 30, 1915. Within the time allowed by law and as extended by stipulation, viz: on July 19, 1915, petitioner duly served and filed notice of its intention to move for a new trial on various grounds, the notice stating that the motion would be made upon a bill of exceptions to be thereafter prepared and served. All this was in accord with the law as it then was.

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On August 27, 1915, the bill of exceptions was regularly signed, certified and filed. The hearing of petitioner's motion for a new trial was then set for November 26, 1915, and was by consent of counsel postponed from time to time until March 15, 1916. On the day last named, respondents finally refused to hear and determine said motion on its merits.

"Section 660, Code of Civil Procedure, was amended in 1915, the amendment taking effect August 8th, by the insertion, among other things, of this provision, viz: 'The power of the court to pass on motion for new trial shall expire within three months after the verdict of the jury, or service on the moving party of notice of the decision of the court. If such motion is not determined within said three months, the effect shall be a denial of the motion without further order of the court.' This provision has been held to be a valid exercise of legislative power. (*Lancel* v. *Postlethwaite,* 172 Cal., 326.) Prior thereto this section had contained in this regard simply the provision that it still contains, one substantially to the effect that the motion for a new trial must be heard at the earliest practicable time after the record is in such condition as to permit its being heard. No express saving clause as to proceedings on motion for a new trial initiated before the taking effect of the amendment is contained in the section. As on March 15, 1916, more than three months had expired after the verdict of the jury, and also after the taking effect of the amendment and the settlement and filing of the bill of exceptions on which the motion was to be

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heard, it is clear that upon no theory can petitioner now require the superior court to pass on its motion for new trial, if the provision quoted is construed as applicable under the circumstances stated. In such event the motion stands denied by reason of the failure of the superior court to act within the time prescribed. The question is whether the provision should be construed as being in any way applicable to proceedings on motion for new trial initiated prior to the amendment, and pending at that time.

"By an amendment to another section of our Code of Civil Procedure, also taking effect August 8, 1915, the right of appeal from an order denying a new trial was abolished. (Sec. 963, Code Civ. Proc.) It has been held that as to the right of appeal from such an order it is the condition of the law at the time of the denial of the motion for new trial that controls, regardless of whether the proceeding for a new trial was initiated prior to or subsequent to the change in the law. (See *Woodruff* v. *Colyear,* 172 Cal., 440.) This ruling, however, is in no way determinative of the question presented by this application. No question of the giving of anything in the nature of a retroactive effect to a statute was involved, but the order was held to be nonappealable simply because at the time it was made there was no law, constitutional or statutory, authorizing an appeal from or other review of such an order. On the other hand we have declined to dismiss appeals pending from such orders made prior to the abolition of such right of appeal and taken when the law authorized such an appeal, for the reason that to so do would be

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to give the change in the statute a retroactive effect not intended by the legislature. No written opinion was filed to that effect, but such were the rulings from the bench.

"The provision of Section 660, Code of Civil Procedure, involved in this proceeding is entirely new, nothing of a similar nature having before been included in our statutory provisions relating to motions for a new trial. As said in *Lancel* v. *Postlehwaite, supra,* it is a provision 'designed to secure a speedy determination of a motion for a new trial, and thus to obviate one of the many delays preceding the review by an appellate court of the proceedings of the trial court,' and its effect is to limit the power of a trial court to grant a new trial to a time 'within three months after the verdict of the jury or service on the moving party of notice of the decision of the court.' (1) We do not think this provision may fairly be construed, as suggested by counsel for respondents, as authorizing a trial court to pass on a motion for new trial pending at the time it went into effect, at any time within three months *after it so went into effect,* or at any time within three months after the record on which such motion was to be heard is finally settled. The only time expressed in the provision is 'within three months *after the verdict of the jury or service on the moving party of notice of the decision of the court.*' In *Pignaz* v. *Burnett,* 119 Cal., 157, subsequent to the entry of judgment the statute fixing the time within which an appeal could be taken therefrom was changed by reducing the time from twelve months from entry to six months from entry. While the appeal there

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was not taken within six months after the change in the law took effect, but it was not sustained for this reason. The court squarely held that to apply the statute to judgments entered before it went into effect would give it a retroactive effect, and that the statute gave '*no time whatever* . . . to appeal in those cases in which judgments had been entered six months or more previously,' and in view of this construction and the consequent cutting off of the right of appeal if the law were construed as retroactive, it was held that the legislature intended that the operation of the law should be limited to 'judgments thereafter entered.' This decision is clearly opposed to the suggestion of counsel for respondents that under the provision the trial court had power to pass on the motion within three months after its taking effect, or within three months after the bill of exceptions was settled and fixed. Decisions cited by counsel involving statutes shortening the period of limitation for the commencement of legal proceedings (*Crothers* v. *Electric Co.,* 149 Fed. Rep., 606; *Garrison* v. *Hill,* 81 Md., 551), to the effect that the reduced period will be held to commence to run only from the time the change accrued, concern a somewhat different subject matter, and are hardly in point on principle. We are here dealing with a provision of law which deprives a court of power to pass on a motion for new trial unless such power is exercised within a specified time *after verdict or notice of decision.* The time is designated in clear and unequivocal terms, and if the provision is applicable at all proceedings pend-

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ing at the time it became operative, its terms are such, in our opinion, as to preclude a construction to the effect that it did not absolutely take away from a trial court the power to pass on the motion for a new trial after the expiration of three months from the rendition of the verdict or service on the moving party of the notice of the decision of the court, regardless of all other circumstances.

"This being the construction that must be given to the provision, we have no doubt that it should not be construed as applicable to the proceedings on motion for new trial pending at the time it became operative. *Pignaz* v. *Burnett, supra,* is practically controlling as to this. We have already substantially stated the question decided in that case. There was involved the question of the application of a statute shortening the time within which an appeal might be taken from a judgment from one year to six months to judgments entered prior to the taking effect of the statute. The statute contained no saving clause as to judgments entered prior to such time. Holding that if this statute were to be construed as applicable to such judgments, the effect would be to absolutely cut off at the very instant it went into effect the right of appeal from any judgment entered six months or more previously, the court said: 'Unless it is absolutely necessary, we should not impute such an intention to the legislature. In view of the construction which has almost invariably been given to statutes of this character, I feel sure that the legislature intended that its operation should be

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limited to judgments thereafter entered.' In the case of the provision here involved, if the same be held applicable to proceedings on motion for new trial pending at the time it took effect, the result would be to absolutely cut off at that moment the right of the party to have the determination of the trial court on his motion regularly instituted and prosecuted, in all cases where the verdict was rendered or notice of the decision given three months or more before the provision became a law. As said in *Pignaz* v. *Burnett, supra:* 'No such intention should be imputed to the legislature unless absolutely necessary.' Under the circumstances we are satisfied that it must be held that the operation of the provision in question was intended to be limited to proceedings on motion for new trial initiated after the change in the law. Especially is this true in view of the decision in *Pignaz* v. *Burnett, supra,* which, it is only fair to assume, was in the minds of those enacting the provision, and to them declared the rule by which their enactment would be construed by the courts."

The reasoning in that case is decisive in the case at bar. The indictment having been returned prior to the enactment of the amendment, the defendant was not deprived by the amendment of his right to move to set the indictment aside.

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THE CHALLENGES TO THE TRIAL JURORS.

This subject was discussed so thoroughly in our opening brief that any extended recapitulation of the subject here would not be desirable. Counsel for the People made the argument which we anticipated that they would make, and which we disposed of, effectively, we believe, in the opening brief. Their argument is in substance that since the answers of the various veniremen to whom challenges were interposed were conflicting, a question of fact was raised in each case, and that the decision of the trial judge thereon is conclusive. That the question as to whether a juror can act fairly and impartially is primarily for the determination of the trial judge may be readily conceded; in fact, we expressly so conceded in our opening brief (Appellant's Opening Brief, page 208). But the conflict of evidence which must exist to support a ruling of the trial court must be a substantial conflict. In other words, we apprehend that the rule is the same as that which prevails in all cases where the appellant contends that the evidence is insufficient to justify a ruling or finding of a trial court. It has always been the law in this State that where there is a substantial conflict in the evidence the ruling of the trial judge is conclusive upon the appellate court. The latter cannot consider

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the question of the weight of the conflicting evidence or the credibility of the various witnesses. These are matters exclusively the province of the court below. But mere categorical denials or affirmations, in the face of clear, distinct and convincing evidence, are not sufficient to raise such a conflict as will permit the rule to be invoked. To use the words of Justice Cooper in *In re Coburn,* 11 Cal. App., 620:

> "We are fully aware that an appellate court will not reverse a finding if there is a substantial conflict in the evidence; but the evidence in order to raise a conflict must be such as to present a fair and reasonable ground for a difference of opinion. The finding or verdict must have meritorious support in the evidence. A few general statements without substantial reasons is not sufficient to raise a conflict."

As we pointed out in our opening brief, the answers of veniremen which counsel for the respondent set forth as sufficient to justify the rulings of the trial judge in denying the challenges, are practically without exception mere categorical denials or affirmations in response to leading questions by the District Attorney. The challenged jurors followed the admonition contained in the Sermon on the Mount, to let their communication be "yea, yea, nay, nay, for whatsoever is more than these cometh of evil."

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Genuine evidence reasonably tending to show that the jurors could or would set aside their preconceived opinions and act fairly and impartially is utterly lacking.

In several instances the ruling of the trial court is not even supported by categorical negatives or affirmatives in the answers of the jurors. Take for instance the testimony of the juror Hunter as it is set forth in Appellant's Opening Brief, pages 267 to 275, particularly the following answers:

> "MR. HARRIMAN—Q. Can you set that view or that opinion aside just as though you had not had it and act as fairly concerning all the facts that caused that opinion to form if you were chosen as a juror, and act as fairly as if you had never had the opinion?
>
> "A. Well, I don't see how I could.
>
> "Q. It would go out with you into the jury box because it is a part of your state of mind, wouldn't it?
>
> "A. Yes.
>
> "Q. And you could set it aside without evidence?
>
> "A. Well, I don't see how I could."

The juror Monia (Reporter's Transcript, page 1246, line 1 to page 1247, line 8) had thoroughly disqualified himself to serve as a juror by the answers which he had given upon direct examination. The District Attorney by

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leading questions attempted to qualify him and elicited the following:

> "Q. Well then, in other words, if you were selected as a juror you would act upon the evidence which you held and would not act upon any belief that you have?
> "A. Well, I would lay that aside the best I could."

(Reporter's Transcript, page 1246.)

Jurors who could not even be qualified by questions repeatedly asked of them by the District Attorney should not have been allowed to sit upon the jury. In such cases as those quoted it is perfectly obvious that the conflict-of-evidence rule cannot be invoked. The law in this State is so well settled and so clear as to the qualification of jurors that discussion of the subject further than that which has already occurred in the briefs on file would seem to be superfluous. Since counsel for the People, however, seem to have some misapprehension of the law, we again call attention to the following language from some of the decisions:

> "Omitting from the statement of the juror that these things come to him from parties directly interested in the case, and allowing the examination to rest upon the sole fact that the juror entered the box with an opinion as to the guilt or innocence of the accused, that fact is of itself a disquali-

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fication, even though the juror should declare to the court under oath that notwithstanding his opinion he would and could act fairly and impartially upon the matters submitted to him. The juror would not only be disqualified at common law but disqualified under the Penal Code, for he has not brought himself within the provisions of Section 1076, as these provisions require an affirmative showing that his opinion is based upon public rumor, common notoriety, or statements in public journals."

People v. *Wells,* 100 Cal., 227.

"Under the Penal Code of this State a single exception is found to the common law rule, and that exception is declared in Section 1076. This juror was clearly disqualified unless he came within the provisions of the aforesaid section. The exception found in the law governs the single case where the opinion of the juror is founded upon public rumor, statement in public journals or common notoriety, and it further appears to the Court from the declaration of the party under oath *that he could and will, notwithstanding his opinion, act impartially upon the matters submitted to him.*"

People v. *Miller,* 125 Cal., 44.

The law of this State requires more of a showing from the juror who has admitted that he has formed an opinion than a statement that he would set aside his opinion "the best he

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could." It requires a showing that he can and will notwithstanding such opinion act fairly and impartially.

Counsel for the People have further failed to answer the argument advanced by us in our opening brief that a juror who had formed an opinion as to the guilt or innocence of the defendant from reading the Los Angeles Times could not properly be said to come within the exception mentioned in Section 1076 of the Penal Code. The Los Angeles Times did not stand in this case in the ordinary position of a public journal printing the news of a crime. It occupied the place of a complaining witness, of an injured party in the cause about to be tried. Its property had been destroyed, the lives of its employes had been taken, it had publicly commented, time without number, upon the merits of the case, and in vigorous terms had expressed its opinion as to the guilt of the defendant. Therefore a juror who had formed an opinion from the reading of the Times is in the same position as one who had formed an opinion from conversation with persons who knew or claimed to know the facts of the case. This phase of our argument as to the qualification of the trial jurors is not even touched upon in respondent's brief.

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THE EASTERN CONSPIRACY EVIDENCE.

Counsel for the respondent in this case in their discussion of the relevancy of the so-called "eastern conspiracy evidence" seem to us to be laboring under the delusion that they are still trying the case of *United States* v. *Ryan, et al.,* at Indianapolis. In that case evidence of what counsel call "the nation-wide conspiracy" was very properly admitted by the trial court for the reason that the defendants on trial in that case were charged with the crime of conspiracy, the crime denounced by Section 37 of the Federal Penal Code. Since, under that section, proof of an overt act by one or more of the alleged conspirators is necessary to the proof of the completed crime, it was absolutely proper for the trial court in that case to admit evidence of as many overt acts of dynamiting, letter writing or the like, as the prosecution saw fit to introduce. But in the case at bar the situation is radically different. The defendant was not charged with having entered into an unlawful conspiracy for the purpose of enforcing the so-called "closed shop." He was charged with the crime of murder and with that alone. Evidence of other crimes or of conspiracy to commit other crimes was wholly irrelevant unless it tended to prove him guilty of the offense

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with which he was charged. Did it have any such tendency?

We do not for a moment question the rule that it is proper in homicide cases to show that the accused entered into a conspiracy in furtherance of which one of his co-conspirators committed the crime. The reason for this rule is obvious. The accused is guilty of the crime in such a case, not because he committed it in person, but because he authorized its commission or authorized the doing of acts which resulted in its commission.

In other words, the liability of a conspirator for the acts of his co-conspirators in the criminal law is governed by the same rules as those which in the civil law govern the liability of a principal for the acts of his agent. A, B and C enter into a conspiracy for the purpose of committing a robbery, in the execution of which A commits a murder. B and C are, under the fundamental rule governing the liability of a conspirator for the acts of his co-conspirators, guilty of the crime of murder. The law holds them liable for the murder because it was in pursuance of their common design that it was committed. But here the liability ends. No one can be held responsible either civilly or criminally for the acts of others which were not authorized by him and which were not done

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pursuant to any plan or design in which he participated. To use once more the words quoted in our opening brief which were used by Justice Cooper in *People* v. *Schmitz,* 7 Cal. App., 355:

> "The sages of the law and the learned judges have established the rule that the independent acts and declarations of one man shall not be evidence against another. It is sufficient for every one to answer for his own sins and not for the sins of his neighbor."

To pursue the illustration which we have previously used: A, B and C conspire to commit a robbery and in furtherance of this common design A commits a murder. Upon the trial of B for this murder it is undoubtedly competent to show the existence of a conspiracy to do the acts which resulted in the homicide. But upon the trial of B for the murder in question it certainly would be incompetent to show the commission of another murder by A at a previous time. This is law so elementary that no one will dispute it. Would it, therefore, be competent upon this same trial of B for the first murder in question to show that at a previous time A and C had entered into a conspiracy to commit various robberies, pursuant to which one or both of them had committed various crimes? To this last question the

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answer is likewise plain. Such proof would be utterly irrelevant for the reason that the independent acts of A and C could not be evidence against B.

The last illustration is on all fours with the case at bar. J. B. McNamara, according to the theory of the prosecution, committed the crime of murder by placing an explosive in the basement of the Los Angeles Times, knowing that the probable result of the explosion would be the loss of life. It was likewise the theory of the prosecution that the defendant Schmidt had aided McNamara in procuring the explosives which were used in the destruction of the Times Building knowing the purpose for which they were to be used. If this last theory was correct Schmidt was, of course, guilty of murder. Any evidence showing or tending to show any unlawful agreement between Schmidt and McNamara for the purpose of doing any act which resulted in the destruction of the Times Building and the death of Hagerty would be relevant. The evidence which was received tending to show that McNamara and Schmidt were together on many occasions in San Francisco, that they were seen together at various places about San Francisco Bay in the launch "Pastime," that they roomed together at the Argonaut Hotel, that Schmidt

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disappeared immediately following the destruction of the Times Building, — all of this evidence was entirely relevant, taken in connection with the evidence relating to the procurement of the powder from the Giant Company, as tending to show an unlawful agreement between them to do the act which resulted in the death of the deceased. So far the analogy of the first illustration given above is entirely preserved. Admittedly it would have been incompetent to have shown the commission of a separate murder years before in another part of the United States by J. B. McNamara. That would be analogous to our second illustration. Now to come to the third illustration: The trial court in the case at bar allowed evidence to be introduced by the prosecution to the effect that J. B. McNamara, J. J. McNamara, Ryan, Hockin, Davis, McManigal, Eckoff and others had entered into a gigantic conspiracy pursuant to which some seventy-seven explosions were caused by various members of the conspiracy in different parts of the United States. As we pointed out at great length in our opening brief, and this is not disputed or denied by counsel for the respondent, there was not a syllable of evidence showing or in even the remotest degree tending to show that the defendant Schmidt ever took part in

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the commission of any of those seventy-seven explosions, or that he ever advised or counseled any of them, or that he ever joined any conspiracy pursuant to which they were committed. It was not even shown that he was in the United States or in the Western Hemisphere at the time of the commission of any of those crimes. They were not brought home to him in any manner whatsoever. Thus, our third illustration fits perfectly the case at bar. More than that, it is on all fours with it. The trial judge, misled no doubt by the intricate, involved and circumlocutory reasoning of the ingenious counsel for the prosecution, allowed himself to be trapped into the error of admitting in evidence a long series of independent acts and declarations and of isolated crimes committed by persons other than the defendant, with which he was not shown to have had the slightest connection, and for which the prosecution itself did not and does not contend that he was in any manner responsible. Surely the admission of such evidence is reversible error. The rule pronounced in the Lawrence, in the Kaufman, and in the other cases cited in the briefs, which imposes a vicarious liability upon a member of a conspiracy for a crime which he has not actually committed, merely because the crime was committed in furtherance of the conspiracy to

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which he was a party, while seemingly a hard rule when applied to some cases, is doubtless a just one. But it has never been held, and counsel for the respondent have been unable to find a case which holds, that a person on trial for the commission of one crime can be bound by evidence that his *particeps criminis* and other persons utterly unconnected with the defendant on trial have previously committed other crimes or entered into a conspiracy to commit them. Such is not the law and there is no case so holding. Not one of the cases cited by the Attorney General holds that such evidence is admissible. Let us discuss these cases in their order and ascertain whether the rule pronounced in any of them upholds the action of the trial judge in the instant case.

In *People* v. *Brown,* 59 Cal., 345, the defendant was indicted jointly with four others for the murder of one of the members of a *posse comitatus* which had been summoned by the constable to assist him in arresting the defendants. There was some question as to whether the shot was fired by the defendant or by one of his co-defendants. It appeared from some of the evidence that the persons indicted had formed a conspiracy to rob the tax collector and had agreed that they would resist arrest and use their arms on anybody that attacked them.

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The court states the following rule which is elementary law:

> "If, therefore, while armed and lying in ambush for the purpose of executing a common design, one conspirator commits murder, it is murder committed in furtherance of the common design, not only by him who commits the crime with his own hands, but in all who enter with or take part in the execution of the purpose for which they confederated together."

There is certainly nothing in the Brown case that upholds the admission of such evidence as the Eastern conspiracy evidence in the case at bar. If the court in the Brown case had admitted evidence tending to show that Brown's co-defendants and other persons had, pursuant to some criminal conspiracy, committed other crimes concerning which Brown had no knowledge, at a time before he was ever shown to have been associated with any such persons, then we would have a state of facts similar to that in the case at bar. But the court does not hold, either expressly or by implication, that such evidence would have been admissible.

In *People* v. *Collins,* 64 Cal., 293, the evidence showed that the defendant and others had entered into a conspiracy to rob stages, mines and whatever else they could. In the execution of a stage robbery the deceased was

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killed by one of the conspirators. The court held that evidence of the conspiracy was admissible. In that case, however, evidence showed that the defendant had been a party to the unlawful agreement from the very beginning, and the case is therefore utterly different from that in the case at bar where it was not shown that the defendant Schmidt was a party in any manner whatsoever to any of the crimes committed by the conspirators in the east.

People v. *Olsen,* 80 Cal., 122, is likewise not in point. In that case the point involved was whether the court erred in giving the following instruction:

> "If a number of persons conspire together to commit a felony, and take the life of another person in the prosecution of the common design, it is murder in all, although only one may have inflicted the fatal blow, the other being present aiding and abetting. 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."

It is held in the decision that the foregoing instruction stated the law correctly. The facts of the case are not stated in the opinion of the

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court and the decision goes no further than to state the elementary rule that where two or more persons conspire to commit a felony and one of them in the execution of the common design commits a murder, all are guilty of the murder. The question of the admissibility of any evidence of a conspiracy was not involved and was not discussed in the Olsen case.

The case of *People* v. *Holmes,* 118 Cal., 444, supports the position taken by the appellant rather than that taken by the respondent. We particularly call the attention of the court to the following language on page 456:

> "The defendants are not charged with the crime of conspiracy. The conspiracy element of the crime becomes important only as a means of establishing the commission of the crime charged."

We submit that in the case at bar the evidence of the various crimes committed in the eastern part of the United States by persons other than the defendant could have no possible bearing upon the guilt or innocence of the defendant of the crime charged in the indictment.

In *People* v. *Lawrence,* 143 Cal., 148, the evidence tended to show that the homicide for which the defendant was on trial was committed pursuant to a conspiracy entered into be-

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tween the defendant and two others to rob the deceased of a demijohn of wine which he had in his possession. Such evidence in that case was undoubtedly relevant and the case has no application whatsoever to the case at bar.

In *People* v. *Carson,* 155 Cal., 164, the defendant who was a so-called "life termer" in the Folsom Penitentiary, was indicted under Section 246 of the Penal Code which provides that

> "Every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

It was the theory of the prosecution that the defendant and others entered into a conspiracy to escape from the penitentiary and that in the execution of this plan to escape the defendant committed the assault charged in the indictment. The court says:

> "Evidence of a conspiracy to attempt an escape from prison, *participated in by defendant,* and all circumstances surrounding the effort to accomplish the purpose of the conspiracy were competent for the purpose of showing the intent with which the ap-

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> pellant, in furtherance thereof, made the particular assault with the chisel that is charged against him in the indictment."

The italicized words in the foregoing quotation are deeply significant. They plainly imply that evidence of a conspiracy is admissible in a homicide case only where such conspiracy was *participated in by the defendant.*

In *People* v. *Wood,* 145 Cal., 659, the facts were essentially the same as those in Carson case, except that the indictment was for murder committed pursuant to a conspiracy to escape from the penitentiary.

In *People* v. *Woods,* 147 Cal., 265, the question involved was whether a conspiracy to commit a burglary was at an end, at the time that the homicide with which the defendant was charged was committed by one of the co-defendants. The case is certainly no authority for the proposition that independent acts and declarations of alleged conspirators would be admissible.

People v. *Creeks,* 170 Cal., 360, the most recent of the cases cited in respondent's brief, was also a case of a homicide committed in an attempt to escape from prison and the remarks which we have made relative to the Carson and Wood cases are applicable to the last mentioned case also.

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The Attorney General also cites the case of *United States* v. *Ryan,* 216 Federal, 13, and quotes a long excerpt from the charge given to the jury in that case by Judge Anderson. The charge given by the learned judge is ordinary hornbook law. It states, and in our opinion states correctly, certain elementary principles governing the law of conspiracy as that law is administered in the Federal courts. In that case the defendants were indicted for conspiracy to unlawfully transport explosives in interstate commerce. The trial court properly allowed evidence of a great number of independent acts of violence and admitted vast files of correspondence, all of which evidence tended to show the existence of the conspiracy charged and the connection of the various defendants with it. But there the defendants were directly charged with conspiracy, and the conspiracy itself was the essential fact to be proven. The learned Attorney General contends that the dynamiting of the Times Building was an overt act committed in furtherance of the general conspiracy, but he does not show or point out that Schmidt had any connection with the general conspiracy or with any of the seventy-seven explosions caused in other parts of the United States by certain of the conspirators. The defendant was charged with the crime of

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murder committed after all of the seventy-seven explosions had occurred. With none of those previous crimes was he shown to have had the slightest connection. Counsel for the People do not claim that the evidence by even the remotest inference establishes his complicity in any one of them. The evidence of those crimes was, therefore, *res inter alios acta.*

Counsel for the People in their discussion of the Ryan case (Respondent's Brief, vol. 2, page 370) use the following language:

> "Although the indictment in the case at bar is not for conspiracy, but for murder resulting from an overt act committed in furtherance of a conspiracy, yet the law governing the proof of the conspiracy is the same as if the indictment had been for the conspiracy itself."

This statement, while correct as an abstract proposition of law, is utterly misleading. It is unquestionably true that where evidence of a conspiracy is admissible at all, the mode of proving it is the same whether the indictment be for conspiracy itself or for some crime resulting from a conspiracy. But in the case at bar the proof of the so-called eastern conspiracy was irrelevant, not only because the indictment was not for conspiracy, but because the evidence in question had no tendency to prove the

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defendant guilty of the crime with which he was charged. As previously pointed out, evidence of a conspiracy is admissible only for the purpose of fastening the crime upon the defendant, and the conspiracy proved must be a conspiracy to which the defendant himself was a party. If he be not a party to the unlawful agreement it is no more binding upon him than evidence of the commission of any other crime by other persons would be.

THE ALLEGED M'NAMARA SUIT CASE.

Counsel for the respondent touch very lightly upon the question of the admissibility of the suitcase alleged to belong to J. B. McNamara which was found in the Ferry Building at San Francisco more than four months after the destruction of the Times Building. They concede that articles in newspapers are not evidence of the truth of the statements therein contained, but claim that the newspapers contained in the suitcase were not introduced for that purpose. They forget that the trial judge, over the objection of counsel for the defendant, permitted the jury to read the said newspapers without giving any instruction designed to limit the purpose for which the newspapers were introduced. In other words, the trial judge permitted the newspapers to be admitted in evi-

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dence for all purposes and, by implication at least, told the jury that they had a right to consider them. Counsel for the People became almost amusing in a further effort to justify the admission of the suitcase. At page 412 of Respondent's Brief we read as follows:

> "The purchase of these newspapers by J. B. McNamara was in strict compliance with the rule already adverted to many times, established 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."

If the possession of two San Francisco newspapers containing accounts of the destruction of the Times Building can be construed as showing guilty knowledge, there are several hundred thousand people in the State of California in whose minds there lurked a consciousness of guilt. The argument upon its face is an absurdity. Most of the crimes perpetrated in the eastern part of the United States were perpetrated secretly and did not arouse any widespread public comment. None of them resulted in any loss of life. The publicity which they created was purely local. There might have been some reason therefore for the alleged rule of J. J. McNamara that before dynamiters should be paid for their work they should pro-

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duce newspaper clippings showing that the explosion had occurred. But that J. B. McNamara should consider it necessary to prove the destruction of the Times Building by producing copies of two San Francisco papers is utterly preposterous. The destruction of the Times Building was one of the gravest horrors of a decade. It was one of the greatest crimes in the history of the country. There was not a city, not a hamlet, probably not an adult person in the entire United States who had not heard of the catastrophe. That J. J. McNamara or anyone else should have required evidence of local newspapers, is an idea that would have occurred to no one but a public prosecutor laboring under a feverish anxiety to maintain a conviction at all hazards.

But in any event, it is a sufficient answer to the argument of the Attorney General to say that no matter what the contents of the suitcase might tend to prove against J. B. McNamara they were not binding on the defendant on trial. Even if it be conceded that it belonged to J. B. McNamara (the identification of the suitcase by Mrs. Ingersoll was by no means satisfactory), it was in no way connected with the defendant Schmidt. It was checked at the Ferry Building in San Francisco on October 3, 1910, and two days after the destruction of

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the Times Building. The issues of the newspapers were respectively of October first and October second. The crime had already been consummated. The alleged conspirators had separated. The avowed purpose of the introduction of the contents of the suitcase, particularly of the newspapers, was, in the language used by Mr. Keyes (Reporter's Transcript, p. 6490), that the contents of the said newspapers were important "as showing the state of mind of the person who owned the suitcase." Even if the contents of the suitcase had such a tendency, the fact remains that the state of mind of J. B. McNamara on the 3rd of October, 1910, was not binding upon the defendant on trial. Nothing that McNamara then did or could do would be binding upon Schmidt. No falsehood, evasion or silence of J. B. McNamara, occurring after the death of Hagerty, was admissible in evidence against the defendant, under any circumstances. (*People* v. *Irwin,* 77 Cal., 506).

Once again we call the attention of the court to *People* v. *Stanley,* 47 Cal., 113, which we cited in Vol. 2 of our opening brief, page 647, wherein it is held that evidence of flight of a co-conspirator occurring after the commission of the crime is inadmissible.

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MISCONDUCT OF THE COURT AND THE DISTRICT ATTORNEY.

As we pointed out in the introductory portion of this brief, counsel for the People discussed only one of the specifications of misconduct of the trial judge. The instance is the occasion upon which the trial judge, commenting upon the testimony of the witness Cook, who had identified certain signatures on the register of the Hotel Argonaut, stated that the witness was mistaken in identifying the signatures. Counsel for the People did not contend that the remark in question was a proper one or one which the court had any right to make. They attempt to justify it, however, by saying that the language was used following "a brutal attack" upon Mr. Noel, the special prosecutor in the case, by Mr. McKenzie, one of the defendant's counsel. It is a sufficient answer to say that the law requires the court to hold itself above the controversy of counsel. In the heat of combat, counsel on both sides frequently say things which are not entirely commendable and which their own sober judgment would condemn, but what counsel may have done in the instance under discussion furnishes no justification for the court to make such a statement in the presence of the jury. Counsel for the People attempt to justify the

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remark of the court upon the ground that it was not made to the jury and that it might well be doubted whether they heard it. We do not need to use our own words to answer so absurd an argument, as it has been far better answered in the following language of Presiding Justice Lennon in *People* v. *Pitisci,* 29 Cal. App., 736:

> "It is idle to argue, and it would be bordering upon the ridiculous for this or any other court to say that because the objectionable remarks of the trial judge were not addressed directly to the jury it must be presumed that the jury ignored them. It was but natural for the jury to listen to and become interested in the discussion between court and counsel, and any presumption to the contrary would do violence to the every-day experience and observation of lawyer and layman alike."

On the subject of the misconduct of the District Attorney, counsel for the People have cited a considerable number of cases which hold that where a defendant in a criminal case has taken the stand on his own behalf he may be cross-examined on all matters concerning which he has been examined in chief and that the District Attorney may comment upon the weight and credibility of his testimony. This is the elementary rule of law in this State which so far as we know has never been questioned.

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The misconduct of the District Attorney which we assigned was his act in wrongfully commenting upon the alleged fact that the defendant had failed to testify upon certain particular subjects. In support of our position we cited a number of cases, upon none of which does the District Attorney make any comment. Counsel for the respondent in their effort to uphold the conduct of the District Attorney cite *People* v. *Mead,* 145 Cal., 500. That case upholds the position of the appellant in the following language:

> "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 on any subject connected with the trial, although he may have been a witness and may have testified on those subjects."

THE INSTRUCTIONS.

We believe that we covered exhaustively and completely in our opening brief the subject of the instructions given to the jury by the trial judge. We have therefore nothing to add to what was there said in the opening brief except on the instruction given by the trial court on the subject of flight. We based our criticism of that instruction solely on the learned opinion of Presiding Justice Cooper in *People*

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v. *Gee Gong,* 15 Cal., 28. We further call the attention of the court to the language used by Justice Henshaw in *People* v. *Jones,* 160 Cal., 358:

> "This court has for a long time discountenanced the giving of such instructions and has refused to reverse cases where they have been given only when it could be seen that the instruction did not work injury. Thus, where a defendant flees "immediately after the crime has been committed with which he knows he is charged" and the reason for his flight remains unexplained, this court has, in effect, said that it would not reverse cases for an instruction in substance declaring to the jury that this evidence can be by them considered and given such weight as they thought fit as tending to indicate a guilty mind (*People* v. *Lem Deo,* 132 Cal., 199; 64 Pac., 265). But this court, as has been said, has frowned upon the giving of any such instructions because it is a clear invasion of the jury's province in weighing evidence and may work much injury and prejudice to a defendant's case. The instruction here given is typical. In the first place it omits the essential qualification that where flight can be indicative of a guilty consciousness, the defendant must know that he is charged with the crime."

It will be noted that instruction given by the trial judge in the case at bar not only tells the jury that evidence of flight is received as

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"indicative of a guilty mind," but that it also omits what Justice Henshaw has termed "the essential qualification" that the defendant must know that he is charged with the crime.

CONCLUSION.

In view of the failure of the Attorney General to even discuss or mention a majority of the grounds for reversal urged in our opening brief, in view of his utter failure to answer those arguments which he has attempted to meet, in view of his failure to produce a single authority which upholds even by implication a single questioned ruling of the trial court,—for these reasons in addition to those which we advanced in the first instance, we respectfully submit that the judgment and order appealed from should be reversed.

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Due service and receipt of a copy of the within brief is hereby admitted this.....day of January, 1917.

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Attorney General,

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Deputy Attorney General,
Attorneys for Respondent.

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