Crim. No. 475.

Vol - 2.

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 Opening Brief.

Volume III.

Subjects:

- The Zehandelaar and Otis Bombs.
- The Alleged McNamara Suit Case.
- Misconduct of the Trial Judge.
- Misconduct of the District Attorney.
- The Instructions.
- A Miscarriage of Justice.

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Filed this_____day of July, 1916.

_____, Clerk.

By_____, Deputy Clerk.

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APPELLANT'S OPENING BRIEF.
VOLUME III.

THE TRIAL—(Continued.)

(30) *The Zehandelaar and Otis Bombs*: The trial court, over the repeated objections of counsel for the defendant, permitted the prosecution to introduce evidence of three very extraordinary incidents that occurred after the destruction of the Times building. We shall

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first set forth the nature of this evidence and we shall then discuss at some length the law applicable to its admissibility. It will be remembered that the explosion which resulted in the destruction of the Times building occurred at approximately one o'clock on the morning of October 1st, 1910. About 9:30 a. m. of the same day a package was discovered at the home of Mr. Zeehandelaar, the Secretary of the Merchants & Manufacturers' Association of Los Angeles. When this package was opened it was found to contain fifteen sticks of some substance wrapped in the same oil paper that is commonly used as a container for dynamite. It was found in plain sight of the sidewalk, lying alongside and against the dwelling of Mr. Zeehandelaar. Shortly after its discovery, in answer to a summons by telephone, the police arrived. In the same package was a clock, a battery and electric wires. The wires were found connected to the purported dynamite sticks, to the clock and to the battery. The so-called "infernal machine" was examined by four or five witnesses who testified at the trial. None of these witnesses noticed at the time and while the package was still in the immediate vicinity of the place where it was discovered, any identification marks upon the sticks. It appeared that the clock was

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ticking, and still going; that the alarm hand which would close the electric current and explode the dynamite was set at about 1:07, and that the wires fastened to the battery were insulated, and that a certain zinc or brass clip, which in other devices of this nature introduced at the trial was used as a contact plate, was missing. Thereafter the fifteen sticks were removed to the office of the Chief of Police. One of these sticks was taken a few days later to the laboratory of the Giant Powder Company at Giant, Cal., to be analyzed. At the time of the analysis three certain sticks were analyzed, one of which, it is claimed by the People, came from the Zeehandelaar bomb. The other two sticks were part of the 80% nitrogelatin which it was claimed was left over after the manufacturing of the five hundred pounds alleged to have been ordered by Schmidt, Caplan and McNamara.

The chemist who analyzed the three sticks testified before the grand jury that two sticks were part of the left-over dynamite, and that the three sticks came from the Du Pont Powder Company. The analysis of the three sticks, however, showed that they were of approximately the same mixture. For the purpose of analysis only a portion of the stick which purported to come from Los Angeles was used.

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That stick, together with the two wrappers from the other two sticks which had been analyzed, were then sent to Los Angeles and were intermingled with the remaining sticks from the Zeehandelaar bomb. Some time in November, 1910, the dynamite was removed to the powder warehouse at Pacioma Quarry, some twenty miles from Los Angeles, for safe keeping. In October of 1912, six sticks were unwrapped and the wrappers were then taken to Indianapolis to be used as evidence in the case of *U. S.* vs. *Ryan, et al.* The contents of these six sticks was placed back without wrappers in the same box which contained the remainder. Some time previous to this, two sticks had been unwrapped and the wrappers taken away, and prior to that time one stick had been unwrapped and the wrapper taken away so that in all the wrappers of nine sticks had been removed. This unwrapped dynamite was all destroyed.

Originally the Zeehandelaar bomb had contained fifteen sticks. Of these nine had been removed, leaving only six remaining. Some time thereafter the District Attorney of Los Angeles County determined to destroy the remainder of the dynamite on the theory that it had deteriorated and was becoming dangerous, and the testimony showed that at the destruction

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of this dynamite there were still ten unwrapped sticks remaining, making in all a total of nineteen sticks destroyed where only fifteen had existed. No attempt was made at the trial by the prosecution to explain this startling discrepancy.

The only other analysis made of these sticks was made by E. H. Miller, Assistant City Chemist of Los Angeles. His testimony as to the results of his analysis will be found in the Reporter's transcript at pages 7399-7414. He testified that on February 27, 1913, he was sent by the District Attorney to make an analysis of the contents of the remaining sticks. At the quarry he made a sample test called the "water test" to find out whether or not the substance contained nitroglycerin. He found none. Immediately thereafter he made a "funnel" test of the same sample and found no nitroglycerin. He then took a sample from another stick, carried it back with him to Los Angeles and made an "ether" test and an analysis to find out the constituent elements of that particular sample. Under the "ether" test the slightest trace of nitroglycerin will be demonstrated. After having made this thorough chemical analysis, he found that the so-called "dynamite" contained no nitroglycerin, but was a mixture composed of sodium, of

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nitro woodpulp and some greasy substance with a petroleum base which could not have been an explosive under any circumstance. Under the most favorable conditions imaginable the compound could have been a mere combustible and not an explosive.

W. J. Ford, a former deputy district attorney of Los Angeles, and one Davidson, acting under the direction of the District Attorney, destroyed the ten sticks which we have previously referred to. When these sticks were destroyed they were not directly exploded, but in order to destroy them some 40%, or ordinary commercial dynamite, was set off and, of course, no one who witnessed the destruction could say whether the condition of the disputed sticks exploded or were scattered and destroyed as so much putty might have been.

Thus it appears that there is the very gravest doubt whether the package found at the house of Mr. Zeehandelaar contained any explosive substance whatever. In any event no connection was ever shown between this mysterious package and the explosion which caused the destruction of the Times building. To admit such evidence without the laying of any foundation or the showing of any connection with the crime for which the defendant was on trial was certainly the very gravest error. In any event,

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there is certainly a reasonable doubt as to whether the Zeehandelaar package could have been used in the commission of any crime.

We have already set forth the substance of the testimony as to the finding on the same day at the house of General Otis of a suit case. This suit case was new and outwardly contained no identification marks whatsoever. The police were summoned, and upon their arrival, one of them, Officer Rico, began cutting open the suit case with a knife. A burring noise was heard, smoke was seen to come from the suit case and the officers took to their heels. When they had run a distance variously estimated at from forty feet to one hundred yards, an explosion occurred which broke some of the windows in General Otis' house and tore a hole in the gravel walk in the public park to which the suit case had been carried. Of course, all evidence as to the mechanism contained within the suit case was entirely destroyed by the explosion.

* * *

(31) *The Suit Case Found at the Ferry Building.* The witness Ed. Gibson (Rep's. Trans., pp. 6482-6492) testified that on the 24th day of January, 1911, nearly four months after the destruction of the Times building, he found in the checking room at the Ferry station at San Francisco a certain suit case. This suit case

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contained copies of two San Francisco newspapers issued October 1st and October 2nd, 1910. The suit case also contained a tattoo alarm clock, a small tin can, a coil of black fuse, a box of Du Pont blasting caps, a piece of brass plate, a small spring attached to a brass bar, two little brass bars with a handle on them and several screws. This suit case with its contents was offered in evidence by the prosecution, and was admitted in evidence by the Court over the objection of the defendant.

This ruling was one of the most flagrantly erroneous and highly prejudicial rulings made by the Court during the progress of the entire trial. There was nothing in the evidence to connect the suit case in any manner with the defendant on trial. It was found, as has been previously indicated, nearly four months after the destruction of the Times building. The only identification of this suit case is found in the following testimony of Mrs. Ingersoll:

> "State whether or not you ever saw that suit case before, Mrs. Ingersoll.
>
> "A. I saw that before; I think this is the suit case that Brice brought to the room.
>
> "MR. COGHLAN—I move that be stricken out as the thought or opinion or conclusion of the witness.
>
> "MR. KEYES—I will consent to have that go out.

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"Q. You say you have seen it before?

"A. Yes sir.

"MR. McKENZIE—Now, just a minute. This witness testified that she thought she had seen it before.

"MR. KEYES—Well, I consented to have that stricken out.

"MR. COGHLAN—She has seen it in the district attorney's office—is that what you mean?

"MR. KEYES—She has seen it there, yes indeed.

"MR. McKENZIE—Oh, pardon me.

"MR. KEYES—You say you have seen it before?

"A. Yes sir.

"Q. Now, when did you first see it, Mrs. Ingersoll?

"A. It is the suit case he brought the first time he came to my house.

"Q. And you saw it in his room there at your house, did you?

"A. Yes sir.

"Q. And examined it?

"A. I didn't examine it; it was open.

"Q. Well, you saw it?

"A. In the room.

"MR. KEYES—We ask to have this marked at this time for identification, if the Court please, as an exhibit.

"THE COURT—For identification, People's offer 571."

Upon this identification the Court admitted not only the suit case but all of its contents in evidence. Not only that,—but the Court, over the objection of the defendant, permitted the

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contents of the suit case to be exhibited to the jury and permitted the newspapers which the suit case contained to be read and examined by the jury, without the giving of any cautionary instruction that the statements made in those newspapers were not evidence in the case. These newspapers were issues printed upon the day following the destruction of the Times building, and they contained not only extensive accounts of the destruction of the building but pictures showing the charred bodies of some of the victims who lost their lives in the disaster. All of this was done over the protest of counsel for the defendant. Mr. Coghlan, one of the defendant's counsel, pointed out to the Court that the newspapers were inadmissible, and should not be exhibited or read to the jury, but the Court admitted them in evidence generally, without telling the jury that they could not consider the statements made in those newspapers as evidence against the defendant. These newspapers, for some reason, have not been copied into the clerk's transcript. Under the provisions of rule XXV of the Supreme Court, this Court has the power, if it so desires, to require the clerk of the court below to transmit these papers, so that this Court may inspect them. The Attorney General will doubtless stipulate to the contents

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of these copies; if he declines to do so, we ask that this Court order the clerk of the Court below to transmit the originals. It is only by inspecting the contents of the said newspapers that this Court can adequately determine the highly prejudicial effect that this utterly incompetent and hearsay evidence exercised in this case. In order that there may be no dispute as to what occurred upon the introduction in evidence of the said suit case, and in particular that there may be no dispute as to the fact that the jury with the sanction of the Court were allowed to read those newspapers, we set forth the proceedings that were had upon the introduction of the said suit case:

"Q. I direct your attention, Mr. Gibson, to a suit case which has been marked for identification in this cause No. 571, being identified by a witness, and ask you to state if you ever saw that before?

"A. I saw it; yes sir.

"Q. Where did you first see it?

"A. I got it from the checking room at the Oakland ferry in San Francisco.

"Q. And you remember in which checking room you got it at that time?

"A. In a news and cigar stand.

"Q. And when did you find it there, Mr. Gibson?

"A. Well, there ought to be a date in there—inside.

"Q. Just open it and see.

"MR. McKENZIE—No, just a moment.

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We object to this suit case being opened on the ground it is incompetent, irrelevant and immaterial. I believe it contains other articles, doesn't it?

"MR. KEYES—Yes; we intend to offer the articles.

"MR. McKENZIE—Well, we claim that there is no foundation.

"THE COURT—Overruled.

"MR. McKENZIE—And we submit the proper way is to lead him as to the date.

"MR. KEYES—I have asked him as to the date.

"A. January 24th, 1911.

"Q. Was that date put on there by you?

"A. It was; yes sir.

"Q. Now, did you open the suit case at that time, Mr. Gibson?

"A. I did.

"Q. Did you examine the contents?

"A. I did.

"Q. Will you look at the contents of that suit case as they are there now, and state whether or not the same articles, that are there now were in the suit case when you found it in the news stand.

"MR. McKENZIE—This is objected to as incompetent, irrelevant and immaterial and no foundation.

"THE COURT—Overruled.

"A. They are the articles.

"Q. I direct your attention to a package of newspapers in the cover of this suit case, Mr. Gibson, dated October 1st,—Saturday, October 1st, 1910; the newspapers being a copy of the San Francisco Post, and a copy of the San Francisco Chronicle—just a moment. I withdraw that. The papers being two copies of the San Francisco Post.

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They are both dated Oct. 1, 1910, one of them being the 6 o'clock edition, and the other labeled, "The Latest Edition," and one copy of the Chronicle of San Francisco, and ask you to state if those newspapers were in the suit case when you found it?

"A. Two of them were, I know.

"Q. And whereabouts in the suit case were they?

"A. I couldn't say just exactly where. They were somewhere in here.

"Q. Wasn't this one there?

"A. That was there, yes sir, and so was this.

"MR. WOOLWINE—Indicate in the record.

"MR. KEYES—Now, you indicate the San Francisco Chronicle dated October 2nd, 1910, and a copy of the San Francisco Post dated Saturday, October 1st, 1910, and designated as the latest edition. How about the other copy of the Post?

"A. My recollection they were just this way when I took it off, one paper, and not separate papers.

"Q. You mean by that that the two editions of the Post were folded together?

"A. Something like they are now. I didn't know they were different dates.

"Q. Now, Mr. Gibson, I direct your attention to a Tattoo intermittent alarm clock, and ask you to state if that was in the suit case.

"MR. McKENZIE—Now, we object to this as being incompetent, irrelevant and immaterial and no foundation; a failure to connect it up; highly prejudicial to this defendant, your Honor.

"THE COURT—Overruled.

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"A. There was a clock like that in there. I don't see any mark on it, though. I remember that it was the make of a clock I had never seen before, that is, the name on it.

"MR. KEYES—Well, was it a clock similar to that?

"A. Just exactly like that.

"Q. Now, I also direct your attention to some fuse attached to a little tin can, and ask you to state if that was in there?

"A. Yes, that was in there.

"Q. I also direct your attention to a box of Du Pont blasting caps marked "100 Du Pont Quintuple Caps," and ask you to state if that was in there

"A. That was in there.

"Q. And also direct your attention to a coil of black fuse. State whether or not that was there?

"A. It was.

"Q. And to another coil of black fuse?

"A. Yes sir, that was there.

"Q. To a coil of white fuse?

"A. There was a coil of white fuse in there, just like that.

"Q. And to a large coil of black fuse?

"A. Yes, there was a piece of that there.

"Q. Now, Mr. Gibson, I direct your attention to a piece of brass plate—I withdraw that offer. I direct your attention to an envelope, here containing a piece of brass plate, a small spring attached to a brass bar, and two little brass bars with a handle on them, and several screws, and ask you to state if they were in there?

"A. Yes, they were in the bottom of the grip.

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"Q. They were not attached to the alarm clock at that time?

"A. No sir.

"MR. KEYES—We now offer in evidence, if the Court please, this suit case, together with its contents as described by the witness.

"MR. McKENZIE—Objected to upon the ground it is incompetent, irrelevant and immaterial, no foundation, not connected.

"THE COURT—Overruled. In evidence as People's Exhibit 571.

"MR. KEYES—We want to keep those articles, if the Court please, right in the suit case. I don't believe it will be necessary to offer them as separate exhibits, unless we letter them. For the purpose of the record, I will offer the suit case as exhibit 571; the three newspapers heretofore described, as exhibit 571a; the alarm clock as exhibit 571b; the alarm clock attachment, that is, the brass pieces and screws, as exhibit 571c; the box of caps, as exhibit 571d; the cup with the fuse attachment, 571e; the coil with that fuse, 571f; the three coils of black fuse, 571g.

"Q. Mr. Gibson, when you saw this suit case, was this tag on the suit case at that time?

"A. Yes, that was on.

"MR. KEYES—We offer that as a part of the exhibit and make it 571h. The tag reads as follows: "Foster & Orear Parcel Depository. Ferry Building, San Francisco, Cal., Parcel Check. Date October 3, 1910. No. 42419."

"MR. McKENZIE—We object to that

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on the ground it is hearsay, incompetent, irrelevant and immaterial.

"THE COURT—Overruled.

"MR. KEYES—You may examine.

CROSS EXAMINATION.

"MR. McKENZIE—Was this clock in exactly the same condition, Mr. Gibson, now as when you found it?

"A. I wouldn't say so.

"Q. Did you try to see whether this alarm clock would work or not?

"A. I did not.

"Q. Do you know whether it did or not?

"A. I do not.

"Q. Do you know, as a matter of fact, that it would work?

"A. I don't know that either.

"Q. You don't remember that. Did you take the number of this alarm clock and endeavor to trace where it had been purchased?

"A. No sir, I did not.

"Q. You don't know, of your own knowledge, Mr. Gibson, who deposited the suit case in the place where you received it?

"A. No sir.

"Q. Mr. Gibson, you identify this suit case by a date mark that you put on some of the articles, do you?

"A. Some of the articles that I put my initial on.

"Q. Did you put your initials on the suit case itself?

"A. Yes.

"Q. And where are they, please?

"A. Right here (*showing*).

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"Q. And you first saw this suit case, I believe, in the year 1911?

"A. Yes sir.

"Q. What date?

"A. Well, I would have to look in here to see. April, I think it was.

"Q. January 24th?

"A. January 24th, the date was.

"MR. McKENZIE—That is all.

REDIRECT EXAMINATION.

"MR. KEYES—Your initials are on what part of the suit case?

"A. Right here.

"Q. On the top?

"A. No, on the main part of the suit case.

"MR. McKENZIE—On the cover?

"MR. KEYES—No, not on the cover.

"A. Right here on the top of the suit case, the handle part.

"MR. KEYES—Now, at this time, if the Court please, I would like to show these papers to the jury.

"MR. McKENZIE—Well, just a minute, now. We object to the newspapers, may it please your Honor, on the ground it is incompetent, irrelevant and immaterial, and hearsay; no foundation.

"MR. KEYES—They are already in evidence.

"MR. McKENZIE—Just a minute, please, Mr. Keyes; wait until we get a ruling, can't you?

"MR. COGHLAN—Of course, your Honor, there can be only one purpose for the introduction of articles here; and that is to trace this valise to its ownership. These

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newspapers, the Court please, cannot be read or exhibited to this jury, in our opinion; they haven't any foundation; not relevant, competent or material, and not attachable to this defendant.

"MR. KEYES—It has already been testified to, the Court please, whose suitcase this is. Now, we think any articles in that suit case are relevant and competent, and should go to the jury, and the newspapers are already offered in evidence. The date of the newspapers is important, and also, in a general way, the contents of the newspaper, as showing the state of mind of the person who owned the suit case. If these newspapers had not referred in any way to the destruction of the Times building they probably would not be relevant, of course; but, I don't want to state the contents of the newspapers, but I will pass them up to the Court and let him examine them.

"THE COURT—I presume the Court can anticipate what the contents are.

"MR. COGHLAN—Mrs. Ingersoll testified she thought this was the suit case that belonged to J. B. McNamara, and nothing of the contents thereof. Now, this suit case is found some months later, by this police sergeant, Mr. Gibson, and brought into court, and he identified these particular articles as having seen them at the ferry in some checking stand, and particular reference was made to these newspapers at that time. Now, if that is binding upon J. B. McNamara, certainly it is not binding on this defendant. It is an act and declaration by a co-conspirator, after the object of the conspiracy has been consummated.

"MR. COGHLAN—These papers them-

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selves bear a date which renders them inadmissible, under our contention.

"MR. KEYES—They are really part of the *res gestae,* the Court please, of this offense.

"THE COURT—Yes, I think so; I think the papers are admissible.

"MR. COGHLAN—Of course, they are not a part, we contend, of the *res gestae,* and we make that further ground of our objection, please the Court.

"THE COURT—Objection overruled.

"MR. COGHLAN — The Supreme Court I believe, pointed that out.

"MR. McKENZIE—I desire the record to show that these papers of October—what date is that, Mr. Keyes?

"MR. KEYES—Two of them October 1st, and one October 2nd.

"MR. McKENZIE— —have been shown to the jury and displayed to the jury, and the jury are now reading them. We desire the record to show that.

"THE COURT—The record may show it.

"MR. KEYES—That is the fact.

"MR. McKENZIE—We desire also, to submit to your Honor, this tag reads, October 3, 1910, Foster & Orear, Parcel Depository, Ferry Building, October 3rd, 1910.

"MR. NOEL—That has already been read. Read three times now.

"MR. COGHLAN—It won't hurt to read it three times."

(Rep's. Trans., pp. 6482 to 6492.)

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We believe that the foregoing episode is unique in the annals of Anglo-Saxon jurisprudence. Under what theory the Court allowed the suit case and its contents to be admitted in evidence we are utterly at a loss to determine. It was not in any manner connected with the defendant. Its identification by Mrs. Ingersoll as having belonged to McNamara was of the most unsatisfactory character. That the newspapers were inadmissible, that their contents were not evidence, is a rule too plain to admit of argument. Jones, in his work on Evidence, section 5825, says:

> "It is hardly necessary to cite authorities to the proposition that as a general rule newspapers are not admissible as evidence of the facts stated therein."

A newspaper account of the transaction is ordinarily hearsay and inadmissible.

Elliot on Evidence, section 419;
Abbott on Proof of Facts, 721;
Downs vs. *New York etc. Railroad Co.,* 47 N. Y., 83;
Fosgate vs. *Herkimer Manufacturing & Hydraulic Co.,* 9 Barb., 287;
Riley vs. *Mayor of St. John,* 11 New Brunswick, 78;
Baldwin vs. *Bricker,* 86 Ind., 221;
State vs. *Brown,* 4 R. I., 528.

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In *Green* vs. *Ashland Water Co.,* 101 Wis., 258, 77 N. W., 722, which was an action against a water company for damages for the death of plaintiff's intestate alleged to have been caused by impure water, the Court, referring to the admission in evidence of a newspaper article says:

> "The appellant further complains of a ruling, admitting in evidence an article published in an Ashland newspaper about seven months prior to Green's death, wherein the defendant was charged with distributing poisonous water to its customers and requiring the city to pay for water service twice as much as was proper, and it was suggested that the most expeditious method of dealing with defendant, in order to remedy the evils complained of, was to annul its franchise and seize its property; and it was further suggested that the officers of the company should be prosecuted without leniency, civilly and criminally, if they did not voluntarily and immediately remedy such evils. There can be no justification suggested for the admission of that evidence. We have a right to assume that the learned counsel for respondent were unable to suggest any, as they did not attempt to do so. If overcharges were made by the water company, that had nothing to do with causing the death of Green by typhoid fever, and if the death was so caused, the declarations made in the newspaper in regard to the condition of the water certainly had no possible bearing on that question. They were no more competent as evidence be-

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cause made editorially in a newspaper than if made by any individual. They had no legitimate place in the trial. They were well calculated to prejudice the jury against the defendant and prevent a fair and impartial trial of the important issues between the parties on the legitimate evidence produced. An examination of the record shows that considerable other evidence, admitted over the objections of appellant's counsel, to which no particular reference is made in their brief, was irrelevant and prejudicial. This observation refers to proceedings of the common council covering a period of about one year before Green's death and a month or two afterwards. That placed before the jury the history of a bitter contest that existed between defendant and the city of Ashland, covering the period mentioned. It closed with a resolution passed some time after the death of Green, canceling the defendant's franchise and directing the city attorney to commence proceedings to annul the same by judicial decree and to condemn the water supply. It is not claimed that any of this evidence was admissible for any purpose except to show notice to the defendant that it was claimed by the city that the water was unwholesome for domestic use. So little of it was relevant for that purpose, and that little so involved with matter having no bearing even on the question of notice, and so tending to prejudice the minds of the jury unfavorably to the defendant and to prevent a fair trial, that the whole should have been rejected on defendant's objection."

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The words used by the Supreme Court of Wisconsin in the foregoing decision are decisive of the question here involved. By the admission of these newspapers in evidence, voluminous hearsay and unsworn narratives of the destruction of the Times building and the death of the deceased were placed before the jury. That this evidence must have been highly prejudicial to the defendant will be shown by the most casual reading of the newspaper statements.

The theory under which the District Attorney offered these newspapers in evidence was, as appears from the statement of Mr. Keyes (Rep's. Trans., p. 6490), that the contents of the said newspapers were important "as showing the state of mind of the person who owned the suit case." Of course, this statement was a mere subterfuge. Nearly every person reads the newspapers, and, of course, every one who bought a newspaper on the 1st or 2nd of October, 1910, could not have failed to have read the story of the destruction of the Times building. That the mere possession of such a newspaper showed guilty knowledge or a state of mind is a proposition too absurd to be dignified by discussion, but in any event, whatever the relevancy of this suit case and its contents

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might be, as against J. B. McNamara, it was certainly irrelevant for any purpose upon the trial of this defendant.

ACTS AND DECLARATIONS OF CO-CONSPIRATORS OCCURRING AFTER THE ACCOMPLISHMENT OF THE CRIMINAL ENTERPRISE ARE INADMISSIBLE.

The Zeehandelaar package and Otis bomb and the alleged McNamara suit case are inadmissible in evidence for the same reason, namely, that if they are evidence of anything at all, they are evidence of acts occurring after the accomplishment of the object of the alleged conspiracy. This is especially true in the case of the alleged McNamara suit case, with its contents. Even if the possession of the newspapers containing accounts of the destruction of the Times building might tend in some degree to show the state of mind of J. B. McNamara, they are utterly irrelevant as against the defendant Schmidt. They were issued after the destruction of the building, at a time when any previous conspiracy or criminal design had become merged in the completed offense. It is a fundamental rule, supported by authorities from every State in the Union that acts done or declarations made by one member of a criminal conspiracy, after the accom-

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plishment of the object thereof are not competent evidence as against his co-conspirators.

James vs. *State,* 115 Ala., 83, 22 So., 565;
Roland vs. *State,* 45 Ark., 132;
Wisdom vs. *People,* 11 Colo., 170, 17 Pac., 519;
Howard vs. *State,* 109 Ga., 137, 34 S. E., 330;
Rex vs. *Marks,* 1 Hawaii, 81;
O'Neil vs. *State,* 42 Ind., 346;
State vs. *Phillips,* 118 Iowa, 660, 92 N. W., 875;
State vs. *Young,* 55 Kans., 349, 40 Pac., 659;
Shelby vs. *Com.,* 91 Ky., 563, 16 S. W., 461;
State vs. *Sims,* 106 La., 453, 31 So., 71;
State vs. *Palmer,* 79 Minn., 428, 82 N. W., 685;
Grogan vs. *State,* 63 Miss., 147;
State vs. *Schaeffer,* 172 Mo., 335, 72 S. W., 518;
State vs. *English,* 14 Mont., 399, 36 Pac., 815;
Priest vs. *State,* 10 Neb., 393, 6 N. W., 468;
State vs. *Soule,* 14 Nev., 453;
State vs. *Larkin,* 49 N. H., 39;

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People vs. *Kief,* 126 N. Y., 661, 27 N. E., 556;
State vs. *Earwood,* 75 North Car., 210;
Dilcher vs. *State,* 42 Ohio State, 173;
State vs. *Hinkle,* 33 Ore., 93, 54 Pac., 155;
Heine vs. *Com.,* 91 Pa. State, 145;
State vs. *Green,* 40 South Car., 328;
Owens vs. *State* (Tenn), 16 Lea., 1;
Steed vs. *State,* 43 Tex. Crim., 567, 67 So. W., 328;
People vs. *Farrell,* 11 Utah, 414, 40 Pac., 703;
State vs. *Fuller,* 39 Vt., 74;
Oliver vs. *Com.,* 77 Va., 590;
Brown vs. *U. S.,* 150 U. S., 93;
Rex vs. *Turner,* 1 Moody C. C., 347.

The California cases to the same effect are numerous. In *People* vs. *English,* 52 Cal., 212, the defendant and one Turner were jointly indicted for grand laceny committed by stealing an ox. The Court permitted a witness against the objection of the defendant to testify that subsequent to the commission of the larceny the co-defendant had made a statement tending to show that he and the defendant on trial had stolen the ox. The Court held that the evidence of the declaration of

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Turner made after the alleged offense was fully consummated was not admissible against the defendant on trial.

In *People* vs. *Aleck,* 61 Cal., 137, the Court says:

> "But there are other points in the case which it is proper for us to notice. The Court erred in admitting in evidence the confession of Sam Dodge. It is true that he was jointly indicted with the defendant Jim Aleck, and the evidence in the case shows that he was present, aiding in the commission of the homicide; but it was a clear violation of the rules of evidence to admit on the trial of a confederate his confession, made after the act was fully accomplished. Speaking of the acts and declarations of confederates it is said: 'Care must be taken that the acts and declarations thus admitted, be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of its objects. If they took place at a subsequent period, and are, therefore, merely narrative of past occurrences, they are, as we have just seen, to be rejected.' (1 *Greenl. Ev.,* Sec. 111.) The rule is clearly stated by another high authority as follows: 'And it should be observed in reference to this evidence, that the declarations and confessions of one of the conspirators, made after the offense has been fully committed, and the transaction is fully over, can not be given in evidence against another conspirator; because, the object of the combination being accomplished, such

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declarations and confessions are not anywise in execution of the original common design.' (2 *Bish. Cr. Pro.,* Sec. 191.) The Supreme Court of this State in the case of the *People* vs. *English,* 52 Cal., 212, said: 'The declarations of Turner (who was indicted with English) made after the alleged offense was fully consummated, were not admissible against English.' These and other authorities to which reference might be made, if necessary, demonstrate that the declarations made by Sam Dodge several days after the homicide, were not admissible in evidence against Jim Aleck."

In *People* vs. *Irwin,* 77 Cal., 506, it is said that no falsehood, evasion or silence of a co-conspirator occurring after the offense is committed is admissible. In *People* vs. *Dilwood,* 94 Cal., 89, we read as follows:

"The Court erred in admitting evidence as to the appearance, conduct and declarations of one Deegan, a co-defendant, the day subsequent to the larceny, the defendant being absent. Conceding that Deegan and defendants were co-conspirators in stealing the calf, at this time the theft has been consummated, and the conspiracy a thing of the past. The declarations of a co-conspirator, after the object of the conspiracy had been accomplished, are not admissible in evidence. The authorities relied upon by respondent are cases where a disposition of the stolen property and a division of the proceeds were a part of the scheme or plan

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of the criminals. The facts of this case do not bring it within the rule there discussed."

In *People* vs. *Brady,* 4 Cal. Unrep., 661, 36 Pac., 949, it is said:

"It is an elementary principle of law which has been recognized by many of the decisions of this Court that the declarations and statements of a co-conspirator made after the accomplishment of the conspiracy in the absence of the defendant are inadmissible."

In *People* vs. *Gonzales,* 71 Cal., 575, it was said:

"Even admitting that other evidence in the record tends to demonstrate that she had conspired with the defendant unjustifiably to slay George Kirkham, yet her narrations (made after the crime with which the former was charged had been fully consummated) were not admissible against him. Prejudicial error was therefore committed in allowing them to go to the jury."

In *People* vs. *Oldham,* 111 Cal., 648, the Court says:

"It is conceded that one George Hilton was the acting, participating robber. At the trial he took the witness stand and so stated, giving all the details bearing upon the perpetration of the crime, and directly charging the defendant as a *particeps criminis.* It is now claimed by the prosecution

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that the defendant, Oldham, though several miles distant at the immediate time of the robbery, was a co-conspirator, and aided and encouraged the commission of the crime, and that Hilton's testimony in this regard is true. Hilton was arrested some seven days after the robbery, in an adjoining county. The officer arresting him testified as a witness at the trial to statements made by Hilton when arrested, pertaining to the commission of the offense and Oldham's connection therewith. Another witness (Stanley) testified to statements made by Hilton while in jail after his arrest and in the absence of the defendant, and these statements amounted to a confession including the details of the robbery. All this evidence was admitted under objection of defendant's counsel, and, we are entirely clear, was erroneously admitted. Evidence of the statements of a co-conspirator, made during the life of the conspiracy, are admissible against the other conspirator, but, after the crime has been committed, the conspiracy is an accomplished fact. It is a thing of the past, and such statements of a co-conspirator stand in no different relation to the law and are no more admissible against a defendant than though he were a total stranger to the whole transaction; for they are the purest hearsay. This Court said in *People* vs. *Moore,* 45 Cal., 19: 'It was never competent to use as evidence against one on trial for an alleged crime the statements of an accomplice not given as testimony in the case, nor made in the presence of defendant, nor during the pendency of the criminal enterprise and in furtherance of its objects. To hold such

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testimony admissible would be to ignore the rules of evidence settled and everywhere recognized from the earliest times.' The same doctrine is also reiterated in *People* vs. *Dilwood,* 94 Cal., 89. It seems that the trial court admitted some of this objectionable evidence upon the ground that the statements were proper as proving the commission of the robbery by Hilton, but that cannot be so. As against the defendant the actual commission of the robbery by Hilton could not be proven by his extrajudicial confessions. Certainly not in a case like this, where they were made without his presence and hearing. If Hilton had refused to take the stand and testify, it would not be contended for a moment that his confessions could have been used against this defendant for the purpose of proving the robbery, or for any other purpose.

"It is insisted that the foregoing error of the Court was cured when the witness Hilton took the stand and gave to the jury substantially the same statements and confessions he had prior to that time made to the officers. We cannot say that the jury attached no importance to these statements of Hilton made shortly after the commission of the crime, nor that the verdict would have been the same if they had been rejected by the Court. It is further insisted that the error of the Court was cured by the following instruction given to the jury: 'I charge you that no statements, or admissions, or confessions (other than his own sworn testimony in court), made by the alleged accomplice, Hilton, after the commission of the offense charged, and not in the presence of the defendant, should be con-

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sidered by you as evidence in this case against this defendant, as tending to connect him with the offense.' Judges are not justified by the law in admitting evidence before the jury under objection and exception, and then, after the case has been argued by counsel, instruct the jury that such evidence should not be considered by them in making up their verdict. Such a course, if practiced, certainly would be out of the ordinary, and not just to a defendant. This is the fair interpretation of the instruction; and if the judge also intimated by this particular charge to the jury that the admissions and confessions of Hilton, not under oath, and made subsequent to the commission of the robbery, and without the presence of the defendant, were admissible in this case for the purpose of proving a robbery, then, as already suggested, the instruction was clearly erroneous from that standpoint."

In *People* vs. *Collum,* 122 Cal., 186, the Court says in the course of its opinion:

"Even conceding Shephard to have been a co-conspirator, still the evidence was the purest hearsay, for the conspiracy had ended at the time this confession was made. The crime was a thing of the past."

In *People* vs. *Opie,* 123 Cal., 294, we read the following:

"William Opie and Edward Opie were jointly charged. William Opie was tried. Conceding the evidence established a con-

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spiracy between these two parties to commit the crime of grand larceny, still the Court committed error in allowing evidence to be introduced as to the appearance, the conduct and the declarations of Edward Opie, the defendant, not upon trial. It is elementary law that such evidence as to a co-conspirator not upon trial partakes of the character of pure hearsay. This evidence was all directed toward matters occurring after the commission of the offense—after the conspiracy was accomplished and ended.

There is not even the excuse for its admission that the defendant on trial was present at the time. This Court has had occasion many times, and recently to advert to the error of similar judicial action (*People* vs. *Moore,* 45 Cal., 19; *People* vs. *Dilwood,* 94 Cal., 89; *People* vs. *Oldham,* 111 Cal., 652). Without question it may be said that this evidence was extremely prejudicial to defendant, and its admission demands a new trial of the case. The attorney general attempts to meet the force of these objections by saying that the conspiracy was not ended when the events occurred which this evidence disclosed. It is said the conspiracy was not ended because the property stolen had not yet been distributed between the thieves. This is no answer, for there is no evidence disclosing that it had not been distributed at the time; and, again, there is no evidence that it was ever intended that it should be distributed. In certain cases where the conspiracy discloses an intention to divide the property to be stolen, evidence of the acts and declarations of a co-conspirator taking place any time prior to the division are admitted. This is

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upon the theory that the conspiracy does not end until that time. The present case discloses nothing of that kind."

In *People vs. Sidelinger,* 9 Cal. App., 298, the defendant had been convicted of manslaughter growing out of a labor dispute. In the course of its opinion the Court says:

"The prosecution, as a part of its case in chief, proved by Mrs. Peterson that after the shooting she went over to Hayes. She was then allowed to testify, over the objection of defendant, that she "asked him if he shot the boys and why he did shoot them, and he said 'they were scabs.' What Hayes then said was in no sense something said or done in pursuance of the conspiracy, or a part of the *res gestae.* The shooting was over, and the crowd had dispersed. The statement of Hayes was but a narrative concerning a past and completed act. What he then said about the matter could only be used as impeaching testimony after he had been a witness, and the proper foundation had been laid for proving statements inconsistent with his testimony. The action of the Court upon this matter was clearly erroneous (*People* vs. *Smith,* 151 Cal., 625, 91 Pac., 511; *People* vs. *Irwin,* 77 Cal., 494, 20 Pac., 56; *People* vs. *English,* 52 Cal., 212)."

In *People* vs. *Dresser,* 17 Cal. App., 27, the Court says:

"Appellant was jointly charged with one Bjerks with forging and uttering, with

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knowledge of the forgery, a Wells-Fargo money order. He was separately tried and convicted, and upon judgment being pronounced, took an appeal from the judgment to this Court.

"The principal point urged for a reversal is based upon the action of the Court in permitting the prosecution to prove, by the officer who arrested the appellant's co-defendant, Bjerks, certain statements made to the officer by said Bjerks, tending to implicate defendant in the commission of the offense with which he was charged. These statements by Bjerks were made in the presence of the defendant on trial. They were made after the completion of the offense for which appellant was being tried, and were in no wise made in furtherance of any common design or in or about the forgery or uttering of any writing whatever. The statements in question were simply narratives of past and completed events, and not being made in the presence of the defendant upon trial, were clearly inadmissible as against him.

"Nothing is better established than that statements made by an accomplice or co-conspirator, after the completion of the offense, and which are simply narratives of the events concerning the accomplished crime, are not admissible against the defendant on trial unless made in his presence (*People* vs. *Moore,* 45 Cal., 19; *People* vs. *Stanley,* 47 Cal., 113, 17 Am. Rep., 401); *People* vs. *Aleck,* 61 Cal., 136; *People* vs. *Gonzales,* 71 Cal., 571, 12 Pac., 783."

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In *People* vs. *Ayhens,* 16 Cal. App., 618, the District Court of Appeal of the First District reversed a judgment of conviction because the trial Court admitted the hearsay declarations of an alleged co-defendant and co-conspirator made after the commission of the offense even though they were made in the presence of the defendant. Presiding Justice Lennon in the course of a very able opinion says:

> "The defendant, jointly with one Charles Miller, was charged with the crime of burglary. He was convicted, upon a separate trial, of burglary in the first degree, and sentenced to fifteen years in the State's prison at San Quentin.
>
> "The testimony of the arresting officer with reference to a conversation which he had with the co-defendant Miller at the time of the arrest and not in the presence of the defendant was not objected to at the trial, and the error in the admission of this testimony cannot now be considered.
>
> "Shortly after the commission of the burglary Police Officer Frank Anderson, while patroling his beat, encountered the defendant and Miller. Their conduct was such as to attract the attention and arouse the suspicion of the officer. Upon the approach of the officer the defendant fled, and an immediate search of Miller's person revealed a box of cigars, which was subsequently identified as having been stolen from the premises charged to have been burglarized. Miller was placed under ar-

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rest and taken to the city prison in a patrol wagon. The arresting officer was permitted to testify, over the objection of the defendant, that immediately after Miller had been booked a brush and a razor, also identified as a portion of the property stolen from the premises in question, were found secreted in the patrol wagon.

"This testimony was admissible as a part of the peoples' case in proof of the fact that the burglary charged had been committed.

"It may not have been competent evidence to show that the defendant committed the crime charged, but it did tend to show that the premises described in the information had been burglarized, and for this purpose it was competent, relevant and material. The defendant's objection, which went only to the competency of the evidence, was properly overruled.

"Several days after the arrest of Miller the defendant was apprehended and charged with the crime. Miller was not called at the trial as a witness for the people, but Police Officer Kyle was permitted to testify, in effect, that, in his presence, and in the presence of the defendant, Miller declared that the defendant committed the burglary. Kyle testified further that the defendant promptly and unequivocally asserted that Miller was not telling the truth, and then, in response to questions put to him by Kyle, narrated the circumstances of his meeting with and being in the company of Miller on the night of and shortly after the commission of the crime.

"Counsel for defendant objected to the testimony of the witness Kyle, upon the ground that the proffered statements of

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Miller were hearsay, and made after the commission of the burglary. The Court overruled the objection upon the theory that Miller's accusation of the defendant was admissible merely because it was made in the presence of the defendant. Subsequently the defendant moved to strike out the testimony referred to. The district attorney resisted this motion upon the theory that he had shown the existence of a conspiracy by Miller and the defendant to commit the crime charged, and that inasmuch as the testimony of Officer Kyle purported to disclose the declarations of a co-conspirator made in the presence of the defendant, it was admissible. The motion to strike out was denied, and in this, and in its ruling upon the previous objection, the Court erred to the prejudice of the defendant.

"The testimony objected to was clearly hearsay, and its admission cannot be justified upon the theory that it was evidence of the declarations of a co-conspirator, or merely because the declarations of Miller were made in the presence and hearing of the defendant.

"The record is barren of any evidence which would tend to show the existence of a conspiracy to commit the crime charged. But even if the record disclosed evidence sufficient to warrant the theory of the existence of a conspiracy, it is apparent that the declarations of Miller were made subsequent to the perpetration of the crime, and several days after the completion of the conspiracy claimed to have been shown by the people.

"The declarations of a co-conspirator, to

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be admissible in evidence, must be made during the life of and in furtherance of the conspiracy, and not upon or after its consummation (*People* vs. *English,* 52 Cal., 212; *People* vs. *Aleck,* 61 Cal., 138; *People* vs. *Dilwood,* 94 Cal., 90, 29 Pac., 420).

"We are aware that there are several decisions in this State wherein it has been said, generally, that conversations had in the presence and hearing of a defendant are not hearsay, and may be admitted in evidence against him (*People* vs. *Moore,* 45 Cal., 20; *People* vs. *Irwin,* 77 Cal., 504, 20 Pac., 56; *People* vs. *Mayes,* 113 Cal., 627, 45 Pac., 860). But we do not understand those cases to decide as an unqualified rule of law that the declarations of a person not called as a witness at the trial, even though he is shown to be a co-conspirator, are competent evidence merely because such declarations were made in the presence and hearing of the defendant.

"The sum and substance of the rule in this behalf, as well as its purpose and the circumstances under which it may be invoked and applied, are concisely stated by Mr. Justice Cooper in *People* vs. *Philbon,* 138 Cal., 532, 71 Pac., 651, wherein it is said: 'It is undoubtedly the rule in this State that statements of persons not called as witnesses are not admissible in evidence simply because made in the presence and hearing of the accused person. It is only when there is something in the conduct of the accused person, in response to the statement, that is material to the issue, that the statements are admissible at all, and they are admissible then solely for the purpose of explaining the conduct of the accused.'

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> "The fact that Miller was either a co-conspirator or an admitted accomplice does not take his declarations, made when the crime or alleged conspiracy was a thing of the past, out of the category of hearsay evidence, nor entitle them to any greater consideration than that accorded to the statements of an innocent and disinterested third person (*People* vs. *Oldham,* 111 Cal., 653, 44 Pac., 312)."

We have discussed this question somewhat exhaustively because it is a question of the most vital importance. The suit case found at the Ferry building with its sinister contents must have been admitted in evidence by the trial judge under the theory that it tended in some degree to prove consciousness of guilt on the part of J. B. McNamara, a co-defendant and an alleged co-conspirator. Indeed that was the avowed purpose for which the district attorney offered it in evidence. It was not connected in any manner with the defendant by even a syllable of testimony. It was not even shown to have been left at the checking stand in the Ferry building by McNamara. Even construing the unsatisfactory and almost unbelievable testimony of Mrs. Ingersoll as an identification, the fact remains that the suit case was left at the Ferry in San Francisco two days after the destruction of the Times building. If the fact of its aban-

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donment indicated a hurried flight and thus, by inference, a consciousness of guilt on the part of McNamara, that fact was utterly inadmissible against the defendant on trial under the uniform doctrine pronounced in all of the numerous cases which we have heretofore cited. If the conviction of this defendant, obtained upon statements in five-year-old newspapers found in a suit case belonging to another person can be upheld, we see no reason why any other person in the State of California might not have been convicted of the same crime.

MISCONDUCT OF THE TRIAL JUDGE.

We have already pointed out two instances in which the trial Judge improperly commented upon the evidence and proceedings in the presence of the jury. The first of these instances occurred during the examination of the witness Walter L. Smith, the Court making the remark, "The witness answered to the best of his apparent ability without any effort to evade it."

(Rep's. Trans., p. 3419-3420.)

We have already discussed at some length the misconduct of the Court in stating, during the cross-examination of the witness Mrs. Faust that, "The District Attorney has a right to talk to the witness without having an infer-

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ence drawn from that fact." We shall therefore pass to a discussion of the other occasions upon which the Court was guilty of misconduct in commenting upon the testimony or upon the proceedings, to the manifest prejudice of the defendant.

It was vitally essential for the prosecution in this case to be able to show the presence of the defendant Schmidt in San Francisco during the month of September, 1910, when it was alleged that he assisted in procuring the 80% nitro-gelatin from the Giant Powder Company. It will be borne in mind that the identification of the defendant as one of the men who procured the powder was by no means satisfactory, one of the witnesses produced by the prosecution testifying in positive terms that he was not the man. Accordingly any evidence of a documentary character which would show the defendant's presence in San Francisco at the aforesaid time was highly important to the prosecution. Now it was the contention of the District Attorney that during a portion of the month of September, 1910, J. B. McNamara, who used the *alias* of J. B. Brice, and the defendant Schmidt, using the *alias* of F. A. Perry, stopped together at the Argonaut Hotel in San Francisco. If the prosecution could prove this, it would go a long way toward establishing their theory. As a means of proving this fact, the District Attorney offered in evidence cer-

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tain pages from the register of the Argonaut Hotel. These exhibits are numbered respectively 321a, 322b and 322c. The first and last of these exhibits contain the signature "J. B. Brice, together with memoranda made by the hotel clerk at the time of registration. Exhibit 322b contains the signature "F. A. Perry," which the prosecution contended was in the handwriting of the defendant Schmidt. The date of the registration of Perry at the Argonaut Hotel was September 18, 1910. These exhibits will be found in the Clerk's transcript, volume 2, pages 1022-1024.

The prosecution placed upon the stand one B. J. Cook, who was employed from July 15, 1910, to February 4, 1911, by J. J. McNamara, Secretary-Treasurer of the International Association of Bridge & Structural Iron Workers. This witness was produced for the purpose of identifying the handwriting of J. J. McNamara, Hockin and others upon various checks, vouchers and other documents of the International Association which were produced in evidence. He was also allowed to testify concerning certain signatures upon various hotel registers, and he identified these signatures as being in the handwriting of Hockin and other members of the alleged Eastern Conspiracy.

(Rep's. Trans., ps. 4737-4779.)

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On cross-examination by counsel for the defendant the witness was shown the three pages from the register of the Hotel Argonaut which we have previously referred to. In response to various proper questions, which were not objected to by the prosecution, he positively testified that the signature "J. B. Brice" which appeared upon Exhibits 321a and 322c was the handwriting of J. J. McNamara, and that the signature "F. A. Perry" which appears upon Exhibit 322b was the handwriting of Herbert S. Hockin. If the witness was correct in this testimony, the theory of the prosecution that the defendant Schmidt and J. B. McNamara were stopping at the Argonaut Hotel during the month of September, 1910, was absolutely destroyed, at least so far as its support in any documentary evidence was concerned. The Court, however, proceeded to assist the prosecution by commenting as follows upon the testimony: *"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."*

(Rep's. Trans., p. 4795.)

If the testimony of the witness was correct, the two men at the Argonaut Hotel who registered under the names of Brice and Perry were not J. B. McNamara and the defendant M. A.

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Schmidt, but were J. J. McNamara and Herbert S. Hockin. If the presence of J. J. McNamara and Hockin at the Argonaut Hotel in Septemebr, 1910, would have been a state of facts utterly at variance with the theory of the prosecution and would have been of very material assistance to the defendant, it follows that the action of the Court in stating in the presence of the jury that the witness was mistaken in his identification of the signatures must have greatly assisted the prosecution and deeply prejudiced the defendant. If the defendant was able to show by the cross-examination of this witness that the name F. A. Perry upon the hotel register was not in his handwriting at all, but was in the handwriting of another person, he certainly had a right to do so, and it was manifestly unjust and unfair for the trial Judge to deprive him of the benefit of this testimony given by a witness for the prosecution. The effect of such a comment by the trial Judge must have been to convey to the jury the impression that the Judge believed in the theory of the prosecution and rejected the testimony favorable to the defendant.

During the examination of the witness Ortie McManigal, the prosecution offered in evidence a leather carrying-case, alleged to have been used for the purpose of carrying nitroglycerin. This case was admitted in evidence over the objection of the defendant. The Dis-

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trict Attorney then asked the witness to state a conversation which he claimed to have had with J. J. McNamara in reference to the manufacture of this case. Counsel for the defendant objected to the question, and the following proceedings occurred:

> "THE COURT—I don't think it is material.
>
> "MR. WOOLWINE—The purpose of the testimony is to show that it was specially made for that purpose.
>
> "MR. COGHLAN—We assign that as misconduct, the last statement of the District Attorney, and move it be stricken out of the record.
>
> "THE COURT—Stricken out.
>
> "MR. WOOLWINE—In view of that, your Honor, would you allow me to introduce the conversation? It will only be brief.
>
> "THE COURT—I don't think it is material. I allowed you to introduce the case. *I assume that the jury will arrive at the conclusion that this case was made, the use of it, and from the testimony of the witness, assume that they will conclude it was made for that purpose, without all the conversation about who made it and where they procured the leather, and everything.*
>
> "MR. HARRIMAN—I assign the conduct of the Court in regard to this as error, that it was made for that purpose."

(Rep's. Trans., p. 5790, lines 11 to 26.)

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During the testimony of the witness McManigal the District Attorney offered in evidence certain photographs of a drawbridge being constructed across the Missouri River at Kansas City by the McClintic-Marshall Company. McManigal testified that these photographs of the work were taken by himself. The defendant's counsel objected to the introduction of these photographs in evidence, saying that the photographs "don't help the prosecution nor do any good in this case; they are simply immaterial." In response to this objection the Court said: "It must be doing some good or you wouldn't be objecting."

(Rep's. Trans., p. 5815.)

In our discussion of the action of the trial Judge in stating that the District Attorney had the right to talk to a witness without having an inference drawn from the fact, we cited *People* vs. *Pitisci*, 22 Cal. App. Decs., 401. In that case a judgment of conviction was reversed because the trial Judge improperly commented upon the testimony and upon the defense which was offered. Pitisci was accused of murdering a woman with whom he had for a considerable period of time maintained illicit relations. The deceased came to her death from a knife wound. The knife with which she was stabbed to death admittedly belonged to the defendant, but the

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defendant claimed that the deceased, during the course of a quarrel, had seized the knife, which she had previously known that the defendant carried, had attacked him with it, and that in the scuffle that ensued the weapon again changed hands and the fatal wound was inflicted. During the course of an argument as to the admissibility of certain testimony the trial Judge stated that the plea of self-defense offered by the defendant was "an absurdity." Because of this comment upon the testimony, together with other improper remarks made by the trial Court, the judgment of conviction was reversed, although the defendant's counsel did not assign the remarks of the Court as misconduct at the time that they were made.

It is needless to indulge in any extended citation of authority to the effect that it is reversible error for a trial Judge to comment upon the weight or sufficiency of the testimony, or in any manner to indicate to the jury his personal belief as to any of the issues of fact. To pass upon and determine the issues of fact is the sole and exclusive function of the jury. The position of authority occupied by the trial Judge gives him an immense influence over the jury, and juries are quick to seize upon anything in the attitude of the Court which seems to indicate a leaning toward one side or the other, and use it as a basis for their verdict. It is probably the universal experience of lawyers that

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juries are more influenced by the attitude of the trial Judge than by any other consideration. Even where the Judge is rigidly impartial, care must always be exercised lest by some inadvertent remark, by the inflection of his voice or by the expression of his countenance, the jury be led to believe that his personal opinion favors one party or the other. This or similar warnings have been reiterated on frequent occasions by the Appellate Courts of this State.

Because the trial Judge (the same Judge, by the way, who tried the Pitisci case) improperly conveyed his opinion to the jury, the District Court of Appeal of the First Appellate District reversed the conviction in *People* vs. *Conboy,* 15 Cal. App., 97. The remark of the Court in that case, together with the law applicable thereto, are set forth in the following portion of the opinion of Justice Kerrigan:

> "After the jury had been deliberating upon their verdict for seven and one-half hours, they returned into court at 11:30 p. m. and requested further instructions. In complying with this request the trial Judge concluded the charge with the following remarks: 'Now, gentlemen, I think I have read to you about all the instructions you desire upon these points, and I suggest to you that there is no reason why twelve honest, intelligent, reasonable men should not reach a conclusion in this case, and I am satisfied that you have not done so already.

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And I want to say to you that you should consider the evidence offered and admitted here and the law as given you by the Court, and decide this case upon that, and not upon any personal observation or relations or experience that any of you may have had. Now, go out and do your duty.'

"These remarks amounted to a plain intimation that the Court thought the evidence in the case warranted a verdict of guilty, and that the jury should so find. If the evidence was insufficient to justify a conviction, it was the duty of the Court to thus advise the jury. Not having so advised them, but, on the contrary, having told them there was 'no reason why twelve honest, intelligent, reasonable men should not reach a conclusion' in the case, and having expressed surprise that they had not done so already, and thereupon having admonished the jury to 'go out and do its duty'—by this conduct it must be held that the trial Court impliedly instructed and urged the jury to convict the defendant. Nothing is better known among lawyers than that juries rely with great confidence on the integrity and fairness of judges, and upon the correctness of their views. For this reason a Judge should be careful not to throw the weight of his judicial position into a case, either for or against a defendant. The case at bar is so completely and fully covered by the case of *People* vs. *Kindleberger*, 100 Cal, 367, 34 Pac. 852, that further comment would seem unnecessary. There the jury, after having deliberated for an hour, requested further instructions, and the Court, in compliance with this request, among other statements, said: 'In view of the tes-

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timony in this case the Court is utterly at a loss to know why twelve honest men cannot agree.' There it was held that the trial Court, not having advised an acquittal, in all probability gave them to understand by the language quoted that it believed the defendant guilty, and that their verdict should so find. The Court further held that this conduct of the trial Court constituted prejudicial error, which was not cured by subsequently informing the jury that they were the sole judges of the facts of the case and of the credibility of witnesses. The opinion was written by Mr. Justice De Haven, and in holding that the instruction was an invasion of the province of the jury, for the giving of which the case must be reversed, the learned Justice said: 'Nothing can be clearer than that in this charge the Judge informed the jury that he had a fixed and definite conviction in regard to the verdict which they ought to return, and that in his opinion the evidence to support such conclusion was so plain and satisfactory that honest and intelligent jurors who had heard the testimony ought not to disagree as to its weight and effect, or at least may have understood from these unguarded remarks that in the opinion of the Judge the defendant was guilty, and that such should be their verdict.

" 'When upon the trial of a defendant the evidence is clearly insufficient to justify a verdict of guilty, it is the duty of the Judge to so inform the jury, and to advise a verdict of acquittal. This power is sometimes exercised by courts, and is one so frequently invoked in the trial of criminal cases that its exercise may be regarded as a matter of

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common knowledge upon the part of jurors or ordinary intelligence and experience, and this fact is not to be lost sight of in considering the impression likely to have been made upon the jury by the charge of the Judge in this case. To anyone knowing that it is the duty of the Court to advise an acquittal if the evidence is such that, in the opinion of the Judge, twelve honest men would have no right to convict, the remarks of the Judge in this case could not fail to create the impression that he thought the jury ought to convict upon the evidence before them. But it is not necessary that we should be able to say that the jury must have so understood the charge. Unless it appears that it could not have been so understood, we cannot say that the charge was without prejudice to the defendant. The Court has no right, except when advising an acquittal, to give any expression of its opinion as to the weight of the evidence, or to tell the jury that the evidence was so clear that they as honest men ought not to disagree, which is in effect the same as telling them that there is no conflict in the evidence, and that as honest men they can render but one verdict. In a subsequent part of the charge the learned Judge did inform the jury that they were the sole judges of all questions of fact and of the credibility of the witnesses, and that the Court had no right to trench upon their province in this respect; but the error already noticed in the previous part of the charge was not cured by this subsequent statement. The facts still remained impressed upon the minds of the jurors that there ought to be no disagree-

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ment, and that the testimony would justify but one verdict.'

"Touching the subject of the independence of the jury in the domain of fact, the Supreme Court of Alabama, speaking through the Chief Justice, says: 'It is of the highest importance in the administration of justice that the Court should never invade the province of the jury, should give them no intimation as to his opinion upon the facts, but should leave them wholly unbiased by any such intimation, to ascertain the facts for themselves. We cannot shut our eyes to the fact that juries, especially in cases which are strongly litigated upon the facts, watch with anxiety to gather from the Court some intimation as to what the Judge thinks should be their finding upon the facts. They do not usually fully comprehend the line of demarcation which separates the duties of the Court from those of the jury. It would not readily occur to one uninstructed in the legal profession why the Judge, who is a sworn officer of the law, impartial as between the parties, sitting upon the trial of the cause, and who hears all the evidence, might not with much propriety give his opinion as to the result of the facts. Hence the jury, in the most perfect good faith, are ordinarily inclined to give weight to what they suppose to be the inclination of the mind of the Judge upon the facts. But it pertains to the Judge to declare the law applicable to the case. He has nothing further to do with the facts than as furnishing the basis for his charge; while the jury are the triers of the facts under the law as given them in the charge by the Judge, who upon contested questions

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of fact should sedulously avoid giving the least intimation as to his own opinion.' (*Hair* vs. *Little*, 28 Ala., 236.)

"The Supreme Court in this State in an early case, discussing this matter, said: 'The Court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the Court, and the great deference which they pay to the opinions and suggestions of the presiding Judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the Court. A word, a look, or a tone may sometimes in such cases be great or even of controlling influence. A Judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts; for of this matter, under our system, they are the exclusive judges.' (*People* vs. *Williams*, 17 Cal., 147.)

"Again, in the later case of *McMinn* vs. *Wheelan,* 27 Cal., 319, referring to this same doctrine, it was said: 'From the high and authoritative position of a Judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power, by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may, on the one hand, support the character or testimony of a witness, or, on the other, may destroy the same in the estimation of the jury; and thus his personal and official influence is exerted to

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the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other.'

"In his work on *Constitutional Limitations* (seventh edition, page 460-1), Mr. Justice Cooley on this subject comments thus: 'The jurors must be left free to act in accordance with the dictates of their judgment. The final decision of the facts is to rest with them, and interference by the Court with a view to coerce them into a verdict against their convictions is unwarrantable and irregular. A Judge is not justified in expressing his conviction to the jury that the defendant is guilty upon the evidence adduced. Still less would he be justified in refusing to receive and record the verdict of the jury because of its being, in his opinion, rendered in favor of the prisoner when it ought not to have been. He discharges his duty of giving instructions to the jury when he informs them what in his view the law is which is applicable to the case before them, and what is essential to constitute the offense charged; and the jury should be left free and unbiased by his opinion to determine for themselves whether the facts in evidence are such as, in the light of the instructions of the Judge, make out beyond any reasoanble doubt that the accused party is guilty as alleged.'

"In a note attached to the foregoing case Judge Cooley remarks: 'A Judge who urges his opinion upon the facts to the jury decides the cause, while avoiding the responsibility.'

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be their finding upon the facts, and, in deference to his opinions and suggestions, readily substitute his decision of the issue for their own, then, in the case at bar, the trial Judge, having impliedly urged his opinion upon the facts to the jury, perhaps decided the cause. In any event, 'nothing can be clearer than that in this charge the Judge informed the jury that he had a fixed and definite conviction in regard to the verdict which they ought to return, and that in his opinion the evidence to support such conclusion was so plain and satisfactory that twelve honest and intelligent jurors who had heard the testimony ought not to disagree as to its weight and effect, and we think the jury understood from these unguarded remarks that in the opinion of the Judge the defendant was guilty, and that such should have been their verdict.' (*People* vs. *Kindleberger,* 100 Cal. 367, 34 Pac. 852.) There is a constitutional prohibition in this State, which has been repeatedly followed in the decision of cases, that judges must not charge juries with respect to matters of fact; much less should judges suggest to or instruct juries what their verdict should be upon the facts."

The two foregoing decisions from the District Court of Appeal of the First District are merely recent expressions of a rule that has always been enforced by the Appellate Courts of this State. In *Thomas* vs. *Gates,* 126 Cal.,

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1, Justice Cooper, at that time a Commissioner of the Supreme Court, says:

> "It is a rule applicable alike to civil and criminal cases that it is error for the Judge directly or inferentially to express an opinion to the jury, or in their hearing, as to the credibility of a particular witness or as to the weight which they should attach to his testimony."

And in *State* vs. *Harkins,* 7 Nev., 383, it is said:

> "Where the trial Judge intimates an opinion as to the weight of the evidence, or as to the credibility of the witnesses, the error is not cured by subsequently instructing that the jury are the sole judges of such matters, or that no expression of opinion was intended or that the Judge had no right to encroach upon their province in that manner."

The case last quoted will stand as a sufficient answer to the contention, which we anticipate will be made by the Attorney-General, that the error of the Court in making the statements and comments hereinabove set forth was cured by subsequent instructions. Other cases strongly in point are

People vs. *Kindleberger,* 100 Cal. 369;
People vs. Chew Sing Wing, 88 Cal. 268;
McMinn vs. *Whelan*, 27 Cal. 319.

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The action of the trial Court in the case at bar was fully as prejudicial as any of the acts of trial judges which have formerly been held reversible error in this State. The statement that the District Attorney had a right to interview a witness without having an inference drawn from such fact; the remark that the witness Cook was mistaken in his identification of the handwriting on the Argonaut register; the statement that the Court assumed that the jury would conclude the purpose for which the case, alleged to have contained nitroglycerin, was used; the impatient rebuke to defendant's counsel who had objected to the introduction of the photographs taken by McManigal that "it must be doing some good or you wouldn't be objecting to it";—these statements must of necessity have been understood by the jury to be expressions of opinion adverse to the defendant by the trial Judge. Certainly, when taken in connection with the long series of erroneous rulings, with the admission of incompetent and hearsay testimony which fills thousands of pages of the record, and with the restriction, and in some cases the absolute denial of the right of cross-examination, these comments by the trial Court must have contributed to deprive the defendant of a fair trial.

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MISCONDUCT OF THE DISTRICT ATTORNEY.

The Supreme Court of this State has held so frequently that it is reversible misconduct for the District Attorney to comment in his argument upon the failure of the accused to take the stand in his own behalf, or upon his failure to give testimony upon any particular subject, that it is inconceivable to us that such a course should be pursued by any public prosecutor, or sanctioned by any trial Court. Yet this very thing occurred repeatedly in the arguments of counsel for the prosecution in this case, and the trial Judge, instead of rebuking the District Attorney for his misconduct, and instructing the jury to disregard it, not only allowed the District Attorney to proceed, but in one instance even sanctioned the course which he was pursuing. In this case the defendant took the stand in his own behalf. He was not cross-examined by the prosecution. In order that the flagrant injustice and impropriety of the comments afterwards made by the District Attorney may be apparent to the Court, we set forth verbatim his testimony, which, while brief, constitutes an absolute denial of all of the material evidence produced against him by the prosecution. The defendant's testimony is as follows:

"MR. HARRIMAN—Mr. Schmidt, were you in California in the year 1910?

"A. I was. Part of the year.

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"Q. When did you come to this State?

"A. I came here in the first part of August, 1909.

"Q. And remained during the remainder of that year, and in 1910?

"A. Yes, sir.

"Q. During that period of time were you in Corte Madera?

"A. I went to Corte Madera in the last part of November or the first of December, 1909, and I remained there, I think, until the first part of May, or the latter part of April, 1910.

"Q. While you were there were you doing any work of any kind?

"A. I was.

"Q. What?

"A. I helped build a bungalow for Mr. Johannsen, and after that I worked for Pesenti, a man who run the hotel there.

"MR. WOOLWINE—Just a little louder.

"MR. HARRIMAN—Speak just a little louder.

"A. All right, sir.

"Q. How long did you work during the time you were there

"A. Practically all the time when the weather permitted.

"Q. And that was how many months about?

"A. About—let's see—December, January, February, March, April, six months.

"Q. Six months?

"A. Maybe seven.

"Q. Were you paid for your services?

"A. I was.

"Q. How much did you receive?

"A. The standard scale, $5.00 a day.

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"Q. Where did you go from there?

"A. You mean after I left Corte Madera?

"Q. Yes.

"A. I went to live at 2410 Mission street.

"Q. How long did you remain there?

"A. I remained at 2410 Mission street until, I think it was, the last week in June.

"Q. And where did you go from there at that time?

"A. I came to Los Angeles.

"Q. And how long did you remain in Los Angeles

"A. It was either three weeks or possibly four; I don't remember exactly.

"Q. And where did you go at that time?

"A. I went to live with a man that I had worked with in Chicago and El Paso, Texas; a man by the name of George Foukes.

"Q. Where did you stop while you were in Los Angeles?

"A. It was on—I believe the name of the street is Central Ave.

"Q. With whom?

"A. It was a lodging house that he was rooming at.

"MR. COGHLAN—Will turn toward the jury, so that they can hear you better.

"A. All right.

"MR. HARRIMAN—Where did you go when you left Los Angeles?

"A. I went back to San Francisco.

"Q. Where did you stop?

"A. I stopped, I think it was, a week at the Belmont Hotel, and then I went back to 2410 Mission St. again.

"Q. Did you remain at 2410 Mission

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St. during the remainder of the time you were in this State?

"A. Yes, sir.

"Q. During that time did you meet a man at 2410 Mission St. by the name of J. B. Brice?

"A. I did.

"Q. State the circumstances under which you met him.

"A. I had a room at 2410 Mission St. and this was the room that—when I rented the room, Mrs. Lavin told me, in the event I was not at home, she wanted the privilege of using that as a sitting room. I was at my room one night, the door was open, and Mrs. Ingersoll and Dr. Ashworth—I had met the two before—they came into my room with a third person. Mrs. Ingersoll introduced this man as Mr. Brice from Chicago. She said that he was a new roomer at her house.

"Q. Was that the first time you ever saw him?

"A. That was the first time I had met him.

"Q. Did you have any conversation with him that night

"A. The conversation was a general conversation. Talking about Chicago—which Ashworth joined in because he had gone to college in Chicago.

"Q. Did you see this man Brice after that?

"A. Yes, sir.

"Q. Where.

"A. I met him once more after at the saloon at the corner of Twentieth and Mission, Roddy's.

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"Q. Where else?

"A. I don't remember whether that was the first or second time I met him there; he asked me to go to dinner with him, and he told me that he wanted to go up to his room and change his linen; I went up to his room with him; I met Mrs. Ingersoll there. Then we went, I believe, to the Bohemian Cafe and had dinner.

"Q. Did you meet him again?

"A. No, sir.

"Q. At that time did you know he was traveling under an assumed name?

"A. No, sir.

"Q. Were you at that time under your own name?

"A. Yes, sir.

"Q. Did you ever travel under an assumed name while you were in California?

"A. No, sir.

"Q. Were you ever in the Argonaut Hotel?

"A. No, sir.

"Q. Were you ever at the office of the Giant Powder Co. in the Kohl building, San Francisco?

"A. No, sir.

"Q. Or at its office anywhere else

"A. No, sir.

"Q. Did you rent a boat, known as the Pastime or the Peerless?

"A. No, sir.

"Q. Did you take a cruise around the bay in that boat, or in any other boat, similar name?

"A. No, sir.

"Q. Were you ever at Sausalito at the Miramar Cafe?

"A. No, sir.

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"Q. Were you ever at the works of the Giant Powder Co.?

"A. No, sir.

"Q. Were you ever at Harrison Street, or Howard St. wharf with a boat of any description?

"A. No, sir.

"Q. Were you ever at 1622 Nineteenth Avenue, San Francisco?

"A. What is that?

"Q. At 1622—

"MR. KEYES—That is right.

"MR. HARRIMAN—1622 Avenue 19?

"A. No, sir.

"Q. When did you leave California?

"A. I left California on the 7th of October, 1910.

"Q. Did you travel under your own name?

"A. I did.

"Q. And where did you go?

"A. I went—I took the train leaving the Ferry Building, I think it was, around 9 or 10 o'clock, I went to Seattle.

"Q. How long did you stop at Seattle?

"A. We had to stop over in Portland, I think a few hours during the day. We arrived in Seattle, morning; I stayed in Seattle a couple of days.

"Q. And from there?

"A. From there I went on to Chicago, Milwaukee & Puget Sound Railroad to Butte, Montana.

"Q. And how long did you remain there, about?

"A. A couple of days.

"Q. And thence?

"A. I went directly to Chicago.

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"Q. And how long did you remain there?

"A. I remained in Chicago, I think it was, a day and a half.

"Q. And thence?

"A. I went to Cleveland, Ohio.

"Q. And were you traveling under your own name all this time

"A. I was.

"Q. And when did you change your name?

"A. I changed my name in going from Chicago to Cleveland, Ohio.

"Q. Why?

"A. Because I had read then that my name was connected with the blowing up of the Los Angeles Times Building. I was accused of being implicated.

"Q. Had you ever before that time gone under any other name than M. A. Schmidt?

"A. I had not.

"Q. Had you in any way disguised yourself?

"A. No, sir.

"Q. Did you ever in any way disguise yourself after that time?

"A. I did not.

"Q. You were working in New York during about 18 months previous to your arrest?

"A. Yes, sir.

"Q. For whom?

"A. I was working for the Berlin Machine Works.

"Q. You met Mr. Cavanan there?

"A. Yes, sir; he was my employer.

"Q. And what were you doing during the period you were engaged with him?

"A. I was acting—my title sometimes

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would be demonstrator and sometimes mechanical expert.

"Q. And in what part of the State or States were you during that period?

"A. I was in almost every city of any size in the State of New York, and in all of the cities in Pennsylvania east of Harrisburg and Williamsport; through the State of New Jersey, and I went up into Connecticut on one occasion. That was, however, for the Boston office of the Berlin Machine Works.

"Q. Installing and repairing—

"A. Installing and repairing machinery.

"Q. And demonstrating?

"A. And demonstrating their use; woodworking machinery they were.

"Q. Did you see, while you were in New York, a man by the name of Donald Vose?

"A. Yes, sir.

"Q. Whereabouts did you see him?

"A. I saw him at a house on One Hundred Nineteenth Street. Emma Goldman's house.

"Q. Did you have any conversation with him at that time?

"A. I don't remember having any conversation, excepting some little thing when we were introduced.

"Q. Did you state to him at that time, or at any other time, anything concerning your whereabouts, or anything directly or indirectly in controversy in this case?

"A. I did not.

"Q. Did you see him at any other time, than at that place?

"A. I did.

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"Q. Where?

"A. I saw him one time at the Woodstock Hotel.

"Q. And at any other place?

"A. I saw him at One Hundred Twenty-fifth Street. Miss Goldman had moved her office, and I went to her office to put in a few bookshelves for her.

"Q. And any other place

"A. Yes; I saw him once at the home of Mr. Baginsky, on One Hundred Eighty-first Street in Chicago—or, I mean in New York.

"Q. And any other place?

"A. No, sir.

"Q. Did you have any conversation with him during either of those times concerning any of the facts in controversy in this case?

"A. No, sir.

"Q. Did you have anything to do with the destruction of the Times Building, either by means of dynamite or any other means?

"A. No, sir.

"Q. Either directly or indirectly?

"A. Neither.

"Q. Going back to Cleveland, who did you meet there?

"A. My sister. I went there for that purpose.

"Q. Were you in disguise at that time?

"A. No, sir.

"MR. HARRIMAN—Take the witness.

"MR. WOOLWINE—No questions."

(Rep's. Trans., 7847, line 8, to 7855, line 12.)

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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. But the District Attorney instead of cross-examining the defendant chose rather to comment unfairly and unlawfully upon the fact that he had not specifically testified on certain subjects. The following statements in this behalf were made by Mr. Noel, the special prosecutor in this case, during his argument to the jury:

> "Although this defendant some months ago entered a plea of not guilty, again today he takes the stand and utters a plea that he is not guilty; he had added nothing to his plea made some months ago; he has taken nothing from it, except that he has failed to explain—
>
> "MR. McKENZIE—Now just a moment; we assign that remark as misconduct, and ask that the jury at this time be instructed to disregard any comments of counsel with respect to the testimony of this defendant.
>
> "THT COURT—Motion denied."

(Rep's. Trans., ps. 7863 to 7864.)

> "Schmidt had been down here on his own mission; he hasn't told you what he

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was doing here; he hasn't informed you of any mission in this city of Los Angeles.

"MR. McKENZIE—We assign that as error. Why didn't you ask him what he was down here for?

"THE COURT—It doesn't make any difference. When a defendant offers himself as a witness, he is subject to the same rules as other witnesses.

"MR. McKENZIE—They have a right to cross-examine, and the doors were thrown wide open. And we assign the Court's remark as misconduct now, and error."

(Rep's. Trans., p. 7896.)

"The most skillful of forgers who have studied it for years, are detected in their crime because of the unfailing character that you put in your penmanship, in your handwriting—and no witness has appeared here to deny the handwriting of Brice as 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 that the signature 'F. A. Perry' is his; to deny 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 today under solemn circumstances.

"MR. McKENZIE—We assign the last three statements as misconduct, and assign it as error. We beg your pardon for interrupting, but the Supreme Court of the State

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has laid down the rule that we must interrupt to save our rights. I beg pardon for having to do it."

(Rep's. Trans., p. 7898, line 11 to bottom of page.)

During the closing argument of District Attorney Woolwine the following occurred:

"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—

"MR. COGHLAN—Now, just a minute. We assign this as misconduct. The law doesn't bind anybody to show anything of the kind, and you had an opportunity on cross-examination to get it—

"MR. WOOLWINE—Cross-examination.

"MR. COGHLAN—We assign it as misconduct on the part of the District Attorney.

"M.R WOOLWINE—All right.

"MR. COGHLAN—Of course it is all right; you ought to refrain from it and it would be 'all righter.'

"MR. NOEL—We are not referring to the testimony of the defendant.

"MR. WOOLWINE—I am speaking about the witnesses you ought to have brought here.

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"MR. COGHLAN—It isn't incombent upon us to show anything.

"MR. WOOLWINE—It isn't until you start, and when you start you ought to show something.

"MR. COGHLAN—We assign that as misconduct. I hate to interrupt you.

"MR. WOOLWINE—I hate to pain you so.

"MR. COGHLAN—You are not paining me; I am perfectly comfortable, so far.

"MR. WOOLWINE—You certainly must have a mighty thick skin, then.

"MR. COGHLAN—Perhaps on a par with your head.

"MR. WOOLWINE—Now, I am not surprised that you are worried.

"THE COURT—Oh, no, gentlemen.

"MR. WOOLWINE—He is baiting me and I have to say something.

"MR. COGHLAN—I am trying to be polite to you, but it seems impossible to be polite to you.

"MR. WOOLWINE—I think it is impossible for you, all right.

"THE COURT—Now, gentlemen, that will do. Let Mr. Woolwine proceed.

"MR. COGHLAN—I will do that.

"THE COURT—These objections, of course, may be entered in the record, but this discussion is not proper.

"MR. WOOLWINE—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 was he the balance of the time? And the echo answers 'Where?' We

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don't know and we will never find out. You know why they didn't bring witnesses to tell what he was doing, because, my friends—

"MR. COGHLAN—Now, we assign that as misconduct, your Honor.

"MR. WOOLWINE—Now, that isn't misconduct. I am not talking about—

"THE COURT—The counsel has assigned it as misconduct, Mr. Woolwine, and if you want to pursue it you will have to take your chances.

"MR. WOOLWINE—Well, it hurts. Do you want to make an assignment there?

"I really feel a sympathy for the attorneys on the other side. They have done the best they can, but the trouble is they have no case, and you can't make a case out of nothing, even if you are gifted in sophistry, because there is a certain amount of common sense in every jury. I will tell you, they are a little more wise than people imagine they are, but say, gentlemen, suppose somebody will say that jury takes an unnatural view of a case, being put in the jury box they don't weigh things as they do in their homes, or on the street. Suppose you heard a story like this on the street; would you believe beyond a reasonable doubt the man was guilty? Why, my friends, you would stake your life upon it. 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.

"MR. COGHLAN—Of course, we as-

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sign that as misconduct on the District Attorney's part."

(Rep's. Trans., p. 7865, line 4, to p. 7867, line 23.)

The trial Court apparently took the position that because the defendant had taken the stand in his own behalf, the prosecution had the right to comment upon his failure to give testimony upon certain particular subjects. The decisions in this State are absolutely to the contrary. The failure of the defendant to testify upon any particular subject creates no inference against him, and for the District Attorney to comment upon such failure constitutes reversible misconduct.

In *People* vs. *McGungill*, 41 Cal., 429, it is said:

"It appears from the bill of exceptions that 'one Yates was called and sworn as a witness for the prosecution, and, among other things, stated that he had a certain conversation with the prisoner.' This closed the evidence for the prosecution. The defendant was then placed upon the stand as a witness in his own behalf, and was asked if he had the conversation with Yates spoken of by Yates, and answered he did not, and was examined no further by his counsel than concerning said conversation, nor was he examined on any other point, but answered all questions required of him by the Court; that upon the argument of the case the counsel for the prosecution commented upon the fact before the jury; that

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the defendant refused to be cross-examined to the whole case; that defendant's counsel protested against such comments, but they were continued by permission of the Court. This conduct of counsel for the prosecution, under sanction of the Court, and against objections of the defendant's counsel, was irregular, and its permission by the Court erroneous, and manifestly prejudicial to the rights of the defendant. (*People* vs. *Tyler*, 36 Cal. 522.)

"The fact that defendant offered himself as a witness in his own behalf, did not, as to him change or modify the rules of practice with reference to the proper limits of a cross-examination of a witness; and, clearly, the prosecution could not legally claim that defendant should be made a witness for the State against himself. To attempt such an outrage of defendant's rights, and then, with the sanction of the Court, in argument to the jury, to comment upon the failure of such attempt as a circumstance tending to establish the guilt of defendant, cannot be justified or sanctioned."

In *People* vs. *Anderson,* 39 Cal., 704, it is said:

"The defendant was not called upon to offer himself to prove any fact in the case, nor can any presumption be properly indulged against him for not so doing."

In *People* vs. *Sanders,* 114 Cal., 210, it is said by Justice Henshaw that "defendant's failure to testify upon any particular point should not be commented upon in argument."

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In *People* vs. *Mead*, 145 Cal., 500, the Supreme Court says:

> "Section 1323 of the Penal Code declares that the neglect or refusal of the defendant to be a witness cannot 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 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 other subjects.*"

In *People* vs. *Morris,* 3 Cal. App. 1, the Court says:

> "Objection was also made to a remark made in his address to the jury, by the associate counsel for the prosecution as follows: 'If that is not true (referring to certain evidence), why has the defendant not taken the stand and denied it?' The Court, immediately on objection of defendant to the remark, said to counsel that he 'had better retract that,' and inform the jury of defendant's constitutional rights to refrain from testifying and cautioned the jury to wholly disregard the statement of counsel, and also in the instructions again called the matter to the attention of the jury, and instructed them as to the right of the defendant and to disregard the remarks of counsel. It was error for counsel to comment upon or allude in any way to the fact that defendant had refrained from testifying. In *People* vs. *Tyler,* 36 Cal. 522; *People* vs. *McGungill*, 41 Cal. 429, and *People* vs.

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Saunders, 114 Cal. 216, 46 Pac. 153, similar misconduct of the prosecuting officer was deemed prejudicial error, where the Court permitted the comment to pass unrebuked. Such misconduct should, we think, work a reversal even where the Court promptly, on objection, checks counsel and directs the jury to disregard the statement, and instructs them as to defendant's right in the matter, as was done in this case. We are unable to see that the prejudicial impression irresistibly made upon the minds of the jury by such comment can be entirely removed by anything the Judge may say or do after the mischief is done. For similar misconduct several courts of last resort have granted new trials. (*Hunt* vs. *State*, 28 Tex. App. 149, 19 Am. St. Rep. 815, 12 S. W. 737; *Brazell* vs. *State,* 33 Tex. Cr., 333, 26 S. W., 723; *Washington* vs. *State* (Tex. Cr. App.), 77 S. W., 810, and other cases in that State; *Long* vs. *State,* 56 Indiana, 182, 26 Am. Rep. 19; *Angelo* vs. *People,* 96 Ill. 209, 36 Am. Rep. 132; *Austin* vs. *State,* 102 Ill. 261; *Yarbrough* vs. *State*, 70 Miss. 593, 12 South. 551; *Saunders* vs. *State,* 73 Miss. 445, 18 South 541.) In this last case a new trial was granted, although the Court rebuked counsel, and instructed the jury to disregard the comment, and counsel himself asked that the remark be considered as withdrawn. Section 1323 of the Penal Code expressly declares that the neglect of defendant to testify as a witness 'cannot in any manner prejudice him, nor be used against him on the trial or proceeding.' In the face of so plain a provision of law, we cannot say that it may be openly violated without prejudice to the defendant."

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In the case last above quoted the judgment of conviction was reversed, although the trial judge very promptly told the District Attorney that he had better retract his statement, and instruct the jury to disregard it. How much greater reason is there to reverse the case at bar, where the trial court not only failed to instruct the jury to disregard the prejudicial misconduct of the District Attorney, but even commended it with a statement to the effect, that when the defendant offered himself as a witness, he became subject to the same rules as any other witness. Equally objectionable, erroneous and prejudicial, and equally good ground for reversal of the judgment in this case, are the remarks of Mr. District Attorney Woolwine, heretofore quoted, in which he comments upon the failure of the defendant to produce witnesses to testify as to various facts. The defendant in a criminal case is under no obligation to produce witnesses to testify to any fact, and his failure to produce a witness cannot be used against him any more than can his failure to take the stand upon his own behalf. For misconduct of the District Attorney, in commenting upon the failure of the defendant to call a certain witness, the Supreme Court reversed the judgment of conviction in *People* vs. *Smith,* 121 Cal., 355. The remarks

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of the District Attorney in that case, are set forth, in the opinion of Justice Van Fleet, from which we quote as follows:

> "The most serious exception in the case is that based upon certain statements of the District Attorney, made in his closing argument to the jury, and the ruling of the Court thereon. The evidence disclosed that there were present at the time Bencomo was killed but four persons other than deceased—the defendant, his brother, John Smith, one Porfirio Tapia, and a lad named Harvey Mills. John Smith, the brother, was informed against jointly with the defendant, for the murder of the deceased, but prior to the trial, had on motion of the District Attorney, been ordered discharged. Whether in fact he had been discharged, or was for some reason still in custody, at the time of the trial, the record does not disclose. It was suggested at the argument that he was yet in custody, but there was no evidence to show that such was the fact. There is nothing in the record to show that he was present at the trial or in the county, or even within reach of the process of the court at that time; and he was not called as a witness. Tapia and Mills were the principal witnesses for the State; They testified at the trial that the deceased was shot and killed by the defendant, and that they gave their version of the details of the shooting. There was evidence, however, on the part of the defense, tending more or less strongly to impeach the testimony of these witnesses, by showing that they had both theretofore made statements

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at variance with their evidence to the effect that, while they were near the place of the shooting, at the time it occurred, they did not see it, nor know who did it; in fact it was shown that they had testified substantially to that effect before the coroner at the inquest on the body of deceased, and again at the preliminary examination of the accused. The defense was that the defendant did not commit the act; and in support of this defense defendant testified that he was going to or standing by his horse at some distance from and with his back to the deceased at the time the shots were fired; that he heard the shots, but did not do the shooting, nor see who did it; that when he started to go to his horse he left his brother John and the deceased in conversation, and that when he returned to where the deceased was lying after the shots were fired his brother was still there, and told him that deceased had shot himself.

"We are not to judge of the probabilities of this defense, nor of the case made by the prosecution; those were questions exclusively for the jury. But the defendant was entitled as of right to have the question of his guilt determined solely upon the evidence placed before the jury, and this right it is claimed was denied him by what follows. During his closing argument the District Attorney stated to the jury: 'There was present at that shooting Gonzales Smith, John Smith, Tapia, Harvey Mills; and Emilio Bencomo was killed. Now, sir, Mr. Tapia and Mr. Harvey Mills came on this stand and told you the story of the shooting. Mr. Gonzales Smith comes on

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to that stand, the defendant, and denies the story as given by those two men. Now, sir, I say, 'where is John Smith?' At this point the defendant interposed this objection: 'If your Honor please we object to the District Attorney commenting on the fact that John Smith was not called as a witness by the defendant, and we ask the Court to instruct the District attorney that he has no right to comment on that to the jury.'

"The District Attorney—'That is just exactly the proposition I propose to talk to you about, and you gentlemen can see the defense is afraid of it or they never would have squealed.' The defendant again objected to the remarks of the district attorney as improper, and asked for a ruling of the Court on his objection. The Court ruled that 'the District Attorney can comment on the fact, if he desires to.' To which ruling the defendant excepted. Thereupon the District Attorney further stated to the jury: 'The presumption of the law is that, if John Smith had testified before you gentlemen as to the facts in this case—the presumption of the law is that his testimony would have been adverse to the defense.' To this statement the defendant objected as improper, and asked a ruling of the Court.

"THE COURT—Let the District Attorney proceed with his argument.

"THE DEFENDANT'S ATTORNEY—Note an exception.

"DISTRICT ATTORNEY—He was subpoeaned as a witness on the part of the defense and not put on the stand.

"THE DEFENDANT'S ATTORNEY—Note an exception to the remark of the

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District Attorney commenting on something that is not in evidence.

"THE COURT—You have got the benefit of the objection on this particular line of the District Attorney's argument, and don't interrupt him any more.'

"It is hardly necessary to say that these statements by the District Attorney were under the circumstances wholly unauthorized and highly improper; and that the overruling by the court of defendant's objections thereto was error. Nor can we avoid the conclusion that the error was one calculated to greatly prejudice the defendant's case. There was, as we have seen no evidence to warrant the facts stated by the District Attorney in the remarks quoted, nor the unfavorable inference deduced therefrom; and yet the Court by its ruling implicitly told the jury that both the statement of fact and the deduction made by the District Attorney therefrom were matters for their consideration. If the jury acted in the belief, as presumptively they did, that John Smith was not called by the defendant because he knew that his evidence would be against him, the consideration could but bear heavily against the degree of credence they might otherwise, and in view of the strong impeachment of the main witnesses of the prosecution, have given the case of the defendant; since it appeared without conflict that John Smith was an eye witness of the affair, and therefore, presumably, knew the truth as to whether the deceased was killed by the defendant or shot himself. The error was, therefore, a material one, and for it the case must be reversed. The rule is universal that it is error to per-

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> mit counsel, against objection in argument before the jury, to make statements of, or comments upon, facts not in evidence; and, unless the Court can see clearly that the error was as to some matter which could not in its nature have prejudiced the defendant's case, the judgment will be reversed. *People* vs. *Mitchell,* 62 Cal., 411; *State* vs. *Hatcher*, 29 Or., 309).
>
> "We find no other error in the case; the action of the Court in modifying the instructions complained of was proper, and its rulings upon evidence correct.
>
> "For the error above pointed out the judgment and order are reversed and the cause remanded."

We are well aware of the rule pronounced on so many occasions by the higher Courts of this State, that they are loath to reverse judgments of conviction for the misconduct of the District Attorney. Certain cases arise, however, where public prosecutors in their misguided zeal toward the securing of convictions not only transcend the limits of propriety, but prejudice the rights of the defendant to such an extent that it becomes obligatory upon the Court to reverse the conviction. The district attorney is a public official whose functions are of a peculiar nature. He is a quasi-judicial officer. He is not merely the advocate of the prosecution. His paramount duty is not to seek the conviction of the defend-

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ant on trial, but to see that justice is done. He is more than the advocate of the State of California. He is counsel for the People, of whom the defendant is one. He violates this paramount duty if he seeks the conviction of an innocent man, or if he seeks the conviction of any person by unfair means. His sole duty is to present the legal evidence against the defendant, and to do so calmly and dispassionately without malice and without personal animus. If he asks a question or makes a statement in good faith and without improper motives the Courts are reluctant to reverse a conviction, even if the question should not have been asked or if the statement should not have been made. But there are certain well defined and universally comprehended principles of law; there are certain rights which every defendant on trial for his life or liberty possesses. These rules and these rights are familiar not only to lawyers but to every intelligent layman. If the District Attorney in violation of some fundamental right of the defendant makes an improper statement in his argument or persists in asking incompetent questions, the Appellate Court has no alternative but to reverse a judgment of conviction obtained by such methods. One of these fundamental rights which is guaranteed to every citizen by the

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Constitution of the United States and by the Constitution and laws of every State in the Union is the right not to be compelled to be a witness against himself. It has always been the law in the State of California that the defendant in a criminal case could not be compelled to testify and that this failure to testify is a circumstance from which the jury have no right to draw any inference unfavorable to him. The Courts have said many times that it is reversible misconduct for the District Attorney in his argument to comment either upon the failure of the defendant to take the stand in his own behalf or upon his failure to testify as to any particular fact. This is the law and the District Attorney of Los Angeles County and his able assistants must have known that it was the law. In defiance of this fundamental right of the defendant and in their inordinate anxiety to obtain a conviction, both Mr. Woolwine and Mr. Noel made statements in their argument to the jury which have been held improper and reversible misconduct on many occasions by the Supreme Court of this State. In so doing they not only did an injustice to the defendant but an injustice to the People of the State of California whom they represented, for the welfare of the People demands that no one, not even the humblest,

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nay, not the worst of criminals, even though he be as guilty as Judas Iscariot, should be convicted except by due process of law and after a fair and impartial hearing. We cannot better conclude this portion of our brief than to quote the words of the learned Justice Melvin in *People* vs. *Derwae,* 155 Cal., 592:

> "The highest commendation should be accorded the learned judge who presided at the trial for the promptness with which he rebuked the improper conduct on the part of the prosecuting officer and the efforts which he made to eliminate from the minds of the jurors the ill effects of the prosecutor's sinister suggestion. That official, however, almost immediately after the Court's ruling and admonition to the jury, proceeded to interrogate the defendant with reference to the latter's acquaintance with the Chief of Police of Depere, Wisconsin, where the defendant had once resided.
>
> "Courts have exhibited a strong disinclination to set aside convictions upon the ground of misconduct of district attorneys. This is eminently proper. The State should not be put to the expense and its officers to the trouble of a new trial unless it clearly appears that the rights of a defendant have been invaded and a fair trial has been denied him because of the behavior of the prosecuting officer. But we cannot see how the highly improper conduct here revealed could fail to make its impression upon the minds of the jurors to the prejudice of defendant's rights. After persistently suggesting that for some reason defendant did not

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want the opinion of the chief of police of Green Bay, his former home, upon the subject of his general reputation for the moral qualities involved in the prosecution, the representative of the state of California asked this man on trial for his liberty, not if he had committed a similar crime to that for which he was being tried, not if he had been guilty of an ordinary offense (and such questions would have been very improper), but if he had not committed or attempted one of the most disgusting and atrocious crimes known. This was done after the court had ruled that the family relations of this man had nothing to do with the case on trial, and was followed by inquiries regarding the acquaintance of witness with another chief of police. It may be that the assistant district attorney showed no heat or malice in his manner, and that the jurors made no demonstration indicating that their passions were aroused against the defendant, but we cannot see how, in spite of the prosecutor's suavity, the apparent imperturbability of the jurors, and the court's prompt declaration of the law, such gross misconduct could fail to make its impression. In the case of *People* vs. *Valliere,* 127 Cal., 65, 59 Pac., 295, where the court had promptly rebuked misconduct not more serious than that displayed by this record, the court said: 'Rebukes do not seem to have any effect upon prosecuting officers, and probably as little on juries. The only way to secure fair trials is to set verdicts so procured aside.' (See, also, *Spencer* vs. *Commonwealth* (Ky.), 107 S. W. 342."

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THE INSTRUCTIONS.

The final instructions given to the jury by the trial Court contained numerous instances of reversible error. Instructions which the Supreme Court of this State has frequently held to be improper, instructions which violate the Constitutional provision that judges shall not charge the jury with respect to the facts, were included in the charge by the trial Judge. The following erroneous instructions were given.

(1) The trial Judge gave the following instruction on the subject of Conspiracy:

> "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 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."

(Clerk's Trans., p. 233.)

This instruction is clearly erroneous by reason of the fact that it is an inaccurate and misleading statement of the law of evidence as applied to conspiracy. To enable the jury to conclude that a conspiracy exists it is not sufficient

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that the defendants pursue by their acts the same object. The object pursued must be an *unlawful* object.

Conspiracy is a combination between two or more persons to do a *criminal* or an *unlawful* act, or to do a lawful act by criminal or unlawful means.

(*Pettibone* vs. *U. S.,* 148 U. S. 197; *Drake* vs. *Stewart,* 76 Fed., 140.)

The trial Court apparently attempted to follow the wording of an instruction that has been given on innumerable occasions in conspiracy cases. But it failed to do so. The correct instruction is that if "the defendants pursue by "their acts the same *unlawful* object, one per-"forming one part and another, another part "of the same so as to complete it, with a view "to the attainment of that same object the "jury are justified in the conclusion that the "defendants pursuing the said objects were "engaged in a conspiracy to effect the same."

Irvin vs. *State,* (Oklohoma) 146 Pac., 453; *The Mussel Slough Case,* 5 Fed., 680;

This instruction has been given many times both by state and federal judges, but we no of no other instance in which a Judge giving this

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instruction has neglected to qualify the word "object" with the adjective "unlawful." It is obvious that there can be no conspiracy if the object thereof be a lawful one, unless the conspirators seek to attain a lawful object by criminal or unlawful means. Both the element of unlawful object and the element of unlawful means are omitted in the foregoing instruction given by the trial Judge.

(2) The trial Judge gave the following instruction on the subject of circumstantial evidence as a means of establishing a conspiracy:

> "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 existence 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 combina-

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tion or agreement, or which tend to show what transpired between them, or any of them, thereafter in relation thereto, as well as to 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 dpend 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 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."

The trial Judge also gave the following instruction on the subject of the effect of circumstantial evidence:

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"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 eye witness 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 a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow."

(Clerk's Trans., p. 246-247.)

The two foregoing instructions are a clear violation of the provision of section 19 of Article VI of the Constitution of this State that "judges shall not charge juries with respect to matters of fact." For the giving of an almost identical instruction, the Supreme Court of this State reversed the judgment in the case

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of *People* vs. *Vereneseneckockockhoff,* 129 Cal., 497. In that case the Court told the jury that circumstancial evidence was not entitled to an inferior degree of credit than direct evidence. Justice Temple, who delivered the original opinion of the Court, says:

> "Whether it is entitled to such credit or not is a question in each case to be determined by the jury from the evidence. This charge was plainly an argument for the prosecution."

On the petition of the Attorney General, a rehearing was granted in that case, and on the rehearing Chief Justice Beatty delivered the following opinion:

> "When this cause was originally submitted for decision the only answer to the objections of appellant to the charge of the trial judge was a reference to Durant's case (*People* vs. *Durant,* 116 Cal., 222). In the opinion of Justice Temple it was shown that Durant's case was not authority on the point here involved. In his petition for a rehearing the attorney general then cited as authority against the conclusions of the Court the charge of Chief Justice Shaw in the Webster case, and various decisions of the courts of New York and other states, sustaining similar charges. Before the oral argument on rehearing the attention of counsel was called to the fact that in all those cases the trial judges were entirely free from any constitutional or statu-

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tory restriction upon their power to sum up the evidence, and, consequently, that the opinions and practices of Chief Justice Shaw, Chief Justice Gibson and other American Judges in such cases, is no more authority in cases arising under the constitution of California than would be a charge approved or delivered by Lord Hale.

"In response to this suggestion, counsel for the people cited at the oral argument a number of decisions by the courts of our sister states, which they contend have given to constitution provisions similar to our own a stricter and narrower construction than that upon which Justice Temple's opinion was based.

"And it is contended that some of these cases having been adopted before the adoption of our first constitution in 1849, and others before the adoption in 1879 of our present constitution, we are bound by a familiar rule of construction to hold that the words of our constitution were adopted in the sense which had been attributed to them in those decisions. I admit the validity of this rule of construction, but on examination of the decisions referred to, find no grounds for its application in this case. The Supreme Court of Tennessee, at its July term, 1843, decided the case of *Ivey* vs. *Hodges,* 4 Humph., 154. That was a civil case, and the only question to be decided was whether the trial court had erred in refusing to restate the evidence to the jury at the conclusion of the trial. In considering this question the writer of the opinion quoted the provision of their constitution, that: 'Judges shall not charge juries with respect to matters of fact, but may

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state the testimony and declare the law,' and thereupon proceed to observe that: 'This provision arose out of the jealousy with which our ancestors always looked upon any attempt on the part of the courts to interfere with the peculiar province of the jury, the right to determine what facts are found in a cause, and to put a stop to the practice of summing up as it was and is yet practiced in the courts of Great Britain, and in all probability in the colonies before the Revolution, and which consists in telling the jury not what was deposed to, but what was proved. This the framers of our constitution considered a dangerous infraction of the trial by jury, and have prohibited it in express terms: Judges shall not charge with respect to matters of fact—that is, shall not state to the jury what facts are proved.' This is the case upon which most reliance is placed by counsel for the people, and they counted that it settled the construction of the Tennessee constitution to the effect that judges are merely prohibited from stating to the jury what facts are proved, leaving them entirely free to comment upon and criticise the evidence, its weight and credibility. It will be seen, however, that this is not even a necessary implication from what was remarked *obiter* in respect to a matter only incidentally related to the question to be decided. The Court was not called upon to decide, and the case before them did not admit of a decision, as to the full scope of the clause prohibiting a charge as to matters of fact. They merely remarked in passing that it prohibited a charge as to the facts proven—a statement which was, and was no doubt

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designed to be, quite within the truth, and by no means exclusive. We shall see when we come to examine the decisions of this Court that it has been expressly held here in some cases, and implied in many more, that the corresponding clause of our constitution means a great deal more than to prohibit a statement of what has been proved.

"Another Tennessee case is *Ayres* vs. *Moulton,* 5 Cold., 154, in which a judgment was reversed because the trial judge told the jury that "from the facts as proven" the plaintiff was entitled to recover. Of course, this decision was correct, but it does not follow that the judgment would not equally have been reversed if the trial judge had merely told the jury that the evidence for plaintiff was entitled to great weight because of a character not likely to be fabricated.

"These two are the only cases called to our attention which were decided before the adoption of the constitution of 1849, and manifestly they did not so construe the clause in the Tennessee constitution as to compel us to hold that in copying it the people of California only meant that judges should abstain from telling juries what facts had been proved. In Arkansas the case of *Harris* vs. *State,* 34 Ark., 469, was decided in 1879. In that case the Court was ruling upon an exception by the defendant to the giving of any charge by the Court after the close of the argument. This was the only point to be decided, and the Court in passing upon it, after quoting a provision of their constitution similar to our own, proceeded to observe: 'Judges may not now, as

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under the former practice, in charging juries, sum up the evidence and tell them what facts are proven and what are not, and leave them to find such facts only as the Court may deem disputed or doubtful, but it is the province of the Court to declare the law applicable to the case, and the Court is not obliged to be silent after the close of the argument.' Here the decision of the Court is completely covered by the last clause of the quotation. What precedes is dictum—as in the Tennessee case—true, as far as it goes, but by no means the whole truth.

"In South Carolina a similar constitutional provision has been construed and applied in cases too numerous to be reviewed in detail here. The very number of these cases—about sixty—suggests a conclusion which is verified by a close examination, viz., that they are not entirely harmonious, and that the earlier decisions have not been accepted as a satisfactory solution of the question.

"The only decision of the South Carolina Court antedating the adoption of our present constitution was in *Redding* vs. *Railroad Co.*, 5 S. C., 67, decided in 1873. The exception considered in that case was to a charge of the trial judge 'that there was no testimony to support the first cause of action.' It was held that if there was no such evidence the ruling was one involving strictly a matter of law, and the Court declined to look into the evidence to see whether there was any testimony to support the first cause of action, because that supposed cause of action was insufficient to support a verdict. This simple proposition

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was all that was decided but the Court made the general remark—wholly outside of the matter to be decided, and wholly foreign to the reasons by which their judgment is supported—that the sole intention of the constitutional provision was to prevent judges from forcing, or to employ their influence to force, upon juries their own convictions as it regards matters of fact. Here, again, all that was said upon the point under discussion was purely *obiter,* but, even so, it goes far enough to condemn the use by the trial judge of any argument on the evidence, or any comment upon its weight or credibility.

"In a subsequent case (*State* vs. *Addy,* 28 S. C., 4, decided in 1887) the South Carolina Court, upon a review of a number of its previous decisions and of the decisions of other courts, announced this construction of the clause in question: 'That the judge must carefully avoid expressing an opinion on the facts, leaving it to the jury to draw their own conclusions entirely unbiased by any impression which the testimony may make upon the mind of the judge. He must not in any way indicate his opinion of the facts to the jury.' Upon this principle they reversed the judgment of the trial court, because the judge had commented upon the credibility of the defendant's testimony, or, in other words, had made an argument on the evidence. This concedes the whole of Justice Temple's position, and shows how far short of the true meaning of the constitutional prohibition are the dicta in the Tennessee, Arkansas and early South Carolina cases.

In the very latest South Carolina case to

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which our attention has been called (*Norris* vs. *Clinkscales*, 47 S. C. 511, 513) there is an elaborate review of their previous decisions upon this point, from which the conclusion is deduced that: 'A Judge violates this provision when he expresses in his charge his own opinion upon the force and effect of the testimony, or any part of it, or intimates his views of the sufficiency or insufficiency of the evidence in whole or in part.' Accepting this as authority, the instructions in this case are obnoxious to the principle stated. When a Judge tells a jury that although there is no evidence of a motive on the part of the defendant for the commission of the offense charged, there may nevertheless have been a motive undisclosed, and that circumstantial evidence (the evidence relied upon to convict) has the advantage of direct evidence because it is not likely to be fabricated, he certainly expresses an opinion upon the force and effect of the testimony and intimates his view of its sufficiency. It is scarcely necessary to extend this review of cases decided in other jurisdictions, since we may find in our own decisions the most explicit statements of the true construction of the clause in question.

"In *Kauffman* vs. *Maier*, 94 Cal. 283, the trial Court had instructed the jury that parol proof of verbal admissions should be received with great caution, etc. This was held to be an invasion of the province of the jury, and none the less so because it is a matter of common knowledge that the statements of witnesses as to verbal admissions are very apt to be erroneous, and notwithstanding the consensus of writers on

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the law of evidence to that effect. The opinion of Justice Harrison, at page 283, points out very clearly and forcibly why this is so, and every word there said applies with equal force to what was said in this case in regard to the advantages of circumstantial evidence.

"In the case of *People* vs. *Fong Ching*, 78 Cal. 169, 173, Justice McFarland uses this language: 'But the moment he (the Judge) attempts to comment upon or argue about the weight of evidence, the credibility of witnesses, or the probability of their sworn statements, he usurps power and violates section 19 of article VI of the State Constitution, which provides that judges shall not charge juries with respect to matters of fact. To weigh the evidence and find the facts is in this State the exclusive province of the jury, and with the performance of that duty the Judge cannot interfere without a palpable violation of the organic law.' (*People* vs. *Dick*, 34 Cal. 666.)

"It is not necessary to multiply citations upon this point, or to refer to the numerous cases in which the same doctrine has been assumed without express statement. It may, however, be proper to refer again to Cronin's case. (*People* vs. *Cronin*, 34 Cal. 191.) In Justice Temple's opinion he has pointed out the apparent oversight of Judge Sanderson in founding his conclusions upon the practice of the United States courts, and ignoring the special provision of our Constitution. I have only to add that the decision in Cronin's case, while it remains unquestioned authority upon the point mainly considered, viz., the sufficiency of the in-

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dictment, has been very seriously questioned and vigorously criticised on every other point. (See 2 Notes on California Reports, 748.) As to one of the instructions it was in effect overruled in *People* vs. *Padillia,* 42 Cal. 540, and as to another, the comment upon the defendant's position as a witness, it has been reluctantly followed in this State with continual protest; while in the State of Nevada, after being followed for a time, it was finally repudiated. In this connection I take occasion to notice the claim of counsel that in delivering the opinion of the Court in *State* vs. *Nelson,* 11 Nev. 334, and in concurring in the opinion of Chief Justice Hawley, in *State* vs. *Rover,* 13 Nev. 24, 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. If such an instruction had been under review I should have had for my guidance the very able opinion of Justice Garber, in *State* vs. *Van Winkle,* 6 Nev. 340, in which an instruction infected with the same vice was elaborately considered and condemned as an infraction of the constitution.

"With these observations upon the points urged upon the rehearing it is sufficient to say that upon mature consideration of the whole case we adhere to the conclusions announced in the opinion of Justice Temple, and for the reasons there stated the judgment is reversed and the cause remanded for a new trial."

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The charge made by the trial Judge in this case is open to precisely the same objections as the charge in the Vereneseneckockockhoff case. The wording of the instruction in the two cases is not identical, but the 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.

(3) The trial Court gave the following erroneous instructions relative to the defendant as a witness:

(a) "You are 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."

(b) "You are instructed that section 1323 of the Penal Code reads as follows: '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

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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.' "

(Clerk's Trans., p. 259.)

The judgment of conviction in *People* vs. *Emmons,* 13 Cal. App., 487, was reversed because the trial Court in that case did precisely the same thing that was done in this case by the trial Court, namely, read section 1323 of the Penal Code. Justice Cooper, who delivered the opinion of the Court, discussing the propriety of the reading of that section of the Code, says:

"This was error and clearly injurious to the defendant. The instruction as requested contained a correct statement of the law pertinent to the issue, and under the circumstances it was very material to the defendant that it should have been given. The Court, in effect, instead of telling the jury that the failure of the defendant to testify should not create a prejudice or an unfavorable inference in the minds of the jury, told them that to a defendant could not 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.' It was not a question before the jury as to what could be done if the defendant had taken the stand as a witness against himself, nor as to whether he

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could be compelled to testify against himself. It seems, therefore, plainly apparent that the effect of reading section 1323 of the Penal Code was to inform the jury that the defendant, if he had taken the stand, could have been cross-examined was probably the reason why he did not take the stand as a witness. If this were not so, why did the Court read the law to the jury as to the effect of something that had not occurred instead of giving the instruction as requested?"

(4) The Judge also gave the following instruction:

"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."

(Clerk's Trans., p. 249.)

This instruction was clearly erroneous. In *People* vs. *Cuff*, 122 Cal., 589, the Court gave a similar instruction which read as follows:

"The Court instructs you that the evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the defendant to contradict, and that, therefore, if weaker or

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> less satisfactory evidence is offered, and it appears that stronger or more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust."

The instruction in the Cuff case was founded upon subdivision 6 of section 2061 of the Code of Civil Procedure and the above quoted instruction in the case at bar is founded upon sub-division 7 of the same section. In the Cuff case the Court held that in criminal cases instructions founded upon these two sub-divisions should be very rarely, if ever, given, and that these instructions, while correct as an abstract proposition of law, were out of place, and that the giving of them was prejudicial error.

(5) We have already pointed out that the trial Court gave an inaccurate, misleading and erroneous instruction as to the character and degree of evidence which would warrant the jury in believing that a conspiracy existed. The instruction in question was inaccurate and erroneous by reason of the fact that it did not mention or take into account the element of unlawful object. The Court in substance told the jury that they had a right to infer that a conspiracy existed if two or more of the defendants named in the indictment pursued by their acts the same object. The prejudicial effect of this instruction was enhanced by the giving of a further instruction with reference

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to the liability of conspirators for the acts of their co-conspirators. This instruction reads 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 in 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 deceased Charles Hagerty 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 conspirators with him at the time he caused the said explosion are guilty of murder of the said Charles Hagerty, and that the same is murder in the first degree."

(Clerk's Trans., pg. 253-254.)

It would be difficult to overestimate the highly prejudicial effect of the foregoing instruction. It was an instruction which in effect told the jury that if certain persons had combined together for the purpose of advancing the interests of Trades Unions by doing away

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with the so-called "open shop" and that any one of such persons for the purpose of advancing such design, committed the crime of murder, that all of such persons were responsible for his criminal act and were guilty of murder in the first degree. 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. Of course, if various persons should enter into a conspiracy, for the purpose of advancing the alleged interests of the labor unions, or if they should enter into a conspiracy for the purpose of doing any other act, whether lawful or unlawful, by criminal or unlawful means, every member of the criminal partnership would be held responsible in law for the acts of his co-conspirators done in furtherance of the common design. But the mere fact that an agreement was formed to compel the discontinuance of the "open shop" policy by the employers of labor would certainly not render every party to such agreement liable for any crime that might be committed by one of the other parties to the agreement.

Criminal liability would attach only if the criminal act was done in furtherance of a previous unlawful agreement. It is a matter of common knowledge and notoriety that all labor unions believe in the policy commonly referred to as the "closed shop." In other words, they

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believe in the principle of collective bargaining, that is, that the laboring classes deal as a unit with their employers in the matters of the hours of labor, of wages and all matters in general in which the employee is interested. There is no labor organization, so far as we know, that does not repudiate the principle of the "open shop." In other words, it is, and has been for a great many years, the design of all labor organizations to compel the discontinuance of the "open shop" policy. Under the foregoing instruction we cannot see how any person who had ever participated in the activities of the Trades Unions throughout the United States could escape the penalty of murder for the destruction of the Times Building, and the resultant loss of life. The instruction contains the same vice as the previous instruction on the subject of conspiracy, namely, that it utterly omits the essential elements of unlawful object and unlawful means. Stripped to its essentials, it was an instruction that all persons connected with the activities of organized labor were guilty of the murder of Hagerty. Under this instruction every member of the American Federation of Labor would be guilty of the crime, because all members of Trades Unions by the very fact of becoming such members repudiate the "open shop" policy and subscribe to the doctrine of the "closed shop." It would be difficult to imagine a more sweep-

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ing generalization than the one contained in the foregoing instruction. It would likewise be difficult to conceive of a more dangerous doctrine than the one therein stated, a doctrine which practically rehabilitates the old barbarous theory of constructive treasons, which were sometimes pronounced by the common law judges, although this doctrine was often repudiated by the greatest of the English judges, and has never been a part of our law.

(6) The trial Judge gave the following instruction on the subject of flight:

> "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 itself, but as *indicative of a guilty mind.* And if you believe from the evidence in this case that the deceased, Charles Hagerty, 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 defend-

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ant, 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 the case."

The giving of this instruction was clearly erroneous and has been held erroneous in *People* vs. *Gee Gong*, 15 Cal. App. 28. In that case the Court charged the jury that, "Evidence of flight is received not as a part of the things done in connection with the criminal act itself, but *as indicative of a guilty mind*, and if you believe from the evidence in this case that a crime was committed in manner and form as charged in the indictment and that immediately after its commission the defendant Gee Gong took flight, 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 the case as presented."

It will be observed that the charge in the Gee Gong case and the instruction given in the case at bar are identical, with the exception of one or two very minor and unimportant variations in phrasing. For instance, the trial Judge in this case uses the Latin phrase *res*

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gestae, while in the Gee Gong case the phrase is translated. In the latter case Presiding Justice Cooper, who delivered the opinion of the District Court of Appeal, said:

> "The part of the instruction given by the Court, 'Evidence of flight is received, not as a part of the things done in connection with the criminal act itself, but as indicative of a guilty mind,' was error. It was equivalent to telling the jury that flight indicates a guilty mind, which is by no means true. It may indicate a guilty mind, but that is for the jury to find or infer from all the facts and circumstances in connection with the flight. Flight is not of itself evidence of guilt, nor does it raise a presumption of guilt. It is at most only a fact to be considered by the jury in connection with all the other facts and circumstances in the case from which it may draw an inference as to the guilt of the defendant. It has sometimes been said that it is a circumstance tending in some degree to prove a consciousness of guilt; but that is quite different from telling the jury that such evidence is received 'as indicative of a guilty mind.' There are many cases where the circumstances show that the flight is perfectly consistent with innocence, but it is always received upon the theory that the jury will give it such weight as it deserves, depending upon the particular circumstances of each case. (*Ryan* vs. *People*, 79 N. Y. 593; *Alberti* vs. *United States*, 162 U. S. 499, 16 Sup. Ct. Rep. 864, 40 L. Ed. 1051.) It is a circumstance to be considered by the jury, who might regard it as sufficient to

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show a consciousness of guilt. (*People* vs. *Ashmead*, 118 Cal. 509, 50 Pac. 681.) The question of fact as to whether or not the defendant is fled is for the jury. (*People* vs. *Choy Ah Sing*, 84 Cal. 276, 24 Pac. 379.) It has been held error for the Court to instruct the jury that flight raises a presumption of guilt. (*People* vs. *Wong Ah Ngow*, 54 Cal. 153, 35 Am. Rep. 69.)

"We see no reason why the Court should have instructed the jury that evidence of flight is received as indicative of a guilty mind. It was clearly a charge upon a question of fact."

(7) The Court refused to give the following instruction on circumstantial evidence requested by the defendant:

"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."

(Clerk's Trans., p. 272.)

The refusal to give this instruction was held reversible error in *People* vs. *Dick*, 32 Cal. 213.

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We quote from the opinion of Chief Justice Currey in that case:

> "The Court, in charging the jury, assumed that the evidence implicating or tending to implicate the defendant in the crime of which he was accused, was of a circumstantial kind, and elaborated the subject of circumstantial evidence at great length before the jury. The instructions which the defendant's counsel requested the Court to give to the jury were predicated of facts and circumstances which seem to have been proved, and which it was claimed on the part of the people warranted the jury in finding the defendant guilty of the murder of Simpson, while on the part of the defendant it was maintained that the circumstances in proof must not only all concur to show that the accused committed the crime, but that they were inconsistent with any other rational conclusion. We are therefore to assume from what the record contains that the evidence produced against the defendant was of facts and circumstances, from which it was the province of the jury to deduce the proper conclusion, and that the charge of the Court relates legitimately to the case as it stood upon the evidence before the jury. (*People* vs. *Barry*, 31 Cal. 357.)
>
> "After the jury had been charged at length, the defendant's counsel requested the Court to instruct them, 'that in order to convict the defendant upon the evidence of circumstances, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that they are all inconsistent with any other

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rational conclusion.' And, also, in these words: 'It is not sufficient that the circumstances proved coincide with, account for and therefore 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.' These requested instructions, with others, the Court refused to submit to the jury, and to the denial of the defendant's request his counsel duly excepted.

"There is no doubt respecting the soundness of the legal propositions contained in the two instructions above set forth, nor of their pertinency to the case before the jury. (*8 Greenl. Ev.*, Sec. 137; *Burrill on Cir. Ev.*, 181, 182; *1 Starkie Ev.*, 482, 483.) But the action of the Court is sought to be justified on the ground that the import of these requested instructions was contained in the general charge of the Court, and that as the jury was correctly instructed in the law of these requested and rejected instructions the defendant sustained no injury because of the Court's refusal to repeat what had in substance been already said. We have carefully examined the general charge of the Court with the view to ascertain if the excuse assigned for the action of the Court is well founded, and are of the opinion that it is not. The general charge comprehended the legal propositions contained in some of the instructions which were requested and refused, but not in those embodied in the instructions above set forth. We have no doubt as to the right of the defendant to

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have the instructions under consideration given to the jury."

(8) The Court also refused the request of the defendant to give the following instruction:

> "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."

This instruction contained a correct statement of the law.

> *People* vs. *Douglass,* 101 Cal. 1;
> *People* vs. *Strassman*, 112 Cal. 687.

The defendant was entitled to have this instruction given and the refusal of the trial Court to give it manifestly operated to his prejudice.

THE ERRORS HEREIN COMPLAINED OF RESULTED IN A MISCARRIAGE OF JUSTICE.

Since the adoption of section 4½ of Article VI of the Constitution, it has been the habit of counsel for the State in every case where manifest and unjustifiable errors were committed to seek safety behind the ambiguous phrasing of

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this amendment. The higher Courts of this State have not yet squarely interpreted this amendment. They have, however, on a number of occasions considered its applicability to specific cases. A consideration of these cases will show that the provisions of this amendment cannot be invoked to uphold the judgment in the case at bar. Most of these cases have already been cited in this brief. In *People* vs. *Fleming*, 166 Cal. 357, for example, the Supreme Court reversed a judgment of conviction because of the misconduct of the special prosecutor who appeared in that case, because of error of the trial Court in permitting the prosecution to show on the cross-examination of the defendant that the defendant had formerly participated in boxing matches under an assumed name, and because the trial Court restricted the cross-examination of a witness for the prosecution designed to show the extent of the interest of the witness in the outcome of the trial. The Court held in that case that section 4½ of Article VI of the Constitution was not applicable. It will be observed, however, that the errors committed in that case were far less numerous and far less prejudicial than those committed in the case at bar. In *People* vs. *MacPhee*, 26 Cal. App. 218, from which we have previously quoted in this brief, it was held that the admission in evidence of testimony as to the acts and declarations of alleged co-con-

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spirators, prior to the time that the defendants were shown to have joined the conspiracy, without proof of the existence of a conspiracy by any other evidence saving the said acts and declarations, was prejudicial error and that the "miscarriage of justice" amendment could not be given application to uphold the judgment.

In *People* vs. *Wilson*, 23 Cal. App. 513, this Court reversed a judgment of conviction because the trial Judge refused to give certain proper instructions on the subject of the good character of the accused. In that case the question of the applicability of section 4½ of Article VI is comprehensively discussed in the opinion of Presiding Justice Conrey of this Court, from which we quote as follows:

> "Having determined that the defendant was entitled to have instructions given with reference to the evidence of his previous good character, and the Court having refused to give any such instructions, we are of the opinion that this failure constitutes error of such importance to the defendant's rights that we must carefully consider whether it has caused a miscarriage of justice within the meaning of section 4½ of Article VI of the Constitution of the State. Under such circumstances we are required to examine the entire cause, including the evidence, and thereby to determine whether the error complained of has 'resulted in a miscarriage of justice.' The phrase, 'miscarriage of justice,' does not simply mean that a guilty man has escaped, or that an

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innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.' (Opinion written by Mr. Justice Sloss in *People* vs. *O'Bryan*, 165 Cal. 55, 130 Pac. 1042.) In the case last cited the same writer said: 'We are not to determine, as an original inquiry, the question of the defandant's guilt or innocence. But, where the jury has found him guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which was reached. If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered.'

"The concrete question now presented in the present case is, was the conviction of this defendant just, and would that result have been reached if the Court had given the defendant the benefit of appropriate instructions concerning the evidence of defendant's good character and concerning the duty of the jury to consider the same? A summary

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of the principal facts shown by the evidence is given at the commencement of this opinion. We have carefully examined the testimony as set forth in the Reporter's transcript. We must take into view the fact that the evident of defendant's guilt is wholly of a circumstantial nature, and that it was possible for some third person to have killed Thomas Wilson while the defendant slept. We must remember that there were some circumstances in the conduct of the defendant which might reasonably be construed as that of an innocent man; such as, for instance, that he promptly reported the fact of his brother's death, freely (we cannot say whether truly or not) answered all questions put to him concerning his brother's death; and made no effort to escape. And the record here shows that in two trials of this case the juries could not agree upon a verdict. Why did the third jury find the defendant guilty? Was the evidence of the State more convincing? Or were these last jurors more intelligent or more faithful to their duty? These questions we cannot answer since we have here a record of only the last trial. On the other hand, there are facts which limit the importance of the refused instructions with reference to the evidence of defendant's good character as a peaceable man. Of what avail is it that one's general conduct is peaceable and friendly, if he harbors malice against some one person? Here several of the witnesses recounted instances when, according to their testimony, the defendant raised his hand against his brother, and the circumstances shown in evidence indicate not only that Thomas Wilson was killed at

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the house on the Hopkins place, but also that some important part of the violent encounter took place in the sitting-room next to the room where the defendant claims to have been asleep. It is not for us to say whether we think that the defendant is guilty, and nothing said here is to be taken as indicating any opinion on the question of his actual guilt. We do hold that if the jury had been instructed upon the law concerning their duty to consider the evidence of defendant's previous good character as a part of the evidence upon which they were to determine the question of his guilt or innocence, such instruction would have added a substantial item to the balance in defendant's favor and might have changed the verdict. This being so, the case is one where the right of defendant to such instruction was a right the loss of which materially affecting his general right to a fair and lawful trial."

In *People* vs. *Pitisci* (*supra*), the District Court of Appeal of the First Appellate District held that said section of the Constitution could not be invoked to uphold a judgment of conviction in a case where the trial Judge had wrongfully commented upon the facts of the case, and had characterized the defense sought to be made as "an absurdity." It will be observed that in none of these cases which we have referred to were the errors numerous. In the Fleming case misconduct of the special prosecutor was the ground for reversal; in the Mac-

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Phee case, the erroneous introduction of testimony as to a conspiracy; in the Wilson case, the refusal to give a proper instruction; in the Pitisci case, misconduct on the part of the trial Judge. In each of these cases one of the enumerated errors was held to be a ground for a reversal. All of these errors and many, many more are present in the case at bar. In view of the position taken by the Supreme Court and by the District Courts of Appeal of this State, including this Honorable Court, how can it be contended that the errors committed upon the trial of this defendant did not result in his conviction and did not produce a miscarriage of justice?

In concluding this brief we cannot do better than to quote from the decision of the House of Lords of England in which a statute similar to section 4½ of Article VI of our Constitution is construed. The case to which we refer is *Makin & Wife* vs. *the Attorney General of New South Wales,* Law Journal Reps., Vol. 63, N. S., p. 41. The question was the construction of the Criminal Law Amendment act of 1883 (46 Victoria, No. 17), which provided: "That no conviction or judgment thereon shall "be reversed, arrested or avoided, unless for

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"some substantial wrong or miscarriage of jus-
"tice. In that case it is said:

> "Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the Judge to consider in arriving at their verdict matters which ought not to have been submitted to them."

It is respectfully submitted that for the reasons herein set forth the judgment and order appealed from should be reversed.

Dated, June ——, 1916.

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Due service and receipt of a copy of the within brief is hereby admitted this.....day of July, 1916.

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Attorney General,

_____

Deputy Attorney General,
Attorneys for Respondent.

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