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Paper No. 91

10 June 2003

本司檔號 Our Ref.:

來函檔號 Your Ref.:

電話號碼 Tel. No.:

2867 2653

LP BLU 5066/2/23C Pt 19

URGENT BY HAND

Clerk to Bills Committee Legislative Council Secretariat 3/F Citibank Tower 3 Garden Road Hong Kong (Attn: Mr Raymond Lam)

Dear Mr Lam,

Bills Committee on National Security (Legislative Provisions) Bill

Foreign case law on subversion

Further to our paper on Foreign case law on subversion (Paper No. 78), I enclose copies of the following cases as requested:

- Mulcahy v R (1868) LR 3 HL 306 (i)
- R v Cuffey (1848) 7 State Tr NS 467, 12 JP 648 (ii)
- R v Davitt (1870) 11 Cox CC 676 (iii)
- R v Deasy (1883) 15 Cox CC 334 (iv)
- R v Meany (1867) IR 1 CL 500, 10 Cox CC 506 (v)
- (vi) R v Mitchel (1848) 6 State Tr NS 599
- (vii) Wright v United States 108 F 805
- (viii) Untied States v Rahman 854 F Supp 254

- (ix) Bryant v United States 257 F 378
- (x) Skeffington v Katzeff 277 F 129
- (xi) Colyer v Skeffington 265 F 17
- (xii) In re Impaneling & Instructing the Grand Jury 26 F 749

Yours sincerely,

(Miss Adeline Wan Ping-siu)
Senior Government Counsel
Basic Law Unit/Legal Policy Division

cc S for S (Attn: Mr Johann Wong)

D of J (Attn: SG

DSG(C)

Encl

#67703 v1

[L.R.] 3 H.L.

[HOUSE OF LORDS]

DENIS DOWLING MULCAHY

PLAINTIFF IN ERROR:

AND

THE QUEEN

DEFENDANT IN ERROR.

1868 June 29, 30; July 3, 10.

THE LORD CHANCELLOR (Lord Cairns),
Mr. JUSTICE WILLES, LORD
CRANWORTH, LORD CHELMSFORD,
LORD COLONSAY.

Indictment - Pleading - Jury Lists - Continuances - Sworn and affirmed.

The 3 & 4 Will. 4, c. 91 (Irish Jury Act), makes a clear distinction between disqualification and exemption. Where, therefore, a juryman was returned whose age exceeded sixty years, that fact only operated in his favour as an exemption, but was not a ground for challenge as a personal disqualification.

The statute directs a jurors' book to be made up in each year for use in the year following, and declares that such book shall be in use from the 1st of January for and during one year. In November, 1865, at a sitting of a special commission, a panel was returned from the then existing jury book; the jurors were not then called, but the sitting was duly adjourned to the 19th of January, 1866, at which time the trial took place, when the jurors named in the return of November, 1865, were called:-

Held, that this was not a ground of challenge to the array.

One of the jurors, who had been duly returned November, 1865, was not on the list for 1866:-

Held, that that was not a ground of challenge to him.

Conspiracy cannot exist without the consent of two or more persons, and their agreement is an act in advancement of the intention which each of them has conceived in his mind.

The 11 Vict. c. 12, intituled "An Act for the better Security of the Crown and Government of the United Kingdom," declares it to be felony to "compass, imagine, invent, devise, and intend to deprive and depose our Lady the Queen," &c., &c. In support of the charge of this offence under the statute, it is sufficient to allege as overt acts that the Defendants conspired, combined, confederated and agreed to commit the offence.

Where there are several overt acts charged in a count, and a judgment is given on a general verdict of guilty on that count, such judgment will be sustained, though some of the matters alleged as overt acts may be improperly so alleged, provided that the count contains allegations of overt acts that are sufficient and are sufficiently alleged.

The allegation, in one count, of several different overt acts of felony is not objectionable under the 11 & 12 Vict. c. 12.

Semble, no objection to the caption of an indictment for an allegation that the grand jurors were "sworn and affirmed" can be sustained without shewing that those who were sworn were persons who ought to have affirmed, or that those who were affirmed were persons who ought to have been sworn.

THIS was a writ of Error brought to reverse a judgment of the Court of Queen's Bench in Ireland, pronounced in Hilary Term,

1867, against the Plaintiff in Error, upon a conviction for treason felony. The trial had taken place under a special commission, which began its sittings on November 28, 1865, when a true bill was found, and farther proceedings were then adjourned to the 19th of January, 1866. The record alleged the indictment to have been found on "the oath and affirmation" of the jurors therein named, who appeared in Court, and were "then and there sworn, affirmed, and charged to inquire," &c. Mulcahy was indicted with five other persons under the 11 Vict. c. 12, intituled "An Act for the better Security of the Crown and Government of the United Kingdom." The indictment contained three counts. The first charged that the Defendants "after the passing of the Crown and Government Security Act. to wit, on the 1st day of January, A.D. 1863, and on divers other days, as well before as after that day, did feloniously and wickedly compass, imagine, invent, devise, and intend to deprive and depose our Lady the Queen from the style, honour, and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland, and the said felonious compassing, imagination, invention, device, and intention, they, the said Defendants, &c., feloniously and wickedly did express, utter, and declare by divers overt acts and deeds hereinafter mentioned, that is to say," &c. Several matters were then alleged as overt acts. The form in which they were alleged was as follows: "In order to fulfil, perfect, and bring to effect this felonious compassing, imagination, invention, devise, and intention aforesaid, they, the said Defendants, &c., afterwards, to wit, on the 1st day of January in the year aforesaid, and on divers other days, as well before as after that day, feloniously and wickedly did combine, conspire, confederate, and agree with" (nineteen other persons, all named), "and with divers other evil-disposed persons, to the jurors aforesaid unknown, to raise, make, and levy insurrection and rebellion against our said Lady the Queen within this realm." Another overt act alleged was a conspiracy with the same parties "to move and stir up certain foreigners and strangers, and certain citizens of the [[United States of America]], and persons resident in America, with force to invade that part of the United Kingdom of Great Britain and Ireland called Ireland." Other matters alleged as overt acts were, the being and becoming members

of an association called the *Fenian Brotherhood*, having for its object the overthrow of Her Majesty's power and authority in *Ireland*; the knowing of the existence of a treasonable association in *America* called the *Fenian Brotherhood*, and aiding its treasonable objects by publishing pamphlets in *Ireland* intended to excite rebellion. Other matters alleged as overt acts were, like this last, matters of fact and not of mere intention. The same form of allegation was used as to all these overt acts, namely, "afterwards, to wit, on the said 1st day of January, and on divers other days, both before and after that day."

The second count charged the Defendants that they "feloniously and wickedly did compass, imagine, invent, devise, and intend to levy war against our Lady the Queen in *Ireland*, in order, by force and constraint, to compel her to change her measures and counsels, and the said last-mentioned felonious compassing, imagination, invention, devise, and intent, the said Defendants feloniously and wickedly did express, utter, and declare by divers overt acts and deeds hereinafter mentioned, that is to say," and then came what was nearly a repetition of the overt acts alleged in the first count.

The third count alleged as the offence that the Defendants, after the passing of the Act "for the better Security of the Crown and Government of the *United Kingdom*," to wit, on the 1st day of January, A.D. 1863, and on divers other days, as well before as after that day, feloniously and wickedly did farther compass, imagine, invent, devise, and intend to move and stir certain foreigners and strangers with force to invade that part of the *United Kingdom* called *Ireland*; and the said last-mentioned felonious compassing, &c., they did feloniously express, &c., by divers overt acts and deeds hereinafter mentioned, that is to say," and then followed allegations and statements of overt acts similar to those in the preceding counts.

The record then contained the entry of the adjournments and continuances from Tuesday, the 28th of November, 1865, to Friday, the 19th of January, 1866, and alleged that on that day *Mulcahy* came in his proper person, and having heard the indictment, he, protesting that he is not guilty, demurred thereto, because it charged that he expressed and declared the said several felonious compassings, &c., by divers overt acts and deeds, which are not,

nor is any of them, set out with singleness or certainty, or with proper averments, that as to each the allegations were double, and were informal and defective, &c., and that he is not bound to answer the same, wherefore he prays judgment, &c., and that he may not be compelled to answer the same.

The Attorney-General joined in demurrer, and prayed "judgment, and that Mulcahy may be compelled now to answer the said indictment."

The judgment of the Court was that the matters objected to "are not sufficient in law to prevent *Mulcahy* from being compelled to answer the said indictment, and that the said *Mulcahy* do now answer the said indictment."

Mulcahy then pleaded not guilty, whereupon the record alleged "the sheriff of, &c., is by the Court here commanded that he cause immediately to come before the justices," &c., a jury, "and the jurors of that jury, by the said sheriff of, &c., for this purpose impanelled, and here returned, being called thereupon came." Mulcahy then challenged the array on the ground that the jurors then called were returned out of the jurors' book for 1865, and not for the year 1866, being the now current year." The Attorney-General, by counter plea, alleged that the panel was duly arrayed and returned by virtue of a precept dated the 6th of November, 1865, issued by the justices on that day, whereby the sheriff was commanded to return the panel on the 27th of November, 1865, and that he did so; that the jurors did come on that day, that the commission commenced its sittings on that day, and "had been thence hitherto duly continued, and still and now is sitting in continuance of its sittings of the 27th of November, 1865." Mulcahy demurred to this counter plea, but the demurrer was overruled. Mulcahy then made several peremptory challenges which were allowed. He then challenged one Henry Fry, on the ground that Henry Fry's name (though on the jurors' book for 1865) was not on the jurors' book for 1866. This challenge was, after counter plea and demurrer, disallowed. H. Fry was then challenged peremptorily, and the challenge was allowed. On the name of James Booth being called, Mulcahy challenged him because he was not a person between the ages of twenty-one and sixty, but was above sixty-one years of age. This challenge was overruled.

Booth was then challenged peremptorily, and the challenge was allowed (1). The jurors were then sworn, the trial proceeded, and on the 21st of January a verdict of guilty was pronounced, and the prisoner was sentenced to ten years' penal servitude, the sentence being entered on the record as pronounced on each count of the indictment. Error was alleged, the case was argued in the Court of Queen's Bench, and the judgment was in all respects affirmed (2).

The present proceeding in Error was then brought.

The Judges were summoned, and Mr. Justice Willes, Mr. Baron Bramwell, Mr. Justice Blackburn, Mr. Justice Keating, and Mr. Baron Pigott attended.

Mr. Butt, Q.C. (of the Irish Bar), and Mr. Coleridge, Q.C. (Mr. Constantine Molloy, of the Irish Bar, was with them), for the Plaintiff in Error:-

The first objection relates to the form of the indictment. It is an indictment under the Treason Felony Act, and therefore resembles

(1) As to the making up of the jurors' book: The 3 & 4 Will. 4, c. 91, directs how returns of persons qualified to serve of juries are to be obtained, and by sect. 9, directs the justices at a special session in October of each year, to revise and amend the lists, then to make out one general list from the rest, and deliver it to the clerk of the peace, who is to copy it into a book, and to deliver it to the sheriff of the county, which "book shall be called the jurors' book for the year (inserting the calendar year for which such book is to be in use), and every sheriff on quitting office shall deliver the same to the succeeding sheriff, and such jurors' book shall be brought into use on the 1st day of January, after it should be so delivered to the sheriff, and shall be used for one year next following."

The 11th section directs the sheriff not to return to any venire the names of any persons not inserted in the jurors' book for the then current year: "Provided that if there is no jurors' book for the current year, it shall be lawful to return jurors from the jurors' book of the year preceding," &c.

As to the challenge on account of the age of the juror, the following provisions were referred to, 3 & 4 Will. 4, c. 91, s. 1:- "The sheriff of any county, &c., in *Ireland* shall not in answer to any writ of *venire facias*, or precept for the return of jurors, return the names of any persons not qualified to serve on juries according to the provisions of this Act, and that every man, except as hereinafter excepted, between the ages of twenty-one years and sixty years, residing, &c., shall be qualified with respect to property, and shall be liable to serve on juries," &c.

The 20th section declared that "if any man shall be returned as a juror who shall not be qualified according to this Act, the want of qualification shall be good cause of challenge," &c.

(2) Ir. Law Rep. 1 Q. B. 12.

an indictment for treason, and must be as strictly framed. It is not so here. The 11 Vict. c. 12, makes it unlawful to compass, imagine, invent, devise, and intend to deprive and depose the Queen, and the indictment charges the Plaintiff in Error and others that they did so feloniously compass. &c., and then it pretends to set out the overt acts which are necessary to make out the charge, all of which, except one, are laid on the 1st of January, 1863, and "on divers other days, as well before as after that day." Now, many of the supposed overt acts are alleged to be conspiracies for treasonable purposes, without anything which can properly be called an act done in pursuance of such conspiracies. That is not sufficient. Two things are necessary to make out the charge under this statute - the compassing or intending to do the forbidden thing, and an overt act, or act done in pursuance, and for the advancement of, such intention. But conspiring and compassing are not acts, they are merely intentions of the minds of those who are alleged to conspire and combine. The indictment would not be good if it merely alleged the compassing, for the statute on which it is framed requires the expression and declaration of such compassing by overt acts, which are, therefore, part of the crime. The deliberate design must be proved by definite acts and deeds, which alone constitute what the law calls overt acts. But mere conspiring is not an overt act, it is no more than compassing, and the allegation of it as an overt act is but the repetition of the charge of the offence, without any overt act being alleged to support it. To treat conspiring as an overt act, when it is really nothing but a mere mental operation which is to be evidenced by overt acts, is to defeat the 7 & 8 Will. 3, c. 3, which renders it imperative to give evidence of overt acts, and forbids evidence of any act not properly laid in the indictment. Overt acts must be clearly and distinctly laid, or the count will be defective. No agreement existing in the minds of many different persons can be treated as an overt act; it is an internal process of their thoughts, not an external act and deed, and unless of the latter class it is not sufficient to support the charge laid in this indictment:- [THE LORD CHANCELLOR:- Does not agreement import consultation, and is not consultation among several persons an act - an overt act?] Not necessarily. There may be a common intention among

several persons without there ever having been any actual consultation among them. What ought to have been alleged was the particular overt act by which the accused had become a party to the asserted conspiracy. There is no allegation of that sort here, and no one can be charged with treason without some act of treason being distinctly alleged against him. The third count fully justifies this argument, for there what is charged is the offence of compassing, intending, &c., to be proved by the subsequent allegation of overt acts. Now, that is actually the very matter that in the two preceding counts constitutes one of the pretended overt acts. It is clear, therefore, that the indictment itself treats the very same thing in two different and inconsistent ways. The conspiracy ought to be charged as a specific offence, for otherwise no particulars can be obtained of the acts which are supposed to constitute the conspiracy, and the humane intentions of the law may thus be defeated.

The allegation of a specific act being done on a particular day, and on divers other days, is uncertain and bad. The indictment is bad on the ground of duplicity: several overt acts are alleged in each count, and several overt acts of distinct character, and which, with the alleged compassings, constitute different species of felony, are alleged in one count. The indictment is, therefore, defective in substance, and the judgment on it cannot be supported: Gabbett on the Criminal Law (1); Vaughan's Case (2); Reg. v. Duffy (3); Reg. v. Parker (4); Watson's Case (5); Hawking(6); Archbold's Pleading and Evidence (7).

If any part of a count is bad, a general judgment on it cannot be sustained: O'Connell v. The Queen (8).

The judgment on the demurrer here was bad in form.

The allegation in the caption that the indictment was found by persons who were "sworn and affirmed," is not sufficient. It ought to be stated who were sworn and who were affirmed, that it might be known that these things were rightly done.

- (1) Book I. c. li. p. 890, where 3 Inst. 12; 1 Hale, P. C. 108-149; Fost. 194; and East, P. C. 116, are referred to.
 - (2) 13 St. Tr. 485; Fost. 246; East, P. C. 123.
 - (3) 4 Cox, Cr. C. 294.
 - (4) 1 Car. & Marsh. 639.
 - (5) 32 St. Tr. 5.
- (6) Vol. ii. c. 25, s. 59 & s. 77.
- (7) Tit. Indictment.
- (8) 11 Cl. & F. 155.

CENTRAL CRIMINAL COURT.

September 21st, 1848.

OLD COURT.—[Before ERLE and V. WILLIAMS, JJ.]
REG. v. CUFFRY AND OTHERS.

Indictment-Copy of-Right to.

When an indictment for misdemeanor is preferred at the instance of the Attorney-General, the prisoner is entitled to a copy at the expense of the crown. But if the indictment is for felony under 11 & 12 Vict. v. 12, depending on facts which before that act would have amounted to treason, the prisoner is not entitled to a copy, nor will one be granted to him ex gratia.

The prisoners were indicted under 11 & 12 Vict. c. 12, the crown and government security act, for feloniously intending to levy war against the Queen, to compel her to change her measures, with overt acts, and for feloniously intending to depose the Queen, with overt acts; they were also

indicted for a common conspiracy.

Ballantine, Huddlestone, Parry, Metcalfe, and Parnell, for the several prisoners, applied for copies of both indictments. As to the misdemeanor, they submitted that the prisoners were entitled of right to receive copies. These indictments were preferred at the instance of the Attorney-General, and thereat the instance of the Astorney-General, and incre-fore came within section 8 of 60 Geo. 3, and 1 G. 4, c. 4, which enacted, that "in all cases of prosecu-tion for misdemeanor instituted by Her Majesty's Attorney-General or Solicitor-General, in any of the courts aforesaid, at any session of the peace, session of over and terminer, great session or session of gaol delivery, (section 7,) the court shall, if required, make order that a copy of the information or indictment shall be delivered after appearance, to the party prosecuted or his clerk in court, or attorney upon application made for the same rice from all expense to the party so applying; provided that such party or his clerk in court, or attorney shall not have previously received a copy thereof." As to the felonies they submitted, that though not entitled as of right to copies, yet the would, ex gratia, direct copies to be delivered or at least intimate to the Attorney-General an opinion, that they should be delivered. Upon a similar application in Ireland on the trial of Martin, under the same statute, the judges there acceded to the application, and a copy was delivered. This course would also obviate the necessity of having the indictments read over, probably several times, in order that they might be taken down. Prior to this statute, the same acts constituted the offence of treason; and if that had been so now, copies of the indictment would have been granted as a right to which the prisoners would have been entitled. The alteration of the name and punishment of the offence ought not to cause an alteration in the mode of dealing with it, at least in this

Per CURIAM.—The copies of the indictments for misdemeanor will of course be delivered in compliance with the statute, but as to the felonies, there is no reason why this should vary from an ordinary felony. The legislature have thought proper to reduce such offences from treason to felony, and that being the case, they must be treated in all respects as felonies; one result is, that a copy of the indictment is no longer to be delivered. There were persons who, forgetting the merits, looked to the indictments as fruitful sources of technical errors, by means of which they might, contrary to the merits of the case, defeat the prosecution. To such persons the court would not afford any facility. In this case, the facts stated in the indictments must be known, because they were necessarily the same with those taken in the informations before the magistrates. The prisoners therefore cannot be prejudiced in their defences. The applications as to the felonies, were respectfully refused.

NEW COURT. — [Before the RECORDER.]
REG. U. SALMON.

Larceny—Fixtures,—House under lease—Consent of tenant—Production of lease.

Where a house had been let by the prosecutor to the brother of the prisoner,—Hald, that under the ordinary counts for steating lead attached and unattached to the freehold, the consent of the tenant to the prisoner's dot must be negatined.

Secondly, that the landlord could prove his interest

only by the production of the lease.

Semble, the indictment should have been framed under section 45 of 7 § 8 Geo. 4, c. 29, for stealing fixtures let with the house.

The prisoner was indicted under 7 & 8 Geo. 4, c. 29, s. 44, for stealing lead attached to the house of Edward J'Anson. Second count laying it as attached to the house of Lawrence Salmon, with counts for simple larceny.

It was proved that a person named Moore was about July 12, in the area of a house in Clevelandstreet, taking the lead out of the cistern. He was cutting it out in small pieces, which was the only way of getting it from the cistern, of which it formed the liuing. This was in the day time, and the prisoner was in the mean time standing at the door of the house. Moore then came out with the lead, and put it into a truck, which he took to Mitchell's, a marine storeshop; prisoner followed at a little distance, went into the shop, and Mitchell came out and hought the lead. Moore's account of the transaction was, that the prisoner met him, took him to the house in question, took a key from his pocket, opened the door, and took him into the parlour. That the prisoner then asked him to cut out the lead from the cistern, which he did, and that he received from the prisoner 2s. 6d.. for his trouble. The lead thus cut weighed three cwt. and a half, and the prisoner received from Mitchell for it, 21. 6s. Edward J'Anson was the landlord of the house in question. It was let by him under a lease to Law-

question. It was let by him inder a tease to Laws rence Salmon, the brother of the prisoner; two years rent was in arrear. The prisoner's brother was absent. The prisoner had no authority from J'Anson to remove the cistern, or to cut out the lead, or to remove anything from the house. The prisoner, on being charged, said, that he had full authority from his brother to remove the lead.

The RECORDER.—Should you not have indicted for stealing fixtures let with the house under 7 & 8 Geo. 4, o. 29, s. 45? The prisoner might have been authorized by his brother to remove the lead; and

though that would have been an offence in both the prisoner and his brother under that section, yet, independent of it, the brother had a temporary property in the house and in the lead, which was part of the house. If therefore he had given to the prisoner authority to remove the lead, the prisoner for pursuing such authority would not be liable under any of the present counts. The prosecution does not call the brother to negative such authority; the evidence is therefore defective, and does not support the second count. The first count fails, because the lead is not in the possession of the landlord, but of the tenant. There is also in this case a further objection, namely, that the lease is not produced; and it is by that alone, in the absence of notice to produce, that the landlord can show his interest in a house which is not at present in his possession. The counterpart is not sufficient until

notice has been given to produce the original.

Ballantine for the prosecution.

Wilds for the prisoner.

September 22.
REG. v. STEINHAN!

Larceny—Taking—Felonious intent.

The prisoner ordered some goods of the prosecutor, which he said were intended for shipment, and should be paid for on delivery. The prosecutor sent his servant with them, instructing him not to part with the goods until he had received the morey. The prisoner, however, induced the servant to leave them, promising to order other goods and then to pay for all; he immediately pawned them:—Held, that if the prisoner induced the servant to part with the goods in pursuance of a previous design to get possession without payment, it was larceny.

Indictment for stealing engineering instruments, the property of Henry Simpson.

The prisoner went to Simpson's shop and ordered

The prisoner went to Simpson's shop and ordered a considerable quantity of engineering instruments,

which he said were intended for shipment to the Cape of Good Hope on the following Thursday, and Cape of Good Lupe on the following lituratury, and directed the prosecutor to send them to his house, where, upon delivery, they should, he said, be paid for. The prosecutor said he would send them on the Wednesday. Prisoner said, "Send a receipt with them. I shall be at home and will send back the money." The prosecutor on the Wednesday sent the goods by a servant, whom he instructed to bring back either the goods or the money, and not to deliver them until he received the money. He sent a receipt and the invoice. The servant, on arriving at the prisoner's house, told the prisoner he was not to leave the goods unless they were paid for. prisoner said he had a German bill, which he wished the servant to take for the amount, and return the balance. He did not produce it. The servant said he could not take the bill without instructions from his master. The prisoner then said the servant might, if he wished, take the goods back; but added, that he was going to meet Mr. Simpson at the house of Mr. Nesbett, at supper, and that he should then have a further order for Mr. Simpson. The servant trusted to his declaration that he was about to order more goods of his master, and to his representation that he knew a mutual friend, and left with him the goods and the invoice. The prisoner was not invited to supper by Nesbitt, nor did he go; but he had heard an invitation given by Nesbitt to Simpson, and was a partial acquaintance of Nesbitt's, having formerly been an usher in his school. The prisoner on the Thursday went to Simpson's, apologised for not sending the money on the previous day, and asked Simpson to take a German bill, which was not produced. Simpson refused to take the bill, saying that he had no opportunity of negotiating it; and added, that he was much surprised that the prisoner had not sent the money. The prisoner said he would negotiate this, with several other bills in his possession, in a day or two, and pay him on the Saturday. The prisoner did not keep his appointment, and Simpson went to the prisoner's house. He there saw the empty packing-case, and prisoner admitted that he pawned the goods on the Thursday.

The RECORDER, in summing up to the jury, told them that the question for their consideration was whether the prisoner got possession of the goods by a strategem with the intention of stealing them, or whether he contracted for and bought them, failing subsequently to pay for them. If he prevailed upon the servant to leave them, intending thus to take a long credit, but to pay ultimately for the goods, the prisoner must be acquitted; but if in thus inducing the servant, he was acting in pursuance of a previous intention to steal—if he intended thus to obtain possession of the goods, and then to appropriate without paying for them, the larceny was made out. The jury found the prisoner

Charnock for the prosecution. Guilty.

Miscellaneous Information.

VITAL STATISTICS OF THE METROPOLIS. (135 REGISTRARS' DISTRICTS.)

| Population 1,948,911. Area in square miles, 115 5-10ths. Week ended | Deaths registered. | | | | Total | |
|---|---|--|------------------------|-------------|--|--|
| | Age. | | | | deaths in the corres | |
| | to 15 | 15 to 60 | 60 nind upwards, | Total | ponding weeks of last year. | |
| 16 Sep. 1848. | 486 | 301 | 139 | 926 | 1040 | |
| 23 ,, ,, | 539 | 314 | 154 | 1038 | 1169 | |
| Wack ended | Deaths Weekly average number of deaths the summers of 1843-4-5-6-7. | | | 01 | Number of birthare of birthare of bistered | |
| | endemic, and con- tagions diseases. | and con- all contagious and contagious | | ind ince | - I | |
| 16 Sep. 1848. | 374 } | 972 | 257 | ∫ 13 | - 1 | |
| 23 ,, 10 | 393 } | | | 12 | 50 56.7 | |

Sec. Sec.

750

REG. SELTEN, 1871.

Murder

Provocation-

words he used with the object of inducing the deceased to follow him, there would be evidence of implied malice to sustain the charge of murder. But if you come to the conclusion that the prisoner had not such intention in his mind, and that he did not utter the words with such intention, that they were idle words of bravado, not of challenge, and that he used the knife on some Manslaughter, fresh and sudden provocation ensuing from the deceased following him and renewing the assault upon him, then there is evidence to reduce the crime to manslaughter.

Verdict-Manslaughter; sentence-fifteen years' penal servitude.

CENTRAL CRIMINAL COURT.

July 15, 16, 17 and 18, 1870.

(Before Lord Chief Justice COCKBURN.)

REG. v. DAVITT AND ANOTHER.(a)

The Treason Felony Act (11 & 12 Vict. c. 12)—Overt acts—Supplying arms to be used in insurrection-Evidence-Jurisdiction.

Under the Treason Felony Act (11 & 12 Vict. c. 12), sending or supplying arms to be used in aid of a treasonable confederacy, having for its object the overthrow of the Queen's Government, in any part of the United Kingdom, by force of arms, is a sufficient overt act of a conspiracy to depose or deprive the Queen. And it is not the less so because the arms are sold, and the motive of the sale is pecuniary profit, provided it is known that they are to be used in aid of insurrection. Secret storing of arms and sending them, under feigned addresses, into districts where the confederacy exists, with various contrivances to conceal their ultimate destination, and with knowledge of the confederacy, is evidence of the offence. And bringing arms to London, with a view to their transmission for such purpose:

Held, a sufficient overt act within the jurisdiction of the Central Criminal Court.

INDICTMENT under the Treason Felony Act.(b) The prisoners, Davitt and Wilson, were indicted for that on the 1st of December, 1865, and on divers days before and after,

(a) Reported by W. F. FINLASON, Esq., Barriater-at-Law. (b) 11 & 12 Vict. c. 12, the "Act for the better securing the Crown and Govern-

they, together with others unknown, did feloniously compass and devise to deprive and depose the Queen from her style and title of the Imperial Crown of the United Kingdom of Great Britain and Ireland; and the said prisoners did utter, express, and declare, by divers overt acts and deeds mentioned, that is to say: (1) In order to fulfil their felonious purpose, they feloniously did (a) conspire to levy war, insurrection, and rebellion Supplying crms against the Queen within the realm; (2) they did feloniously conspire to subvert the constitution; (3) to incite foreigners, to wit. citizens of the United States of America and persons resident in America, to invade Ireland; (4) to become members of a certain society known as the Fenian Brotherhood, having for its object and design the overthrow of the Queen's authority in Ireland, and to induce others to be members; (5) to prepare means whereby the authority of the Queen in Ireland might be overthrown; (6) to procure and provide large quantities of arms and ammunition with intent to arm themselves and other evil disposed persons, to raise, make, and levy insurrection and war against the Queen, within the realm; (7) they did feloniously make and provide large quantities of arms with such intent; (8) did become members of the Fenian Brotherhood, having for its object the establishment of a republic in Ireland; (9) did become members of an unlawful association, the members of which were required to take an unlawful oath purporting to bind the persons taking it by force and arms to make Ireland a republic; (10) they—well knowing that an unlawful association existed in Ireland of persons known as Fenians, having for their object the overthrow of the Queen's authority in Ireland and the establishment of a republic there-did feloniously, by causing to be conveyed arms and ammunition into Ireland, endeavour to aid and assist the said association, and to advance the object thereof; (11) they did feloniously and unlawfully conspire together to incite and urge divers subjects of the Queen to join and become members of the Fenian association having for its object the overthrow of the Queen's power in Ireland, &c.; (12) they feloniously entered into a treasonable conspiracy, and became and were members of the Fenian Brotherhood, having for its object, &c., and as such members did collect arms, and distribute sums of money, and make journeys, and give orders and directions to divers persons. and did mutually aid and assist each other, with the object and intent of advancing and effecting the felonious object; (13) they did conspire in raising insurrection in Ireland and levying war

ment of the United Kingdom," s. 8: "That if any person shall compass or devise to deprive or depose the Queen from the style or royal name of the Imperial Crown of the United Kingdom, or to levy war against her, in order by force or constraint to compel her to change her counsels or measures; or to move or stir any foreigner or stranger with force to invade the United Kingdom, and such devices or intentions shall declare or express by any publication, or by any overt act or deed, he shall be guilty of felony."

(a) No venue was laid for the conspiracy or any of the overt acts, except such as is expressly stated in any of them, nor was there any allegation "within the jurisdiction."

REG. DAVITE. 1870.

Treason Fe'ony

REG. DAVITE. 1870.

Treuson Felom

there; (14) they did feloniously conspire and consult with divers persons in and about raising insurrection in Ireland and levying war against the Queen; (15) they conspired with such persons to levy war against the Queen; (16) to subvert the constitution and government of the realm; (17) to seize arms at Chester; (18) they. with others, did at divers places in Ireland meet together armed Supplying arms to fight the peace-officers of the Queen, and did thereby levy war

- Evidence. against hor. (10) there did not be a supplying arms to fight the peace-officers of the Queen, and did thereby levy war against her; (19) they did aid and assist the Fenian Brotherhood in making war against the Queen: (20) they did come into Paddington in the county of Middlesex, (a) and did make divers other journeys in order to aid in forwarding to Ireland arms and ammunition, for the purpose of fighting against the Queen's troops and peace-officers, and for the overthrow of her power and authority in Ireland; (21) did conspire to cause to be sent large quantities of arms to Ireland with the object of their being used in Ireland in feloniously making war against the Queen; (22) did conspire to cause to be sent to Leeds quantities of arms and ammunition, with the object that they should be sent to Ireland and used there in feloniously making war against the Queen and fighting against her troops and peace-officers; (23 to 25) similar, laying different places; (26) they did conspire to send to Paddington, in the county of Middlesex, (b) quantities of arms and ammunition, with the intent that they should be sent to Ireland, to be used in making war against the Queen, &c.; (27) they did cause to be brought to Paddington, (c) in the county of Middlesex, and within the jurisdiction of the Central Criminal Uourt; and there did have large quantities of arms with the intent and object that they should be used in levying war, insurrection, and rebellion against the Queen; (28) they did conspire that, with the intent of aiding such object, such arms should be brought into Paddington, &c., and the said Wilson did bring the said arms into Paddington, within the jurisdiction, &c.; (29, 30) similar; (31) did conspire to meet together at Paddington within the jurisdiction, for the purpose of siding and advancing the said object; (32) they did for that purpose there meet together; (33) they did for that purpose go to the Great Western Railway Station at Paddington, within the jurisdiction, against the peace of the Queen, against her crown and dignity, and contrary to the statute.

> Second Count.—That the prisoners did with divers others feloniously conspire to levy war against the Queen in Ireland, in order by force to compel her to change her measures and councils; and the said felonious purpose did utter and declare by divers overt acts (laying overt acts similar to those in the former count), against the peace of the Queen, and her crown and dignity, and contrary to the statute.

Sir R. Collier, A.G., Sir J. Coleridge, S.G., H. T. Cole, Q.C., Archibald, and Poland, for the Crown.

Collins for the prisoner Wilson.

Griffiths and Moody for the prisoner Davitt.

Evidence was given as to the existence and action of the illegal association alluded to in the indictment under the name of the "Fenian Brotherhood." The evidence was chiefly that of an Supplying arms informer, who stated that the object of it was to overthrow the Queen's government in Ireland, and to establish a republic. Oaths were administered to the members to take up arms when required for this object, and measures were taken to procure arms for the purpose. In February, 1861, an attempt was actually made to take Chester Castle. He stated that he had seen the prisoner Davitt about that time at meetings of the brotherhood, and had seen him there when the intended rising was discussed.

It was also proved that the prisoner Davitt had been seen in the company of persons afterwards convicted as members of the treasonable brownerhood referred to, and that he had been seen at places frequented by American officers. Evidence was given that the meeting of the brotherhood had continued to the present time. Evidence was given of attacks by insurgents upon the military and police in Ireland during the year 1867. And there

was evidence that the organisation still continued. With regard to the complicity of the prisoners, the substance of the evidence was as follows:--It was proved that the prisoner Davitt, in October and November last, was residing in London under the name of Jackson. In December last, on the occasion of the arrest of a man suspected to be a Fenian, and convicted of illegally possessing arms, he tried to destroy a letter which was seized by the police and proved to be in the handwriting of the prisoner Davitt. It was dated from Glasgow, but had no signature, and contained the passage: "As to the other affair, I hope you will not take any other part in it; you are of too much importance to your family to be spared, even at the risk of allowing a rotten sheep to exist among the flock. All care and trouble of the last twelve months will have been in vain. Whoever may be employed to do it, let him not use the pen we have been selling, but get another for the purpose."

It was, in effect, admitted by a witness called for the defence, that the terms "flock" and "family" meant the Fenian brotherhood; that "rotten sheep" meant a traitor to it; that "pen" meant a fire-arm. Another witness admitted buying revolvers from a man named Monaghan, the partner of the prisoner Wilson, and selling them to various persons.

In January last the prisoner Davitt took a warehouse at Leeds, under the name of Jackson. He had a warehouseman named Anderson. The other prisoner, Wilson, was a gun-maker at Birmingham, in partnership with Monaghan. Arms made by him were from time to time taken to the house of a poor man, an Irishman, who had no demand for them, and to whose house they

Ræg. DAVITT.

1870.

reason Felony Act-

⁽a) Not laid to be, but being within the jurisdiction of the court.

⁽c) Vide supra. These were the more material parts on which the case really proceeded.

REG. 32. DAVITT.

1870.

were evidently carried for the purpose of secret conveyance. On several occasions the prisoner Wilson was seen to fetch away parcels of arms thus disposed of.

Treuson Felonu

On the 26th of March, when the police had their attention directed to the matter, a box was found at the railway-station addressed to Wilson himself, at Leeds. The box, being opened, Supplying arms was found to contain arms. Wilson went to Leeds, and there, with Anderson, the other prisoner's foreman, went to the station to fetch away the box of arms thus addressed to him; and they carried it to the warehouse of the other prisoner, Davitt. Next day Davitt and his men went to the warehouse, and took away two casks, which were found to be heavy, and carried them to the station of the London and North-Western Railway Company, addressed to some person in Ireland, at a place where no such person was found to exist. Several other consignments of arms were traced under similar circumstances. Between the 26th of March, when the attention of the police was first directed to the matter, and the 14th of May, when the prisoners were arrested at the Great Western Railway Station in Paddington, there were fifteen such consignments of arms-eight to Ireland, and six to Glasgow and other places; all sent with false and fictitious addresses, and all the addresses in the handwriting of the prisoner Davitt, and all the consignments coming originally from the workshop of the prisoner Wilson.

On the 14th of May Davitt came to London under the name of Mathews, and on that day Wilson was seen at the station at Birmingham with two parcels, which turned out to contain fifty revolvers; and at the other station at Paddington, when he arrived, the other prisoner, Davitt, was found loitering about the station, and said he was waiting for a friend. On their being arrested, his address, under the name of Mathews, was found in the pocket of the other prisoner, Wilson; and the sum of 1501. was found on the person of Davitt.

Such was the substance of the case against the prisoners.

Collins, for the prisoner Wilson, urged that it was not proved that he had any connection with the Fenian conspiracy, and that it was consistent with all the evidence that he was ignorant of it, and merely sold weapons to the other prisoner in the way of business, with no idea of their destination.

Griffiths, for the other prisoner, Davitt, urged that there was no sufficient proof that he was connected with the conspiracy, as the only evidence of it was that of the informer, not confirmed; and that it was consistent with the evidence that the object of the consignments was innocent.

On the part of the prisoners witnesses were called, one of whom, however, proved that the letter was in the handwriting of the prisoner Davitt, and gave it an interpretation applying to the Fenian conspiracy. He, however, attempted an explanation of it by suggesting that it was a copy of a letter sent to Davitt, and by him sent to the witness.

Sir R. Collier, A.G., relied strongly on the letter as proof of the complicity of Davitt, but urged that these numerous secret consignments of arms—especially to Ireland—all emanating from the shop of the prisoner Wilson, and conducted by the other prisoner, were proofs of the complicity of both of them.

Cockburn, C.J., to the Attorney-General. - Supposing the prisoner Wilson had had nothing to do with Fenian designs, but Supplying arms was willing to supply men whom he knew to be Fenians with arms, although indifferent to the purposes for which they might be used, was it contended that he had conspired in the felony? In such a case he would sell them with a knowledge of his customers, but without any intention of his own to aid in their design. Would he be liable to be charged with complicity in the felony?

Sir R. Collier, A.G., said he apprehended that if the prisoner knew the illegal purpose for which the arms were to be used, without any further complicity on his part than the mere sale, he would be guilty of felony. An accessory before the fact to a felony had been held to be a principal. In this case the prisoner had done more than sell the arms—he had gone to Leeds to co-operate with Davitt in using them.

COCKBURN, C.J.—It may be so.(a) Afterwards, at the close of the case,

Cockburn, C.J., to the jury.—The prisoners are indicted for what is in substance high treason, though that is not the crime for which they are indicted, as, under the statute, what would before have been high treason is now created an offence for which, upon conviction, a lesser punishment than that of treason is to be inflicted. The substance of the charge against the prisoners contained in this voluminous indictment may thus be stated: A conspiracy to depose the Queen (a charge which would be proved by showing an attempt to depose her from her State as sovereign in any part of her dominions—as Ireland), and with that object to levy war against her. And the overt acts relied upon in support of the conspiracy are the procuring and producing arms for the purpose of being used in the intended insurrection against the royal authority in Ireland. You will have to consider, first, whether arms were provided in this country for the purpose of being sent to Ireland with the intention of being used and employed in rebellion there; next, whether they were sent by the prisoners, or either of them, with the intention of their being so used and employed. We have the fact of the letter, proved to be in the handwriting of the prisoner Davitt, and proved by a witness for the defence to refer to the Fenian conspiracy, and to traitors to it, and to the use of weapons against such traitors. We have the fact of large and repeated consignments of arms by the defendants to false addresses and fictitious persons in

(a) It will be seen that the Lord Chief Justice, after consideration—the case occupying several days, and there being an adjournment after it was concluded before the summing-up-directed the jury in accordance with this view of the case.

REG. DAVITT.

1870.

Treason Felony

them, and merely shut his eyes to their destination, that is not

sufficient to convict him. But if you believe that, in supplying

the arms, he had a knowledge that they were about to be used

for a traitorous purpose, and with the intention that they

should be so used, then he is involved with the other prisoner in

a common guilt. If he was indeed ignorant of their destination,

then it would be otherwise: of this you must form your own judgment. And if he, knowing the object, though himself not

caring about it, yet, for the sake of sordid gain, lent himself

to that object, he would be guilty. The great question is,

whether the arms were sent with the traitorous purpose of

exciting insurrection. If you are satisfied that they were sent for that purpose, then, if both the prisoners knew of it, both are

guilty; or, if not, then such one of them as knew of it. It is neces-

sary that an overt act should have been committed within the jurisdiction of this court, and if you are satisfied that the arms

were brought by the prisoner Wilson to the Paddington station

in pursuance of the traitorous object, then there would be such an act within the jurisdiction. Nothing has been proved to account

for the arms being so brought. If you are satisfied that they were brought to be used for the traitorous purpose, and that one

prisoner was bringing them in concert with the other for that

purpose, then they would be both guilty upon this indictment, for there would be an overt act by both of them in furtherance of a

common traitorous design. Consider, then, whether the prisoners,

or either of them, sent these arms, and sent them secretly and clandestinely, for the purpose of aiding the treasonable conspiracy.

REG. DAVITT.

1870.

Ireland and other parts of the country, these arms coming from the workshop of one prisoner-Wilson-and secretly consigned to false addresses in the handwriting of the other prisoner, Davitt. And the question naturally arises for what purpose were all these consignments; and why were they thus made? not openly, but Treason Felony secretly; and by means of such devices and contrivances. The Supplying arms fact that strikes the mind most forcibly is, that in all these cases there was concealment and contrivance, which must have been for some purpose. It is for you to exercise your own judgment as to whether it was an innocent purpose. In these consignments both prisoners take part, and finally one of them (Wilson) comes to London, evidently to meet the other, with his address, under a feigned name, in his pocket, and with fifty revolvers: and there, at Paddington, the other prisoner (Davitt) actually is to meet him. As regards the prisoner Davitt, there is positive evidence (that of the informer) that he was engaged in the Fenian conspiracy. Whether the evidence is credible and reliable, and how far it is confirmed, it is for you to judge. There is the letter, which in terms appears to point to this conspiracy and as to which you have heard the explanation, which it is for you to judge of. If you are not satisfied, then from the terms of that letter you may infer the complicity of Davitt. But that is not the whole evidence; and even if you are not satisfied as to the evidence of the informer, and were satisfied with the explanation as to the letter, there would yet remain other evidence in the case fit for you to consider. There is the internal evidence afforded by the nature of the acts themselves, laid as overt acts of the alleged conspiracy. When you find men sending arms to a country in which disaffection and disloyalty exist-doing it secretly and by clandestine means, and under circumstances calculated to excite extreme suspicion and distrust-in the absence of any explanations of such conduct, it will not be difficult to draw your own inferences as to the purpose and motive of such conduct. No doubt it is for the Crown to make out their case; but it is often impossible to give direct evidence of a man's motives or intentions in a particular matter, and a jury must often look at the act itself, and judge from the nature of the act as to the character of the motive; and when you find these clandestine consignments of arms to Ireland, the country where this treasonable conspiracy existed, and where it was to be attempted to effect its object, it is for you to form your own judgment as to the purpose of these consignments. And if you are satisfied, either from the letter or from the other facts proved, that the purpose in sending these arms was the furtherance of the Fenian conspiracy, and that the arms were intended to be used in subverting the Queen's authority in that country: then although you may not be satisfied that the prisoner was at any of the Fenian meetings, you may draw your own inferences from the other facts. Considering the character of the arms, as well as the circumstance under which they were sent, arms in a rough

and unfinished state, not fitted for sale though just as well capable of being used, and bearing in mind the absence of any DAVITI. attempt at an explanation of these things, it is for you to judge what is the natural inference to be drawn. And if you believe that the prisoners sent these arms in order that they might be used in levying war against the Queen, then the case is established lished against them. These remarks on the evidence in the Supplying times case have applied more particularly to the prisoner Davitt, who A-Evidence. directed the transmission of the arms. With regard to the other prisoner, Wilson, there can be no doubt the arms were made by him; and if he did no more than make and supply

Verdict against both prisoners—Guilty.(a)

(a) Davitt was sentenced to fifteen years' penal servitude, and Wilson to seven.

REG.

FERENS O'BRIEN. 1883,

Larceny -

Water.

larceny at common law. The sections of the Waterworks Clauses Acts referred to do not take away the remedy under the Larceny Acts. The case must be remitted to the justices with a statement of our opinion.

MATHEW, J., concurred.

Case remitted.

NORTHERN CIRCUIT.

LIVERPOOL SUMMER ASSIZES.

Aug. 7, 8, and 9, 1883.

(Before STEPHEN, J.)

REG. v. DEASY AND OTHERS.

Treason-felony-Purpose of instrument-Treasonable intention-Evidence—Burden of proof.

D. and others were charged under the Treason-Felony Act (11 & 12 Vict. c. 12), sect. 3, with being in the possession of certain instruments and explosive materials, with intent to use them for the purpose of carrying out the objects of certain treasonable combinations existing in the United Kingdom and abroad.

Held, that, for the purpose of showing such intent, evidence might be given showing that the only known use hitherto made of such instruments and explosive compounds had been in causing destructive explosions to property; and that the fuct of some of those explosions having happened out of the jurisdiction of the court did not affect the admissibility of the evidence.

Held also, that, for the purpose of showing a treasonable object on the part of the prisoners, and negativing any private object, evidence might be given of the existence, down to a period nearly approaching the date of the alleged acts, in the country from which the explosive and instruments were brought, of a treasonable conspiracy having for its object the alteration of the existing form of government by violent means, although such evidence did not establish that the prisoners were members of, or directly connected with, such conspiracy.

Though the general rule is that the prosecution must make out intent, there may be circumstances under which the burden of proof is shifted to the other side.

CRIMINAL LAW CASES.

DEAST AND OTHERS.

1883.

335

THE prisoners Denis Deasy, Timothy Fetherstone, Daniel O'Herlitry, Patrick Flanagan, and Henry Dalton alias Treason felony John Henry O'Connor, were charged with the commission of the - Evidence. offence of treason-felony under the 11 & 12 Vict. c. 12, s. 3. which section provides that, if any person, with the intention of deposing the Queen, or with the intention of levying war against Her Majesty in order to force her to change her measures, or in order to overawe both Houses of Parliament, or either of them. does any open act from which that intent or any of those intents

can be inferred, he shall be guilty of treason-felony. The first count of the indictment alleged that defendants on the 20th day of March, 1883, and before and after, together with others unknown, feloniously compassed to deprive the Queen from the style of the Imperial Crown of the United Kingdom, and such felonious compassing did express by divers overt acts; the second count alleged that defendants on the 20th day of March, 1883, and before and after, with others unknown, feloniously did compass to levy war against the Queen in the United Kingdom in order to force her to change her measures and counsels, and such felonious compassings did feloniously express by divers overt acts; and the third count charged that defendants on the 20th day of March, 1883, and before and after, with others unknown, did feloniously compass to levy war against the Queen in order to put force and constraint upon, and in order to intimidate the Houses of Parliament, and such felonious compassing did feloniously express by divers overt acts.

The overt acts alleged were the same in each of the counts, and were fifteen in number, viz.: (1) Conspiracy to levy war against the Queen within the realm; (2) conspiracy to subvert and destroy the constitution and government of the United Kingdom; (8) conspiracy to overthrow the power and authority of the Queen of Ireland; (4) that, knowing of the existence in America of a treasonable combination having for its objects to depose the Queen from the style of the Imperial Crown of the United Kingdom, the defendants did on the 20th day of March, 1883, and before and after, feloniously aid its treasonable objects by manufacturing at Cork and bringing to Liverpool 60lb. of dynamite, with intent to employ the same in furtherance of the object aforesaid; (5) that defendants on the 20th day of March. 1883, and before and after, knowing of the existence in the United Kingdom of a treasonable combination having for its object to depose the Queen from the style of the Imperial Crown of the United Kingdom, did feloniously aid its said object by manufacturing at Cork and bringing to Liverpool other 60lb. of dynamite, with intent to employ the same in furtherance of the object aforesaid; (6) that defendants on, &c., knowing of the existence

REG. DEASY AND OTHERS.

1883.

of a treasonable combination, as well within the United Kingdom as without, having for its object the levying war against the Queen within the United Kingdom, did feloniously aid its said object by manufacturing at Cork and bringing to Liverpool other 60lb. of dynamite, with intent to employ it in furtherance of the Treason felony Object aforesaid; (7) conspiracy between defendants and others on the 20th day of March, 1883, &c., to levy war against the Queen in the United Kingdom in order, by force and constraint. to compel her to change her measures and counsels; (8) that defendants did, on the 28th day of March, 1883, bring to, and have at Liverpool, other 60lb. of dynamite, with intent to use the same in raising war against the Queen within this realm: (9) that defendants, on the 28th day of March, 1883, did bring to, and have at Liverpool, other 60lb. of dynamite, with intent to use the same in the accomplishment of their said object of subverting and destroying the constitution and government of the United Kingdom; (10) bringing to Liverpool 60lb. of dynamite, to be used in the accomplishment of their object of overthrowing the power of the Queen in Ireland; (11) doing the same in furtherance, &c., of levying war against the Queen within the United Kingdom, and in order to force her to change her measures and counsels; (12) conspiracy in the county of Lancaster between defendants and others on the 20th day of March, 1883, and before and after, to blow up by the explosion of dynamite divers public buildings unknown at Liverpool, and to provide large quantities of dynamite, and to have the same in the county, with intent to employ the same in the furtherance of the object of such conspiracy; (13) conspiracy between defendants and others to blow up, by the explosion of dynamite, divers public buildings unknown at Westminster and other parts of Great Britain, and to provide large quantities of dynamite, with intent to employ the same in furtherance of the object of such conspiracy; (14) that defendants, on the 20th day of March. 1883, &c., did manufacture, and procure to be manufactured at Cork, other 60lb. of dynamite, with intent to use the same in furtherance of the felonies compassing aforesaid; (15) that defendants did, on the 20th day of March, 1883, bring to Liverpool other 60lb. of dynamite, with intent to use the same in furtherance of the felonious compassing aforesaid.

On the evening of the 28th day of March 1883 the prisoner Deasy, who had been employed as a railway porter at Cork, landed at Liverpool from the Cork boat, bringing with him a heavy box, which he engaged a badge porter to carry for him to No. 34, Regent-street, Liverpool. A detective inspector of the Liverpool police force followed them, and, in answer to inquiries from him, Deasy stated that the box contained cattle food; but, on being taken to the detective office, and the box opened by means of a key which was found in Deasy's possession, it was found to contain two tin canisters, each of which was neatly covered with canvas, and having a hole in the canvas corres-

ponding with a hole in the canister, while the canisters were filled with lignine dynamite—an explosive not known to be used for any commercial purpose in this country. Between the canisters there was a small parcel, labelled "chlorate of potash," another labelled "powdered sugar," and a smaller one containing red orpiment, or realgar, and there was also a bottle containing Treason fellowy vitriol. Three brass taps were also found in the box, each of - Evidence. which fitted into the hole in the canisters. These taps were made up of an inner and an outer cylinder; at the top of the inner cylinder was a cup, shut off from the cylinder by means of a tap, while at the bottom of the cylinder were two holes, round which was tightly wrapped some white paper, tied with very fine cord, and this then fitted into the outer cylinder, at the bottom of which was a cup. The method of using these brass taps was not at first apparent, but, by means of experiment, their use was discovered. The cup in the outer cylinder was filled with a mixture of chlorate of potash and powdered sugar, while the cup at the top of the inner cylinder was filled with sulphuric acid, and the tap then turned, so as to allow it to escape into the cylinder. After the lapse of twenty minutes, the acid, escaping through the holes in the inner cylinder, had eaten its way through the paper, and so came in contact with the contents of the cup at the bottom of the outer cylinder, thereby causing it to explode. On Deasy, when arrested, were found two papers, one containing the address of the prisoner Flanagan, who was employed on the railway near St. Helens, and the other a letter recommending Deasy to Flanagan, in the handwriting of the prisoner Fetherstone, whose real name seems to have been Edmund O'Brien Kennedy. Flanagan was arrested in consequence on the same night, and at his lodgings was found a box, which he said was his. On its being opened there was found in it a black bag which the prisoner said contained "private little matters," and these were found to be a false beard, a six-chambered revolver (five of which were loaded), a box of cartridges, a tin canister containing chlorate of potash and powdered sugar and a bottle of strong sulphuric acid; and afterwards, while awaiting his trial he made a statement to the chief superintendent of police which indicated that he knew that the letter written by Fetherstone and found on Deasy was coming to him. The prisoner Fetherstone had arrived at Liverpool from America in June, 1882, he then describing himself as a newspaper correspondent; and after a time he left Liverpool, stating that he was going to Dublin. On the 9th day of December, 1882, he was in Glasgow, and then he ordered a carboy of the strongest nitric acid, of the strength known as 82, to be sent to Mr. O'Herlitry, ink manufacturer, 10, Great Georgestreet West, Cork, that being the address and occupation of the prisoner of that name. It was sent as directed, and, after some delay, the prisoner Deasy came to where it was stored, and obtained delivery of the carboy. On the 14th day of February, 1883, Fetherstone was again in Glasgow, and, on that date, was

DRASY AND OTHERS.

Rro DEAST AND OTREES.

1883.

inquiring at another firm of manufacturing chemists for nitric acid of above 90 degrees T., a description of strength, and on being told that was a kind used only for explosives, he said he wanted it for a patent for preserving meat, but would let them know after consulting his partner. On the 19th day of February. Treason felony 1883, that firm received a letter in the name of O'Herlitry - Evidence. referring to this visit, and asking that a carboy should be sent. and one was sent addressed as the previous one had been, and of this Deasy again took delivery. On the same 14th day of February Fetherstone had called on another firm of manufacturing chemists in Glasgow, and made inquiries for sulphuric acid of 90 degree T., and on the 19th day of February that firm received an order, in the name of O'Herlitry, for a carboy of sulphuric acid, graded (160 degrees T.), which carboy, on arrival at Cork, was called for and taken away by Deasy. On the 29th day of March, 1888, another order was sent to the first firm for two carboys of nitric acid, with a request that it should be of greater strength than before; but, though that order was executed, the prisoners never received it, they being taken into custody meantime, while upon Fetherstone when arrested there was found another order dated the 29th day of March, and evidently intended to be sent off, requesting four more carboys of sulphuric acid to be sent. All these orders were shown to be in the handwriting of Fetherstone, and, when arrested at Cork on the 28th day of March, there was also found on him a paper containing a description of the method of making and using what is known as "Fenian fire," as also a small glass tube of the kind mentioned in the description of this "Fenian fire."

Dalton, whose real name was H. J. O'Connor, arrived in this country from America early in March, 1883, and immediately went down to Glasgow, where he passed under the name of Dalton. On the 13th day of March, 1883, he wrote from there, in the name of O'Connor, to his parents, who resided at Edenplace, Chelses, informing them of his arrival in this country, and requesting them to receive, and take great care of, any letters or packages that might come addressed to Henry Dalton, a friend of his-adding that he did not want everybody to know that he was home, and asking them not to mention it to anybody. Whilst in London, a few days before his arrest, he was seen apparently making a careful examination of various public buildings-he stood for a considerable time near the Houses of Parliament, on a wet day, making notes; and from there he went to Lambeth Palace, the Treasury, and various other public buildings, including the Local Government Board Office, the Treasury, and the Home Office. When arrested in London, on the 5th day of April, several papers and books were found, some on the prisoner and others where he lived, and in one of them was a card bearing the address "10, Great George-street West," what appeared to be the name "O'Herlitry," and "Cork," being smudged out. There were also abbreviations of the names of the Glasgow chemists from whom earliers of acids had been nurchased, and a recipe for the manufacture of explosions; and besides these there were found on him a parket of powder, a thermometer, and a roll of blank paper, which was aworn by practical paper makers to be identical with the paper wramped round the tubes of the brass taps, and to have been made by the Treases falony same manufacturer and at the same time—while some of the letters found showed that, some years ago, he was in communication with persons connected with a society called the International

In order to show the purpose for which this lignine dynamics and the boxes and taps had been brought into this country. evidence was tendered to show that there had been dangerous explosions on the 21st day of January, 1883, at the Possil Cons. Bridge, near Glasgow, on the 15th day of March, 1883, at the Times office in London, and subsequently at the Local Government office, and that in all these instances the explosive employed had been lignine dynamite, inclosed in canisters, and exploded by fuses consisting of brass tubes, corresponding exactly with those found in the possession of Deasy

Dr. Commins (who appeared for Deasy) objected to the admissibility of this evidence on the ground that the prisoners were not shown to have been connected with those explosions, and urged that the fact of an explosion having taken place in Glasgow could not be evidence of the connection of the prisoners with a conspiracy here, and that besides the prosecution could not as against the prisoners adduce evidence of something which had happened out of the jurisdiction of the court.

The Solicitor-General (Aspinall, Q.C. and R.S. Wright with him) urged its admissibility as showing that these instruments were of a particular kind, and that a similar instrument had been used on a former occasion for causing an explosion; that on the only other occasions known, these instruments were used for purposes of explosions.

STEPHEN, J. said that in a case of this kind, where you had an instrument having no known commercial use, evidence was admissible to explain the use of it; that you may show the use of a particular instrument by showing that similar ones have only been used for one purpose, viz., to cause explosions: that, so far as is known, they have been only used for those three unlawful explosions, have never been used for any other purpose, and no suggestion of any other, except those in which it must cause great public disturbance. On the same principle evidence of a similar kind has been received in reference to the uses of strychnine, in Palmer's case, and in Dove's case and others.

On the question of treasonable intent, a witness named William Laurie was called, and he stated that in 1867 he was sworn in as a member of an organisation in Dublin, called the Fenian Brotherhood.

Addison, Q.C. (who appeared for Fetherstone) objected to any

DEAST AND OTHERS,

1883.

REG. DEASY AND OTHERS.

evidence about the Fenian Brotherhood unless some of these prisoners were shown to be connected with it. What was asked about was in 1867.

The Solicitor-General.—I shall bring it down to a later date. 1883.

Addison, Q.C.—I shall object to all that does not relate to this

Treason felony charge. - Evidence.

The Solicitor-General.-In the case of Walsh and another, tried before your Lordship, exactly similar evidence was given by a witness named Connell, and was admitted, with the view of showing the existence of a conspiracy of a treasonable character.

STEPHEN, J.—Of course the existence of a conspiracy in 1867 is not much, but I suppose your question is merely preparatory.

Addison, Q.C.—If it is to prove the existence of a treasonable conspiracy up to the present time, and to connect the prisoners with it, I might admit it.

The Solicitor-General.—I do not propose to connect, by the

evidence of this witness, any of the prisoners with it.

Addison, Q.C.—If my friend only proposes to prove the existence of a conspiracy in Ireland up to the present time, without connecting these prisoners with it, he might as well give evidence of a conspiracy of any nature—a trade's union conspiracy or any.

thing else.

STEPHEN, J.-Evidence of the existence of a treasonable conspiracy about the same time, which would involve the use of substances of this kind, would be admissible. Evidence of the same kind was admitted in Walsh's case, and it is a matter which the jury may take into account in considering the purpose for which these things, found in the possession of the prisoners, were intended. It will show that certain persons had conspired together to change the measures of the Queen "by force or constraint,"

Addison, Q.C.—That might be true of any conspiracy of any kind, either in France, England, Ireland, or America. Supposing a person were charged with using a pistol with intent to murder, could it be suggested that the proof of the existence of a murderous organization in England, Ireland, or Scotland, without connecting the person with it, was a proof of his intention?

STEPHEN, J.-I think it could be. Take the case of the Burke and Hare conspiracy to obtain bodies for purposes of dissection. in which their victims were suffocated by means of pitch-plasters: if at that time persons had been found prowling about in the night in a suspicious manner with a quantity of pitch-plasters in their possession, it might fairly be inferred, in the absence of other reasonable explanation, that they were engaged in a murderous conspiracy. I do not know what sort of evidence the Solicitor-General is going to give to prove the existence of a treasonable conspiracy, and the mode in which that conspiracy is carried out, but it may throw light on what those people are doing with these things. If the matter is in no way brought home to the prisoners, I am sure the jury will not be influenced by it.

Addison, Q.C.-Admitting it for the present, if the evidence does not connect the prisoners with the conspiracy, I shall object

STEPHEN, J.—After hearing the evidence you may raise any contention that you like; but at present I cannot exclude the evidence.

DEASY AND OTHERS. 1883.

REG.

Treason felony - Evidence.

The witness then went on to say that the oath he took was "a solemn swearing that I was a member of the Fenian Brotherhood established for the erection of a Republic in Ireland; that I would never divulge any of the secrets of the organisation or the names of any of the members; that I would take up arms at a moment's notice; would obey the commands of superior officers; that, should I ever divulge any of the secrets of the organisation or the names of any of the members, I deserved death at the hands of my fellow-men; and that I took the oath in the true spirit of a soldier 'so help me God.'" He further stated that he left Dublin in 1868, but returned in 1878, and after that regularly attended Fenian meetings twice a week, at which sometimes seventy or eighty members were present, and that then they drilled and made collections "for arms and civil money;" that in the organization there were "centres," and "sub-centres," and "B.'s" and "C.'s" - the "B.'s" coming under the "centres," and the "C.'s" under the "B.'s"; that he himself was for a time a "C.," then a "B.," and afterwards a "Centre." and that, as such, he had attended Fenian meetings down to as late as Oct. 1882, but he had not been present at any such meetings this year.

At the close of the case for the prosecution Addison, Q.C. submitted that there was no evidence of treason-felony against any of the prisoners. It was essential that there should be an intention to deprive or depose the Queen from her style and title.

STEPHEN, J. pointed out that, whoever intended to depose the Queen from her sovereignty over her dominions or any part of them, and displayed such intention by any open act, was within the statute. There were two questions with regard to the levying of war to make it high treason: one was, what amounted to a levying of war; and the other, what sort of object there was for the war. The act constituting the levying of war must be done by force to constrain and compel the Queen to change her measures and counsels, or to put force and constraint upon the Houses of Parliament.

Addison, Q.C. proceeded to argue upon the overt acts alleged, and to urge that before the case could go to the jury it must be shown in evidence what object they had in view in having possession of dynamite. There were many cases that might be put, such as trade unionism, mere wanton mischief, or private revenge, to account for the possession of explosives. But what was suggested as their purpose? The existence of a Fenian conspiracy in Ireland in 1867. But the evidence as to that only showed that men were to be trained for open rebellion, and there

DEAST AND

OTHERS.

1883.

DHASY AND OTHERS. 1888.

Treason felomi

was no evidence that explosives were to be used, and the word Fenian was never used at all except by Flanagan, who said that the Fenians had nothing to do with it. STEPHEN, J. - In Fetherstone's pocket-book there were entries relating to "centres" and others, corresponding to the description given by the witness Laurie. There were no acts proved from which a treasonable intent could be inferred—these were the individual acts of those men and not in any way associated with a political object.

STEPHEN, J.—There is evidence that a conspiracy exists for erecting an Irish Republic, and to take arms for that purpose. and altogether it constitutes a matter for the jury's consideration. Persons of a violent and unruly temper might suppose that a series of violent acts and public calamities would kare an effect on the temper of Her Majesty's subjects, and induce them to pass measures that they would not otherwise do, and will if that kind might amount to a sort of informal war. The whole case centres in this, that Deasy had all these things in his possession on the landing stage in Liverpool, and that was an overt act from which all the rest follows. Substantially the question is, if the object was to procure by violent means the independence of Ireland, then the first count would be proved, and the second and third counts were not substantially different from the first.

Addison, Q.C.—Frost's case establishes that it is the duty of the prosecution to make out the intention, and the utmost they had proved here was co-existence, but no necessary connection between the conspiracy in Ireland and their violent acts there and the prisoners.

STEPHEN, J.—The prosecution must prove such things as naturally suggest the intention they allege. But there was a point in all these cases at which the burden of proof shifts, and if the prosecution proved the prisoners to have been in such circumstances as, without explanation, left them open to the reasonable inference of the existence of such a conspiracy as they wished to establish, then it might be for the defence to say what they were doing. He fully appreciated the weight of the argument, and would hear the Solicitor-General upon it.

Dr. Commins (for Deasy) and Dr. O'Feely (for Flanagan) submitted that there was no evidence of any levying of war, and Little (for Dalton) that he was not shown to be connected with the other prisoners.

The Solicitor-General called attention to the details of the evidence, proving, he maintained, an unlawful use of these machines, and that four at least of the prisoners were in combination; that they were well acquainted with the making of explosives, and that the use of these formed no part of their ordinary occupations; that they had come to this country under false names, and one of them had been seen examining public buildings, which negatived the suggestion of a private unlawful object, the proved existence in Ireland of a treasonable conspiracy having some of the objects mentioned in the indictment,

and explosive material brought from Ireland into this country by a combination of these persons. Coupled with this was the fact that the only known previous use of these materials, and the mode of exploding them, had been in the Possil Bridge, the Times, and the Local Government Board explosions, and that all these matters led to the criminal inference, and pointed rather to Tragson felony an object of a public nature and a treasonable purpose than to - Evidence. anything else.

STEPHEN, J.—I do not think it necessary at present to say more

than this, that that part of the case must go to the jury.

M'Connell, on behalf of O'Herlitry, asked if there was any case as against him, and ultimately, at the suggestion of his Lordship, the case was withdrawn as against that prisoner. In the result. all the other prisoners were found guilty, and were severally sentenced to penal servitude for life.

Solicitor for the prosecution, W. Marks, Manicipal Offices.

Liverpool, for The Solicitor to the Treasury.

Solicitor for the prisoners, Quelch, Liverpool.

CROWN CASES RESERVED.

Saturday, November 24, 1883.

(Before Lord Coleridge, C.J., DENMAN, HAWKINS, WILLIAMS, and MATHEW, J.J.)

REG. v. G. HOLMES. (a)

Jurisdiction—False pretence—Posting the letter containing the pretence-Obtaining of money thereby.

A false pretence was made by letter in N., England, and posted there to, and received by, a person in France. In consequence of the letter that person drew a cheque in France, payable at N. in England, and sent it to the prisoner at N. in England, who cashed the cheque in England.

Held, that the prisoner was properly indicted and tried at N. in England.

THIS was a case stated for the opinion of this Court by Huddleston, B.

The prisoner was tried and convicted at the Assizes at Nottingham, on Thursday, the 26th day of July, 1883, for obtaining from Louis Gabet 1501. by false pretences.

(a) Reported by JOHN THOMPSON, East, Barristor-at-Law.

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CRIMINAL LAW CASES.

COURT FOR CROWN CASES RESERVED.

April 17 and 18, and May 18, 1867.

(Before Whiteside, C.J., Monahan, C.J., Pigott, C.B., KEOGH, O'BRIEN, FITZGERALD, O'HAGAN and GEORGE, JJ., FITZGERALD, HUGHES and DEASY, BB.)

REG. v. STEPHEN JOSEPH MEANY.(a)

Treason-felony-Jurisdiction.

The defendant was indicted for treason-felony under 11 Vict. c. 13. Some of the overt acts laid were conspiracies to effect the treasonable intent charged. The venue in the margin of the indictment was "the county of the city of Dublin," and the trial took place in that county. No overt act of the treasonable compassing was proved to have been personally done by the defendant within the venue, nor did he appear to have been within the realm at the time of the doing of any of the overt acts laid. But overt acts were laid and proved as done within the venue by members of a treasonable conspiracy extending over America and Ireland, of which the defendant (who was a British subject) was proved to have been an active member in America before and at the time of the doing of these acts:

Held, that there was jurisdiction in the ordinary Court of Commission of Oyer and Terminer for the county of the city of Dublin, to try the prisoner, as the responsibility of the plaintiff for the acts of his co-conspirators made their acts his acts, so as to satisfy the common law rule that the offence must be proved where the venue is laid.

Pigott, C.B., O'Brien and O'Hoyan, JJ., and Fitzgerald, B., dissentientibus.

THE defendant in this case was tried at the Commission Court for the county and county of the city of Dublin, on the 16th of February, 1867. The indictment charged the defendant in three counts with the several felonies of compassing-

(1.) To depose the Queen from the honour and Royal name of the Crown of the United Kingdom;

(a) Reported by W. MULHOLLAND, Esq., Barrister-st-Law.

(2.) To levy war against the Queen in Ireland in order to compel her, by force, to change her counsels;

CRIMINAL LAW CASES.

(3.) To stir up foreigners by force to invade Ireland; And of uttering the said several compassings by certain overt acts alleged in the indictment, some of which were conspiracies to effect the several objects aforesaid.

In the indictment the same overt acts were charged in each Treason-felom count.

The venue in the indictment was the "county of the city of Dublin," and the indictment did not charge the felonies or any of them to have been committed without the realm. The defendant

pleaded "Not guilty."

Sufficient evidence was given on the part of the Crown that the defendant was an active member of an association in the United States of America called the Fenian brotherhood, having for its objects the several objects stated in the indictment; that the defendant was born in Ireland and was a subject of the Crown of the United Kingdom; that there existed in Ireland an association which bore a similar denomination to that of the said association in America, and having the same objects, and that the two were connected as parts of one and the same society. Sufficient evidence was also given of acts of members of the said association in Ireland, not named in the indictment, in promotion of the several objects aforesaid and done within the county of the city of Dublin to sustain some of the overt acts charged in the indictment, supposing them to have been the acts of the defendant himself, and that the persons by whom the said acts were done were, in the doing thereof, conspirators with the defendant to effect the several objects aforesaid.

But no evidence was given on the part of the Crown or otherwise, save as aforesaid, of any acts done by the defendant himself in Ireland, or that the defendant was, antecedent to his apprehension and arrest in Ireland, at any time during the existence of the said association, either in America or Ireland.

The defendant was arrested in England, and thenceforth continued in custody till the time of his trial, and was in custody in the county of the city of Dublin at the time of the first sitting of the Commission Court, and thenceforth until and at his trial.

Upon this evidence the case was sent to the jury, who convicted the defendant. The questions reserved for the consideration of the Court were two:

(1.) Whether the said Commission Court had jurisdiction to try the defendant for the said alleged felonies or any of them.

(2.) Whether the judge was right in directing the jury that there was evidence on which they might find that some or one of the said alleged overt acts were or was done, and the said felonies committed, by the defendant in the county of the city of Dublin.

Molloy (O'Loghlen with him), for the prisoner,

The jurisdiction for trying offences at common law was that the offence must have been committed in the county from which

REG. STEPHEN JOSEPH MEANY.

1867.

— Jurindiction - Venue.

509

REG. STEPHEN

JOSEPH MEANY.

1867.

-Jurisdiction --- Venue.

the jury was taken: (2 Hale, P. C. 163; 2 Hawkins, P. C. 8th edit., 301; 3 Inst. 48; King v. Gough, 2 Douglas, 790; Rez v. Stainbury, Leigh & Cave, C. C. 128.) And if it appeared on not guilty pleaded that the offence had been committed in another county, the prisoner should be acquitted: (2 Hawkins, P.C. 301.)

The offence must not only have been begun, but completed within the county where commenced: (1 East, P. C. 361; Danby's case, 1 Hale, P. C. 652, 426; Fulwood's case, Cro. Car. 488.) So also if begun, and not completed, on the high seas or in a

foreign country: (1 Hawkins, P. C. 93.)

These defects have been remedied in the case of most offences by statutes, but the statute remedying the defect in the case of treason is only partial in its effect. 33 Geo. 3, c. 45 (Irish). regulates the trial of persons committed outside the realm, and provides that such offences may be tried by Special Commission. or at the bar of the Queen's Bench. High treason then was only triable by Special Commission, or at the bar of the King's Bench. There are several cases where this course was pursued: - Story's case (3 Dyer, 298 a, 1 St. Tr. 1087); Duke of Norfolk's case (1 St. Tr. 958); Campion's case (1 St. Tr. 1050); Lord Ray's case (3 St. Tr. 483); Vaughan's case (13 St. Tr. 486); W. Stone's case (25 St. Tr. 1155; 6 T. R. 527); W. Jackson's case (25 St. Tr. 783). Therefore, if the present offence is triable under the provisions of the statutes regulating trials for high treason committed outside the realm, there was no jurisdiction in the ordinary Commission Court.

The Treason-Felony Act, however, under which the prisoner is indicted (11 & 12 Vict. c. 12), contains no provisions for trial of the offence, and therefore it is still subject to the rules of the common law. The next question is, Where was the offence committed? By 14 & 15 Vict. c. 100, sect. 23 (Roscoc, 4th Edit. p. 954), the indictment is to be taken as if the offence took place where the venue is laid. It is legally impossible that this offence could have been committed as charged in the indictment. The overt acts laid in the indictment are some of them personal acts done by the prisoner in America, and the remainder are charges of conspiring with other persons for treasonable purposes. We are entitled to disregard the personal acts, as they clearly do not constitute an offence triable here at common law. The only means of proving an act done in America is to establish an overt act within the realm first, and then the foreign acts come in as evidence. But it is said that the manifestations laid by conspiracy bring the offence within the jurisdiction, for that the acts of co-conspirators in Dublin are to be taken as the acts of the prisoner, and that the conspiracy so proved manifests the compassing. But in order to use the acts of co-conspirators here against the prisoner, you must assume the conspiracy to exist, which is the very thing to be proved. FITZGERALD, B .- You say the Crown confounds the overt act of the conspiracy with the overt act of the felony?] Yes. [WHITESIDE, C.J.—The case states that a conspiracy or

association had been proved to exist in America in connection with a similar one here.] The judge had no authority to receive evidence of acts done in America, to prove the conspiracy. Mulcahy's case (I Ir. Rep. Q. B. 12) decided that conspiracy is a good overt act of treason, but to prove conspiracy here you must go to America, and that is not to be permitted, for the vision of the Court is limited to this country until an overt act is proved Treason-felo within the country: (Butler's case, 3 Inst. 113.) The offence here is created by statute. It is, perhaps, not clear whether the overt act is part of the offence or not. But it is submitted that, on the construction of the statute, it is part of the offence. But however that may be, the defendant is equally out of the jurisdiction. If the overt act is part of the offence, then the offence was not committed wholly in the county. If it be not part of the offence, no part of the offence was committed in the county. Assuming that a conspiracy had been legally proved, it cannot aid the indictment here, which is for felony. The acts of co-conspirators have never been attempted to be given in evidence to prove a felony. but only in treason and misdemeanor: (1 East, P. C. 97; Kelyng 19.) In treason and conspiracy all are principals, and therefore all alike liable. But this is felony, and he is only an accessory before the fact, and the acts done in the venue cannot be regarded as his.

Chatterton (Attorney-General), Warren (Solicitor-General), Longfield, Q.C., Murphy, Q.C., and J. P. Humilton, for the Crown. -Treason is triable in any county where an overt act is proved: (1 East, P. C. 102; 1 Hale, P. C. 107.) A conspiracy is established as existing between the defendant in America and persons in Dublin. By the ordinary doctrine of conspiracy the acts of co-conspiracy must be deemed his acts. The overt act of conspiracy charged must therefore be taken as committed by the defendant in Dublin. If this is not treason it is felony, and the prisoner may be tried as an accessory before the fact, and by 11 & 12 Vict. c. 46, s. 1, and 24 & 25 Vict. c. 94, s. 57, he is liable to be tried in all respects as a principal. [FITZGERALD, B. -That only means, you may find him guilty as a principal ceteris paribus; but it does not affect the law of venue. Besides, he cannot be an accessory unless the acts are not his, and the jury were told that the acts were his. The jury have found that he is a principal. The overt act, however, is all that is necessary to consider on the question of venue. Whether or not it is part of the offence does not affect the question. The prisoner is to be considered as actually himself committing the acts done in the county of Dublin by his co-conspirators, and the law of venue is satisfied if the acts prove the guilt of the prisoner.

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REG. STEPHEN Joseph MEANY.

May 18.

1867. Treas m-felony -Jurudiction - Fenue.

GEORGE, J. (after stating facts, &c.)-The Court has now to consider on these facts whether the judges had jurisdiction to try the defendant, and whether there was evidence of an overt act done, and a felony committed by the defendant in the county of the city of Dublin, either in his own person or by others for whose acts he can be made responsible. It is, in fact, a question of venue, whether the felonies charged, and the overt acts, or any of them sustaining the same, were done or committed by the defendant in the county of the city of Dublin; if they were, the venue is rightly laid. I think they were so committed; that the felonies or conspiracies were manifested by overt acts done by persons within the county of the city of Dublin, for whose acts the defendant was, as a co-conspirator, responsible, and whose acts became in law his acts; that the Court therefore had jurisdiction, and that the defendant was rightly convicted of conspiracy within the jurisdiction. I do not attach much importance to the discussion which took place as to whether or not the overt act is part of the offence, as under all the statutes of treason the conspiracy is nothing of itself; it is the overt act which is evidence of the intention of the heart, and it is to the overt act the prisoner must apply his defence. By 7 & 8 Will. 3, c. 3, s. 8, no overt act can be proved which is not stated in indictment; but any number of overt acts may be stated and proved, and for the purpose of venue, at least one overt act must be proved in the county or other venue where the offence is laid. Reg. v. Mulcahy decides that conspiracy to levy war was a sufficient overt act in support of an indictment for compassing to depose the Queen. In the present case sufficient evidence was given of the existence of a conspiracy-not two conspiracies, but one and the same conspiracy -ramifying in America and Ireland; that the defendant was a member of that general conspiracy in connection with the members in Ireland, and if so, the defendant became responsible for every act proved to be done in furtherance of that conspiracy in Ireland by members of it, whether named or not in the indictment; their acts, in fact, became the act of the defendant himself. If this be so, the defendant is responsible here, and in the eye of the law himself actually committed the overt acts proved against any of his co-conspirators; the offence of the defendant was therefore committed within the venue, and the judges had jurisdiction to try it under the ordinary commission. The cases of Rez v. Hardy (1 East, P. C. 70), Rex v. Stone (6 T. R. 627), Rex v. Brissuc (4 East, 164), and Rex v. Hon. Robt. Johnson (6 East), abundantly establish these doctrines and apply them to treasons and misdemeanors, and there is no reason why we should refuse to apply them to felonies or to treason-felonies, under 11 & 12 Vict., as they were certainly applied to conspiracies to

murder in Ireland when a statutable felony. This view which I have taken of the subject, being founded on the doctrine of conspiracy, makes it unnecessary to discuss the elaborate argument of the prisoner's counsel, grounded on the rule that a crime by common law must be tried where committed.

O'HAGAN, J., was of opinion that the question should be

answered in the negative.

Treason-felony --Jurusdiction - Venue.

DEASY, B.-In this case the prisoner has been tried and convicted of a treason-felony under the 11 & 12 Vict. c. 13. appears that he was proved to have been a member of a treasonable association, which extended through various parts of Ireland. and amongst the rest the county of the city of Dublin, and also through various parts of the United States of America. The prisoner is proved to have been actively engaged in forwarding the objects of that conspiracy in America, and some of his confederates were proved to have been similarly engaged in the county of the city of Dublin. The jury were told that they might consider the acts of the conspirators done for the purpose of effecting the objects of the conspiracy within the county of the city of Dublin as the acts of the prisoner; upon this they convicted him. The correctness of that direction is one of the questions reserved. I think it was quite correct, and follows from the principle of the law of conspiracy, that conspirators are partners in crime, and each has, from their mutual agreement, authority to affect the others by acts done in pursuance of the conspiracy. It is not necessary to go at length into the cases sustaining this principle. I may refer to one, however, of very high authority, Reg. v. Wm. Stone (6 T. R. 527). That case has since been repeatedly acted on by successive judges in England and Ireland, and appears to me to establish the correctness of the direction given to the jury in the case before us. If so, I think it follows that the venue in the indictment was rightly laid in the county of the city of Dublin, and that the judges under their ordinary commission had jurisdiction to try the prisoner for acts which in contemplation of law were his acts, which for that reason were received in evidence against him without objection, and were proved to have been done in the county of the city of Dublin. If authority were wanting for this, it is to be found in Rex v. Brissac and Scott (4 East, 164). In that case the defendants, who were captain and purser of one of Her Majesty's ships, were indicted for a conspiracy to defraud the Queen by forging accounts. The accounts were forged upon the high seas, but were sent, when forged, to an innocent third person in London, who obtained payment of them from the Admiralty in Middlesex. On the trial in the county of Middlesex, it was contended on behalf of the prisoner, that as the offence was committed on the high seas, he was only liable under the Admiralty commission, directed by the provisions of 28 Hen. 8, c. 15 and 39 Geo. 3, c. 33; that it made no difference that the ultimate object and completion of the conspiracy was to operate on shore, as all the acts of the defendants

REG. STEPHEN JOSEPH MEANY.

1867.

reason-felony

themselves which constituted the conspiracy were committed out of the jurisdiction of the common law. This was resisted, on the g ound that the conspiracy was an offence not merely resting in the mind, but shown by overt acts, and that the delivery of the document in Middlesex was an overt act of the conspiracy sufficient to entitle them to lay the venue in that county. After consideration, it was held that the objection could not be sustained: (see judgment of Grose, J., p. 171.) Reg. v. Bowes and others is, I think, a clear and precise authority governing the present case. Here the trial proceeded on this principle: no proof of actual conspiracy embracing all the individual members was given in Middlesex, where the trial took place, and the individual dealings of some of the conspirators were wholly confined to other counties. Still, on the principle of the law of conspiracy, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of the conspirators in the county where the trial was had. The objection in that case is precisely similar to that raised here, and the answer given by the Crown the same, viz., that conspiracy is a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of a common criminal purpose, and that the crime of conspiracy may be tried wherever one distinct act of conspiracy is in fact committed. It was argued, however, that those were cases where the conspiracy is a misdemeanor, but that in the present case it is a felony. I am unable to see how the principle of law, which is founded on the nature of the crime of conspiracy, can be affected in its application by the degree of guilt of the particular conspiracy charged. The community of guilty purpose is the foundation of the rule, and that exists in all cases of conspiracy. But if authority were wanted for its application to a felonious conspiracy, it is to be found in Reg. v. Dowling (3 Cox Crim. Cas. 515). If, then, the acts of the defendant's co-conspirators in furtherance of the common design are, in contemplation of law, his acts, and as such may operate to cause his conviction, they may, in my opinion, equally operate to regulate the locality in which that conviction takes place.

FITZGERALD, J.—It seemed to me, in the course of the argument. that Reg. v. Mulcahy (1 Ir. Rep. Q. B. 12) went a considerable way towards deciding this case, so far as we are bound by the Court of Queen's Bench. If conspiring to depose the Queen is a good overt act of treason, and if the defendant here had so conspired by being a member of this treasonable conspiracy, this appears to me to let in all the doctrines of conspiracy, and amongst them the doctrine that every man entering into an illegal confederacy, knowing its objects and designs, becomes responsible for all done by his brother conspirators to the same extent as if they were his own acts. It appears, then, applying that doctrine to the present case, that the conspiracy existed in Dublin, and that though the defendant personally had not committed any overt act in the city, his co-conspirators in Dublin had done so;

the case, therefore, appears to me properly triable in the county of the city of Dublin, and there was, I think, sufficient evidence to show jurisdiction in the Court. It has been pointed out that the statute has omitted to create any other than the ordinary common law tribunal; the compassing may be within the realm or without, but it must be evidenced by an overt act, and if the defendant is not properly tried here, we must come to the Treason-felo conclusion, which we should not do unless coerced, that the Legislature has made the compassing abroad a felony, but left no possible tribunal by which it can be tried. The defendant might be abroad and have set the conspiracy at work, and, if not personally present in the country, never could be tried. Nav. after entertaining this design abroad, and setting it in motion in the city of Dublin, he might afterwards come to this country, and, provided he stayed in the next county, he never could be tried, though all he had set in motion was being done in an adjoining county. This may be a casus omissus, but we should not hold it so if there is any solution. There is this reasonable solution, that the defendant who compassed or imagined the design may be tried where there is an overt act indicating that design, and for which he is responsible. It therefore comes round to the question whether the doctrine of conspiracy is applicable. If it is, the act of the conspirators is his act, and Reg. v. Mulcahy appears almost to determine that. I think, therefore, that the acts of conspiracy in the county of the city of Dublin are to be treated as the acts of the defendant; and though his imagining was abroad, yet when he acts by his brother conspirators in the county, the moment he becomes amenable he may be tried, and I cannot think the defendant's personal presence in the county necessary.

FITZGERALD, B.—Several matters were discussed during the progress of this case which appears hardly to admit of controversy. It appears clear, from the statute itself, that certain acts declared by 11 Vict. c. 12 (Treason-Felony Act) to be felony, so constitute felony whether committed within the realm or without. It appears also clear that the entire corpus delicti of the offences charged against the defendant has been established, and that upon evidence perfectly legal and admissible. Whether the overt act is to be considered as part of the offence or not, I have no doubt that whenever in the case of any such felony the overt act alleged is a conspiracy to effect the intent charged, then the acts of other parties may be given in evidence for the purpose of proving such conspiracy; and when agreement between them and the defendant has been proved, their acts are to be considered as his acts for the purpose of establishing the overt act charged to be his act. And the law is the same whether the indictment be for treason-felony or misdemeaour, or any other indictable offence, with this single limitation (to be found in the answer to the third question proposed to the judges of the House of Lords in The Queen's case, 2 Brod. & Bing. 302), that the rule relates to a prosecution for any crime,

REG. STEPREN JOSEPH MEANY.

1867.

REG. STRPBER JOSEPH MEANY.

1867.

Treason-felony --- l'enue.

the proof whereof consists wholly or in part of a conspiracy entered into by the party then indicted and under trial. But the question is not whether the felony was committed by the defendant or not. or whether the evidence given was admissible or not; but, in what place shall the felony so established be deemed to have been committed? The defendant contended that if the felony was not committed in the county of Dublin, the case could not be tried by a jury of that county, no matter how clear the proof of the offence may be. If the prosecutor has made a mistake in charging (as in fact he has charged) that the offence was committed within the county of Dublin, and in trying it by a jury of that county, the defendant is clearly entitled to avail himself of this mistake. The question is one entirely arising out of the British law of venue; and I fear that all logic which does not assume as premises the rules of that law, or which disregards those rules, is merely thrown away in discussing this question. It is clear from the case stated that no act personally done by the defendant in Ireland was in fact, or indeed by possibility could have been, proved in evidence against him. He was proved to have been a conspirator with persons not on trial with him, not indicted, or even named in the indictment, in the doing by them of certain acts in the county of the city of Dublin, which if they can be deemed his acts there, not only proves the offence charged, but satisfies the allegation that the offence was there committed by him. But the complicity which makes their acts his, though it was proved by acts done by him personally, was not proved by any act done by him personally in the county of the city of Dublin. Certain general rules of the law of venue need no authority to be cited for their support. A venue must be laid in every indictment. The trial must be heard where the venue is laid. By the 14 & 15 Vict. c. 100, s. 23, the venue is now laid by naming the place intended for trial in the margin of the indictment. The cases of Reg. v. Stowell (5 Q. B. 44), Rex v. Connop and others (4 Ad. & El. 942), may be referred to for the purpose of showing the importance attributed to these rules, and the strictness with which they are upheld by late decisions. In the present case the venue laid is the county of the city of Dublin, and there, and there only, could the trial have taken place. Another general rule of the law of venue is that the offence must be proved to have been committed within the venue laid in the indictment, or the prisoner will be entitled to be acquitted on "Not guilty" pleaded. Statute after statute has been passed from the time of Henry VIII., in order to remedy mischiefs arising in peculiar cases from this rule, leaving, however, the rule untouched in the cases to which they do not apply, and therefore this rule would seem to require no authority to support it. As it appears to me, however, that the right decision of the real question in this case depends on the extent of this rule, I may cite Rex v. Burdett (3 B. & Ald. 717; 4 B. & Ald. 95), where the rule was discussed with great learning and ingenuity, and to which I shall have occasion hereafter to refer at length. The meaning

of the rule, as I understand it, is, that the act or acts of the culprit in which the crime charged consists must be proved to have been done by him within the venue laid. In the treason of compassing the king's death (under the stat. of Edw. 3), the crime consists in an act of the mind, or an intent only; some act, therefore, by which the intent was uttered must be proved to have been done within the venue. In the felony of bigamy under the act Treason-felony of Jac. 1, and the corresponding act of Car. 1 in this country, the act in which the crime consisted was a marriage, and that marriage—the second marriage—must have been proved to have taken place within the venue. In the misdemeanor of conspiracy, the act in which the crime consists is the defendant's agreement with another or others; that agreement must, I apprehend, be proved to have been made by the defendant within the venue, or some act done by the defendant within the venue, in pursuance of the concert. The rule, however, only extends to the proving as done within the venue the mere act of the defendant in which the crime consists. The jury, however, are not only not excluded from inquiring into any fact done without their venue, but may inquire into facts done without their venue, which are absolutely essential to show that the act done by the defendant within their venue was a crime. In treason of compassing the king's death with overt act of levying war, the levying war by the defendant must be proved by some overt act of his within the venue; but the intent or purpose for which the war was levied, which is essential to make the act an act of treason, may be proved by acts outside the venue. In the felony of bigamy, the marriage within the venue is only guilty by reason of a subsisting prior marriage, and that prior marriage may be proved as having taken place without the venue. Buttery's case, mentioned by Abbott, C.J. in 4 B. & Ald. 179, is another instance of the same kind. So in the misdemeanor of conspiracy, though the concert of the defendant with another or others must be shown to exist by some act or acts of his done within the venue, all that is essential to prove the guilty concert may be proved by acts of the defendant outside the venue, and, owing to the general principles of that law of conspiracy. by acts of conspirators either out of or within the venue. This qualification, if it can be called such, is shortly but intelligibly stated by Holroyd, J., in 4 B. & Ald. 137. It will not aid the cause of the Crown here, for while it supposes the act of the defendant in which his crime consists to be done within the venue. the objection here on the part of the prisoner is that no act whatever is shown to have been done by him within the venue. There is another qualification of this rule mentioned by Abbott, C.J., in Rer v Burdett, under which Rex v. Bowes, cited in that case and in the argument before us, is to be classed: "Where a misdemeanor is composed of acts in different counties, each act being itself a misdemeanor, it is wholly triable in that county wherein any criminal part was committed": (4 B. & Ald. pp. 175, 138.) In Rex v. Burdett, the whole crime charged was the

REG. STEPHEN JOSEPH MEANT.

1867.

-Jurisdiction - Yenue.

Rπα. STEPHEN

517

JOSEPH MEANY. 1867.

REG. STEPHEN JOSEPH MEANY.

1867.

writing and publishing a libel, the writing having been proved in one county and the publishing in another, the majority of the judges considered that the writing alone, at least if followed in fact by a publication, was a misdemeanor, distinct from the publishing, and of which there might be a conviction on the indictment, and the publishing another offence; and the whole reason-felony misdemeanor charged, being a compound of both, was properly proved in the venue where the criminal part of writing was proved, The judges did not consider this rule as applying to felony, but only because they did not conceive there was any case of a felony compounded of felonies, such as the present felonious conspiracythe overt act being, as I conceive, part of the offence-under the statute of 11 Vict. But the objection here is that no act whatever is proved to have been done by the defendant within the venue. No act was done by any one within the venue under which there could have been a conviction on the indictment, the acts done within the county are the acts of persons not even named in it. This case is not, therefore, within the qualification sanctioned by Rex v. Bowes. No case of treason has been cited in which it has been attempted to satisfy the law of venue by proof of the acts of co-traitors only not upon their trial within the venue; but there are many instances in which the attempt was not made. such as Lord Preston's case (12 St. Tr. 645). Some of the consequences resulting from the doctrine contended for by the counsel for the Crown are rather startling. If for the purposes of the law of venue the acts of his co-conspirators in Dublin are to be considered the defendant's acts there, it seems to me that his acts in America must be considered as their acts in America, and they might be tried for treason without the realm in Westminster or any venue to be selected by the Crown. I am not prepared to adopt this consequence. It is true there are cases, independent of statutes, in which the law of venue was satisfied by a constructive presence of the defendant within the venue. These exceptions arise from what is or what was the law of principal and accessory. In felony, if one procured the deed to be done by an innocent agent, and was not present at the doing of it, he was considered as constructively present, satisfying the law of venue, as otherwise it is clear no crime would have been committed at all. This was also applied to misdemeanor in Rex v. Brissac (supra). But as a general rule, those acts which would make one an accessory in felony are considered as making him a principal in misdemeanor (that is, one present at the conclusion of the offence), so that, whether the actual doer be guilty or innocent, the law of venue is satisfied by his constructive presence. This rule is applicable to all misdemeanor as such, and has nothing to do with the law of conspiracy. However, the stat. 24 & 25 Vict. c. 94, s. 1 (which provides that an accessory before the fact "may be indicted, tried, convicted and punished in all respects as if he were a principal felon"), was relied upon by the Crown as sustaining the conviction. It is said the case shows that defendant was an accessory before

the fact to the felonies committed, and therefore he might, under the statute, be tried in the venue where the principals might have been tried. But the case does not show, nor was it intended to show, any such thing; it only shows that the defendant and other persons in the county of the city of Dublin were conspirators, and in point of fact no question was ever left to the jury to say if there was evidence to show defendant to be an accessory before the fact, if Treason-Jelony he had been indicted as such. The only other argument on the part of the Crown is founded on a dictum of the Court in Platt's case (1 Leach, 151, p. 168), that the "species of treason which by 25 Ed. 3, c. 2, consists of adhering to the king's enemies, might be tried before stat. 35 Hen. 8, within the kingdom, by the rules of the common law, though the aid and comfort was afforded without the realm." But if any aid was to be derived from this dictum, the indictment ought clearly to have followed the words of the statute, and charged the felony to have been committed without the realm. But there is no rule of the common law by which any felony committed without the realm may be tried in the place where the prisoner is at the time the commission is sitting or the like; and if any jurisdiction is to be inferred from the defendant's act without the realm being made a felony by statute, he ought to be charged with that act so as to enable him to raise the question of jurisdiction. On the whole I am of opinion that both the questions should be answered in the negative.

HUGHES, B., concurred with the majority of the Court in

upholding the conviction.

O'BRIEN, J., agreed with O'Hagan, J. and Fitzgerald, B. in

holding the conviction bad.

KEOGH, J.—I think it is altogether a question of venue. The offence charged is one of compassing, which must be manifested by one or more overt acts. The only mode in which it can be localised is by selecting the place where the overt acts were committed. By the law of conspiracy, the overt acts were committed by the prisoner in the county of the city of Dublin. I am therefore of opinion that judgment should be given for the Crown.

PIGOTT, C.B.—I cannot say that I feel any difficulty in this case except that arising from the circumstance that my opinion differs from so many of my brothers on the bench. I concur with my brother O'Hagan, Baron Fitzgerald, and O'Brien, and it would be mere pedantry to attempt to add anything to their judgments. I will therefore sum up in a word or two my views on the subject. First, conspiracy is not the offence charged; next, conspiracy is an overt act of the offence charged; next, the offence charged is that of compassing, which is specified in the indictment. Now, assuming prima facie that conspiracy is a good overt act of the compassing, that assumption appears to me conclusively rebutted by the fact that the prisoner never was in Ireland at all up to the period of his arrest, never was within the venue where the acts were committed. Now, though compassing is an act of the mind, it is not a physical act, it is not an act to be done at all

REG. STEPHEN Јовкри MEANY.

1867.

except personally; and while it is true that a man may do, and often does, an act by deputy, I am of opinion that it is utterly impossible that he can think by deputy. The overt act of any member of the conspiracy, therefore, though it would be proof of compassing by a confederate, is only proof of such compassing in the place where the confederate is located; and, being of that opinion, I am at a Preason-felony loss to accept the proposition that an overt act of a member of the same conspiracy as the prisoner can attach to the prisoner, and that it can be said that he committed it within the county of Dublin. The crime charged against the prisoner is that of compassing, and it must be committed within the county where the venue is laid, and if he cannot think where he is not, I think it is impossible to sustain the indictment. I think, therefore, the conviction should

be quashed.

MONAHAN, C.J.—I must confess I regard this case as one of extreme difficulty, and though I am bound to express the opinion I have formed, after giving the case all the consideration in my power, I must say that opinion is not quite free from doubt. I think the conviction was right, and I must give my judgment that way. This is a case of a person committing an offence in a foreign country; there is no doubt that at the time of the committing of the offence, at the time of the personal compassing, he was not within the county of Dublin. But still it occurs to me that it does not follow that he cannot in point of law be convicted of compassing where he was not personally present. This case is a very important one, and in many respects a new one, but I think the case of Rex v. Wm. Stone, referred to by Baron Deasy, is in many particulars applicable to the circumstances before us. In that case the defendant was tried in the Court of Queen's Bench in England for high treason, and it was proposed to give in evidence a letter written by a person called Jackson in Ireland, to a person named John H. Stowe in France, both of whom were proved to be co-conspirators in the treason with the defendant. Mr. Erskine objected to the reading of the letter, on the ground that it did not appear it had ever come to the knowledge of the defendant, and insisted that nothing should be given in evidence but the prisoner's own acts. After consideration, Lord Kenyon ruled the evidence admissible, and said that the letter in question affected the prisoner just as much as if it was his own act, as it was done by co-conspirators in furtherance of the common object of the conspiracy. In Rex v. Bowes (supra) the same point was decided, but it was not the only one. That was a case of a conspiracy to carry off the Countess of Strathmore, and a number of persons were put upon trial, as it appeared that some carried her through one county and some through another, but it was not alleged that any of the parties were in the county of Middlesex, where the venue was laid. In addition to the question of the prisoner's responsibility for the acts of his co-conspirators, there was also decided the second question whether or not you can try him, except in the venue where the acts were committed. It was

decided that they were properly tried in Middlesex, for criminality might be placed wherever any of the conspirators were at the commission of the offence. I don't think however this rule intelligible, except on the principle that the act of one conspirator is the act of another, not only for the purpose of criminality for laying the venue, but for any other purpose.

WHITESIDE, C.J., concurred with the majority of the Court.

Treason-felony —Jurisdiction --- Venue.

REG.

STEPHEN

JOSEPH

MEANY.

1867.

Conviction affirmed.

Attorney for the Crown, Anderson. Attorney for the Defendant, J. Lawless.

Breland.

COUNTY OF DUBLIN SPECIAL COMMISSION.

April 24, 1867.

(Before WHITESIDE, C.J., FITZGERALD, J., and DEASY, B.)

Reg. v. Thomas Burke.(a)

Pleading-Indictment-Practice.

An allegation that the prisoner indicted for high treason has not got a true copy of the indictment is not matter for a plea, but only a ground for an application for a postponement of the trial.

The copy of the indictment furnished to the prisoner need not contain a copy of the indorsement of the finding of the grand jury in order to

satisfy the statute.

The Act authorising Quakers to make an affirmation instead of an outh

(1 & 2 Vict. c. 77) applies to Ireland.

It is no ground of challenge to the array, that the justices have omitted the duties prescribed by the Jury Act (Ireland) as to making out lists of names, &c. for the jury book, and that the sheriff has summoned the jury from a jury book so improperly made. Challenge to the array is only where the sheriff has been guilty of wilful default, and the summoning of the jury is a duty purely ministerial.

IN this case the prisoner was indicted for high treason. The I indictment having been read in the usual way, and the prisoner arraigned,

O'Loghlen, for the prisoner, applied to have the finding on the

(a) Reported by W. MULHOLLAND, Esq., Barrister-at-Law.

The Queen against John Mitchel, 1848, THE QUEEN against JOHN MITCHEL.

TRIAL OF JOHN MITCHEL FOR FELONY AT THE COMMISSION COURT, GREEN STREET, DUBLIN, BEFORE LEFROY, B., AND MOORE, J., MAY 22-27 1848. (Reported in 3 Cox C.C. 1.)

In May 1848, John Mitchel, registered proprietor of the United Irishman Newspaper, was indicted under 11 & 12 Vict. c. 12. (the Treason Felouy Act) for feloniously compassing to deprive and depose the Queen from the style, honour, and royal name of the Imperial Crown of the United Kingdom, and for feloniously compassing to levy war against the Queen in Ireland, in order by force and constraint to compel her to change her measures and counsels, and with expressing, uttering, and declaring such compassings in certain publications in the United Irishman of May 6 and May 13, 1848. Verdict : Guilty.

Held by Lefroy, B., and Moore, J .-

1. Indictment under 11 & 12 Vict. c. 12. - Joinder of two felonies - Compassing to levy war. On an indictment containing counts for feloniously compassing to depose the Queen, and also counts for feloniously compassing to levy war against the Queen, to force her to change her measures and counsels, the Court will not put the Crown to its election, the two charges not being repugnant or likely to embarrass the prisoner in his defence.

On an indictment for feloniously compassing to levy war against the Queen, to force her to change her measures and counsels, it is not necessary to aver in the indictment, or prove in evidence, the particular measures or counsels to be changed.

2. Evidence.

Where the publication in a newspaper of a report of a speech purporting to have been made by a prisoner is charged against him as an overt act of compassing to depose, &c., but the speaking itself is not so charged, evidence that the prisoner in fact made a speech at the time and place named is only admissible to identify him with the speaker named in the report.

3. Challenge to the Array-Evidence-Religion of Jurors.(a)

The mere fact of a disproportion existing between the number of Roman Catholics on the panel returned by the sheriff and on the jurors' book of the year is not sufficient evidence of unindifferency in the sheriff.

Evidence of the number of Roman Catholics on the panel admitted.

4. Practice-Treason Felony-Copy of Indictment.

On an indictment for treason felony, the prisoner has no right to a copy of the indictment, the jury panel, or the jury panels returned at the three previous sessions of the Court.

5. Postponement of trial. See below p. 627 .- Demurrer, right to plead over. See below, p. 623.

(a) See Reg. v. O'Doherty, below, 831.

This was the first prosecution under Vict. c. 12., which received the royal

(a) The short title under the Short Titles a bailable misdemeanor, a prosecution for sedi-Act, 1892. The full title is "An Act to pro, tion afforded no security against a dangerous Government of the United Kingdom." The on bail awaiting trial. chief objects of the measure were to assimilate or imprisonment. As regards Ireland, it the bill, Sir George Grey stated that the law

the Treason Felony Act, 1848,(a) 11 & 12 assent on April 22, 1848. On May 20 in

vide for the better security of the Crown and repetition of the offence while the offender was

The relation of the Treason Felony Act, 1848. the law of treason in England and Ireland, and to the earlier statutes and its leading provisions to provide a more suitable method of dealing may be briefly stated as follows:—The Treason with certain offences, which in England were | Act, 1851, declared that it should be adjudged treason under the Treason Acts, 1795, 36 Geo. 3. treason "when a man doth compass or imagine c. 7., and 1817, 57 Geo. 3. c. 6., but which it the death of our lord the King or if a was found inexpedient to prosecute as such, man do levy war against the King in his realm;" owing to the inconvenient nature of the pro- and "thereof be proveably attainted of open cedure on trials for treason, and the severity deed by people of their condition." By judicial of the punishment. These offences were now construction, attempts to depose or to restrain the made felonies punishable with transportation person of the King, and conspiring to levy war against him, were held to be overt acis of compasshad been doubted whether the provisions of ing the King's death. (Fost. C.L. 195). The temthe Treason Acts, 1795 and 1817, extended to porary Treason Act, 1795, 36 Geo. 3. c. 7., made that country, and such offences could only be perpetual by the Treason Act, 1817, 57 Geo. 3. dealt with there as constructive treasons under c. 6., gave statutory force to some of these the Treason Act, 1851, 25 Edw. 3. st. 5. c. 2. constructive treasons by providing "if any (see below), or as sedition. In introducing person or persons . . . shall within the realm or without, compass, imagine, invent, devise, or of sedition was vague, and that sedition being intend death or destruction, or any bodily harm

i 600

tending to death or destruction, main or wounding, imprisonment or restraint of the person of the same our sovereign lord the King, his heirs and successors, or to deprive or depose him or them from the style, honour, or kingly our Lady the Queen upon their oath present, name of the Imperial Crown of this Realm, or that John Mitchel, late of Ontario Terrace, in of any other of His Majesty's dominions or the county of Dublin, gentleman, after the passthem to change his or their measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to dominions . . . and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, and declare by publishing any printing or writing, or by any overt act or deed . . . every such person and persons so as beforesaid offending shall be deemed, declared, and adjudged to be a traitor and traitors, and shall suffer pains of death, and also lose and forfeit as in cases of high treason."

The wording of the above provisions closely follows 13 Eliz. c. 1., and 13 Cha. 2. c. 1.

The Treason Felony Act, 1848, 11 & 12 Vict. c. 12 .- after reciting the above provisions, and that doubts existed whether they extended to Ireland, and that it was expedient "to repeal all such provisions as did not relate to offences against the person of the sovereign, and to enact other provisions iustead thereof applicable to all parts of the United Kingdom, and to extend to Ireland such of the above provisions as were not thereby repealed "- provides s. 1, that all the above provisions, save those relating to offences against the person of the sovereign, should be repealed; and, s. 2, that the provisions relating to offences against the person of the sovereign should apply to Ireland; and, s. 8, "if any person whatsoever after the passing of this Act shall, within the realm or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, her heirs or successors, from the style, honour, or royal name of the Imperial Crown of the United Kingdom, or to levy war against Her Majesty, her heirs and successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures and counsels, or in order to put any force or constraint upon, or to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other Her Majesty's dominions, and such compassings, imaginations, inventious, devices, or intentions, or any of them, shall express, utter, and declare by publishing any printing or writing [or by open and advised speaking], or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the Court to be transported Years of Irish History."

the same year, the grand jury of the true bill against John Mitchel, (a) proprietor county of the city of Dublin returned a of the United Irishman, for Treason Felony under the above statute.

INDICTMENT.

County of the City of Dublin, \ First Count .to wit. The jurors for countries: or to levy war against His Majesty, ing of an Act of Parliament made and passed in his heirs and successors within this realm, in the eleventh year of the reign of our Sovereign order by force or constraint to compel him or Lady Queen Victoria, entitled "An Act for the better Security of the Crown and Government of the United Kingdom," to wit, on the sixth day of May, in the eleventh year of the reign of our said Sovereign Lady Queen Victoria, with force and arms, at the parish of Saint Thomas, in the invade this realm, or any other his Majesty's county of the city of Dublin, within the United Kingdom, feloniously did compass, imagine, invent, devise, and intend to deprive and depose our said Lady the Queen from the style, houseur, and royal name of the Imperial Crown of the United Kingdom, and the said felouious compassing, imagination, invention, device, and intention, he the said John Mitchel then and there feloniously did express, utter, and declare by then and there feloniously publishing a certain printing in a certain public newspaper called the United Irishman, of which said public newspaper be, the said John Mitchel, then and there was the proprietor, which said printing is as follows, that is to say :-

Report of the Limerick Speech.

"Mr. Mitchel (meaning the said John Mitchel) having been loudly called, then rose amidst a harricane of applause, and said-Mr Chairman and citizens of Limerick, my first duty is to thank you, which I do cordially and sincerely, for the generous reception you have this night given to those who have been selected for prosecution by the British Government-a reception

beyond the seas for the term of his natural life, or for any term not less than seven years, or to he imprisoned for any term not exceeding two years with or without hard labour as the Court shall direct."

Section 4 provides that no person shall be prosecuted for felony for such compassings, &c., in so far as they are expressed, &c., by open and advised speaking only, unless within two years after the passing of the Act.

Section 6 provides that nothing in the Act shall lessen the force of, or in any manner affect snything enacted" by the Treason Act. 1851; and s. 7, that indictments under the Act shall be valid, though the facts amount to treason, but that no person tried for such felony shall be afterwards prosecuted for treason on the same facts.

See Stephen's Hist. Cr. L. vol. 2, p. 267, &c., and charge of Alderson, B., at Liverpool, below, p. 1,127.

(a) See the earlier proceedings against Mitchel above, page 545; as to this prosecution see Mitchel's "History of Ireland," vol. 2,

one-(hear, hear). I have seen nothing in all this mob violence to make me despond for a moment. The people are the true source of legitimate power; that howling multitude outside are a thousand times preferable to the howling legislators of England who yelled against Smith O'Brien-(cheers). I am no drawingroom democrat who can discourse of the powers smiling and cheering around me. Mob-law itself, in Ireland, is far better than Government law-that well-ordered and civilised system that I tell you that rather than endure one other year of British dominion, I would take a provisional government selected out of the men that are bellowing there in the street-(loud cheers). Sir. I fear that I am unfortunately the cause of your meeting this night being disturbed-(no. no). I think, however, the matter arises out of surely between bearing testimony to one's approval of a man's general conduct, and identifying oneself with all his acts-(hear). It is one thing to offer encouragement and support its vengeance; and it is quite another thing to adopt for your own every particular sentiment. saying, and doing, of the individual in question. This difference I feel bound to note and acknowledge to-night; and I do so with alacrity and with gratitude. You need not fear, my friends, that I will misinterpret the compliment that has been paid me, in inviting me to your city on this occasion. You need not fear that I have accepted your invitation in order that I might thrust any particular opinions of my own down your thronts (hear, hear), or in order to induce a belief that there is between me and your distinguished guests-Smith O'Brien and Thomas Meagher-a more thorough identification thun there is or needs to be. We don't either that they were wrong in themselves, or that the time had not come for them. And I cannot be even with my friends in this matteracts. Can I repudiate, for instance, the last sneech of Mr. O'Brien in the British Parliament -one of the noblest, cleurest statements of Ireland's case—the very haughtiest, grandest defiance flung in the face of Ireland's enemies that ever yet fell from the lips of man?-(loud by Mr. Meagher, who says, when the last constitutional appeal shall be made, and shall fail-"Then up with the barricades, and invoke the God of Battles"?-(great cheering). Can I that we have even now no resource, exceptwhen we have the means and the pluck to do itthe barricades and the God of Battles?-(hear, bear, and loud cheers). No; all the seditions and treasons of these gentlemen. I adopt and

which, notwithstanding what has occurred out- | accept, and I ask for more-(hear, hear). side that door, must be called a triumphant Whatever has been done or said by the most disaffected person in all Ireland against the existence of the party which calls itself the Government-nothing can go too far for me. Whatever public treasons there are in this land, I have stomach for them all-(loud cheering). But, sir, have we not had in Ireland somewhat too much of this adopting and avowing, or also repudiating and disavowing what has been said and virtues of the people only while they are or done by others? Might we not, perhaps, act with advantage less as parties, and more as mere men, each of us on his own individual responsibility? - (hear, hear). For myself, slays its millions of human beings within the year. I though an active member of the Irish Confederation, I declare that I do not belong to the Young Ireland party, or to any party. I have found myself unsuited to party ties and trammels together; I have been found not to draw quietly either in single or double harness-(hear, hear, and laughter). I very soon quarrelled with the old Repeal Association; and as for the Cona misapprehension. There is a great difference federation, it has once or twice nearly quarrelled with me. Not many weeks ago the council of the Confederation, headed by Smith O'Brien and Mr. Meagher, thought it necessary to disavow my proceedings. Very well : what harm came. to a person singled out by government (which of it? I merely retorted in the most goods is the enemy of us all) as the especial object of humoured way in the world, by setting them at defiance; and things went on afterwards more smoothly than ever-(cheers and laughter). In short, I have long felt that I belong to a party. of one member-a party whose basis of action is: to think and act for itself-whose one fundant mental rule is to speak its mind-(cheers). Its secretary, committee, librarian, and treasurer are all one in the same person; and in its proceedings. I assure you, there reigns the most unbroken unanimity - (continued laughter) Seriously, sir, I know no other way of ensuring both honest unanimity, and independent cooperation than this very way of mine; and with these views and sentiments, you may be sure I am not likely to misconceive the motive of your kindness in asking me to join your party want this thorough identification-(hear). Some to-night. I am here, I believe, as your guest of the things I have done and written these on one account alone. You will say whether gentlemen have both condemned, as believing I state it truly. I am here not as a Jacobin (which I am not), nor as a Communist (which I am not), nor even as a Republican (which I am)-(loud cheers); but simply and merely I am not able to repudiate any of their public | because I am a bitter and irreconcilable enemy to the British Government-(hear, hear). Will you forgive me for speaking so much about myself, on this the first time I have had the honour to address an audience in the south of Ireland -(hear, hear). I assure you it is not my habit; nor would I do so to-night, but that I found cheers). Or can I condemn the alternative put myself, on my arrival in Limerick to-day, in a rather singular position. I found some twenty or thirty poor fellows who had risen very early in the morning for no other purpose but to hoot me as I came into the town. I have no ill-will, repudiate this - who hold that constitutional I assure you, against those who hooted, nor appeals are long since closed against us, and even against those who set them on to hoot-(bear). I believe it all arose out of some expressions in my paper, the United Irishman -(loud cheers for the United Irishman), which were construed as disrespectful to the memory of one whom -whatever I may think

Emancipator. I think the passage did not really convey the gross and degrading imputation on O'Counell's memory that has been spelled out of it; but at any rate I must acknowledge that the feeling on the part of these people against me is not an unnatural one, and that it is merely an exaggerated and perverted example of a sentiment creditable in itself-(hear). But, sir, while I admit this, I must also insist on my right to hold and to express, on all public questions and on the characters of public men, the opinions which I have honestly formed-(cheers). I established that paper in order to assert and vindicate this right, as well as all other rights of Irishmen, and especially the rights of labouring people like my friends who hooted me this morning. And I must inform them that I value the hootings of a mob just as little as the indictment of an Attorney General-(hear, hear, and cheers). And further, that I had rather never be invited to a public assembly nor appear in a public place, nor sit at good men's feasts,-I had rather be overwhelmed by state prosecutions, and by the execution of my countrymen, all at once, than yield or waive the privilege of saying what I think for a single hour-(hear, hear, and great cheering). Enough now about these personal matters. As to the position of our great cause, I think it is full of peril as well as full of hope. In proportion as the Irish nation has been gathering up strength and spirit to rid its soil of their enemies, those enemies have also been collecting their strength and hardening their hearts to hold our country in our despite. It is fortunate, I think, that those who have taken a forward part in rousing our people to these hopes and efforts are the first to bear the brunt of the danger. It is better that they should be called to encounter it in the course of justice first, than that it should stall on a people not yet prepared in the field. But while we meet the enemy in the Queen's Bench, we have a right to call upon you to sustain us by a firm and universal avowal of your opinion. On the constituents of Smith O'Brien especially devolves this duty. While the British Parliament calls his exertions "treason" and "felony," it is for his constituents to declare that in all this treason and follony he is doing his duty by them—(cheers). man (meaning the said John Mitchel) is no hero And more than this; it is your duty further to at all, and never said he was. He (meaning prepare systematically to sustain him, if it come to that, in arms-(loud and enthusiastic persuade his countrymen that they will never cheering). May I presume to address the gain their liberties, except by fighting for them; women of Limerick - (hear, hear, and loud cheers). It is the first time I have ever been in the presence of the daughters of those pikes-that's all. And he (meaning the said heroines who held the breach against King John Mitchel) continues to preach this saving William; and they will understand me when I doctrine, and will continue so to do until a say, that no Irishwoman ought so much as to considerable number of his countrymen agree speak to a man who has not provided himself with arms-(loud cheering). No lady is too and then he hopes to aid in enforcing the delicate for the culinary operation of casting arguments practically-that's all. As to the bullets-(laughter). No hand is too white to he needful to come to the last resort, that the citizens of Limerick, male and female, will not disgrace their paternal and maternal ancestors who wrote it, and the editors of Saunders and

of him - most Catholics revere as their | - (hear, hear, and cheers). Before sitting down now, I wish to contradict one calumny. It has been said of me-Lord Clarendon has had it posted up over Dublin-that I have been inciting the people to plunder and massacre ; that my object is to raise a hasty and immature insurrection; that I want to plunder houses, to rob banks, to break into shops and stores. Need I refute this outrageous calumny?-(cries of "no, no," and cheers). Who ever heard me stimulate my countrymen to civil war against their own flesh and blood? My friends, we have no enemies here save the British Government and their abettors. A war of assassination and plunder against our countrymen would be a wound to our own vitals—(hear and cheers). I shall say no more of this; but again heartily thanking you for your kindness, I conclude by urging you once more to stand by and sustain Smith O'Brien against his enemies and yoursto sustain him, not for his sake, but for your

> If yet you are not lost to common sense, Assist your patriot in your own defence. The foolish cant -he went too far-despise. And know that to be brave is to be wise.

Mr. Mitchel (meaning the said John Mitchel) sat down amidst protracted cheering.

And the said felonious compassing, imagination, invention, device, and intention, he the said John Mitchel afterwards, to wit, on the thirteenth day of May, in the eleventh year of the reign of our said Lady the Queen, to wit, at the parish aforesaid, in the county of the city of Dublin aforesaid, did further feloniously express, utter, and declare, by then and there feloniously publishing a certain other printing in one other number of the said public newspaper called the United Irishman, which is as follows ; that is to say :-

"THE TIMES" ON REBELLIONS.

" The Times appears to have been labouring under the impression that Mr. Mitchel (meaning the said John Mitchel) had given himself out for a "hero," and the leader of a rebellion, and further, that the three prosecuted confederates went to Limerick to fight a pitched battle, instead of to attend a peaceful evening party. Now the fact is, the editor of the United Irishthe said John Mitchel) has only endeavoured to and that the only arguments the English Government will understand are the points of with him (meaning the said John Mitchel), "sneaking away" of Mr. Mitchel and Mr. make up cartridges (cheers); and I hope, if it Meagher, or either of them, "under the protection of police," or any protection, it is merely an untrath, and the writer in The Times 6091

The Mail who, we find, have copied it, knew it | to you now of religious sects, when the matter in

number of the said public paper called the United Irishman, a certain other printing, which is as follows : that is to say :--

Letter to the Protestant Farmers, Labourers, and Artizans of the North of Ireland .-

been made to you by exceedingly genteel and any more than it is in France or Belgium now. very rich noblemen and gentlemen. Those of you, especially, who are Orangemen, seem to have somehow got into high favour with this to remember, first, that he has written you a genteel class, which must make you feel rather long and paternal letter, upon the state of the strange, I think :- you have not been used to country, and has not once alluded to your tenantmuch recognition and encouragement of late right; and second that he belongs to that class years from British Viceroys, or the noble and of persons from whom alone can come any right worshipful Grand Masters. They rather danger to your tenant-right,—which is your life avoided you; seemed, indeed, as many thought, and property. somewhat ashamed of you and your old anniversaries. Once upon a time no Irish nobleman or British minister dured make light of the colours of Aughrim and the Boyne. But can you divine any cause for the sudden change of the country are there to be attached to? That all light? Do you understand why the whig, Lord Clarendon, calls you so many names of endear- of those taxes is not one of our institutions, ment, and the Earl of Enniskillen tenderly entreats you as a father his only child? Can these men want anything from you?

Let us see what the drift of their addresses generally is. Lord Clarendon, the English governor, congratulates you on your "loyalty," and your "attachment to the Constitution," and seems to calculate, though I know not why, upon a continuance of those exalted sentiments in the North Lord Enniskillen, the Irish nobleman, for his part, cautions you earnestly against Popery and Papists, and points out how completely you would be overborne and swamped by Catholic majorities in all public affairs.

My Lord Enniskillen does not say a word to you about, what is, after all, the main concern, the tenure of your farms, not one word. It is muskets to defend? about your Protestant interest he is uneasy. He is apprehensive, not lest you should be evicted loyal men." Have they? And what do they by landlords, and sent to the poor-house, but lest purgatory and seven sacraments should be thrust down your throats. This is simply a Protestant ing at all, except that we, Protestants, hated pious fraud of his Lordship's, merely a right the Papiets, and despised the French; this, I worshipful humbug. Lord Euniskillen, and think if you will examine it, is the true theory every other commonly informed man, knows of "loyalty" in Ulster. I can hardly fancy any that there is now no Protestant interest at all; of my countrymen so brutally stupid as to really that there is absolutely nothing left for Pro- prefer high taxes to low taxes,-to be really testant and Catholic to quarrel for: even the proud of the honour of supporting "the Prince Church establishment is not a Catholic and Protestant question, inasmuch as Al dissenters, and all plebeian churchmen, are as much concerned they have, in magnificent idleness, at the sole to put an end to that nuisence as Catholics are. expense of half-starved labouring people. I Lord Enniskillen knows, too (or, if he do not, should like to meet the northern farmer, or be is the very stupidest Grand Master in Ulster), labouring man, who would tell me, in so many that an ascendancy of one sect over another is words, that he prefers dear government to cheap from henceforth impossible, the fierce religious government; that he likes the House of Brunszeal that animated our fathers on both sides is wick better than his own house; that he would utterly dead and gone; -I do not know whether rather have the affairs of the country managed this is for our advantage or not; but, at any by foreign noblemen and gentlemen than by

hand relates to civil and political rights, to ad-And, in another part of the said last-mentioned ministration of government, and distribution of property,-depend on it, though he wear a coronet on his head, he means to cheat you. In fact, religious hatred has been kept alive in Ireland longer than anywhere else in christendom, just for the simple reason that Irish landlords and British statesmen found their own account My Friends,--Since I wrote my first letter to British dominion are finally rooted out of the in it; and so soon as Irish landlordism and you, many kind and flattering addresses, have country, it will be heard of no longer in Ireland,

If you have still any doubt whether Lord Enniskillen meant to cheat you, I only ask you

As for Lord Clarendon and his friendly addresses, exhorting to "loyalty" and attachment to institutions of the country, I need hardly tell you that he is a cheat. What institutions of that those who create the whole wealth of the State by their labour should get leave to live; like Christians, on the fruits of that labour,this is not among the institutions of the country. Tenant-right is not an institution of the country. No; out-door relief is our main institution at present-our Magna Charta-our Bill of. Rights. A high-paid Church and a low-fed people, are institutions; stipendiary clergymen, packed juries, a monstrous army and navy, which we pay, not to defend, but to coerce us,these are institutions of the country. Indian meal, too, strange to say, though it grows four thousand miles off, has come to be an institution of this country. Are these the "venerable institutions" you are expected to shoulder your.

But, then, "Protestants have always been mean by "loyalty"? I have never found that, in the north of Ireland, this word had any mean-ALBERT" and his lady, and their children, and all the endless list of cousins and uncles that rate, it is gone: nobody in all Europe would now himself and his neighbours; that he is content so much as understand it, and if any man talks to pay, equip, and arm an enormous army, and

give the command of it to those foreign noble- | ay, and in your souls, too, Protestants of Ulster. and a good appetite for his yellow meal.

Lord Clarendon knows, on his side, that if you hour, inevitably drifting together. phold landlordism and abandon tenant-right, government, in these terms,--"keep down for word "Repeal." me my tenantry, my peasantry, my 'masses,' in due submission, with your troops and laws; and I will garrison the island for you, and hold it as your liege-man and vassal, for ever."

this is true? And still you are "loyal" and attached to the institutions of the country !

I tell you frankly, that I, for one, am not "loyal." I am not wedded to the Queen of England, nor unalterably attached to the House of Brunswick. In fact, I love my own barn tions, our Protestant Repeal Associations, our better than I love that house. The time is long | Tenant-right Societies, our Clubs, Cliques, and past when Jehovah anointed Kings. The thing | Committees, amidst confusions enough and the has long since grown a monstrous imposture, saddest jostling and jumbling-are all inevitably and has been already, in some civilised countries, detected as such, and drummed out accordingly. A modern king, my friends, is no more like an aucient anointed Shepherd of the people than an Archbishop's apron is like the College green chapel-of-ease to St. Stephen's-Urim and Thummim. There is no divine right but an IRISH REPUBLIC, one and indivisible, now but in the Sovereign people.

And for the "Institutions of the Country," I loathe and despise them; we are sickening and dying of these institutions fast; they are and power. But why do I reason thus with consuming us like a plague, degrading us to | you, -with you, the Irish of Ulster, who never panpers in mind, body, and estate-yes, making | have denied the noble creed and Sacraments of our very souls beggarly and cowardly. They manhood? You have not been schooled for are a failure and a fraud, these institutions; from the topmost crown jewel to the meanest detective's note book there is no soundness in culated by the clap-trap platitudes of public them. God and man are weary of them. Their meetings, and the empty glare of "imposing last hour is at hand; and I thank God that I demonstrations;" you have not yet learned the live in the days when I shall witness the utter | litary of slaves, and the whine of beaten hounds, downfall, and trample upon the grave, of the most portenious, the grandest, meanest, falsest, and cruellest tyranny that ever deformed this world.

These, you think, are strong words; but long. they are not one whit stronger than the feeling that prompts them-that glows this moment deep in the souls of moving and awakening millions of our fellow-countrymen of Ireland,-

men, and to be disarmed himself, or liable to if you would acknowledge it to yourselves. ? be disarmed, as you are, my friends, at any smile at the formal resolution about "loralty to moment. I should like to see the face of the Queen Victoria," so engerly passed and hurried Ulsterman, who would say plainly that he over as a dubious kind of form at tenant-right deems himself unfit to have a voice in the meetings and "Protestant Repent" meetings. management of his own affairs, the outlay of his I laughed outright here, on Thesday night last, own taxes, or the government of his own at the suspicious warmth with which Dublin country. If any of you will admit this, I own merchants, as if half afraid of themselves, prohe is a loyal man, and attached to our venerable tested so anxiously that they would yield in institutions; and I wish him joy of his loyalty, loyalty to none. They, Democrats by nature and position, meeting there without a noble-Now, Lord Clarendon and Lord Enniskillen | man to countenance them; with the Queen's want you to say all this. The Irish noble and representative scowling black upon them from the British statesman want the very same thing: his castle, are—they declare it with most nervous they are both in a tale. The Grand Master knows solemnity-loyal men. Indeed, it was easy to that, if you stick by your loyalty and uphold see that a vague feeling was upon them of the British connexion, you secure to him his coronet, real meaning and tendency of all these meetings, his influence, and his rental; discharged of -of what all this must end in, and to what tenant-right, and all plebeiun claims. And haven they and you, and we, are all, in a happy

My friends, the people's sovereignty: the and bend all your energies to resisting the land, and sea, and air of Ireland, for the people generoachments of Popery," you thereby per-petuate British dominion in Ireland, and keep and the earth are preaching, and that all hearts the "Empire" going yet a little while. Irish are secretly burning to embrace. Give up for laidlordism has made a covenant with British ever that old interpretation you put upon the

REPEAL is no priest-movement; it is no sectarian movement; it is no money swindle, nor "eighty-two" delusion, nor puffery, nor O'Connellism, nor Mullaghmust "green cap" stage Do you not know, in your very hearts, that | play, nor loud-sounding inanity of any sort, got up for any man's profit or praise. It is the mighty passionate struggle of a nation hastening to be born into new national life; in the which unspeakable throes all the parts, and powers, and elements of our Irish existence,-our Confederatending, however unconsciously, to one and the same illustrious goal, -not a local Legislature, -not a return to "our ancient constitution," not a golden link, or a patchwork Parliament, or a And how are we to meet that day? In arms, my countrymen, in arms. Thus, and not otherwise, have ever nations of men sprung to liberty forty years in the fatal cant of moral force-you have not been utterly debauched and emasand the way to die a coward's death. No : let once the great idea of your country's destiny seize on you, my kinsmen, and the way will be plain before you as a pike-staff twelve feet

Yet there is one lesson you must learnfraternal respect for your countrymen of the south, and that sympathy with them, and fuith in them, without which there can be no vital

nationality in Ireland. You little know the his- | tention did then and there feloniously express, tory and sore trials and humiliations of this ancient Irish race; ground and trampled first for long ages into the very earth, and then taught-expressly taught-in solemn harangue, and even in sermons, that it was their duty to die, and felonious compassing, imagination, invention, and see their children die before their faces, device, and intention aforesaid, he, the said John rather than resist their tyrants as men ought. You can hardly believe that creatures with the gait and aspect of men could have been brought to this. And you cannot wonder that they should have been slow, slow in struggling upward out of such darkness and desolation. But I tell you the light has at length come to them: the flowery spring of this year is the dawning of their day; and before the corn fields of Ireland are white for the reaper, our eyes shall see the sun flashing gloriously, if the Heavens be kind | count], and further to fulfil, &c. (2nd overt act), to us, on a hundred thousand pikes. I will speak plainly. There is now growing on the on Rebellions" with the inuendoes, as in the soil of Ireland a wealth of grain, and roots, and first count]. And further to fulfil, &c. (3rd overt cattle, far more than enough to sustain in life and in comfort all the inhabitants of the island. That wealth must not leave us another year,not until every grain of it is fought for in every stage, from the tying of the sheaf to the loading of the ship. And the effort necessary to that simple act of self preservation will at one and the same blow prostrate British dominion and landlordism together. 'Tis but the one act of volition-if we resolve but to live, we make our country a free and Sovereign state.

Will you not gird up your loins for this great national struggle, and stand with your countrymen for life and land? Will you, the sons of a warlike race, the inheritors of conquering memories, - with the arms of freemen in all your | fifth, but assigned only one overt act, the homes, and relies of the gallant republicans of ninety-eight for ever before your eyes-will you stand folding your hands in helpless "loyalty;" -and while every nation in Christendom is seizing on its birth-right with armed hands, will you take patiently with your rations of yellow meal, and your inevitable portion of eternal contempt? If this be your determination, Protestants of Ulster, then make haste, sign addresses of lovalty and confidence in Lord Cherendon, and protest, with that other Lord. your unalterable attachment to "our venerable fore, and set out the following overtex institutions." JOHN MITCHEL.

Against the form of the statute in such cases made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

The Second Count was the same as the first, but assigned only one overt act, the report of the Limerick speech.

The Third Count was the same as the first, but assigned only one overt act, the letter to the Protestant Farmers, &c.

The Fourth Count, in which the publi cations were laid as overt acts, charged that the prisoner

feloniously did compass, imagine, invent, devise, and intend to deprive and depose our said Lady the Queen from the style, honour, and royal name of the Imperial Crown of the United Kingdom, and the said felonious compassing, imagination, invention, device, and in- sussions, to move, induce, and persuade the sub-

utter, and declare, by divers overt acts and deeds hereinafter mentioned, that is to say (1st overt act), in order to fulfil, perfect, and bring to effect his most evil and wicked felony Mitchel, on the said sixth day of May, in the eleventh year of the reign aforesaid, at the said parish of Saint Thomas, in the county of the city aforesaid, feloniously did publish a certain printing in a certain public newspaper called the United Irishman, of which said public newspaper he, the said John Mitchel, then and there was the proprietor, which is as follows. that is to any [setting out the prisoner's speech at Limerick, and the innuendoes, as in the first [setting out the article entitled " The Times act setting out the letter to the Protestant Farmers, Labourers, and Artizans of the North of Ireland, No. II., with innuendoes, as in the first count].

T612

The Fifth Count charged that the prisoner

feloniously did compass, imagine, invent, devise and intend to levy war against our said Lady the Queen within that part of the United Kingo dom called Ireland, in order by force and con straint to compel her to change her measures and counsels, and the said felouious compassing &c., as in the First Count.

The Sixth Count was the same as the report of the Limerick speech.

The Seventh Count was the same as the sixth, but assigned as overt acts the article. "The Times on Rebellions," and the letter to the Protestant Farmers.

The Eighth Count charged a company ing to levy war as before, with overt acts laid as in the Fourth Count.

The Ninth Count charged a compassing to deprive and depose the Queen as be-

and the said felonious compassing, imagination, invention, device, and intention did then and there feloniously express, utter, and declare, by divers overt acts and deeds hereinafter ment tioned, that is to say, in order to fulfil, perfect and bring to effect his most evil and wicked felony and felonious compassing, imagination invention, device, and intention aforesaid, he the said John Mitchel, on the said sixth day of May, in the eleventh year of the reign aforesaid and on divers other days and times, both at well before as after, at the said purish of Saint Thomas, in the county of the city aforesaid; feloniously did publish divers printings in divers numbers of a certain public newspaper called the United Irishman, of which he, the said John Mitchel, was then and there the proprietor and publisher, containing, amongst other things, incitements, encouragements, advices, and perdects of our said Lady the Queen, in that part | been followed in Ireland, but it would of the United Kingdom of Great Britain and appear to be contrary to the common law Ireland called Ireland, to fulfil and bring to effect, and to aid and assist in fulfilling and the Irish House of Commons.(a) The bringing to effect the aforesaid felonious compassings, imaginations, inventions, devices, and intentions; and also containing therein information, instructions, and directions to the said subjects of our said Lady the Queen, how and when the said felonious compassings, imaginastions, inventious, devices, and intentions should and might be carried into effect, against the form of the statute in such case made and prowided, and against the peace of our said Lady the Queen, her crown and dignity.

The Tenth Count charged a compassing to levy war as before, and set out the same | conceived or thought of for or concerning the overt acts as the Ninth Count.

Counsel for the Crown: The Attorney General (Monahan), (a) the Solicitor General (Hatchell),(b) Whiteside, Q.O. (c) Baldwin, Q.C., Smyly and Plunket.

Counsel for the prisoner: Holmes, (d) Sir O. O'Loghlen, Pigot, and John O'Hagan (e)

The prisoner having been called on to plead.-

Sir C. O'Loghlen, in moving for a copy of the indictment, the jury panel, and the Jury panels returned at the three former sessions of the court, read an affidavit of O'Flaherty, the prisoner's attorney, stating that he had applied for a copy of the common jury panels and been refused, and that such copies were necessary for the

defence. Hale and other text books state that at common law in England parties were not entitled to copies of the indictment; but up to the time of Charles II. it was the practice in England to give them in felouies and treason. Thus, in Bothe's case, (f) felony, the prisoner was allowed a copy of the findictment, though the Attorney General opposed the application. In the political trials in the reign of Charles II., which, as Sir Michael Foster remarks (p. 231), were carried on "too often in the spirit of party," copies of indictments were refused, and in the 10th of Charles II. a resolution was passed by five of the judges astembled at the Old Bailey, (g) prohibiting copies of indictments for felony to be given without special order to be made upon motion in open court. That resolution has given rise to the practice in England.(h) This practice has

of Ireland, as appears from the records of practice though uniform, cannot be considered as settled, as it has never been brought under the consideration of any court. In the year 1640, questions were prepared by the Irish House of Commons, and sent to the House of Lords with a request that they would lay them before the judges and request their opinion. The House of Commons stated that they took this course.

"not for any doubt or ambiguity which may be premises, nor of the ensuing questions, but for the manifestation and declaration of a clear truth and of the said laws and statutes already planted, and for many ages past settled in this

One of these questions was as follows :--"Whether the judges of the King's Bench, or any other judges of gool delivery or any other court, and by what law, do or can deny the copies of indictments of felony or treason to the parties accused, contrary to law?"

The Lords delivered these questions to the judges, who took time to consider. and in May, 1641, delivered the following answer :-- (b)

"That neither the justices of the King's Bench (as they inform us that are of that court), or justices of gaol delivery, or of any other court, do or can by any law they know, deny the copies of indictments of felony or treason to the party only accused, as, by said question is demanded."

The House of Commons not being satisfied with the answers which the judges made upon some of the questions made what was called a declaration upon all the points submitted to the judges, and upon this particular subject declared that

"the judges of the King's Bench, or justices of gaol delivery, or the judges of any other court, ought not to deny copies of indictments of felony or treason to the party indicted."

This affords strong evidence that at common law in Ireland a prisoner was entitled to a copy of the indictment against

Even if a prisoner is not entitled to a copy of an indictment in cases of felony, the Court have a discretion to grant it.(c)

⁽a) Afterwards Chief Justice of C.P. (b) Afterwards Attorney General.

⁽c) Afterwards Lord Chief Justice of Ireland. (d) See below, p. 682.

⁽e) Afterwards an additional Judge of the Supreme Court of Judicature in Ireland, and Judge of the Irish Land Commission.

⁽f) Moore, 666.

⁽g) Kel. 3. (h) Anon., 1 Lew. C.C. 205, n.

⁽a) Vol. i., p. 174.(b) See Nelson's Collection of the Great Affairs of State, 1st vol. p. 587, Lond. 1683, in which the answers of the judges are preserved. the journals of the Irish House of Lords for 1641 having been burned. And note by Sir Colman O'Loghlen to Neil's case (Irish Circ. Rep. 375).

⁽c) See Reg. v. Grace 2 Cox C. C. 101.

and this is a proper case in which to 1 Lewin, C. U. 207, n.) to enable him to do exercise that discretion, being the first so. The object of the prisoner in seeking prosecution under a new Act which alters | copies of the former panels is to be in a the nature of a crime for which, had the prisoner been indicted before the Act passed, he would have been entitled to a copy of the indictment by express statute: (Rosewell's case) (a).

LEFROY, B.: At what stage of the proceedings was the application made in Rosewell's case P

Sir O. O'Loghlen: Both before pleading and afterwards in arrest of judgment. With respect to the rest of the motion, it is not necessary to apply for a copy of the present panel, as that has been given by the sheriff, but we ask for a copy of the panels of jurors summoned at the three preceding commissions. They are matters of record in the Crown Office, and as such we ought to have access to them; Lord Coke in his preface to 2 Rep., p. 6, says that

" the records of the King's Court are safely kept. yet not so kept but that any subject may for his own use and benefit have access thereuuto, which was the ancient law of England, and so is declared by an Act of Parliament,"

By stat. 46 Edw. III. it was enacted that all persons shall for the future have free access to them, and may have exemplifications of them, whether it makes for or against the King: 1 Bla. Com. 39; Reg. v. Worsenham and another (b) Herbert v. Ashburner (c) Rew v. Smith (d)

The Attorney General (Monahan) and Queen's Beuch, and on circuit; Rev v. Holafter an acquittal, in order to enable the defendants to maintain an action for a court to grant a copy of the indictment, has no right to it (2 Hale, P. C. 236; Fost. O. L. 228; 2 Hawk. P. C. o. 39, 8, 14).

counsel could not demur to this indictment if they have not a copy of it. If the court do not permit the defendant to ferred to, on the other point, show that he have a copy, he will be obliged to get a had just as little to receive a copy of the shorthand-writer to take a note of it, and it will be the duty of the Clerk of the no question arises regarding it. As to the Crown to read it slowly and distinctly (see

position to challenge the array, if it appears that a different class of jurors have been impannelled to try this case from that usually impannelled for trials at this court: or if it appears that the names of jurors have been placed on the panel in such a way as to prejudice the prisoner. I do not impute such conduct to the sheriff: all we seek is to get such information as is necessary to enable us to exercise a constitutional right, without which, in the words of Lord Denman, trial by jury would be "a delusion, a mockery and a snare."(a)

LEFROY, B.: This motion must be refused. The law is clear and express upon the point, as laid down in 2 Hale, P. C. 236; 2 Hawkins, P. C. c. 39, s. 14; and Foster. 228; and the practice is stated accordingly by Lord Kenyon in Rea v. Holland.(b) No case to the contrary has been cited to us to show that a prisoner, in this stage of the proceedings, is entitled to a copy of the indictment. The act entitling a prisoner to this privilege in cases of high treason, and the more recent act. 1 Geo. 4. c. 4. s. 8, granting it in cases of ex officio informations in cases of misdemeanors, would alone be sufficient to show that by the common law a prisoner had no such right; we conceive, therefore, that we have no authority to grant this application, and that it would be mischievous to Baldwin, Q.C., for the Crown: To grant break in upon a long-established practice, this application would be a departure from sanctioned by the highest authorities and the settled practice at this court, in the a course of uniform practice for a long period down to the present time. The land(s); Browne v. Cumming, (f) show that argument urged by the prisoner's counsel the court will grant such an application that the prisoner may require the indictment to be read so slowly as to allow of its being taken down by a shorthand malicious prosecution; but not in such writer, and much time be thereby uncase as the present. With regard to the necessarily occupied, cannot avail. No question of the discretionary power of the decision or rule of a court of justice could be made to depend on the length of an inall the authorities show that the prisoner dictment, or the time which it would take to have it read. There cannot be a different rule for a short indictment and a Sir Colman O'Loghlen: The prisoner's long one. As to the application for copies of the preceding panels, the prisoner has no right to them, and the authorities represent panel. But as he has received it use proposed to be made of the former panels, to show that the present panel differs from them in some respects, it should be recollected that every sheriff has his own duty to perform, and must

act upon his own discretion, and accord-| counts (the 9th and 10th) should be coningly the Jury Act (3 & 4 Will. 4. c. 91. s. 11), expressly provides

"that nothing therein contained shall be construed to prevent any sheriff or returning officer in making returns to any writ of venire or precept from exercising his discretion in framing the panel annexed to such returns in such manner as he is now by law directed to do, save only so far as to prevent the insertion in such panel of any names not contained in the said jurers' book.'

This is the law of the land applicable to all cases, and we have no authority to hold a doctrine contrary to it in this particular case.

2. Moore, J.: I fully concur in the decision to which Baron Lefroy has come. I will not lay down the broad abstract principle that in no case a copy of the indictment should be granted, but having seen a copy of the indictment in this case, I do not see any sufficient reason why in the exercise of the discretion of the court a copy of it should be furnished to the prisoner's counsel, and on an appeal to our discretion, the worst argument that can be used is the threat, that a large portion of time will be consumed in reading the indictment, so as to enable a shorthand writer to take a note of it. As regards the anplication for a copy of former panels, I cannot see what connection exists between the panel of the present sheriff and those prepared by former sheriffs, and I am bound to presume that in the present instance the sheriff has acted in the discharge of his duty, as the law allows him.

The prisoner being then put forward to

the bar:

The indictment was, at the request of Sir C. O'Loghlen, read out slowly, and at full length, so as to enable a shorthand writer to take a note of it.

The prisoner having been called on to plead, Sir C. O'Loghlen applied that as a matter of favour Mr. Mitchel might not be compelled to plead until to-morrow, as it was intended to move that the indictment be quashed, on the ground that it charged two distinct felonies, which might have been made the subject of separate indictments. Young, in error v. The King.(a)

The Attorney General assented upon the understanding that the motion to quash the indictment should be proceeded with the first thing on that day.

Sir O. O'Loghlen: We apply for a bill of particulars as regards the two last counts, the charges in which are of a most general

The Attorney General gave an undertaking that the charges contained in those

(a) 3 T. R. 89, 106.

fined to the matters specified in the previous counts of the indictment.

The Queen against John Mitchel, 1848.

Tuesday, May 23.

Sir C. O'Loghlen (with whom was J. E. Pigot and J. O'Hagan): I move that the indictment be quashed, as it charges the prisoner with two distinct felonies :- compassing to deprive and depose the Queen from the style, honour, and royal name of the Imperial Crown of the United Kingdom; and compassing to levy war, in order by force and constraint to compel Her Majesty to change her measures and counsels. The practice is, when the objection is taken before plea, to quash the indictment, and when after plea, to put the prosecutor to his election. I admit that the objection is not available in arrest of judgment, and that it is not the ordinary practice to quash indictments for serious offences such as treasous. But in Young v. The King, (a) Buller, J., when speaking of an objection similar to the present, says:

"as to the remaining objection, that is founded on a point which once embarrassed me a great deal. Some years have elapsed since I looked into it : but I believe I can state pretty accurately how it stands. In misdemeanours the case in Burrow shows that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration, but even in such it is no objection at this stage of the prosecution. On the face of an indictment every count imports to be for a different offence, and is charged as at different times, and it does not appear on the record whether the offences are or are not distinct. But if it appear before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of brudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to his election on which charge he will proceed. I did it at the last sessions at the Old Bailey; and hope that, in exercising that discretion, I did not infringe on any rule of law or justice.

This is an application to the discretion of the court, Rew v. Jones, (b), Reg. v. Flower(c); and in Reg. v. Smith, (d) tried before Mr. Baron Vaughan, where the prisoner was charged in one count of the indictment with stealing two pigs, and in an-

⁽a) 10 St. Tr. 261, 266.

⁽b) 1 Ld. Raym., 705. (c) I Wils. 297.

⁽d) 1 Str. 126.

⁽e) 4 T. R. 693. (f) 10 B & C. 70.

⁽a) In Reg. v. O' Connell, 5 St. Tr. N.S. 1. (b) 4 T. R. 692-8.

⁽a) 3 T. R. 132.

⁽b) 2 Camp. 132,

⁽c) 8 C. & P. 412.

⁽d) 3 C. & P. 413.

to be stolen, the prosecutor was compelled this statement of the rule and practice to elect on which count he would proceed and abandon the other count.(a) In O'Connell v. The Queen (5 St. Tr., N.S. 784), Tindal, C.J., savs:

"It must, indeed, be conceded that the practice in the case of a prosecution for a misdemeanor so far differs from that in a prosecution for a felony, that there may be (though it is not usually the case) several counts for distinct offences contained in one and the same indictment. In that case the prosecutor is not always put to his election, as in the case of felony."

The Court have sometimes acted contrary to this rule; but in those cases there was but one offence charged in different wavs ; here there are two distinct felonies charged.

O'Hagan followed: Reg. v. Basset (b) shows that where the evidence applicable to the one charge is the same as that anplicable to the other, a second offence might be included in the indictment, it being all the one transaction; but that if that is not the case, the prosecutor must be put to his election. This indictment charges in one count an intent, on a certain day, to depose the Queen, and in another count an intent, on a different day, to levy war. The prisoner has, therefore, a right to a separate trial for each offence, and then would have a power of challenging forty jurors.

LEFROY, B.: We do not think it necessary to call on the Attorney General, as we have had a full opportunity of considering the subject, in consequence of the annonncement which was yery fairly made yesterday evening, by Sir Colman O'Loghlen, of the grounds on which he intended to rest his application; and we think it of great importance, where we find the law well settled, and an established practice, not to appear to entertain any doubt upon it. We are called upon either to quash this indictment, or to put the Attorney General to his election as to which of the counts he will proceed upon. It is admitted not to be an objection which will vitiate the indictment, that it contains several distinct charges-even of felony. But it is said, that if it appear before the prisoner has pleaded, or the jury be charged, that he is to be tried for separate offences, it has been the practice of the judges either to quash the indictment, lest the prisoner should be confounded or prejudiced in his defence, or to put the prosecutor to his election on which charge he will proceed; but that these are matters of discretion

ether with receiving them knowing them (Young v. The King,(a) in error). With question is in the application of it to the present case. Now it must be admitted that in cases of high treason which seem most nearly similar to this, different kinds of treason, and different overt acts. may be charged in the same indictment. and that it never has been considered either to vitiate the indictment or to afford any ground for quashing it, or putting the Crown to an election; indeed, we know that indictments have been maintained which contained at once the old species of treason enumerated in the 25 Edward III .. and also those enumerated in the late Act (whilst they were treason) (Thistlewood's case (b)). We have in our own experience the constant practice, under the Whiteboy Acts, of several offences (both whilst they were felonies, and since they were mitigated to statutable misdemeanors) being jucluded in the same indictment, such as appearing by day or by night in arms, to the terror, &c.; maliciously assaulting dwelling-houses, taking arms or other property against the will of the owners, administering unlawful oaths, where, thoughseveral offences, they arose out of one transaction, or were parts of one corpus delicti; we quite concur in the statement of the prisoner's counsel, that there are several compassings charged in this indictment, and that they are charged as distinct felonies. But the authority to which I am about to refer will show clearly that there is no ground on that account for either quashing the indictment, or making a case of election, in this case. We have looked through, I believe, all the cases on this subject; one of the latest, we think, lave down the rule insuch a manner as to commend itself to the judgment, as well from the reasonableness of it as from the high authority of the two learned judges who decided the case upon great deliberation (Mr. Baron Parks and Mr. Justice Patteson). Res v. Black. son and others (c) is the case I refer to, When the objection was made, the Court, after some discussion, postponed the trial to consider the objection; then, when the trial was called on again, Baron Parks

"The reason why counts ought not to be joined. in an indictment against a prisoner for stealing: and also for receiving is because they are in fact totally distinct offences, and a prisoner cannot be found guilty of both. But in cases where two charges are not repugnant they may be properly joined, as in an indictment for forgery, where

one count is inserted for the forging, and another | O'Loghlen in thinking that there may be for the uttering the forged instrument. In such many cases where a Court should quash a case the prisoner might be convicted of both charges, and here also a conviction on both counts might take place, the two facts charged form part of one transaction, and cannot possibly embarrass or confuse the prisoner in making his defence; the prosecutor, therefore, cannot be put to his election, and the trial must

Patteson, J., in the same case, says:

"With respect to electing, there is a case in which a man was indicted for a rape committed by himself, and also for aiding and assisting another party to commit the like offence, on both which charges he had been convicted; the judges held the conviction proper, though the prosecutrix had not been put to her election, although it had been urged and refused at the

Folk's case; (a) and Baron Parks again, in summing up, adverting to the decision;

"We have not come to this decision without giving the subject due consideration, because what we decide here will form a precedent which will determine the course of similar cases in

Then to apply the rule laid down in that case to the present : here is no repugnancy in the different offences charged, they constitute but one corpus delicti, laid different wavs. The overt acts are the very same which are charged in support of all the counts, except the two last. If the prisoner is prepared to meet them as applied to one, he is prepared to meet them as to Atherest. Even with respect to the two last counts, they only differ from the Sothers by affording an opportunity of giving in evidence other writings in the same | practice that the two counts of the indictment anewspaper, calculated to carry into effect the compassings charged in the previous sounts, but might be supported by the identical evidence which would support the others. As the offences, therefore, scharged in this indictment are in no wise repugnant, nor does there appear to be anything by which the prisoner could be sembarrassed or projudiced in his defence, we cannot see any ground either for quashing the indictment, or putting the Aftorney General to his election, and the motion must consequently be refused.

MOORE. J.: I concur in the opinion which has been pronounced by my brother Befroy. Now it has been conceded by Sir Colman O'Loghlen (who, I must do him the justice to say, on every occasion states everything with the utmost fairness), that even if there were two distinct felonies, that would not form a ground for arrest of judgment, or for a writ of error. I fully concur with Sir Colman

an indictment where the counts charge the prisoner with distinct offences; as, anppose, if a party were charged with a burglary in entering a house in Merrion Square, and with entering a house in Fitzwilliam Square, in such a case it would be extremely unfair to involve him at the same time in two cases, requiring distinct defences, and if this case were at all like the one I have put. I would say it would be unfair here; but it is because I have brought my mind to the conclusion that the cases are not similar, that I have come to the determination that this application cannot be granted. As my brother Lefrou has observed, all the overt acts which go to support the one or the other felony charged in the indictment are the same, and form one corpus delicti. I cannot look on it as charging separate distinct felonies, but as attributing a different nature to the same felony. Sir Colman O'Loghlen has referred to the observations of Lord Chief Justice Tindal, in the case of O'Connell v. The Queen, but I will refer him to an antecedent passage (a) in which Lord Chief Justice Tindal says:

"In an indictment for cutting and wounding under the stat. 1 Vict. c. 85., the indictment ordinarily contains two counts at the least; one stating the intent to have been to disable, auother to do grievous bodily harm, but the only object of the prosecutor in making this double statement is, that as the charge may take a different complexion and character from the evidence at the trial, the chance of the offender's escape by the misdescription may be avoided. In no case, however, was it ever known in contained two distinct charges of felonious cuttings and woundings, but one corpus delicti, under two different descriptions."

Now what is the difference of that case and the one before the Court? The prisoner is charged with having put forward publications with one intent-that is, one felony; he is again charged with putting forward the same publications with another intent: but it is one and the same act. The prisoner is charged in one count with an intent to depose the Queen, and in another to levy war. So in indictments upon the statute relative to the administering of unlawful oaths (Archbold Cr. L. 536. edit. of 1846), where the purport or intent of the oath is doubtful, the practice is to set it out in different ways in several counts, though every separate intent is a separate felony, and so in cases of cutting and stabbing (where it relates to the same transaction). I am at a loss, therefore, to understand, where the overt acts are the

⁽a) But see now 24 & 25 Vict. c, 96, 8, 92, reenacting 11 & 12 Vict. c. 46. s. 3. (b) I Cox C. C. 51.

⁽a) 3 T. R. 106.

⁽b) 38 St. Tr. 682;

⁽c) 8 C. & P. 43.

same and the publications are the same. 1 why you cannot charge two intents in the | what was done in Reg. v. Purchase. same indictment. Motion refused.

The prisoner having been again called

on to plead.

Sir O. O'Loghlen: We now propose to demur to this indictment and plead over demurrer, but that it should be put upon the record. The demurrer we take is to the way in which the time is stated in the indictment; every day or time is stated under a videlicet, and we say that in an indictment a day certain ought to be stated. We demur generally ore tenus.

Attorney General: I require to see the

demurrer.

The demurrer was then drawn up on paper and given to the counsel for the Crown.

The Attorney General objected that the prisoner had no right to demur and plead

over at the same time.

Sir C. O'Loghlen: In Reg. v. Adams (a) it was done; in Reg. v. Phelns (b) the prisoners were allowed to demur, and afterwards to plead over. Reg. v. Purchase (c) was the case of an indictment for embezzlement. The prisoner having pleaded before his counsel had seen the indictment, and the prisoner's counsel having stated that some doubt existed whether the prisoner could, if a demurrer was decided against him, plead over to the felony, Mr. Justice Patteson said :

"I think that there is no doubt that the prisoner may plead over to the felony, if the demurrer be decided against him."

I know that there has been a doubt raised in some text books as to whether it can be done where the case is not capital. But there is no distinction between capital felonies and felonies not capital. Gray v.

The Queen.(d)

Henn, Q.C., contrà: The prisoner cannot demur and plead over at the same time : the demurrer must first be decided; there are later cases than those cited which are the other way; allowing such a course would operate as a repeal of the 7 Geo. 4. c. 64. I need not enumerate the different defects which are cured by pleading over, but it has been decided that this objection will no longer be available in arrest of judgment or on writ of error. We are entitled, if the prisoner demur, to have final judgment on the demurrer; Arch. C. L. 85, 6th edit. In 2 Hawk. ch. 31, it is said that in favorem vito it may be done.

(a) C. & M. 299.

Sir Colman O'Loghlen: We only seek

Moone, J.: Have the Court discretion to allow the prisoner to plead over after a judgment against him on demurrer?

Sir Colman O'Loghlen: I submit they have; in two cases the party demurred to the felony; we do not seek to argue the | and pleaded over at the same time : Reg. v. Adams and Reg. v. Purchase. And in one case they demurred, and after judgment on the demurrer pleaded over: Reg. v. Phelps.

Attorney General: I submit that the Court is not to pre-judge the case by giving any permission. I deny that the right exists ex debito justitue to demur and plead not guilty at the same time.

Moore, J.: It was done in two cases. Sir Colman O'Loghlen: In Rew v. Vaudercom,(a) Rew v. Welsh,(b) and Reg. v. Hedgeock (c) there was a plea of autrefois acquit and not guilty at the same time.

Attorney General: In Reg. v. Odgers (d)

.Oresswell, J., says:

"It is admitted that the only mode of the prisoner's taking advantage of the objection would be by demucrer. And it is said that in felonies he might demur and plead over at the same time. I am decidedly of opinion that the prisoner has no such right, and Mr. Justice Patteson and myself, after consultation on the Oxford Circuit, agreed that it ought not to be allowed. If a prisoner demurs he must abide the consequences."

This is the latest case on the subject, Patteson, J., is the judge who is said to have decided the case of Reg. v. Phelps, but Cresswell, J., in Reg. v. Odgers, says that he had consulted Mr. Justice Patteson on the subject; therefore, the case of Reg. v. Phelps dannot now be relied on.

Moore, J.: I apprehend it is very plain that a demurrer to an indictment admits all the facts, and if the demurrer is over. ruled, there is no fact to be tried.

Sir C. O'Loghlen: It is clearly stated in the books that a party may plead after de-

murrer in a capital case.

Henn: It is not so clear even in a capital case, for there is a case in one of the year books (14 Edw. 4. 7 a. pl. 10), in which it is said by Choke, J., that if a defendant demur to a plea and it be ruled against him, he shall be hanged "quod fuil conoessum."

LEFROY, B. (to the Attorney General): Do you object to the prisoner demurring and pleading not guilty at the same time?

Attorney General: I do object, and I take this opportunity of stating that if they demur-without anticipating what the judgment of the Court may be-I shall | contrary thereof was knowingly and advisedly ask the Court for final judgment on that by the said Henry Sneyd French, or the person demurrer.

625]

LEFROY. B.: We should feel great difficulty in acting upon the case which has been referred to by the prisoner's counsel (Reg. v. Purchase).(a) it is so much at variance with the report of what was decided on that occasion as given in a subsequent case: Reg. v. Odgers. It seems also to be at variance with the law as stated by Lord Ooke (2 Inst. 178), 2 Hale, P.C. (257), and names of certain persons (which said names the 2 Hawk. P.C. (c. 31. ss. 6 & 7), which said John Mitchel is unable to set forth, the latter authority is cited by Lawrence, J., in R. v. Gibson, (b) as an authority, that the judgment upon a demurrer to an indictment in criminal cases, not capital, is not a "respondent ouster," but final (c) Without, therefore, more than thus intimating our present impression, we shall leave the prisoner to take whatever course he may be advised.

The prisoner, on the advice of his counsel, pleaded not guilty, and the following day was fixed for the trial.

Thursday, May 25.

The jurors upon the panel having been called, and more than a full jury having answered to their names, the prisoner handed in the following:

CHALLENGE TO THE ARRAY.

"Court of Over and Terminer and General Gaol Delivery in and for the City of Dublin.

"And now, that is to say, the 25th day of May, in the said 11th year of the reign of our Sovereign Lady Queen Victoria, comes the said John Mitchel in his own proper person, and the jurors of the jury empavelled and so forth also come, and thereupon the said John Mitchel challenges the array of the said panel, because he says that the said panel was made, and arrayed, and returned by Henry Sneyd French, Esquire, the High Sheriff of the county of the city of Dublin, or by the person or persons employed by him to array said panel, at the nomination, instance, and request of some person or persons to the said John Mitchel unknown, acting for and on behalf of the Crown in this prosecution; and also because the said panel was arrayed by the said Henry Sneyd French, sheriff as aforesaid, or the person or persons employed by him to array the same, in a partial and favourable manner to our said Lady the Queen, and to the prejudice of him the said John Mitchel, and also because the said panel was not arrayed by the said Henry Sneyd French, sheriff as aforesaid, fairly and impartially from the jurors' book of the county of the city of Dublin for the current year, but on the

or persons employed by him to array said panel, arrayed from said jurors' book unfairly and prejudicially to the said John Mitchel so as to decrive him, the said John Mitchel, of a fair and impartial trial, and to have him, the said John Mitchel, tried by persons prejudiced against him; and also because the said Henry Snevd French, sheriff as aforesaid, or the person or persons whom he employed to array said panel, did, in arraying said panel, omit the same being of record in the office of the clerk of the crown of the county of the city of Dublin, and the said John Mitchel being refused access thereto) qualified to act as jurors upon the trial of the issue in this cause, who had been heretofore usually summoned as jurors in this honourable court, because he, the said Henry Snevd French, or the person or persons employed by him to array said panel, deemed them more likely to acquit than convict the said John Mitchel, and did insert in said panel the names of certain other persons, to wit, the jurous named in the said panel, because he, the said Henry Sneyd French, or the person or persons employed by him as aforesaid, deemed them more likely to convict than to acquit the said John Mitchel; and also because the said Henry Snevd French, sheriff as aforesaid, or the person or persons whom he employed to array said punel, did, in arraying the said panel, omit the names of certain jurors, because he, the said Henry Sucyd French, or the person or persous employed by him as aforesaid, deemed them more likely to acquit than to convict the said John Mitchel, and inserted therein the names of certain other jurors, because he, the said Henry Sneyd French, or the person or persons employed by him as aforesaid, deemed them more likely to convict than to acquit the said John Mitchel; and also because the said Henry Sneyd French, sheriff aforesaid, or the person or persons whom he employed to array the said panel, did, in arraying the said panel, dispose the names of certain persons whom the said Henry Sneyd French, or the person or persons employed by him as aforesaid, deemed more likely to convict than to acquit the said John Mitchel, above the names of certain other persons whom he, the said Henry Sucyd French, or the person or persons employed by him as aforesaid, deemed more likely to acquit than to convict the said John Mitchel, to the manifest wrong and injury of him the said John Mitchel, and this he is ready to verify; whorefore he prays judgment, and that the said panel may be quashed, and so forth.

The Attorney General, after consulting with the other counsel for the Crown, stated that he took issue upon the challenge and called upon the Court to appoint triers. رجي الربوانة ولا الحداث للكعم معط للمرازي الراجات

⁽b) C. & M. 180.

⁽c) Ib. 617.

⁽d) Above, pp. 122, 126, 150.

⁽a) 2 Leach 708; 2 East P. C. 519. (b) 2 Moo. C. C. 175.

⁽c) 4 Ch. Cr. L. 530.

⁽d) 2 Moo. & R, 480.

⁽a) Car. and M., 619.

⁽b) 8 East 112.

⁽c) See as to felonies, Reg. v. Gavan Duffy, 4 Cox. C.C. 24, Reg. v. Faderman, I Den. C. C. 569, 8 C. and K. 853; and as to misdemeanors, Reg. v. Birmingham and Gloucester Railway Co. 8 Q. B. 224.

[&]quot; ROBERT HOLMES.

[&]quot; COLMAN M. O'LOGHLEN.

[&]quot;JOHN E. PIGOT.

[&]quot;JOHN O'HAGAN."

Holmes moved to postpone the trial | han, brother of Mr. Stephen Monahan, in in consequence of the absence of a material witness in support of the challenge stated his belief that there was good ground affidavit of Singleton stated that on the be sent for and brought back in time. 23rd May he was directed to serve a summons on Stephen Monahan; that he proceeded to the house of Stephen Monahan, and was informed that he had left town the day previous; that, suspecting that the said Stephen Monahan was keeping out of the way lest he might be served with said summons, he made several inquiries at different places to ascertain if such was the fact, but could gain no intelligence of him; that he again applied this morning at the residence of the said Stephen Monahan, when he was informed by the man-servant that the said Stenhen Monahan had left town by the eleven o'clock train on Monday morning, for the purpose of proceeding to the fair of Loughren, in the county of Galway, but would return in a couple of days. It should be the desire of the Crown that the panel should be not only perfectly chaste, but above suspicion. If the Crown produce this gentleman, we are ready to proceed at once.

Attorney General: They want the Crown to do a thing which is impossible. If they had taken any pains they might have secured the attendance of the gentleman by

serving him with a summons.

Holmes: How could we summon the witness until a day was fixed for the trial? It is necessary to state in the summons the day the trial is to take place. The moment we ascertained the day the Court had fixed, we at once proceeded to serve this gentleman. We have heard that he is in the county of Galway, and that he is expected back in a few days. He is the clerk of the Attorney General; the Attorney General must be better informed on the subject than we can possibly be. I submit, therefore, that this application ought to be granted.

Attorney General: Nothing would induce me to resist this application if I were not perfectly satisfied that the person absent could not be examined as a witness for the prisoner, and, in fact, knows nothing whatever of the subject of the challenge. The affidavit in support of this application is insufficient. It is new doctrine to me that you cannot summon a witness until a day is fixed for the trial. An affidavit has been made by Dr. Mona-

whose house he lives, stating that he was aware that for several days previous Mr. to the array, and referred to the affidavits | Stephen Monahan intended to leave town of O'Flaherty, the prisoner's attorney, and on Monday last, for the purpose of trans-Singleton, his clerk, the former of whom acting business of a private nature, purchasing stock at the fair of Longhrea for challenging the array; that Stephen to-morrow (Friday). No intimation that Monahan, the Attorney General's clerk, was his presence would be required was an indispensable witness; and that the given until one o'clock yesterday, when application was not made for delay. The by no possibility could this gentleman But, besides, the affidavit states no material fact, which only Mr. Stephen Monahan could depose to. Mr. O'Flaherty

> "Is advised and believes that sufficient grounds exist for challenging the array of the panel in this case."

and that

"He believes the said Stephen Monahan will be a most indispensable witness to sustain such

No grounds are stated for inducing a belief that he is an indispensable witness, or that he can prove any facts of consequence. If the facts are so, there should have been a positive affidavit to that

LEFROY, B.: The application made to us in this case is to postpone the trial of the issue now joined on a challenge to the array, on the ground of the absence of a material witness. It is always required that a statement be made by affidavit of the materiality of the witness; but that is not the only ground. Lord Mansfield says, upon a similar application (The King v. D'Eon)(a):

" No crime is so great, no proceedings so instantaneous, but that upon sufficient grounds the trial may be put off. If the usual form of the affidavit is observed, and there is no special ground of suspicion, the rule goes of course. But if there be such grounds, it is refused, unless the party will go into further and minuter circumstances; or if it appear there is an affected dulay, the rule is also then refused. Three things are necessary to put off a trial; first, that the witness is really material, and appears to the Court so to be; second, that the party has been guilty of no neglect; third, that the witness can be had at the time to which the trial is postponed."

These rules, we know by every day's experience, are required to be observed even in capital cases. The Court must be satisfied that due diligence has been used to procure the attendance of the witness; that due diligence consists in issuing and serving a summons in reasonable time to enable the witness to attend at the trial. I know no rule of law that the prisoner is not to make preparations for his defence

until the very day is fixed for his trial. | of the case lead strongly to an opposite in-Neither I nor my brother Moore know any ference? Upon the whole of this case, rule which establishes that proposition. No | therefore, and adverting to the rule of law doubt, if, even on the very day fixed for and practice so necessary to be sustained his trial, he satisfied the Court that he was for the ends of justice, we feel ourselves ignorant that he (the witness) could give bound to refuse this application. material evidence, up to the time of making the application, it might be even then the duty of the Court to postpone the trial. But such being the rule of law, and a reasonable rule of practice, the duty of preventing that rule from being abused for the purpose of delay, or obstructing the administration of justice, is imposed on the Court. Now what are the facts in this case? The prisoner was committed on the 13th day of May, when he was put into possession of the grounds of his committal. Bills of indictment were sent up to the grand jury on the first day of the sessions (20th May), and their attention was called to them by a charge from the bench. The whole case was then developed; the prisoner and his advisers were then at least apprised of the case he would have to meet, and on Monday the bills were found. On that day various preliminary matters were discussed, which left no doubt that a challenge to the array was then in contemplation. On Tuesday, the Attorney General called on the Court to fix the trial for Wednesday, and we were about to fix it, when there was an application on the part of the prisoner to postpone the trial on the ground of his counsel not being able to attend on that day. The Attorney General having objected to the delay on the ground of the uncertainty as to what preliminary proceedings were intended to be taken on the part of the prisoner, it was then distinctly avowed that a challenge to the array was to be taken; but on a statement by the prisoner's counsel that in his opinion the trial would not last more than one day, including the challenge to the array, the Attorney General consented to the trial being postponed till Thursday. To day an application is made to violate that arrangement, and to postpone the trial in consequence of the alleged absence of a material witness to support a challenge to the array. When was this discovery made of the materiality of this witness? The affidavit is perfectly silent as to that most important matter. Have we it verified by the affidavit, that the party used any diligence whatever to serve a summons on the witness, or take any step whatever to procure his attendance, until after he had left town? Is there any ground to satisfy the Court that whatever materiality there might be in the testimony of this witness was unknown to the prisoner or his advisers whilst the witness was in town? Or, on the contrary, do not all the circumstances

6291

Moore J.: I concur in the rule which has been pronounced for the first ground which has been stated, and on that ground Motion refused.

Thomas James Quinton, Esq., the foreman, and William Worthington, Esq., the next to him on the list of the county grand jury, were appointed triers, and sworn "well and truly to try the challenge to the array in this case, and a " true verdict give according to the evidence."

Peter Casserley, a witness, called in support of the challenge, having stated that he had looked through the panel, and that the jurors were in his opinion more respectable than those usually summoned-he did not mean more aristoeratic-was then asked by Sir Colman O'Loghlen the following question :- Are you able, from your information, to state how many Roman Catholics there are on the panel?

Attorney General: I object to that anestion.

LEFROY, B.: You know that is a perfectly irrelevant question.

Sir C. O'Loghlen: We press the question; we say that out of one hundred and fifty jurors on the panel there are only twenty-eight Roman Catholics; we also say that there are on the jurors' books two-thirds Roman Catholics to one-third Protestants: there are on this panel only about one-sixth Catholics to fivesixths Protestants. In the case of Adams and Langton, (a) Bushe, C.J., upon a challenge to the array, save:

"Your duty is to try whether this is an impartial panel, or has it been so constructed as to deprive the prisoner of a fair trial? If persons have been left off the pauel, or corruptly placed or postponed in such a manner and to such an extent as would deprive the prisoners of impartial jurors, or throw them into the power of urors prejudiced against them, this is not an impartial panel, and you will find accordingly."

Now, my Lords, I say that applies perfeetly to our case; we are prepared to prove that whilst the proportion of persons qualified to be invors is two-thirds Catholics and one-third Protestants, the proportion here upon the panel is fiveeixths Protestants and one-sixth Catholics. From this fact we assert that the sheriff

⁽a) Report of Maryborough Special Commission, p. 289.

has not made out an impartial panel. with that learned judge that it would be names are classified alphabetically, if find a verdict on account of their religion, a small proportionate number of those names begin with the letter L, and a of religion. If a man were playing hazard, very large number are classed under the if all is fair and the dice are not loaded, letter M, and that it was found that on there can be no honester game; but if the panel, out of the names taken from one man always throws "crabs," as it is the two letters, two-thirds were taken called, whilst the other always throws in from the less numerous letter L, and but his own favour, the presumption is that one-third from the more numerous letter the dice are loaded; so, in this case, there M. I ask, would not that look suspicious? is strong evidence that all is not right. But if the disproportion is shown to be a If the natural result of the proportionate great deal more unequal even than that, number of those qualified to be placed on is it not natural to draw the inference the panel should be that there would be that fair means have not been used? We on it two Catholics to one Protestant, now offer this evidence to show that in and that we find that, so far from that this instance there is reason to believe that unfair means have been used in the formation of the panel.

LEFROY, B.: I should like to know what the requisite proportion is to make an im-

partial panel P

manner and from a partial motive. The impartial panel? challenge to the array in Rew v. Adams and Langton has formed a precedent for the greater portion of the challenge which has been put in here to-day. In charging the triers in that case, Bushe, C. J., says:

"That very plain question (whether the panel was impartially arrayed) has led to the discussion of another, its connexion with which I am unable to discover; that is, whether the Roman Catholic freeholders of the Queen's County have been returned in such numbers and in such places, as their fair pretensions, on the score of rank and respectability, entitle them to." "We have nothing to do with the question whether that complaint is well founded, or whether the evidence you have heard has not afforded a sufficient answer and explanation, but we must confine our attention to the single question whether this is an impartial panel." "I might say that it has not appeared to this moment of what religion the prisoners are. And it would be affectation not to assume that they are Roman Catholics, and we know from the Crown books that they are charged with an offence connected with the existing insurrection ; but when I look at the words of the challenge I cannot imagine to myself how the evidence we have heard, supposing all the inferences claimed from it to be well founded, can apply to the question before us, unless we are bound to identify the insurrection, and the crimes it has produced, with the religion of the prisoners .an insult and calumny directed against my Roman Catholic fellow-subjects in which I cannot consent to participate."

These observations apply with greater force here. It does not appear what the religion of the prisoner is. And I say

But, putting the question of religion an insult to the Roman Catholics entitled altogether out of the question, if the to serve on juries, to say that they would

Holmes: We don't put it on the ground being the case, there are of Protestants five to one on the panel, is it not the natural presumption that there has not been fair dealing in the construction of the panel?

LEFROY, B.: Suppose there were a great Henn: The question here is whether | many rich men on the panel, and a poor the array has been made in a corrupt man was to be tried, would it be an

Holmes : I would say not.

LEFROY, B.: That case has been already

decided the other way by Lord Tenterden. Moore, J.: The judgment to which I have come is that this evidence ought to be received. The objection is that it is irrelevant. It does not appear to my mind that it is so plainly, and palpably, and clearly irrelevant, as that it could not in any case be left to the triers, with other evidence. Suppose that the sheriff was proved to have been making inquiries about persons as to their religion, and after those inquiries, left them on, or took them off the panel, would not the evidence in such case be applicable? And though possibly and probably the evidence may ultimately turn out not to be relevant, or of any value, I think it safer in the first instance to admit it.

Attorney General: The admission of the evidence referred to in Chief Justice Bushe's charge was not objected to. I contend that the sheriff is not bound to put his hand into a balloting-box and take out the names of jurors by chance; if he selects the names honestly and fairly from the jurors' book, that is all that can be required of him.

Sir O. O'Loghlen: But that is just the question to be tried upon this challenge.

LETROY, B.: It is much safer, in accordance with the opinion of my brother Moore, to admit the evidence at present. and then, if it be clearly irrelevant, to exclude it when we come to charge the

The examination of the witness was then proceeded with. He stated that he had

examined the panel, and that there were i twenty-four or twenty-five Roman Catholies upon it.

Peter Slavin, examined by Sir C. O'Loghlen, was asked did he assist in examining the names on the jurors' book.

The Attorney General objected to any evidence being given of the contents of the jurors' book, the book not being produced.

A document purporting to be a copy of the general list of jurors, prepared pursuant to the 3 & 4 Will. 4. c. 91., which, when revised by the recorder in open court, and signed by him, becomes the jurors' book, was put into the witness's bands for the purpose of enabling him to state from it the relative number and disposition of the names of Protestants and Catholics on the jurors' book and the panel. This was objected to on behalf of the Crown.

MOORE, J.: How could the witness state that it is a copy of the inrors' book?

LEFROY, B.: It is quite an elementary rule of law that where the original is in existence, a copy is not evidence.

Sir Colman O'Loghlen: The jurors' book is in the clerk of the peace's office, within the precincts of the court, and would be produced by the officer, if the Court ordered.

This the Court declined to do, and the witness was withdrawn.

Francis Dowling proved that he had attended at the revision of the jury lists and taken a list of the jurors placed on the revised list by the recorder in open court. In answer to the Attorney General, he stated that he bad not compared such list with the list as revised by the recorder, after it had been made up and signed by the recorder.

The Attorney General objected to the document being received in evidence.

LEFROY, B.: The thing from which the sheriff is to take his panel is the jurors' book, and nothing can be evidence of the contents of the book except the book itself, unless the Act of Parliament dispenses with its production, and makes something else evidence of it.

Holmes: The clerk of the peace has refused to produce the jurors' book without an order from the Court.

Attorney General: It was quite competent to the prisoner's agent to have gone into the office of the clerk of the peace, and to compare the panel with the jurors' book. They want now to have a postponement of the trial, perhaps till the day after to-morrow, to investigate the names on the book. They could have got this information in time, if they had applied in the proper quarter.

LEFROY, B.: We are clearly of opinion that the document offered in evidence can by no means be received as evidence of the contents of the jurors' book. Then we are asked to postpone the trial, and to give an order for the production of the jurors' book, in order to give an opportunity of investigating the religion of the several jurors, and making an analysis to show the proportion of jurors of different religious persuasions on the book, and comparing that with the proportion in which they appear on the panel. But unless the law has ascertained what that proportion should be, and that the court can thus have some standard in reference to which to direct the triers, it would be a nugatory and irrelevant inquiry, as well as invidious and objectionable, for the reasons so well expressed by the late Chief Justice Bushe, in the case referred to.(a) We must, therefore, refuse this applica-

John Bruton, a person whose name did not appear on the panel, stated that he had received a summons to attend as a juror. He was asked what was his reli-

The Attorney General objected.

LEFROY, B.: I don't see any reason at present for admitting this evidence.

Sir Colman O'Loghlen : I submit that it is evidence to show partiality on the part of the sheriff, that before the arrest of Mr. Mitchel Bruton had been summoned to attend this Court as a juror, but afterwards his name was not placed on the

LEFROY, B.: First prove the service of the summons on the witness.

Mr. Ponder, sub-sheriff of the City of Dublin for nine years, proved that the jury summons produced by the last witness was in the handwriting of a Mr. Wheeler, who was in his employment, and stated that Wheeler had left Dublin to attend the Dublin Election Committee, under B Speaker's warrant. Wheeler was occasioually employed to prepare panels for the commissions, but had no part in forming the present panel.

Cross-examined by the Attorney-General.

Mr. Wheeler was only employed to summon jurors after the panel was prepared.

John Rosborough, summoned as a jurer, but not on the panel, and E. J. Milliken, summoned on the previous Friday, and on the panel, were asked as to their religion. The questions were disallowed.

⁽a) See Morgan's Report of the Mary borough Special Commission in 1832, p. 236, vol. 3.

6371

Henry Sneyd French-Examined by Sir C. O'Loghlen.

I prepared the panel in this case in the sub-sheriff's house. Only Mr. Hamilton, my sub-sheriff, was present. I afterwards gave Mr. Hamilton the panel containing 150 odd names. I placed the names of the parties on the panel according to their position and respectability.

Did you receive any assistance from Mr. Hamilton !-- I merely asked him questions as to the position and respectability of the persons on the list.

Had you the former panels before you? -No, there was no occasion, as I had already prepared two panels.

Were you aware of the religion or politics of any of the parties you placed upon the panel?—No.

Did anyone state the religion or politics of any of those persons at the time?-I don't recollect it.

Might any person have stated it ?- They might. I do not know Mr. Stephen Monahan. I never gave him a copy of the panel.

Cross-examined by Henn.

I selected the panel fairly and impartially, and to the best of my judgment. No one suggested to me that I should insert or omit the names of any persons, or change the order in which they stood.

Hamilton-Examined by Holmes.

I was present with the High Sheriff at the framing of the panel.

Which of you selected the names?-

Which took the most trouble?-I rather think I did.

You took them by chance, of course? -No, not exactly by chance; I took them by their respectability. I call men respectable whom I know by their general public character to be such. I never heard any of them talk on politics. I knew nothing of their religion. I know Mr. Wheeler.

Did he know anything of these jurous? -Yes; I asked him to give me a list of the persons who were generally put upon panels, and he did so.

Then it was from Mr. Wheeler's list you made the selection !- Partly.

Can you say how many you took from that list?-I should say a hundred,

Oh, so it was from that list you took them, and not from the book.

Cross examined by Whiteside.

I discharged the duties of my office fairly, honestly, and without corruption.

LEPROY, B. (addressing the triers). Every person who could by possibility give you information upon that ones-

tion, involving, as it does, one of the most important duties of the sheriff, and his due performance of it, has been produced; every opportunity of satisfying your minds has been afforded; you have heard the examination of those witnesses who, if there had been any corrupt motive or practice in the conduct of the high sheriff in forming that panel, must, from their position, have been acquainted with it; you have heard the persons who made out the panel (the sheriff and his returning officer) state on their oaths that they had made that panel impartially, and that they had no communication, direction, or understanding from or with any person so as to influence their judgment, and that they had no partial or corrupt view in selecting the names upon it; that they only selected them with a view to the respectability and character of the parties selected. They have been closely sifted upon the subject; if you find any grounds upon which you can on your oaths impute to the sheriff or his officers anything which brings him or them within the charge of partiality, or what is called unindifferency in the framing of the panel, you will find for the challenge; but, on the other hand, if you find no such grounds, you will find against it, and, in our opinion, and you have a right to know that opinion, there is no evidence whatever to sustain the charge of partiality or unindifferency in the formation of the panel by the sheriff or his officers, and you will be warranted in finding against the challenge.

[636]

The Triers found against the challenge. The panel was then called over, and after twenty peremptory challenges on behalf of the prisoner, and thirty-nine jurors having been set aside on behalf of the Crown, a jury was sworn.(a)

Friday, May 26, 1848.

OPENING SPEECH FOR THE CROWN.

Attorney General: The offence, gentlemen, of which Mr. Mitchel stands charged is one which, until a very recent period, if committed in England, would have been considered as treason. From the earliest period of our law the highest offence of which a subject can be guilty, is the crime of treason; partly in consequence, perhaps, of the reverence that is always entertained by the laws of England towards the person of the Sovereign; and partly in consequence of the dreadful mischiefs that may result from, and the

(a) See the debate in Parliament on the selection of the jury in this case, Feb. 26. 1875, Hans. vol. 222, p. 964.

number of parties who are necessarily (though that was so, it was held from very involved in, a crime of that description.

In order, gentlemen, that you should fully understand the question, and the considered as a compassing the death of only question you will have to try in the present case, I consider it my duty to call your attention, very shortly indeed, to in its nature to endanger the personal what the original law of treason was according to the laws of this country. So long ago as the reign of Edward III., an Act of Parliament was passed defining what was treason. It is by that enacted or declared that

"when a man doth compass or imagine the death of our Lord the King, or of our Lady his companion, or of his cldest son and heir."

that is an act constituting treason. You will observe the words of this declaration-they are, that if a man should compass or imagine the death of our Lord the King, or of our Lady his companion, or of their eldest son and heir. Other matters declared treason by the same Act are.

"That if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be probably attainted of open deed by the people of their condition,"

You will observe the distinction. To constitute treason of the first branch all that is required is, that the party should compass or imagine the death.

"and that he thereof be probably attainted of open deed by the people of their condition."

It is not so, so far as the levying of war is concerned; it is not that he should compass or imagine the levying of the war, but it is, that he should actually levy war against our Lord the King in his realm. Therefore, gentlemen, this distinction has always been held in the law of treason. that any act whatsoever compassing or intending the death of the Sovereign was considered as a treason; but the compassing or intending to levy war was not considered treason, unless, in point of fact, the act of levying war had been actually committed. Accordingly, it has frequently been decided, that any act whatsoever tending to the endangering the life of the Sovereign, -such, for instance, as people meeting, consulting, and considering together as to the manner in which they should deprive the Sovereign of life, although they did not determine upon the means, that such was an overt act of compassing the death of the King. That, gentlemen, would not have been so as to the levying of war; for the consulting and the determining as to the mode of levving war would not constitute treason, unless they had gone further, and actually commenced the levying of war. But

early times that that act, though it might be a portion of another treason, would be the King. For instance, if parties engaged in a war against the Sovereign, calculated safety of the Sovereign, a levying of a war of that description, or even taking steps towards the levying of such a war, would be considered as a compassing the death, because it was in its nature calculated to terminate in that way.

Thus, gentlemen, matters stood according to the law of England, [until the 36 Geo. 3. c. 7., in the year, I believe, 1796. At that time an Act was passed by the Parliament of England, by which it was enacted:

"That if any person or persons whatsoever during the natural life of His Majesty, or until the end of the then next session of Parliament after a demise of the crown, shall within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the same, our sovereign Lord the King, his heirs and successors, or to deprive or depose him or them from the style, honour, or kingly name of the Imperial crown of this realm, or of any other of His Maiesty's dominions and countries, or to levy war against His Majesty, his heirs and successors within this realm, in order by force or constraint to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon, or to intimidate, or overawe both houses, or either house of Parliament, or to move or stir any foreigner or stranger with force to invade this realm, or any other His Majesty's dominions or countries, under the obeisance of His Majesty, his heirs and successors; and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed; being legally convicted thereof, upon the oaths of two lawful and credible witnesses, upon trial, or otherwise convicted or attainted by due course of law, then every such person and persons, so as aforesaid offending, shall be deemed, declared, and adjudged to be a traitor and traitors, and shall suffer pains of death, and also lose and forfeit as in cases of

That Act, gentlemen, which was originally a temporary Act, was afterwards made perpetual; (a) but though that Act was made perpetual, and as such continued in force in England, it was not made the law of Ireland. Accordingly, the law of Ireland until recently stood thus, that if a party were guilty of the act of compassing or imagining the death of Her. Majesty, such a party would be guilty of

(a) 57 Geo. 8, c. 6.

the offence of treason; but if a party | demeanor according to the law of Irewere guilty of the offence, not of com- land. Accordingly, in order to assimilate passing the death, but merely compassing, the law of the two countries, and in order or intending, or exciting disturbance or to mitigate the severity of the law of rebellion, which disturbance or rebellion | England, the Act of Parliament was passed was not in its nature calculated to lead to upon which the present prosecution is the personal danger of the Sovereign, that founded. That Act of Parliament rewas an offence not amounting in law to ceived the royal assent on the 22nd of treason, but amounting to sedition. On April last. the other hand, the compassing the levying of a war against the Queen, which Parliament receiving the royal assent, I naturally would lead to the deposition or think it was on the 12th February, the endanger the life and personal safety of newspaper of which Mr. Mitchel is the the Queen, was still, according to the law | proprietor was first published in this city. of Ireland, treason within the statute of It was called the United Irishman. From Edward, as it would have been considered | the very first number the articles published as a compassing or imagination of the in it were of a tendency certainly calcudeath of the Sovereign.

was a legitimate and legal object. The Parliament; and there is no illegality, nor is there anything wrong, in any person who supposes that a repeal of that Act country, endeavouring to obtain that re- April last enacted : peal by legal and constitutional means. Accordingly, some of the associations professed to obtain a repeal of the legislative union by legal and constitutional modes. as they said; by the force of public opinion, by bringing the opinion of the public to bear upon the question; raising a party in the country favourable to it, and satisfying the legislature that the true interests of the country required such an alteration in the constitution. So far. gentlemen, there was nothing wrong, nothing illegal; but a party separated from that association, and the professed object of that party, -so far as we can judge from their publications, some of which will be laid before you to-day .was, to obtain that repeal of the legislative union, not by legal and constitutional modes, but by having recourse to force and violence. In that state of things the law of Ireland was this, that advising or exhorting people to have recourse to a levying of war against Her Majesty, or advising people to have recourse to such shall be guilty of felony, and being convicted measures as would lead to or compel by thereof, shall be liable, at the discretion of the force and constraint Her Majesty to change her measures or counsels, though it would have been treason in England, was a mis-

Previously, gentlemen, to that Act of lated to excite the attention of the Govern-In that state the law remained until the | ment, and of those having any regard to month of April last. Previous to the the preservation of the public peace or month of April you are aware of the tranquillity in this country. I do not mean state of circumstances in which this | -because, although perhaps it might be country was placed. You are aware of strictly legal, there might be some questhe political associations that were formed | tion as to whether it would be exactly fair throughout the country, and you are to the prisoner-to offer in evidence any aware of the objects professed and avowed | articles of this newspaper published prior by those several associations. The object to the Act of Parliament receiving the avowed by some of those associations up | royal assent. It is enough to say that to that period was, to procure a repeal of some of those articles had been made, the legislative union. That, gentlemen. and still are, the subject matter of proseoutions pending against him for sedition legislative union is the effect of an Act of in the Court of Queen's Bench.(a) That, gentlemen, is all I shall say in relation to those articles.

But the Act of Parliament which reof Parliament would be beneficial to this | ceived the royal assent on the 22nd of

"That if pay person whatsoever after the passing of this Act shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most Gracious Lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs or successors within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels; or in order to put any force or constraint upon, or in order to intimidate or overawe both houses, or either house of parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other Her Majesty's dominions or countries, under the obeisance of Her Majesty, her heirs or successors; and such compassings, imaginations, inventions, devices, or intentions, or any of them shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed; every person so offending Court, to be transported beyond the seas for the

term of his or her natural life, or for any term | he given to witnesses. Your opinion will not less than seven years; or to be imprisoned be required merely upon the meaning, for any term not exceeding two years, with or without hard labour, as the Court shall direct."

against Mr. Mitchel is that he did, since prietor. the passing of this Act.

"compass, imagine, invent, devise, and intend to deprive and depose the Queen from the style, honour, and royal name of the Imperial Crown of the United Kingdom."

And that he did also

" compass, invent, devise, and intend to levy war against Her Majesty within the United Kingdom, in order by force and constraint to compel her to change her measures or counsels; and that such his intention he did express and declare by publications in a newspaper of which he is the editor, publisher, and proprietor."

pending against Mr. Mitchel in the Court of Queen's Bench for articles published by him in the United Irishman.(a) Prosecutions were also pending against Mr. Smith O'Brien and Mr. Meagher, members of the Irish Confederation (b) It appears that, in consequence of those prosecutions, it was considered advisable by persons entertaining the same political opinions in the city of Limerick to get up a meeting, or to give an entertainment to those three persons who were so prosecuted. And accordingly a meeting which was described as "a soirée to the prosecuted patriots" was held on Saturday, the 30th of April; and at that meeting Mr. Mitchel, Mr. Smith O'Brien, and Mr. Meagher attended. In the course of that evening Mr. Mitchel delivered a speech, the publication of which speech in his own newspaper on Saturday the 6th of May is one of the articles upon which we rely, as a printing and publishing by him within the words of the Act of Parliament, expressing and declaring such the imaginations, inventions, and devices that he had previously formed. And the question-and I believe the only question-that will be left to you by the Court will be this, whether in point of fact this article and the article in the other paper, which I shall call your attention to just now, do not clearly express and declare such the intention of Mr. Mitchel; that intention being a deposition of Her Majesty the Queen, from the style, honour, and royal name of the imperial crown of the United Kingdom, or a levying of war against Her Majesty. in order to force her to chauge her measures and counsels. You will not in this trial have to determine upon the credit to

(a) See above p. 545,

(b) See above p. 571.

and intention, and construction of these articles, written and published by Mr. The charge that we bring forward Mitchel in this paper of which he is pro-

Gentlemen, the first of these articles is the report of a speech delivered by him at the meeting at Limerick. It purports to be a report taken from another paper, the Limerick Reporter. But, gentlemen. it is not for the publication of that document as taken from another paper we proceed. We do not make the subjectmatter of our proceeding any of the speeches, however seditious, that may have been delivered at that meeting; but we rely on this publication, as a publishing, expressing, and printing of an article, containing the sentiments delivered by I mentioned that a prosecution was Mr. Mitchel himself, at that meeting, which of course he adopts by this his publication. The article is as follows:

" Mr. Mitchel having been loudly called on, then rose amidst a hurricane of applause and

This was in answer to the toast of the Prosecuted patriots ":

" Mr. Chairman and citizens of Limerick, my first duty is, to thank you, which I do cordially and sincerely, for the generous reception you have this night given to those who have been selected for prosecution by the British Government-a reception which, notwithstanding what has occurred outside that door, must be called a triumphant one,"

As far as I can judge, what occurred outside that door was this-it so appears in a subsequent part of the speech of Mr. Mitchel-that a portion of the people of Limerick, who did not approve of the course pursued by Mr. Mitchel, had hooted him, and not given him that reception which perhaps he had some reason to expect. He says:

"I have seen nothing in all this mob violence to make me despond for a moment. The people are the true source of legitimate power. That howling multitude outside are a thousand times preferable to the howling legislators of England, who yelled against Smith O'Brien (cheers). I am no drawing-room democrat, who can discourse of the powers and virtues of the people only while they are smiling and cheering around me .- Mob law itself in Ireland is far better than Government law-that wellordered and civilized system that slays its millions of human beings within the year. I tell you that rather than endure one other year of British dominion, I would take a provisional government selected out of the men that are bellowing there in the street."

Now, gentlemen, what did Mr. Mitahel mean by alluding to a provisional government? What does the history of the times we live in tell us? Where then

⁽a) See above, p. 546.

the kingdom of France? Within a very lished, the people of France had overcountry, and established a republic. If ment he expresses. He says: there are other expressions in this speech of which there shall be any doubt, I think that this expression, that he would prefer a provisional government formed of the moh that was hooting outside the door rather than endure one other year of the British Government of misrule, as he called it, will leave very little doubt in your minds as to what the true meaning, character, and intention of Mr. Mitchel and of this publication was. He says:

6431

"You need not fear, my friends, that I will misinterpret the compliment that has been paid me in inviting me to your city on this occasion. You need not fear that I have accepted your invitation in order that I might thrust any particular opinions of my own down your throats (hear, hear), or in order to induce a belief that there is between me and your distinguished guests-Smith O'Brien and Thomas Meagher-a more thorough identification than there is, or needs to be. We don't want this thorough identification (hear). Some of the things I have done and written these gentlemen have both condemned, as believing either that they were wrong in themselves, or that the time had not come for them. And I cannot be even with my friends in this matter-I am not able to repudiate any of their public acts. Can I repudiate, for instance, the last speech of Mr. O'Brien in the British Parliament -one of the noblest, clearest statements of Ireland's case—the very haughtiest, grandest defiance flung in the face of Ireland's enemies. that ever yet fell from the lips of man (loud cheers)? Or can I condemn the alternative put by Mr. Meagher, who says, 'when the last constitutional appeal shall be made, and shall fail, then up with the barricades, and invoke the God of battles '?'

That is the sentiment of Mr. Meagher the last constitutional appeal shall be made, and shall fail, then up with the barricades, and invoke the God of battles." He says:

" Can I repudiate this-who hold that constitutional appeals are long since closed against us and that we have even now no resource, except -when we have the means and the pluck to do it-the barricades and the God of battles?"

Mr. Mitchel states his own opinion to be that the time for all constitutional appeals was past; "and that we have even now no resource except-when we have the means and the pluck to do it-the barricades and the God of battles." You, gentlemen, no doubt recollect-it is a portion of the history of the worldthat this allusion to barricades is bor-

was there, and where alone was there, a rowed from the then recent revolution provisional government? Where, but in that was effected in France. He says: "No: all the seditions and treasons of short period before this article was pub- these gentlemen I adopt and accept, and I ask for more." Here, gentlemen, he thrown the monarchical government of the gives his own construction of the senti-

"No: all the seditions and treasons of these gentlemen I adopt and accept, and I ask for more (hear, hear). Whatever has been done or said by the most disaffected person in all Ireland against the existence of the party which calls itself the Government-nothing can go too far for me. Whatever public treasons there are in this land, I have stomach for them all (loud cheering). But, sir, have we not had in Ireland somewhat too much of this adopting and avowing, or also repudiating and disavowing, what has been said or done by others? Might we not, perhaps, act with advantage less as parties. and more as mere men, each of us on his own responsibility (hear, hear)? I am here, I helieve, as your guest on one account alone. You will say whether I state it truly. I am here, not as a Jacobin (which I am not) -- nor as a Communist (which I am not)-nor even as A Republican (which I am) (loud cheers); but simply and merely because I am a bitter and irreconcilable enemy to the British Government (hear, hear). As to the position of our great cause, I think it is full of peril as well as full of hope. In proportion as the Irish nation has been gathering up strength and spirit to rid its soil of their encinies, those enemies have also been collecting their strength and hardening their hearts to hold our country in our despite. It is fortunate, I think, that those who have taken a forward part in rousing our people to these hopes and efforts are the first to bear the brant of the danger. It is better that they should be called to encounter it in the Courts of Justice first than that it should fall on a people not yet prepared in the field. But while we meet the enemy in the Queen's Bench, we have ? a right to call upon you to sustain us by a firm and universal avowal of your opinion. On the constituents of Smith O'Brien especially devolves this duty. While the British Parliament culls his exertious 'treason' and 'felony,' it is for his that he cannot find fault with :-- " when constituents to declare that in all this treason and felony he is doing his duty by them (cheers). And more than this: it is your duty further to prepare systematically to sustain him, if it come to that, in arms."

> For what purpose, may I ask, were those arms to be used? Were those arms to he used, or is it possible they were intended to be used, for any purpose except that which I take the liberty of suggesting?

"May I presume to address the women of Limerick (hear, hear, and loud cheers) ? It is the first time I have ever been in the presence of the daughters of those heroines who held the breach against King William; and they will understand me when I say that no Irishwoman ought so much as to speak to a man who has not provided himself with arms. No lady is too delicate for the culinary operation of cast-

ing bullets (laughter). No hand is too white | a Republican in principle. He stated, to make up cartridges (hear, and cheers). And | that, I hope, if it be needful to come to the last resort, that the citizens of Limerick, male and female, will not disgrace their paternal and maternal ancestors."

For what purpose were the ladies of Limerick to make up these cartridges and to cast bullets? For what purpose but to be used, as the arms were, against those whom he designates the enemies of the country, namely, the British Government?

"Before sitting down now I wish to contradict one calumny. It has been said of me-Lord Clarendon has had it posted up over Dublin-that I have been inciting the people to plunder and massacre; that my object is to raise a hasty and immature insurrection; that I want to plunder houses, to rob banks, to break into shops and stores. Need I refute this outrageous calumny (cries of 'no, no, and cheers)? Who ever heard me stimulate my countrymen to civil war against their own flesh and blood? My friends, we have no enemies here save the British Government and their abettors."

Can there, gentlemen, be any doubt who were the enemies designated all through This speech as the enemies that were to be met in arms; as the enemies for whose destruction these arms were to be provided; and for whose destruction the ladies of Limerick were to be employed in to levy war against the Government, in He savs :

A war of assassination and plunder against our countrymen would be a wound to our own witals (hear, and cheers). I shall say no more of this; but, again heartily thanking you for wour kindness, I conclude by urging you once indre to stand by and sustain Smith O'Brien against his enemies and yours—to sustain him, not for his sake, but for your own,

the If yet you are not lost to common sense, Assist your patriot in your own defence; The foolish cant, he went too far-despise,

And know that to be brave is to be wise." I will not, gentlemen, trespass upon your patience by again going over this Speech. I shall only very shortly remind you, that in the early part he announces that he rather would prefer a provisional government, constituted of a mob that hooting him at that time outside, than for one year more endure the British Governa ment. I would call your attention to this other passage. He said that all the treasons that had been spoken he approved of and, I think, had stomach for them all; that he did not repudiate the statement of Mr. Meagher, who had stated that,

when the last constitutional appeal should be made, and should fall, then up with the barricades and invoke the God of battles."

"All the constitutional appeals were long since closed against us; and that even now we had no resource except-when we have the means and the pluck to do it—the barricades and the God of battles."

I beg of you therefore, gentlemen, when considering this publication in your jurybox, to ask yourselves calmly and deliberately what other object or intention could he have had than that which we assign to him, of compassing to deprive or depose the Queen from the style or royal name of the Imperial Crown of the United Kingdom; or, if not that, to levy war against Her Majesty within the United Kingdom, in order by force and constraint to compel her to change her measures or counsels. If, gentlemen, a provisional government is to be formed. what, may I ask you, is to become of her? If a provisional government is to be formed sitting in Dublin, is it for the purpose of continuing Her Majesty as Queen of the United Kingdom? The two things, gentlemen, are utterly and altogether inconsistent and incompatible. If that was not the object, must it not, at all events, have been the other-of intending order by an armed force to compel a change in the constitution? That, gentlemen, is the nature of the publication in the first paper, upon which we call for your verdict. That paper was published on the 6th of May.

Gentlemen, if that article stood alone I do not anticipate that any doubt could be entertained of what the feelings, opinious, and intentions of Mr. Mitchel were. But in order to remove all doubt, in order, I should suppose, to leave no alternative to any Government, or to any officer holding the position that I do, but to appeal to the laws of the country, Mr. Mitchel, in the very succeeding number of his paper, published two other articles in which the intention of establishing an Irish republic, the time of its establishment, the mode of had hooted him in the morning, and were stated. This, gentlemen, is not merely a publication in the newspaper of Mr. Mitchel, it is a letter purporting to have been written by himself, addressed "To the Protestant farmers, labourers, and artisans of the north of Ireland." The letter is not dated, but of course, the newspaper being dated the 13th of May, the letter must be presumed to be written and published, and of course was published, on the same day.

[The Attorney General read the first part of the letter to the Protestant farmers He stated, that although he was not there of the North of Ireland set out in the in his character of a Republican, he was indictment, above, p. 607 and continued:

Now, gentlemen, I come to the part of | meeting there without a nobleman to countenthis letter which clearly and plainly ex- ance them; with the Queen's representative presses the whole object of Mr. Mitchel. and the nature of this publication:

"I tell you frankly, that I, for one, am not 'loval.' I am not wedded to the Queen of England, nor upalterably attached to the House of Brunswick. In fact, I love my own barn better than I love that house. 'The time is long past when Jehovah anointed Kings. The thing has long since grown a monstrous imposture. and has been already, in some civilized countries, detected as such, and drummed out accordingly."

Alluding, I suppose, to the recent changes in France, and the abolition of monarchical government.

" A modern King, my friends, is no more like an ancient anointed Shepherd of the People than an Archbishop's apron is like the Urim and Thunmin. There is no divine right now but in the Sovereign People.

"As for the 'institutions of the country.' I loath and despise them; we are sickening and dying of these institutions fast; they are consuming as like a plague, degrading as to paupers in mind, body, and estate-yes, making our very souls beggarly and cowardly. They are a failure and a fraud, these institutions -from the topmost crown-level to the meanest detective's note-book there is no soundness in them, God and man are weary of them. Their last hour is at hand : and I thank God that I live in the days when I shall witness the atter downfall, and trample upon the grave of the most portentous. the grandest, the meanest, and cruellest tyranny that ever deformed this world."

Gentlemen, may I ask you what meaning will you put on this paragraph? He says, "I am not loyal. I am not wedded to the Queen of England, nor unalterably attached to the House of Brunswick. Does not that of itself mean, that he sees no difficulty, or no objection, if he can, in getting rid of the Queen of England and the House of Brunswick? "The time is long past when Jehovah anointed kings." He says, "in some civilized countries the humbug has been discovered and the thing drummed out." It does not even rest here. He says:

"These, you think, are strong words; but they are not one whit stronger than the feeling that prompts them-that glows this moment deep in the souls of moving and awakening millions of our fellow-countrymen of Ireland-aye, and in your souls too, Protestants of Ulster, if you would acknowledge it to yourselves. I smile at the formal resolution about lovalty to Queen Victoria' so eagerly passed and hurried over as a dubious kind of form at tenant-right meetings and 'Protestant Repeal' meetings, I laughed outright here, on Tuesday night last, bauched and emasculated by the clap-trap at the suspicious warmth with which Dublin merchants, as if afraid of themselves, protested so auxiously that they would yield in loyalty to none. They, democrats by nature and position,

scowling black upon them from his castle, are. they declare it with most nervous solemnity, loyal men. Indeed, it was easy to see that a vague feeling was upon them of the real meaning and tendency of all these meetings-of what all this must end in, and to what haven they and you, and we, are all, in a happy hour, inevitably drifting together."

That haven he expresses in the next para-

"My friends, the people's sovereignty, the land, and sea, and air of Ireland for the people

That, gentlemen, is the maxim, having previously talked of "not being wedded to the Queen of England, or unalterably attached to the House of Brunswick." He

"This is the gospel that the heavens and the earth are preaching, and that all hearts are secretly burning to embrace. Give up for ever that old interpretation you put upon the word Repeal.' Repeal is no priest movement : it is no sectarian movement; it is no money-swindle. nor 'eighty-two' delusion, nor puffery, nor O'Connellism, nor Mulinghmast 'green-cap' stage-play, nor loud-sounding inanity of any sort, got up for any man's profit or praise. It is the mighty passionate struggle of a nation hustening to be born into new national life; in the which unspeakable throes, all the parts, and powers, and elements of our Irish existenceour confederations, our Protestant repeal associations, our tenant-right societies, our clubs, cliques, and committees, amidst confusions enough, and the saddest jostling and jumbling, are all inevitably tending, however unconsciously, to one and the same illustrious goal-not a local legislature—not a return to 'our ancient constitution '--- not a golden link, or a patchwork parliament, or a College-green chapel-of-ease to Saint Stepheu's-but an IRISH REPUBLIO, one and indivisible."

How, gentlemen, is that consistent with the sovereignty of the Queen? How is that consistent with her remaining Queen of the United Kingdom, to establish "an Irish republic, one and indivisible"? And how gentlemen, was that republic to be established? "How are we to meet that day? In arms, my countrymen, in arms." He says:

"In arms, my countrymen, in arms. Thus, and not otherwise, have ever nations of men sprung to liberty and power. But why do I reason thus with you-with you, the Irish of Ulster, who never have denied the noble creed and sacraments of manhood? You have not been schooled for forty years in the fatal cant of moral force-you have not been utterly deplatitudes of public meetings, and the empty glare of 'imposing demonstrations.' You have not yet learned the litany of slaves, and the whine of beaten hounds, and the way to die a

coward's death. No; let once the great idea of | the harvest of the present year, to rise in your country's destiny seize on you, my kins- arms, possess themselves of the property pike-staff twelve feet long.

"Yet there is one lesson you must learnfraternal respect for your countrymen of the south, and that sympathy with them, and faith in them, without which there can be no vital nationality in Ireland. You little know the history and sore trials and humiliations of this ancient Irish race : ground and trampled first for long ages into the very earth, and then taughtexpressly taught-in solemn barangues, and and see their children die before their faces, rather than resist their tyrants as men ought. You can hardly believe that creatures with the gait and aspect of men could have been brought to this. And you cannot wonder that they should have been slow, slow in struggling upward out of such darkness and desolation. But I tell you the light has at length come to then; the flowery spring of this year is the dawning of their day; and before the corn fields of Ireland are white for the reaper, our eyes shall see the sun flashing gloriously, if the heavens be kind to us, on a hundred thousand pikes."

He thought, gentlemen, perhaps that he savs :

"I will speak plainly. There is now growing on the soil of Ireland a wealth of grain, and roots and cattle, far more than enough to susthe island. That wealth must not leave us another year."

That is, the crops that were growing, and the cattle that were feeding.

" Not until every grain of it is fought for in every stage, from the tying of the sheaf to the loading of the ship. And the effort necessary to that simple act of self-preservation will at one and the same blow prostrate British dominion and landlordism together. 'Tis but the one act of volition; if we resolve but to live, we make our country a free and sovereign state."

What, gentlemen, is that free and that sovereign state? What but this ideal republic? What are the means of getting monkeys, of which travellers love to write. He it? By arms. What is the time? When chatters, he gibbers, he mops, he mows, he the harvest is ripe. What is the mode? You, the farmers of the country, rise at once; put an end to landlordism; possess close quarters. Not a bit of it. When, at last, yourselves of the corn, the crops, and the cattle of the country. To do so you must do it in arms. Let not a particle of it to meet the forest hero, lo I be scrumbles up the leave the country. The same force that is necessary for the one achieves the other. Abolish property, abolish the rights of property, and constitute yourselves "a free and sovereign state." Gentlemen, in sober earnestness, may I ask you, as rational men, may I ask my very able respected friend who is to follow, if he can with his great ability (let him if he can), no law could reach him, but how eager to shrink but any other meaning on this except an even from the penalties of felony! Is it not a

men, and the way will be plain before you as a of the country, establish a republic, and become a free and sovereign state? "Will you," he says.

" not gird up your loins for this great national struggle, and stand with your countrymen for life and land? Will you, the sons of a warlike race, the inheritors of conquering memorieswith the arms of freemen in all your homes, and relies of the gallant Republicans of Ninety-eight for ever before your eyes - will you stand folding even in sermons, that it was their duty to die, your hands in helpless 'loyalty,' and while every nation in Christendom is seizing on its birthright with armed hands, will you take patiently with your rations of yellow meal, and your inevitable portion of eternal contempt?

"If this be your determination, Protestants of Ulster, then make haste, sign addresses of loyalty and confidence in Lord Clarendon, and protest with that other lord, your unalterable attachment to 'our venerable institutions.'

"JOHN MITCHEL."

This is a plain incitement to the establishment of au Irish republic, the first fruit of which was to be the abolition of property, the abolition of landlordism, was not sufficiently plain, and accordingly and the occupiers possessing themselves of the soil and the produce of the land.

IThe other article, in the same publication made the subject-matter of indictment, is an editorial article by Mr. tain in life and in comfort all the inhabitants of Mitchel in reply to the following article of the Times on the Limerick demonstration. 7

> "As for this braggart wind-bag of a man, John Mitchel, he seems deficient even in the common allowance of 'pluck' which falls to the share of ordinary men. He head a rebellion! He a hero! John Mitchel, the runaway of Limerick, preach armed resistance with success, even in the land of political dupes! With all his vanity and tomfoolery, the descendant of Brian Born stood up, and took his brickbats and black eye like a man; while Boanerges Mitchel. and Meagher 'of the sword,' sneaked away, under the protection of the police, to Cruise's Hotel. Mr. Mitchel's idea of carrying on the war is precisely that of one of those strange flourishes his stick, and he shows his teeth. You would think he actually intended coming to you have made up your mind that, at any rate, it is better to settle matters at once, and advance nearest tree, and hangs pendulous, spitting and gibbering from a bough above your head.

"Is this really the best leader-the man of most mark-Young Ireland had to show? If this be the fugleman, what are the rank and file? While danger there was none, he was valiant enough. For squaring up to a ghost, his equal was nowhere to be found. How ready to take upon himself the penalties of treason, when exhortation and advice to the people, at little remarkable that Mr. Mitchel should have 6537

been absolutely unable to get his pages printed, just as the law became suited to his case? Is it not still more remarkable that he alone, of the I cannot of course anticipate. three Irish traversers, should have had recourse to technical objections, to avoid the consequences of the state prosecutions? Is it not still more remarkable, again, that in the skirmish at Limerick, Mr. Smith O'Brien should have found himself entirely alone, and that the supposed Murat of the Confederation was at the same time literally under the protection of the jury who are now to try this important police, as much as an old woman with a basket be feared, is made of such stuff as dreams are

"It will soon be all over with the Confederation and the physical force heroes. Mr. Mitchel is turned inside out, and Messrs, Smith O'Brien and Meagher, before many days are elapsed, will know where it will be their fate to spend their next year or two. This agitation was one evidently on the surface."

That was the article to which the article. the subject-matter of this prosecution, purports to be an answer; both in the same paper, and published immediately one under the other. He says:

"'THE TIMES' ON REBELLIONS.

" The Times appears to have been labouring under the impression that Mr. Mitchel had given himself out for 'a hero,' and the leader of a rebellion; and, further, that the three prosecuted Confederates went to Limerick to fight a | that it was merely and entirely the act of pitched battle, instead of to attend a peaceful evening party. Now, the fact is, the editor of the United Irishman is no here at all, and never said he was. He has only endeavoured to persuade his countrymen that they will never gain their liberties except by fighting for them; and that the only arguments the English Government will understand are the points of pikes -that's all. And he continues to preach this saving doctrine, and will continue so to do, until a considerable number of his countrymen agree with him; and then he hopes to aid in enforcing the arguments practically-that's all."

Well, gentlemen, if that be not a tolerably clear expression of the intention of Mr. Mitchel, and his meaning in this article I have read, I confess I know not the meaning of the English language. He savs:

" As to the 'sneaking away' of Mr. Mitchel and Mr. Meagher, or either of them, 'under the protection of police,' or any protection, it is merely an untruth; and the writer in The Times who wrote it, and the editors of Saunders and the Mail, who, we find, have copied it, knew it to be an untruth.'

Then he copies the article itself.

those articles, the subject-matter of this prosecution. We auticipate that the only question you will have to try is this, and intend, as we allege he did.

What the line of defence will be that may be taken by the able counsel of Mr. Mitchel.

There is, however, gentlemen, one matter of defence which I trust you will excuse me anticipating. It may be alleged that the Government, of which I am the servant, have endeavoured unfairly or improperly to empanel the case against Mr. Mitchel. You were of eggs might have been? Mr. Mitchel, it is to present in court yesterday, and are aware an attempt was made to satisfy the Court and the jury, or rather the gentlemen who were appointed triers, that an effort had been made by the Crown to interfere with the right and duty of the sheriff in empanelling a jury. The complaint against the jury panel was that it did not contain a sufficient number or proportion of Roman Catholic jurore. It was not alleged or stated that Mr. Mitchel was himself a Roman Catholic; on the contrary, it is stated in this publication, which I have read for you, that Mr. Mitchel was himself a Protestant. The evidence, I believe-and I should not appeal to it but that it is now, in fact, on record in the indictment before us-satisfied everybody, that the Government, or any servant or officer of the Government, had nothing whatever to do with the formation of the jury panel; the sheriff; that the difference, if any, which existed between the present panel and any that preceded it was that men of greater respectability and higher station were put upon it, or a greater number of men of that class than usual. That was the only charge brought against the sheriff in the constitution of this panel. I certainly should have expected that if there was one person in the world who was incapable of objecting to a Roman Catholic fellow-countryman to try a case. it was the humble individual who has now the honour to address you. I am myself -I have been from conviction, from education, and from habit, and shall always continue-a Roman Catholic. That I should be supposed capable of objecting to my Roman Catholic fellow-countryman on account of the religion which he entertains; or that the Government of which I am the servant, should object to a Roman Catholic juror on the ground that he professes the Roman Catholic religion, is a calumny on that Government, to which every act of theirs gives the most flat and ample contradiction. The very circum-I have now, gentlemen, laid before you stance of that Government promoting me, a Roman Catholic, to one of the highest offices that I am capable of filling; the fact of that very Government promoting whether or not Mr. Mitchel did compass to the highest offices within their gift in this country distinguished members of the

men were excluded from the jury simply and solely, or at all, because they professed the Roman Catholic religion. But, gentlemen, may I ask, would I honestly, or fairly to my country, or fairly to my Queen, discharge the duty of the situation which I hold, if I were to allow any man, no matter what his religious opinious were, to sit upon the jury if I had reason to know, and was instructed, that that gentleman concurred and coincided in the politics of the traverser? This is not a trial for mere larceny, where the simple question to be tried is, did a particular individual steal this or steal that. This is the trial of a political offence. The only instructions given by me to the Crown Solicitor were, on no account, under no circumstances, exclude a manon account of his religion; but it is your duty to exclude from that jury men, no matter what their religion may be, whose politics coincide with the political opinions for the profession of which the traverser is now prosecuted at the bar, May I ask. gentlemen, when we know that a man's political opinions do very often bias his judgment, could an impartial verdict on a mere political question be expected from political partisans, such as those, for instance, who join in these soirees, and in entertaining individuals because they are made the subject-matter of prosecution P The only instructions that were given were these: obtain a fair, honest, impartial jury. Any man whom, from your information, you believe to he not a man who will give an impartial verdict between the Crown and the subject, that man, and that man alone, without reference to his religion, you are to exclude from the jury. That Mr. Kemmis, according to the best of his judgment, exercised that right, I en-

tertain no doubt. Gentlemen, you will also recollect the efforts that have been notoriously had recourse to to intimidate jurous in the exercise of their duties. You are above all feelings of that description. You are, I trust, all that was required on the part of the Crown-men who have discarded from your minds anything that you may have heard of Mr. Mitchel, or of the publication of his paper, before you entered the jury-box; men, who having regard to the obligation of the oath you have taken, will honestly and fairly give that verdict which you can lay your hand on your hearts and say is consistent with the duty which you owe to your country, on the one hand, and to the traverser, Mr. Mitchel, on the other. That you, gentlemen, will give that verdict; that you will honestly and fairly discharge the very important duty which paper?-Yes.

profession to which I belong, is, I trust, a | you are called on to perform, I certainly, sufficient answer to the insinuation that for one, do not entertain any doubt what-

EVIDENCE FOR THE CROWN.

Charles Vernon-Examined by Henn. Do you hold any situation?-I hold the situation of Registrar of Newspapers in the Stamp Office.

Do you know John Mitchel ?-Yes. Have you got a certified copy of the leclaration lodged by him?—I have. Produce it ?- Yes.

(The witness handed in the document.) By whom does that purport to be signed — the certificate? — By Jonathan Sisson Cooper, the Comptroller-General.

Is that his handwriting ?-Yes, Is he the proper officer?—Yes.

You are a witness to that yourself?-Yes. I was; I compared it with him, and saw him sign it.

Have you the papers that were lodged in the Stamp Office !-- I have.

Will you produce the United Irishman of the 6th of May ?-Yes.

(The witness handed in the paper.) Was that lodged at your office ?- Yes. Do you see the name "John Mitchel" there !- I do.

Do you believe that to be his bandwriting ?-I believe it is.

Have you seen him write ?-I have. Do you produce the copy of the 13th of May P-Yes.

(The witness handed in the paper.) Was that also lodged in the Stamp Office P-It was, and signed by him.

Is that in his handwriting?-I believe it to be his bandwriting.

Where is the Stamp Office ?-At the Custom House.

Is that in the city of Dublin !- It is. Have you got the original declaration? -I have; it was signed in my presence by John Mitchel.

You have witnessed it?—I have, sir. Henn, having read the declaration, and the certificate at the foot signed by the Comptroller-General: That, my Lord, is made evidence by the Act of Parliament, The original is here, and we will hand in the original also.

Sir C. O'Loghlen: You have read the original declaration, and the copy of the two newspapers read by the Attorney General.

Henn: Yes, a certified copy.

John Landy - Examined by Plunket.

Look at that paper (handing a newspaper to the witness). Did you purchase that in Trinity-street?—I did, on the 6th May; I purchased it at 12, Trinity-street.

The office of the United Irishman news-

6571

From whom did you buy it?-From a man in the office.

Is Trinity-street in the county or the city of Dublin ?-In the city.

James Allen-Examined by Baldwin.

Did you buy that paper anywhere (handing a newspaper to witness) ?-I did.

Where ?-At the office of the United Irishman, in Trinity-street.

When ?-On the 13th of May.

What date is the paper !- The 13th of May.

Pierce George Barron-Examined by Whiteside.

I believe you are a magistrate?—Yes. Were you in Limerick on the 29th of April last ?- I was; on the evening of which day an entertainment was given.

Sir U. O'Loghlen: We object to any evidence of what occurred at Limerick. Whiteside: You were there ?-Yes.

Do you know the person of Mr. Mitchel, the prisoner ?- I saw him there for the first time.

Did you see him there ?-Yes, I did.

Where did you see him?

Holmes: This is quite irrelevant, because the proper thing under the Act of Parliament is the printing. It is quite irrelevant what passed there; the part 1848. which constitutes the offence is the print-

ing of it.
MOORE, J.: We cannot tell what they are going to prove. As soon as they put a question which is improper you can

object.

Whiteside (to the witness): You saw him in Limerick !- Yes.

Where was that P-At the soirée given to Mr. Mitchel, Mr. Meagher, and Mr. O'Brien.

On the evening of the 29th of April ?-

Did you hear him speak there? Do not tell me what he said.—I did.

Sir C. O'Loghlen: I object to this.

Whiteside: Have you read that report of his speech in the paper of the 6th of May ?-I read what purported to be a report of it.

Did he speak such a speech as sub-

stantially there stated?

Sir C. O'Loghlen: Now that is unim-

portant to the present issue.

Attorney General: We have not laid an overtact that Mr. Mitchel was the gentleman who spoke the speech. There is no such thing; but the reported speech purports to be a speech spoken by Mr. Mitchel, the traverser here; the newspaper itself merely says Mr. Mitchel.

LEFROY, B.: Everything that is in the

What is the date of it?-The 6th of lindictment you are authorised to establish; and if there is to be any difference as to identity.

Sir C. O'Loghlen: The Mr. Mitchel named in the report is the proprietor.

Moore, J.: That is clearly relevant.

Whiteside: The document purports to be a speech. We claim to prove that he made that speech, and it is evidence of the intent with which the speech was published.

Sir C. O'Loghlen: The question here is, did he, in point of fact, publish the dooument which they proved by the Stamp Office? It is not whether he spoke any speech at Limerick. The question is, did he publish that paper ?

LEFROY, B.: The evidence of speaking is guarded with peculiar strictness (a); and if it was contended that it was one of the means and ways of giving manifestation to the compassings and imaginations, it should be laid in the indictment as one of those, and therefore it cannot be given as evidence of it save in that way to identify Mr. Mitchel with the overt act that is laid. They are entitled to go that length, and no further. That is our opinion.

Whiteside (to the witness): In point of fact you heard Mr. Mitchel speak there ?-

Henn: Now we propose to read in evidence the publication of the 6th of May,

Holmes: I think it would be only waste of time; the Attorney General has read them all through.

Henn: We must do so pro forma. I will just read the heading of each paper.

LEFROY, B.: Yes.

Henn: This is the United Irishman of the 6th of May, 1848; and the motto is, "Liberty, Equality, Fraternity;" and at the foot is, "Dublin, printed and published every Saturday morning, by the proprietor, John Mitchel, at the office, 12, Trinity-street;" and here is also the paper of the 13th of May, 1848. We offer the two copies, the one purchased from the office, and the one from the Stamp Office; and they may be entered as read.

John Virgo-Examined by Smyly.

A collector of police tax proved the Stamp Office was in the parish of St. Thomas, and the office of the United Irishman in the parish of St. Andrew.

Attorney General: We now close our case, my Lord.

SPEECH FOR THE DEFENCE.

Holmes: May it please your Lordships, gentlemen of the jury, I am in this case counsel for the prisoner, John Mitchel;

(a) See 11 & 12 Vict. c. 12. s. 4.

and I am well aware of the important duty | partial jury between the Crown and the which devolves upon me, and of my in accused, the Crown, or the officers of the adequacy to discharge that duty as I ought. But I will avow that I feel proud to have been selected by Mr. Mitchel as bis counsel, because I believe him in my heart to be an honest man, sincerely believing in, and attached to, the principles which he avows, and which there is no Mitchel, may have committed in these doubt that he avows boldly; and although the Government of this country may fear alleged against him. If you should even him, or hate him, they cannot despise him. I think him guilty of high treason in these

Gentlemen, having thus said a word respecting him as to character, I shall now proceed with his case. The Attorney General has very fully stated the case upon or other, or both of the specific charges the part of the Crown, and has read very fairly all the publications respecting which him altogether, as I trust that you will do. Mr. Mitchel stands accused; and I have one part only of his statement to complain | imagined, invented, devised, or intended of, and that is the conclusion. I do not to deprive or depose our most gracious think that he was warranted in stating in Sovereign the Queen, from the style. this Court what instructions he, or those connected with him, received from the Crown of the United Kingdom; and that Chief Governor of this country, with respect to striking juries.

Attorney General: What I stated was the instructions which I gave myself to the

Crown Solicitor.

Holmes: I should be very sorry to misconstrue anything you said; but I did understand, certainly, that you did state, or intimate very strongly, the directions which you had received from the Lord Lieutenant.

Attorney General: Certainly not-I did not mean to do so. I merely stated the instructions which I gave myself to the Crown Solicitor.

Holmes: Very well, if it is a mistake I "to depose her from the style, honour, or royal am quite satisfied.

LEFROY, B.: Mr. Holmes. Had it not been with a view to a brief and justifiable personal vindication of himself, I should have felt it my duty to have interrupted the Attorney General upon that topic.

Moore, J.: I quite concur in that

opinion.

Holmes: There is, however, in the conclusion of that statement, something which cannot be mistaken, and to which I must advert. There was a challenge to the array, in this case, upon the part of the accused man, who, from information we had got, false perhaps, bad reason to believe that those whose duty it was to empanel an impartial jury, had not in all instances done so, particularly with respect to placing Roman Catholics upon the panel. Well, that issue was tried, and the triers found upon their oaths that it was a fair and impartial jury-a fair, impartial jury upon the oaths of those triers! What do I find then? That from that jury, declared upon the oaths of those two respectable men to be a fair and im-

Crown, struck off nine and thirty men, eighteen of them being Roman Catholics. I say no more upon that subject.

Now, gentlemen of the jury, as the Court will tell you, the question in this case is not whether the prisoner. John publications other offences than those publications, you ought not to attend to that at all, the Court will tell you so. You must believe him to be guilty of one made against him, or you must acquit

The first charge is, that he compassed. honour, or royal name of the Imperial these intentions, and so on, were evidenced by the overt act of his printing and publishing various articles in the newspapers which have been already read to you. Now, my Lords, I really may be very dull. but I do not rightly comprehend this part of the Act of Parliament,

"to depose the Queen from the style, honour, or royal name of the Imperial Crown of the United Kingdom."

Any man of common sense knows what it means to depose the Queen from her throne, or to assassinate her, or to attempt to assassinate her; but for the life of me I cannot understand what it is

name of the Imperial Crown of the United Kingdom."(a)

It is curious how unimportant this same style and title is considered, because you will find the very first article in the Act of Union between the two countries states.

" that it be the first article of the Union that the said kingdom of Great Britain and Ireland shall. from the first day of January, in the year of our Lord one thousand eight hundred and one, and for ever be united into one kingdom by the name of the United Kingdom of Great Britain and Ireland; and that the royal style and title appertaining to the Imperial Crown of the said United Kingdom, and the armorial bearings belonging thereto, shall be such as his Majesty by his royal proclamation under the great seal, of the United Kingdom, shall be pleased to appoint."

It is not the essence of the thing at all. Her being the Sovereign of the United Kingdom, that I can understand; and I

⁽a) The wording of this portion of the Act is the same as in the Treason Acts of Elizabeth and Charles II., 18 Eliz. c. 1, and 18 Cha. 2; c. 1.

I cannot.

What is the other charge? It is

"devising, intending, and so on, to levy war against Her Majesty, her heirs or successors. within any part of the United Kingdom."

That is not, however, the offence complete: it must be.

"in order by force or constraint to compel her to change her measures or counsels."

What measures or counsels? Is there the with France, or her measures with America, or her measures with any other country upon earth? What are the measures even in this country which they charge the prisoner with wanting her to change, or what counsels? What have been the measures during this Session of Parliament passed for the improvement of Ireland? The poor law. That is the only measure which I know of; and has Mitchal endeavoured to oppose or interfere with that? Not in the least,

specific measures, or some specific coun- | boldly and broadly--sels which Mitchel intended to levy war against the Queen in order to force her to Mr. Holmes, to interfere, but we hope that change, your Lordships cannot rossibly Eay that there is any case to go to the jury.

general, it required a specification of the in itself, as objectionable as the matter measures, that is an objection which might | we are trying, would really make us

be raised upon the record.

Holmes: I understand that; but I think it would be competent for them, without specifying the particular measures upon the record to give evidence as to these the words of the Act, without going on without doing justice to Ireland. (Cheers.) and specifying upon the record the partimight supply that by evidence.

LERBOY, B.: We could not allow them to give evidence of any specific measures unless they had averred them, for the same reason that we would not allow them to give evidence of the prisoner's speak.

ing at Limerick.

Holmes: With the greatest possible respect, if your Lordship finds an Act of them to gaol.

can also understand anything done to Parliament on which you cannot direct deprive her of that; but depriving or the jury, how can your Lordships tell the deposing her from the style, honour, and jury what the measures or what the royal name of the Imperial Crown of the counsels are that this accused man is United Kingdom, for the life of me I charged with levying war for the purpose cannot understand that -- for the life of me of compelling the Queen to alter or change? It is an offence for which he may be transported for life, and is it to be sent and left to the jury in that state of uncertainty? Your Lordships cannot do it. I say it with the greatest possible respect, your Lordships cannot do it. If your Lordships think otherwise, it will be my duty to proceed with the case.

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Gentlemen of the jury, it is not my duty to tell you, and if I did tell you, you would not believe me, that there are not very, very strong expressions used by my client slightest evidence here of what measures in these publications. There are, and he or counsels it is that these publications arows them; and many of them I myself are calculated to force or constrain her to avow; and it will be impossible to try alter? Are the jury to grope in the this case fairly between the Crown and dark? Are these publications calculated the accused, without calling your attention to force her to change her measures to something of the history of Ireland, and the present state of Ireland-impossible. And I tell you, in the first place. Ireland is an enslaved country, and I will prove it. A great mistake, in my opinion, is entertained by many persons that there cannot be slavery, that no man can be a slave, except he is actually in chains, or is subject to the lash of the planter who flogs the negro. Some men seem under that false impression. Slavery, gentlemen, the slavery of a people consists in this-that they do not make the laws themselves by My Lords, I do with the greatest respect | which they are governed, but those laws put this to your Lordships, that under this are made for them either by another Act of Parliament, unless they prove some nation or another individual; and I say

LEFROY, B.: We are very reluctant. you will not place the Court in an embarrassing situation, by giving utterance LEFROY, B.: If, although the Act was to that which, if it appeared to the Court, guilty of a great breach of duty if we sat quietly by and listened to it.

Holmes: I would be the last man in the world to ask the Court, or press upon the Court, what I did not feel I had a measures and counsels. It would be right to do; and I think that it is imposenough for them in point of law to follow sible in this case to do justice to my client

LEFROY, B.: The police have received cular measures or counsels; but they orders to take into custody immediately any person who should be guilty of such an outrage upon public decorum and the order that should be preserved in a court of justice, as that which we have just witnessed. If the offence is repeated, the police will certainly be directed to take into custody the parties so offending, and it will be the duty of the Court to commit

Lordship will do so.

LEFROY, B.: It is an interruption to yourself as well as to the Court.

Holmes; My Lord, it is with that view alone that I mention it. This Act of Parliament does not prescribe one punishment only, there are distinct offences contained in the Act. The punishment may be two years' imprisonment, it may be seven years' transportation, or it may be transportation for life. If there should be a verdict and conviction here, is it not important for your Lordships to know all the circumstances of the case, under what circumstances, and under what provocation my client has acted, when you come to pass sentence upon him? I do, in that view alone, think it is quite essential to his case. I do respectfully say, in that view alone, the course I mean to take is quite legitimate and necessary. And though my client may be by this statute guilty of some offence, I do say boldly | That is the doctrine of a commentator on and broadly England is the cause-England is the cause of the offence of which he is accused; and I will demonstrate it.

Gentlemen of the jury, I care not how you are empanelled or put into that box. I address you as what I believe you to be, honest men and Irishmen. I will now state to you (for take nothing on my assertion)-but I will state to you on the highest authority, what it is that consti-

tutes the liberty of a people.

"In what does the liberty of a people consist? It consists in the right and power to makes laws for its own government. When an individual makes laws for a people, it is admitted, that the individual who makes the laws is a despot, and the people slaves. If so, when one country exercises the power of making laws for another country,'

and I will demonstrate that England makes laws, and she has no power here to make

laws for Ireland.

"the country that makes the laws is the absolute sovereign, and the country for which the laws are made is in a state of slavery. To give laws to a people is the true mark of sovereignty; to give laws to a conquered people is the principal mark and effect of perfect conquest."

Now, for that I give you the authority of an Englishman, in his day an honest, able Attorney General of Ireland, Sir John Davis.(a) And what does Blackstone say upon this -- and he is a great authority upon constitutional questions? He cannot be suspected of leaning too much in favour of popular rights. He says, speaking of country. Ireland and her dependence upon England(b)---

"it follows from the very nature and constitu-

(b) 1 Bla. Com. 103.

Holmes: I hope with all my heart your | tion of the dependent state, that England should make laws for Irelaud "-

> treating Ireland as a conquered and dependent country, he is contending for the right in England to make laws to govern Ireland-

> "dependence being little else than the obligation to conform to the will or laws of the superior person or state upon which the inferior depends;" and he savs.(a)

"And, as Ireland thus conquered,"

(for England claims her right to Ireland by what is called conquest-that unrighteous claim of conquest, because one nation is stronger than another, that it has a right to keep it for ever in slavery; that is his doctrine)-

"And, as Ireland thus conquered, planted, and governed, still continues in a state of dependence, it must necessarily conform to, and be bound by, such laws as the superior state thinks proper to prescribe."

the laws of England-a standard work. And in speaking of this country, Ireland, he maintains, that because England conquered Ireland, not only the men who were actually conquered at the time, but their posterity for ever, should be bound by such laws as the conquering state, England, should think proper to prescribe. And accordingly, gentlemen, England, except for a period of eighteen years, did make laws for Ireland. There was a celebrated statute called "Poynings' Law,"(b) passed in the reign of Henry VII., by which it was enacted by the English ('Irish) Parliament that the Irish Parliament (for there was then an Irish Parliament in name) should have no power to pass any law for Ireland except that law was previously approved of by the King in Council in England. At a later period, in the reign of George I., an Act was passed declaring expressly in words "that England had a right to make laws for the government of Ireland.'(c) So that England by that declared that no law whatever could be passed in Ireland except they permitted it; but that the English Parliament alone had the right to make laws for Ireland. I ask any man-I ask the able lawyer and counsel who is to reply to me-I question him as I was questioned by the Attorney General-I ask him to controvert this if he can: down to the last century, and until that statute was repealed, Ireland was not an enslaved

Well, it happened some years after that Act was passed that a body of men appeared in Ireland-armed men-the Volunteers of

⁽a) Discovery of the true causes why Ireland was never entirely subdued, London, 1612.

⁽a) 1 Bls. Com. 100.

⁽b) 10 Hen. 7. c. 4. Ir.

⁽c) 6 Geo. 1. c. 5.

Ireland. The Parliament of England did I boldly assert, that an enslaved people, justice for a while. They repealed (a) that | enclaved contrary to the law of Providence, bad a right to bind Ireland by her laws. to obtain liberty even at the hazard of They declared solemnly by that Act of life itself. I say life-for what is life? Parliament, passed in the year 1783,(b) Is it worth any thing without liberty? that from thenceforth England renounced the right of making laws for Ireland; and | country and go to Russia? that the Irish Parliament, with the King of England, was the only power that from henceforth should make laws for Ireland. After the passing of that solemn Act-the Act of the English Parliament, in eighteen years, I think, less than twenty years at all events, the Aut of Union was passed. What is that Act of Union? Ireland is said to be represented in the English Parliament by one hundred members, I think; the English Parliament consisting of five hundred-five to one-five to one. Does Ireland, will any man say, will my able friend answer this question and say, that Ireland now makes laws for herself: and that she is now free? There never was. I venture to assert, in the history of nations, so flagrant an act of injustice as that act of passing the Union-the Act of Union in this country. What was the Irish Parliament then chosen by the people of Ireland to do? To make laws, the ordinary laws, which are made by a Parliament-to make those laws. It had no more right, being delegated for that purpose, and that purpose only, to surrender the rights committed to it by the Parliament to annihilate itself, than I had: no more. It was chosen for a different present case ? purpose. Would it be said now in England that the Parliament, which is there assembled, would have the right. being delegated to make laws, to erect an absolute government? Would any man say that the Parliament in England, delegated for the purpose of making laws in England, could change every thing, and establish an absolute monarchy? Would any man say that? Just the same right, and no more, had the Irish Parliament to destroy itself-just the same right. And I do say boldly and broadly, as a man and as a lawyer, that that Act of Union is only binding upon the people of Ireland as a thing of expediency. Men will often submit to a certain order of things rather than run any risk or danger (and it is often wise and humans to do so) of subverting by force of arms what has been unjustly established; and, therefore, it may be a very expedient thing, and no man ought, but upon strong grounds, to endeavour to subvert by force the present order of things; but when the question is the right,

Act of Parliament declaring that England | has a right, if necessary, by force of arms What man, even here, would leave this

> LEFROY, B.: We cannot possibly, Mr. Holmes, sit here and allow you to preach that doctrine to the people, the Court sitting by, and appearing to acquiesce in it -that any man has a right by force of arms to obtain a repeal of this Act. Objectionable as it may be, we cannot listen to it without observation.

Holmes: I certainly do entertain that opinion, my lord.

LEFROY, B.: That may be your private opinion, but we cannot suffer the case of the prisoner to be put to the jury upon the ground that he had a right by force of arms to obtain that repeal.

Holmes: I do not say that he has the

Lerroy, B.: Any man, you said.

Holmes: I said the people; and it ought to be a great majority of the people, so as not to leave any doubt. I did not say an individual. I deny it.

LEFROY, B. : We cannot admit that consistently with his allegiance, any individual, or the whole body of the people can resort to force of arms as a matter of right. And how can that abstract quespeople, and to conspire with the English | tion possibly justify your case, unless you mean to show that it bears upon the

> Holmes: I do, and I will show that it does bear upon my case. I will show that it bears thus-that the conduct of England, with respect to the very question of repeal, has been the cause of the present state of this country. I will demonstrate that the English Government and the English Ministry, by their conduct upon this very question of repeal, have brought this country to the unfortunate state in which it now is; and I will demonstrate, by the duplicity and by the conduct of the English Government with respect to that very question of the repeal of the union, that they are the guilty persons, with respect to the state of this country, and not my client.

> My lords, this question of the repeal of the union has been agitated several years in this country. Mr. O'Connell, whose powers of mind, and whose great popularity we all know, bearded Whigs and Tories for years, in agitating the question of the repeal of the union, at the very same time, and I will demonstrate it, that the Government of England were determined that it should never pass. They declared

prefer civil war to yielding that point; | very measure which they foresaw at the and yet that same Government suffered time must end in separation, and then Mr. O'Connell and those connected with they prosecute an unfortunate Irishman him to agitate the question for years. for attempting to agitate that question What was that? Was it weakness, was it which they themselves encouraged. guilt, or was it both? In the year 1831, Lord Althorp-it was then a Whig any prosecutions? But one, and we all ministry: I believe it was in the time of know the fate of that prosecution. It Earl Grey's ministry-Lord Althorp said | ended in the defeat of the Government of in the House of Commons, in reference to the day. O'Connell survived it; he only a repeal of the union-

"Is it not evident that a repeal of the legislative union must inevitably produce the separation of the two countries?'

Now this is his deliberate opinion, deliberately expressed in the House of Commons :-

"Is it not evident," he says, "that the separation of Ireland from England must be the result of the repeal of the union? And I trust that those who are engaged in seeking the attainment of a measure so dangerous to the stability of the empire, and so injurious to the peace and prosperity of the country, will not succeed; but if they do succeed, they must do so by one mode only, and only in one way, namely, by successful war; and I know too much of my countrymen."--meaning Englishmen -" to believe such an event to be possible."(a)

That is, he trusts his countrymen, he knows them so well, will vanquish Ireland in arms, and by arms prevent this Act of Union being repealed; that is, he was satisfied that the repeal of the Act of Union would end in separation, and he would prefer war to granting repeal, and in | done, against the agitation of the question, that war he had no doubt that his countrymen would prove victorious in putting put from the commission of the peace the down Irishmen. And how was that declaration and avowal followed up afterwards by the present Prime Minister, do? They restored the head and leader Lord John Russell? We all know the manner in which they suffered that question to be agitated in this country. I say, that if their resolve was an honest resolve, when they were persuaded that the repeal of the union would lead to a separation of the two countries, and they preferred war rather than grant it, they ought to have at once passed an Act of Parliament, if they were honest men, making it treason to advocate or attempt the repeal of the legislative union. That would have been, I admit, an act which no man could justify. I admit that; but it would have been honest, it would have been open, it would have been bold. We should have understood the thing. But what did they do? They suffered men to be entrapped, entrapped, I say, into what they now complain of-of struggling for a repeal of the union, they themselves being parties to that very agitation, in order to obtain the

(a) Hansard, 3rd Series, vol. 2, p. 323.

What was done afterwards ! Were there changed or used a word or two of magic meaning, "moral force;" and he was suffered untouched, not only suffered to agitate the question of the repeal of the union, which he did to his last hour in this country-suffered by this very Whigh Government-suffered to agirate the question which they foresaw, if granted, must end in separation. Did ever any man know such base hypocrisy-such base hypocrisy as that? It must be a ruinous thing to repeal this Act of the Union; now that it has passed, be it ever so iniquitously passed, yet it must be a ruinous thing to repeal it. We will make no laws against your attempting to repeal it. We will let you agitate, and have monster meetings, and deliver speeches at monster meetings worse than any speech my client is accused of here.

What did they do more? They restored O'Connell and several others who had been struck off the commission of the peace for agitating this question. The Tories in some measure acted consistently. They did not pass a law, as they ought to have but they so far discountenanced it, as to persons who were favourable to the repeal of the union here. What did the Whigs of that agitation to the commission of the peace; they restored several other magistrates to the commission of the peace also: and now they say it is an offence under this new Act of Parliament to deprive the Queen from ber style, honour, and royal name of the Imperial Crown of the United Kingdom. I do say, and I think every honest man must agree with me, that the very Government which have instituted this prosecution, have been themselves the great cause of bringing this country into the wretched state in which it is at present. My client may be statutably guilty, but he is not morally guilty. I vindicate his character which ought to be dearer, and which I have no doubt is dearer, to him than his life.

Blackstone lays it down distinctly, my lords, I must revert to that doctrine-he lays it down distinctly that the English people have a right -- you will find it, my lords, in vol. i., page 147—to have arms. and to use arms against oppression. He

⁽a) 22 Geo. 8. c. 53. (b) 23 Geo. 8, c. 28.

that it should never pass; that they would

6691

lays that down distinctly in so many | seven centuries of wasting wars, wasting words, and I am not wantonly or wildly laws, and still more wasting policy, finds here preaching doctrines of my own. I | it now necessary to maintain that dominion say they are founded upon legal and con- in Ireland by special commissions, state stitutional grounds and principles, and I prosecutions, and military force-by the would not presume to address your lord. ships upon any other; but I have authority for every word I utter-I have historical

facts for every word I utter. Oh! but surely we find that these doctrines of Mr. Mitchel and others are condemned? Yes, condemned by the high derogation of that praise. I more in a and the wealthy. Do we not find every higher orbit. But this I will say, that day addresses upon addresses, and is not this an argument that this country | the wisest of the wise, and the bravest of is not friendly to a repeal of the Union P | the brave, he could not long maintain the And it is proved, forsooth, by the number | connexion between Great Britain and Ireof loyal addresses which are now sent forward to the present Lord Lieutenant, by the gaol, and by the sword. The laws declaring the unalterable attachment of of eternal justice forbid it. How is that those who sign them to the institutions of connexion to be maintained? By justice the country. Yes, gentlemen of the jury, by justice. By giving to Ireland her there are men, and they are chiefly to be | rights-her rights by nature, and her found in what are called the better ranks rights by compact; by giving to Ireland of society-excellent men, religious men, her own Parliament, representing the inmoral men, kind men, courteous men; terests of the people. Give to Ireland but yet, if all mankind were like them, we that, and you may have the two countries should have no such thing as liberty in the united for ages under one common soveworld. Peace in their time is their first | reign; united by a community of interests, prayer and highest aspiration. They en- by an equality of rights, by mutual affecjoy the good things of this life with grati- tion and reciprocal respect. But if for tude. They are consoled for the afflictions | this you substitute a connexion founded in of others by the reflection that the sufferer the triumph of strength over weakness. here is only in a state of trial, upon his you will have jealousy, and distrust, and passage to another and a better world. fear, and hate, and vengeful thoughts, and There is a better world, where the tyrant | bloody deeds-the sure, the never failing must account for his oppression, and fruits of tyranny. Give to Ireland her where the slave will be redeemed from his own Parliament-not the Parliament of bondage. O Ireland, Ireland, 1782: that was a meteor light which thousands and thousands and thousands of flashed across the horizon-a deceptive thy children have for ages been obliged to vapour which vanished quickly. Ireland look to that other world alone as a release wants a fixed star, bright and lasting, the from their bondage in this! If from past genial influence and reflected radiance of times we turn to the present time what do which may be seen and felt in the glorious we see? An Attorney General, an able law- union of liberty, happiness and justice. yer, and under Special Commissions (a) a successful prosecutor. Death, death, death Althorp, it will lead to a separation. You has followed his footsteps and marked his cannot have repeal without its leading to track. Ought not the assassin to suffer a separation; the consequence of that will for his crime ?-Yes. But in the history be the erection of Ireland into a separate of the world, in the history of civilization, and independent state. Suppose it does, no civilized nation has ever yet been a who is to blame for that !- England. nation of assassins. Assassination is the | What right has England-has any country, crime of the untutored savage or the to build or peril its greatness upon the brutalized slave. Ought not the assassin slavery, the degradation, and the wretchto suffer for his crime?—Yes. But deep, edness of another country? Where is the deep, deep is the guilt of those who have right? Strip this case of the disguise made Irishmen slaves, and slaves assassins, which ambition, and pride, and love of instead of leaving brave men free and power, and love of wealth-which the happy, Deep, deep deep is the guilt of corrupt passions of the human breast-England, which by unprovoked and unjust | which the sophistry of conquerors, and invasion obtained dominion in Ireland. and which at the close of the seventh century of that dominion, at the close of

gibbet, by the gaol, and by the sword. I hear much, and I have read much in praise of the present governor of this countryof his good intentions, his great abilities, his firm purposes. It is neither my province, nor my wish to say anything in were the noble lord the best of the good. land under a common crown, by the gibbet,

Oh | but if you do that, says my Lord princes, and statesmen, and courtiers, and lawyers have cast around it, and what is it? It is this: a strong man, because he is strong, enslaves his brother man because he is weak; the slave struggles to

him because he struggles to be free. A extinguished; but were I now standing brother's blood-

" It smells to Heaven. It hath the primal cldest curse upon it. A brother's murder."

Yet that is British invasion in Ireland; that is British conquest in Ireland; that is British dominion in Ireland; that is British civilization in Irleand: that is and free. I call upon you, as you value British legislation in Ireland; that is the Act of Union. Pass the Act of Union in violation of every principle of justice, in violation of every principle of honour, in love the country of your birth and the violation of solemn pledges; pass the Act | land of your fathers-I call upon you, by of Union by terror, by deceit, by violation | your verdict of acquittal in this case, to of faith, by bribery, by corruption; pass the Act of Union and declare that to attempt to repeal that Act of Union shall be rebellion, and then kill, kill, kill the Irishman. That is British justice in Ireland: that is British morality in Ireland; that is British Christianity in Ireland. A Russell once bled upon the scaffold-he bled in the cause of liberty; may his name be for ever embalmed in the memories of the virtuous and the brave. A Russell of the present day supports power against right prefers war to pence, to liberty, to justice. A Russell of the present day calls upon the men of Waterloo to stain the laurels which now encircle their brows with brothers' blood. Russell of the present day calls upon the men of Waterloo to steep in brothers' blood the swords which saved England and conquered France. Should the battle thus provoked by England come; in that struggle to the death Ireland may perish. the noise of her song may cease, and the sound of her harp no more be heard; her cities may be wasted, and her habitations left without men; her fruitful valleys may be laid desolate, and her green fields may be crimsoned with blood; but should the victory belong to England, so will the guilt. The actions of men are not to be judged of by the event-the actions of men are not to be judged of by success or by defeat. Had the liberties of Greece perished with Leonidas at Thermopyles. Spartan glory would have been the same. Had the days of Marathon, Salamis, and Pharsalia (sic) (a) been days of defeat instead of victory to Greece, orators might still have spoken, and patriots sworn by the sacred memory of the dead. He who dies in battle for liberty and his country, dies the death of a soldier and sleeps in a hero's grave. Gentlemen of the tury. I speak not here

merely for my client-I speak for you and your children, and your children's children; I speak not here for myself-my

be free, and the enslaver kills him-kills | lamp of life is flickering and must soon be on the brink of the grave, and uttering the last words of expiring nature, I would say, "may Ireland be happy, may Ireland be free." It rests with you, gentlemen of the jury, this day, by your verdict of acquittal-it rests with you to contribute your parts towards making Ireland happy truth, as you value justice, as you value public good, as you value manly bearing and personal honour, as you value and do your parts towards making Ireland happy and free.

REPLY.

Henn, as representing the Attorney General, replied for the Crown(a); The connsel for the defence has abstrained from calling attention to the real issues or to the evidence offered in support of them.

The prisoner is charged with compassing to deprive and depose the Queen, and with compassing to levy war against the Queen to force her to change her measures and counsels. These offences were treason under 57 Geo. 3. c. 6., and in the indictment in Thistlewood's case(b) were charged in the same way as here. No objection was taken that the charge of compassing to depose the Queen from the style, honour, and kingly name of the Imperial Crown of these realms was unintelligible, or that in a charge of compassing to levy war in order to force the Queen to change her measures and counsels the precise measures and counsels should be set out. In charging the grand jury, Abbott, L.C.J., said:

"Before the passing of the late statute it had been settled by several cases actually adjudged, and by the opinions of the text writers on this branch of the law, that all attempts to depose the King from his royal state and title, to restrain his person, or to levy war against him; and all conspiracies, consultations, and agreements for the accomplishment of these objects, were overt acts of compassing and imagining the death of the King. By this statute the compassing, or intending to commit these acts-that is, to depose his Majesty, to restrain his person, or to levy war against him for the purposes that I have mentioned, is made a substantive treason; and thereby the law is rendered more clear and plain, both to those who are bound to obey it, and to those who are engaged in the administration of it. It may be proper for me to add that it has been established in like mancer"—

And this, gentlemen, you will find of importance-

(b) 88 St. Tr. 682n.

⁽a) As to the right of reply, see 2 St. Tr. N.S. 1019; 5 St. Tr. N.S. 3.

⁽a) Platea.

"that the pomp and circumstance of military | measures and counsels is most undoubtedly a are by no means necessary to constitute an actual levying of war, within the true meaning of the ancient statute. Insurrections and risings for the purpose of effecting by force and numbers, of Edward 3." however ill-arranged, provided, or organized; any innovation of a public nature, or redress of supposed public grievances, in which the parties had no special or particular interest or concern, have been deemed instances of the actual levying of war; and consequently to compass or imagine such an insurrection, in order, by force and numbers, to compel His Majesty to alter his measures or counsels, will be to compass or imagine the levying of war against His Majesty for that purpose, within the just meaning of the modern statute. Rebellion at its first commencement is rarely found in military discipline or array, although a little success may soon enable it to assume them."

a conspiracy to assassinate His Majesty's ministers, who were expected to assemble | the name, style, and honour of the Imtogether at a Cabinet dinner, at the house | perial Crown of the United Kingdom P of my Lord Harrowby. There does not Does she remain Queen of the United appear, from the beginning to the end, that it was their intention to make the Ireland? Is a republic consistent with the King alter any particular measures or counsels, and yet, hear what Lord Chief Justice Abbott says here, speaking of that be the Queen of the United Kingdom? conspiracy to murder:

"Upon the law, as applicable to these supposed matters of fact, I should tell you that a conspiracy to murder a number of individuals. whether in a private or public station, however high or important the public station may happen to be, grounded only upon private malice harboured against them in the minds of the conspirators, and for the mere gratification of private revenge, and not meant to be accompanied or followed by any other act or matter, or to bring about any object of a public nature, however odious and criminal such a conspiracy may be, does not in law constitute the offence of high treason. But if the assassination be meant as the signal for, or commencement of, a tumultuous insurrection of large numbers of persons expected to join the conspirators, and with a view, by force and numbers, to take the government of the country into the hands of the leaders, or to compel the Sovereign to adopt such measures as they may think fit to dictate to him; then the conspiracy to assassinate will assume a different character, and become an overt act of those species of treason, which consist in an intention to depose the King, or to levy war against him for one of the purposes before mentioned, and may also be an overt act of treason in compassing his death."

My Lords, I will just advert to one passage in the close of Chief Justice Abbett's summing up to the jury at the trial in that case. He says:

"If they had succeeded so far as to establish a provisional government, the royal functions would have ceased. Any attempt, by numbers and by force, to compel his Majesty to alter his

array, such as usually attend regular warfare, levying of war within this Act. An actual rising or insurrection for the redress of any supposed public grievance, was always considered as an actual levying of war under the old statute

> All the prisoners were convicted on the count which the counsel for the defence is unable to understand.

Gentlemen of the jury, the prisoner is first of all charged with compassing, imagining, inventing, devising, and intending to depose the Queen from her style, honour, and royal name of the Imperial Crown of the United Kingdom. Have you any difficulty in understanding that charge? I will ask you this one plain and simple question, is it possible for any one to compass, imagine, or invent to deprive the Queen of the United King-Thistlewood and others had entered into dom of that portion of her dominions called Ireland, without deposing her from Kingdom if you establish a republic in existence of a Sovereign at all? If you establish a republic in Ireland, can Victoria And if a man compasses, intends, and devises to deprive her of that important part of her dominions, and to separate it from the rest of the United Kingdom, seeks to dismember the kingdom, to overthrow the Government as established in this country, and erect an independent republic, "one and indivisible," here; is it not a mockery to say to you, as men of intelligence, that that does not amount to an intention to depose the Sovereign from the royal name, style, and honour of the Imperial Crown of the United Kingdom?

Gentlemen, is not the other charge equally simple and as clear—the charge of intending to levy war for the purpose of constraining Her Majesty by force to change her measures or counsels? My learned friend asked over and over again "what measures and counsels?" We are not called upon to state precisely what measures or counsels. I say that if a man compasses and intends to levy war for the purpose of depriving Her Majesty of a portion of her dominions—if he compasses to levy war for the purpose of dismembering the kingdom-if he compasses to levy war for the purpose of overthrowing the Queen's Government altogether, in any part of her dominions, he comes clearly within the provisions of this Act-the compassing of the levying of war, in order. by force and constraint, to compel her or them to change her or their measures or counsels. What measures and counsels, let me ask, could she carry on in Ireland.

if Ireland were a republic f It was scarcely (rather surprised that my learned friend dealing fairly with you to attempt to defend should have misspent his energies, and this case, I would say, on grounds such wasted his time, in trying to establish a as these.

I am sorry to do so, to the topics I must, humble and feeble as I am prowhich my learned friend thought fit to test against as grossly illegal. Gentleintroduce in this case-topics which are men, are we in a court of justice? Are not only calculated not to throw any light | you empanelled there, under the existing inpon the subject, but rather to excite your imagination, to warp your judg- felony? Are the judges on the bench inments, and to call you away from the consideration of the real question, which you, upon your oaths, are bound to try.

My learned friend attempted to advocate the right of the people to resort to as established by law? That there was arms; he only went to this extent, that it at the time to which my learned friend. would be justifiable to attempt to procure Mr. Holmes, thinks fit to advert, an Irish the repeal of the union by force, to resist | Parliament and an English Parliament, I that which he called unjust aggression on do not deny: but they were both under that Act of Parliament which he has designated in terms which I will not repeat. But he did well to abstain from adverting to the evidence in this case: because although I do deny that position -and I am astonished that any constitutional lawyer, in any court of justice, should have advanced such a doctrineyet still I say, even if it were law, it has no application to the case of the prisoner whom he defended; because, gentlemen, my learned friend spoke to you of the blessings which would result from the restoration to this country of its own Parliament, and the expression slipped out, of a Parliament "under one common sovereign." Is that the object of the prisoner at the bar? Are the publications you have heard read expressive of any such intention on the subject? What becomes, which you have heard against the Act of not the prisoner at the bar repudiate it? Does he not deny and condemn, as ridiculous, the restoration of a common Parliament, under one common sovereign? Does he not treat it as mere idle humbug, and proclaim in terms no human being can misunderstand, that his object-his only object, is not the repeal of the Union, not the restoration of our Parliament "under a common sovereign," but the establishment of

" an independent republic, one and indivisible?"

Has my learned friend, notwithstanding his energy and zeal, ventured to go the length of that P He has attempted to justify what I think is unjustifiable, but he has not | fiable by force to procure an alteration in attempted to justify that with which the the law. Is every man to set up his own prisoner is charged; and I was, therefore, opinion?

doctrine which had not the slightest bear-Let me now advert, gentlemen, and ing upon the case before you, and which constitution, to try a person charged with vested with legal authority? Is Queen Victoria Queen of the United Kingdom, and are we her subjects? Gentlemen of the jury, what is the present constitution the liberties of Ireland, and to rescind one common sovereign. There was no republic even then. What is the case now? Is there not by the established law of the country one United Kingdom? My learned friend has forgot, or did not choose to go a little further back ; he might have looked a little further back, and have found that at one time England and Scotland were distinct and separate kingdome, but that in the reign of Queen Anne, a statute was passed uniting Scotland to England, and thenceforth England and Scotland became one United Kingdom, called Great Britain. And gentlemen, there were then Great Britain and Ireland baving separate legislatures, under one common sovereign; but both Parliaments thought fit to pass Acts uniting the two kingdoms; and from that moment the established law of both countries is this-that Great Britain and Irethen, of all the splendid declamation land form one United Kingdom, which is governed by one common sovereign, and Union, of the benefits which would result has one common legislature, and all parts from the repeal of that Act, and of the of the United Kingdom are represented in restoration to Ireland of her Parliament, one Parliament. It is not one country and her one common sovereign? Does | making laws for another; it is the Parliament of the United Kingdom making laws for all.

Gentlemen of the jury, is it here that we are to discuss the question, whether Ireland has or has not a proper number of representatives in that Parliament? What power have you, gentlemen, or my learned friend, or the judges on the bench, to decide that question? It is the established law of the land-the constitution is fixed and settled-and as you value the peace, tranquillity, and prosperity of your country, let me implore of you not to be misled by the energetic address of my learned friend, or induced to entertain. for a moment, the opinion that it is justi-

Holmes: I did not say every man; I | question is, or to find a verdict of guilty said the people.

Henn: My friend says not each man, but the people. What is it that constitutes the people? If you take every man in Ireland, as the constitution now exists, Ireland is but a portion of the United Kingdom, as Scotland or as York is; and, gentlemen, it is monstrous to say that any bility of any reasonable doubt. Deeply persons, no matter in what numbers, are as I might lament it for the sake of the justified in resorting to force to procure a change in the law. Resistance is a different thing. I do not deny that. In certain cases they may be justified in resorting to force, to resist an attempt to deprive them of their rights; but I say that it is utterly inconsistent with the constitution of this country, that the people, or any portion of the people, can resort to force to procure an alteration in the existing laws. Gentlemen, there would be an end of all law if that was the law. IIf the Union is to be repealed, it must not be by force.

Gentlemen, the evidence, in my judgment, does not tend to show that Mr. Mitchel sought by force to procure a repeal of the Union. But let us see whether he did not, by these publications. express an intent to depose the Oueen from the style, honour, and royal name of the Imperial Crown of the United Kingdom; and whether he did not intend to levy war for the purpose of constraining her by force to change her measures or counsels, and express those intentions by the publications that have been proved. I shall not trouble you by going through them all in detail, but I shall just call your attention to some parts of them, and I will venture to say this, that | when you come to consider them calmly, you will see that they not only do bear the construction which we put upon them, but that the prisoner himself would very little thank his learned counsel, if he denied that they did bear that very construction which, I think, you will be of opinion they do bear. It would be almost an insult to his honour to shirk from avowing at the bar what he has expressed in language more explicit than I could utter, in the very publications that will go before you.

[Counsel proceeded to review the evidence in detail.

You will have the whole before you, and if you can spell out anything that will take the sting out of it, if you enter-

if there was the slightest doubt that any reasonable or rational man could entertain. But I will affect no mock liberality; I will not profess any false humanity; I say sincerely. I do desire the conviction of a man charged with offences of this nature, if his guilt is proved beyond the possiindividual himself, there are interests here concerned of a much higher nature than the interests of any individual-gentlemen, the interests of the country are at stake. He says, gentlemen.

"He has only endeavoured to pursuade his? countrymen that they will never gain their liberties except by fighting for them."

Does that support the charge that he de-

vised the levying of war?
Gentlemen of the jury, I have nearly done. There is one topic which was introduced at the commencement of my learned friend's speech, upon which I shall just make one or two observations; and no more. He commented on the construction of the jury. I ask you this, when you are considering what Mr. Mitchel intended by those publications, when you, upon your sworn oaths, are considering did he publish those doctrines, did he compass and intend to depose the Queens or levy war to constrain her to change her measures, did he express those intentions in those publications-I ask you what aid you will derive, and how it will assist you in coming to a right conclusion. to know how many jurors were struck off. and how many were challenged? Would it not rather mislead you? Oan it assist you? And why should it be introduced?

Holmes: It was the Attorney General

who adverted to it.

Henn: The Attorney General repelled un attack that was made on himself per: sonally. But, gentlemen, with respect to the striking of the jury, why has it been adverted to at all P It is the undoubted law of the land, that a prisoner charged with felony is entitled to challenge twenty peremptorily; and it is equally the law of the land, that those acting on the part of the Crown are authorised to set by any number, unless the panel be exhausted; that they think are not proper persons to be empanelled. Gentlemen, the prisoner ! exercised his privilege, and properly. No one would ever impute anything to a pritain a rational doubt as to the guilt of soner for doing so, it is his right. But it the prisoner, God forbid he should not is the right equally on the part of the have the benefit of it. I do protest I Grown to set by persons; and we all know should deeply regret that in any case a | that there are a thousand reasons that jury should be influenced by any feeling may render it unwise and unsafe (sic) (not but that of simply fulfilling and discharg to set by jurors) without any impeaching their duty, of trying what the real ment on their moral honesty whatever.

Some men may be feeble, some timid I may say the entire of it, upon the conscious of guilt (though no man is prehonest verdict. But what motive can the alone. Grown have to exercise its power in that way? Why should not credit be given to an officer in the discharge of a painful duty that he is acting honestly and conofficers of the Crown thought fit to make a certain number stand by. Gentlemen, has nothing whatever to do with the question you have to try to-day, for we must come back to that; and you, upon your oaths, without reference to the numher that were struck off, without reference without reference to any of the topics in your room, after you have heard from the bench the law applicable to this case, you do really and seriously entertain a conscientious doubt, give the prisoner the benefit of it; if you do not, pronounce regardless of what the public may say upon

SUMMING UP.

satisfy the ends of justice, and, therefore,

those who prosecute for the crown.

great deal of this case will depend, indeed | eral, -the fact, which probably is the case

and some prejudiced; but what reason struction that is to be given to the docuon earth is there to suppose that those ments that have been laid before you in concerned for the Crown have any object evidence; and, gentlemen, it is my duty but this, to have the prisoner fairly tried? to tell you, that the construction of those can well conceive that a prisoner con- documents rests altogether and exclusively with you. The law has cast upon the jury dimed to be guilty until he is tried), might the responsibility and due discharge of exercise his privilege, and would have a that duty, and the law expects that you hight to do it, to set aside those jurors will discharge it to the best of your sense whom he thought would pronounce an and of your judgment, and upon that

Gentlemen, the Attorney General called your attention to the mode of the formation of the jury and the occurrences of vesterday. We would have felt it our cientiously? What motive can there be duty to have prevented any recurrence to but to have the law fairly administered? any such topic by the Attorney General, if And I would ask you, what would be the it was not that he himself had been in opinion of any sensible man as to the ad- some degree sought to be personally imministration of the law, if a prisoner was plicated in the formation of the jury; and permitted to put what men he pleased we thought it was but just and right that supon a jury, and the Crown were re- a man upon whom a personal imputation strained from exercising its privilege? had been sought to be cast, should be You have heard of the trial of the challafforded, or at least not stopped of the lenge to the array. The trial was whether opportunity, of viudicating himself from the panel had been fairly arrayed or not; any such imputation, if there was any and the Crown are reproached because the man in the community who believed that it was justly attributed. Gentlemen, that topic should be altogether dismissed from your consideration.

Another topic to which the Attorney General has alluded, and from which, I confess, I wish he had abstained, is, what he has called the notorious efforts made to the number that were challenged, and to intimidate the jury. If any such efforts have been made to intimidate the jury. I which you have heard urged this day on am unacquainted with them. If the the part of the defence—you will say upon Attorney General thought it was imporyour solemn oaths whether you do believe tant to give evidence of that kind, and that the prisoner intended either the de- thought he could make it legal, he of position of the Queen, or the levying of course was at liberty to do so. That topic war, for the purpose charged, and ex- also you will dismiss from your considerapressed either or both of those intents in tion; and if any efforts have been made the publications that have been read. If, before you came into that box, or since, after a fair and calm consideration of them I do earnestly trust and hope that you will treat them with contempt and disregard.

The counsel for the prisoner has also introduced some irrelevant topics. He began with expressing his opinion, and I your verdict accordingly. Satisfy your own find no fault with him for doing so, as to consciences, and go home with the sanc- the honesty and sincerity of his client; tion of an approving conscience, utterly but, gentlemen, let Mr. Mitchel have put forward those publications with the utmost sither side. No matter what the political honesty of purpose and sincerity of intenopinions, or the religious sentiments which tion, yet what has that to say if those pubhave been improperly introduced here of lications are in reality found to be a any person in the community; satisfy your violation of the provisions of an Act of own consciences, and I am sure you will | Parliament?

Mr. Holmes has also adverted to another extraneous and irrelevant topic-indeed I cannot find any great fault with him for doing so, because it sprang out of the con-MOORE, J.: Gentlemen of the jury, a cluding observations of the Attorney Gen(but although in court I was not aware of | that has but very recently come into the fact), that the Crown set aside no less operation. That Act is entitled than 39 individuals of those who were "An Act for the better security of the Crown on the panel; that topic, likewise, you ought to exclude from your consideration.

The party accused is allowed the privilege of challenging peremptorily 20 persons; he is not bound to assign any reason for the exercise of that power; and could anything in the world be more monstrously unjust than for the counsel for the Crown to get up and say—"Oh, he was so diffident of the justice of his case that he exercised his privilege and ohallenged twenty peremptorily"? Gentlemen. I do not believe there is a man in the land who would be capable of advancing such a proposition; I am sure if any one did he would, deservedly, be scouted out of court for it. Well, the law has given to the Crown a corresponding privilege of setting saide persons until the panel is exhausted; and why should it be made the subject of observation to the

jury Gentlemen of the jury, I should have been very glad if the very learned and able counsel for the prisoner had not been guilty of any greater irrelevancies than those to which I have adverted. But I regret to say that he has introduced a great variety of topics perfectly foreign and irrelevant to the questions you have to decide; and many of them topics which in no court of justice ought to have been allowed to be introduced. He has hibited by the Act of Parliament. And told you that Ireland is an enslaved it is not sufficient merely that there should country; he has gone into the history of the Union; he has gone into the history of the prisoner; but he must have gone of the country before the Union: he has denied the competency of the Irish Parlia. ment to pass an Act for the passing of the | ing, or in writing, or by open and advised Union. Gentlemen, let the Union be speaking. good, let it be bad, let the means by which it has been passed be right or proper, whether there was or was not corruption in passing that Act of Union, what has constituted as has been already put to you by the counsel for the Crownupon that? There is no issue in the case | the prisoner at the bar. at all resting upon any such subject; and I cannot account for my learned and able friend, the counsel for the prisoner, holding as high a position as any man ever did, resorting to such topics; because, gentlemen, when he concluded his speech he demonstrated to you, that he was unable to say one single syllable upon the publications which formed the subject-matter of this indictment.

Now, gentlemen of the jury, the prisoner at the bar is indicted for the violation of felt it my duty to call your attention to the provisions of an Act of Parliament | the evidence in support of the publication,

and Government of the United Kingdom."

And by the third section it is enacted.

"That if any person whatsoever after the passing of this Act shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most Gracions Lady the Queen, her heirs or successors, from the style, honour, or royal name of the Imperial Crown of the United Kingdom "-

if a man should do that, and express such compassing or intention by a publication in printing or writing, or by open and advised speaking, that in that case it would be felony contrary to the provisions of this Act. And, gentlemen, there is another portion of the Act which says, that if any man shall compass

"to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels:"

and shall also express that intent by any advised publication, in printing, or in writing, or by open and advised speaking, that man is also guilty of the offence provided for by this Act of Parliament. Now to constitute an offence under this Act of Parliament it will be necessary that two things should concur.

First of all there must be a compassing or an intention of one of the things prohave been such a compassing in the mind further, and have expressed that compassing and intention by publication in print-

The first thing you will have to inquire into is, has there been a publication by the prisoner at the bar-whether the two publications, the one of the 6th of May, and the other of the 13th of May-whether those documents, or either of them, are what has constituted this court, or you in | brought home, and are to be attributed the jury-box, as the tribupal to decide to, and considered, as the publication of

[The prisoner is the registered proprietor of The United Irishman; he signed the copies lodged at the Stamp Office; and other copies were purchased at the office of The United Irishman. I It therefore appears to me that there is no question raised; indeed, to do justice to the counsel for the prisoner, they have not sought to raise any question of the kind; but as the publication is a material and important fact in the present case, I have

and I think I am warranted in saying to papers. Therefore, gentlemen, if it was 13th May, whether he be innocent or whether he be guilty, are the publications of the prisoner at the bar, for the consequence of which, if they are bad, he is responsible.

Gentlemen of the jury, if that should be your opinion, one of the two ingredients necessary to constitute a crime is then fully established against the prisoner at the bar, namely, the publication of the two documents given in evidence.

Now, gentlemen of the jury, if you are satisfied of publication, do you collect from those documents, satisfactorily to your own minds, that the prisoner at the bar intended by them, either to depose Her Majesty, or to deprive Her Majesty of her imperial title, or to levy war against Her Majesty to compel her to change her measures or counsels?

The only evidence that has been laid before you as to the intentions of Mr. Mitchel, is the publications themselves. You, therefore, will have to take those publications into your jury-room; you will have to read them over from beginning to end with the strictest attention; you will not give a strained or forced meaning to any part of them, to the prejudice or to the benefit of the prisoner; you will not of course pervert any passage to do him mischief, nor pervert any passage to do him service. You will read those documents as if you were reading | Kingdom; and I shall call your attention, them in your chamber, and not in the in the first instance, to the passages in jury-room; you will say what are the the different publications which appear to impressions that they honestly and fairly me to hear upon that intent. Now before make on your minds and judgments; you | you come to the consideration of the paswill bring to the consideration of them sages that may more directly bear on the your best understanding, and having done point in question, it may be material and so, you will then be called upon to pronounce, upon your oaths, whether the the prisoner brings himself forward, and Orown has, or has not, put the right interpretation upon the documents they have given in evidence.

Gentlemen of the jury, there is in this case that very remarkable circumstance that probably never existed in any other be says this: case; certainly never existed in any case with which I am acquainted. The Crown has, in the indictment, attached certain meanings to certain passages contained in those publications. The Attorney General in his opening statement read to you the passages, and stated to you the out of the men that are bellowing there in the meaning which he thought those passages bore. The able counsel for the prisoner never once adverted to those publications. and never made a single observation for the purpose of showing that the Attorney General, either in the indictment, or in his statement, had put a married Robert Emmet's sister, and after the

you, that there is not one particle of doubt a case in which any thing would, or that those two publications of the 6th and ought, to be taken against, or to the prejudice of the prisoner, you have this remarkable fact, that the counsel for the prisoner, the first in the land, (a) has felt himself unable to offer to you any observations upon the contents of those documents, beyond stating that he did not understand the Act of Parliament; and he has not attempted to assign a meaning different from that which has been attributed by the Crown to them. That however ought not to determine this case, or influence your minds. The counsel for the prisoner has taken the course which he thought most beneficial to his client; but if he abstained from adverting to the purport and meaning of the publications in question, that is no reason why you are to take for granted, that the interpretation and meaning given by the Crown is the true and correct one. But before you come to the conclusion that that interpretation is the wrong one, you would, of course, satisfy your own minds, and see what is the other interpretation that can, or ought to be fairly put upon the documents which have been laid before you in

Gentlemen, the first intent that I would direct your attention to-and I think it would be proper to keep them distinctis the intent to deprive or depose Her Majesty from the style, honour, or royal name of the Imperial Crown of the United important to consider the light in which the general opinions that he thinks fit to promulgate in his own paper. And in the commencement of the first document, namely, the report of the speech which he is alleged to have made in Limerick,

"Mob law itself in Ireland is far better than Government law - that well-ordered and civilized system that slays its millions of human beings within the year. I tell you that rather than endure one other year of British dominion, I would take a provisional government selected street."

(a) See Dict. Nat. Biog. "Holmes, Robert." (1765-1859) where it is stated that Holmes for many years enjoyed the largest practice in the Irish Courts, and that he refused to take silk, or to accept the office of Solicitor-General. He wrong interpretation on either of those latter's rising was imprisoned as a suspect.

What is the ordinary and natural meaning, as we understand it, of a provisional government? Can you reconcile the existence of provisional government, in the sense in which it is used in this publication, with the existence of a Sovereign of the United Kingdom? Can there be any doubt to anybody, who does not shut his eyes and ears to what has been going forward in the world, that this reference is a reference to the provisional government that has lately taken place and been set up in a neighbouring country? You cannot but remember, the result of the establishment of that provisional government was the abolition of royalty, the destruction of the monarchy, and the deposition of the reigning monarch from his title, crown. and dignity; and you are to say whether or not, looking at this passage according to its fair and natural interpretation, that the man who avows his hatred to British dominion, and sooner than endure it for a vear, would take a provisional government, whether that does not of itself, almost necessarily and inevitably, imply the contemplation of certain events, by which a provisional government might be established, and the reigning monarch dethroned and deposed?

"Nor can I condemn the alternative put by Mr. Meagher, who says, when the last constitutional appeal shall be made, and shall fail,then up with the barricades and invoke the God of battles."

Now, what was the opinion of Mr. Meagher as expressed in that publication? Not that the barricades were to be piled up at once -not that the God of buttles was to be invoked at once-but that constitutional appeals were to be made, might still be made, and that until the last constitutional appeal was made, then, and not until then, the God of battles was to be better than that house. The time is long past invoked. But, gentlemen, see whether Mr. Mitchel, who says he does not condemn that doctrine, is satisfied with it. and whether he does not go considerably further. For he says:

"Can I repudiate this -- who hold that constitutional appeals are long since closed against us. and that we have even now no resource except when we have the means and the pluck to do it-the barricades and the God of battles?"

Why, gentlemen, he goes far beyond what Mr. Meagher had done. He fully approved of what Mr. Meagher had said, for he says he goes further-he says, there is no constitutional appeal remaining to be made; that that time has passed by; nothing now remains-"we have now no resource, except-when we have the means and the plack to do itthe barricades and the God of battles."

Well, gentlemen, he goes further, and

"Whatever has been done or said by the most disaffected person in all Ireland, against the existence of the party that calls itself the Government, nothing can go too far for me."

Gentlemen, we unfortunately know that there have been disaffected men in Ireland: that those disaffected men have gone to the full extent of high treason: and Mr. Mitchel tells you, in the most direct terms, that nothing that has been done, nothing that has been said by the most disaffected man in Ireland, that he does not go to the full extent of it. And said against what? Against the existence of the party which calls itself the Government. Why, gentlemen, what is the Government? It is not the minister of the day, according to the interpretation here used, that means the Government: but the Government to be collected from the meaning of the other portions of itthe Government of England, constituted of Queen, Lords, and Commons; and there is nothing that any disaffected man has done or said against the existence of that Government that does not meet with the full approbation of Mr. Mitchel.

Well, gentlemen, we come now to the next passage :

"I am here not as a Jacobin (which I am nor even as a Republicau (which I am not) simply and merely because I am a bitter and irreconcilable enemy to the British Govern-

He announces himself a Republican. .. Gentlemen, in the publication of the 13th of May, you will find this:

"I tell you frankly that I for one am not loyal. I am not wedded to the Queen of England, nor unalterably attached to the House of Brunswick. In fact, I love my own bard when Jehovah anointed kings. The thing has long since grown a monstrous imposture."

What has grown a monstrous imposture? In the preceding passage with respect to kings, he tells you he is not wedded to the Queen of England. He says afterwards, in the same passage, that "the time is long past when Jehovah anointed kings. The thing has long since grown a monstrous imposture Gentlemen, you are to say what is the thing that he there refers to; and if you believe that the thing is the sovereign royalty of Her Majesty, you then have him pronouncing that "the thing has grown a monstrous imposture,"

"and has been already in some civilized countries detected as such, and drummed out accordingly. A modern king, my friends, is no more like an aucient anointed shepherd of the

people, than an archbishop's apron is like the junconsciously, to one and the same illustrious Urim and Thummim. There is no divine right | goal." now but in the sovereign people."

6851

Well, gentlemen, the next passage says, " As for the institutions of the country." Now, what would you understand or mean by the institutions of the country? It would appear that the institutions of the country would be composed, among others, of what constituted the government of the country, of the Queen, Lords, and Commons; and he tells you, "As for the institutions of the country, I loathe and despise them." He then goes on

"Their last bour is at hand; and I thank God that I live in the days when I shall witness the utter downfall, and trample upon the grave of the most portentous, the grandest, meanest, and cruellest tyranny that ever deformed this

Gentlemen, you will have to say whether, if these passages stood alone, they do not furnish an inference, taken in their natural meaning, to support the intent that has been attributed to the prisoner at the bar.

The passage which I am now about to call your attention to appears to me to be the passage which is most deserving of

your consideration :

"It was easy to see that a vague feeling was upon them of the real meaning and tendency of all these meetings—of what all this must end in, and to what haven they, and you, and we, are all in a happy hour inevitably drifting together, my friends-the people's sovereignty.

That is what he alleged they were all drifting towards - "the people's sove-'reignty." Now, gentlemen, you will have to say whether you can reconcile with your own notions, with your own meaning and understanding of these expressions, that, when the prisoner tells you "you are all drifting to the people's sovereignty," he does not mean that sovereignty that would be in the people, exclusive of that sovereignty which, by cor constitution, is vested in Her Majesty.

"Give up for ever that old interpretation you put upon the word 'Repeal.' Repeal is no priest movement, it is no sectarian movement, it is no money swindle, nor ' Eighty-two' delusion, nor paffery, nor O'Connellism, nor Mullaghmest green-cap' stage-play, nor loud-sounding iuanity of any sort got up for any man's profit or praise. It is the mighty, passionate struggle of a nation hastening to be born into new national life; in the which unspeakable throes all the parts, and powers, and elements of our Irish existence-our confederations, our Protestant Repeal associations, our tenant-right societies, our clubs, cliques, and committees, amidst confusious enough, and the saddest jostling and

I ask you whether the plain import and meaning and inference to be drawn from that is not, that that constitution was to be abolished when the goal was accomplished, which would be the deposition of Her Majesty from her throne and crown.

-- "not a golden link, or a patchwork parliament, or a College-green chapel-of-ease to Saint Stephen's-but an Irish republic-one and

Now, gentlemen, you are to say whether the man who contemplates the occurrence of events to end in "an Irish republic, one and indivisible," that the various meetings were all tending to, and for the purpose of ending in "an Irish republic, one and indivisible," whether he did not necessarily imply the deprivation and deposition of Her Majesty from her imperial throne? There are no two things more inconsistent with each other-no two ideas more opposed to each other-no two expressions more contradictory to each other, than that of a republic to a monarchy; and any man who does arow his desire to compass and obtain a republic. must inevitably intend and imagine the deposition and destruction of the monarchy. The two things cannot combine; the destruction of one is involved in the existence of the other. And if, looking to the natural import, tenor, and meaning of the words used, you think that he did compass and intend to have a republic. there is necessarily and inevitably implied in that compassing an intention to deprive Her Majesty of her imperial throne.

Gentlemen, in adverting to the second branch of the indictment, namely, the intent to levy war against Her Majesty, for the purpose of procuring a change of measures and counsels, the counsel for the prisoner told you, in his able and eloquent address, that there were no particular measures laid in that indictment: that there had been no proof given of any particular measure or counsel which it was alleged Mr. Mitchel had an object in changing, or getting changed, by levying war against Her Majesty. Gentlemen, it is very true, but it is my duty to tell you, and I have the concurrence of my brother judge, that in point of law, in order to constitute the offence mentioned in this Act of Parliament, it was not necessary either to have specified in the indictment any particular measure or counsel which the levying of war was sought to affect: or, in point of proof, to give any evidence of any particular measure or counsel. I think upon plain principle and common sense, independent of authority, that that jumbling, are all inevitably tending, however would appear to be the case. A man

might compass and intend to levy war, | might publish that through every part of the land, but because he kept secret in his own mind and breast what were the particular measures he simed at in levying war-if the counsel for the prisoner was right -- then there could be no offence committed under the provisions of this part of the Act of Parliament. But, gentlemen of the jury, the Court has been referred to a case, a wellknown established case (Thistlewood's), in which the ablest judges of the land, convicted of high treason, upon an indictment | substantially the same as this, where the party was charged with levying war to make | liberties except by fighting for them. Her Majesty change her measures or counsels: and in that indictment there was no statement of a specific measure, and there was no specific evidence given of a specific measure; but the able judge, perhaps one of the ablest that ever presided in a court of justice, the late Lord Tenterden, both in his charge to the grand jury, and in his charge to the petty jury in summing up, never raised any question; nor did the counsel for the prisoner in that case ever raise any such objection as is raised by the counsel

for the prisoner on the present occasion. Now, gentlemen of the jury, I am going to call your attention to the passages in the two publications that have reference to the charge of compassing and intending to levy war. In the first publication of the 6th of May, there is this passage:-

"On the constituents of Smith O'Brien especially devolves this duty. While the British Parliament call his exertions 'treason,' and 'felony,' it is for his constituents to declare that in all this treason and felony he is doing his duty by them. And more than this, it is your duty further to prepare systematically to sustain him, if it come to that, in arms."

In order to constitute the crime that exists here, it is not necessary there should be an actual levying of war; it thing done for the purpose of the inception of the war; the mere compassing, and imagining, and intending to levy war, is the offence which the Act of Parliament thought fit to provide against.

Well, he goes on to say:

"May I presume to address the women of Limerick. It is the first time I have ever been in the presence of the daughters of those heroines who held the breach against King William; and they will understand me when I say, that no Irishwoman ought so much as to speak to a man who has not provided himself with arms."

Can this mean any thing else than a direction or an incitement lo every man to provide himself with arms, for the purpose of sustaining Mr. O'Brien in the charge of treason and felony P

"No lady is too delicate for the culinary operation of easting builets. No hand is too white to make up cartridges."

And then, he says:

"My friends, we have uo enemies here, save the British Government and their abettors."

Well, gentlemen, in the second publication, there is a short commentary on the publication in The Times, which appears also to bear on the present question :-

"Now, the fact is, the editor of the United Irishman is no here at all, and never said he was. He has only endeavoured to persuade his countrymen that they will never gain their

On the 6th May he had, if you believe the interpretation, devised, compassed, and intended that every man should be provided with arms; and he then tells them, that "he has only endeavoured to persuade his countrymen that they will never gain their liberties except by fighting for them." He avows that that was his object, and his intention, in the speech in question. And then he goes on to say:

"The only arguments the English Government will understand, are the points of pikes-that's all. And he continues to preach this saving doctrine, and will continue so to do, until a considerable number of his countrymen agree with him; and then he hopes to aid in enforcing the arguments practically.

Gentlemen, I come now to the publication of the 13th May, the second part, namely, the one addressed "To the Protestant farmers of Ulster;" and after that passage where he speaks of the one and indivisible Irish republic, and that they were hastening to that day when that event was happening, he says:

"And how are we to meet that day?-In arms, my countrymen, in arms. Thus, and not otherwise, have ever nations of men sprung to liberty and power. But why do I reason thus with you-with you, the Irish of Ulster, who is not necessary that there should be any lover have denied the noble creed and sentiments of manhood."

> Now here, gentlemen, be expressly refers to the day when there was to be the one and undivided republic, and on that day they were to meet in arms; and he repeats that twice. Gentlemen, in the next passage he says :

> " But I tell you the light has at length come to them : the flowery spring of this year is the dawning of their day; and before the corn fields of Ireland are white for the reaper, our eyes shall see the sun flashing gloriously, if the heavens be kind to us, on a hundred thousand

> Gentlemen, it will be for you to say, whether, in any portion of any one of those documents, there is any thing that can enable you, or could enable any man,

exercising honestly the use of his judg- | what he compassed and intended, in like ment, to say in those passages there was manner, you would be bound to give him not a compassing, an imagination, an in- the benefit of that doubt. But if, after a tention of levying war ?

Well, gentlemen, he follows that passage by saying:

"I will speak plainly. There is now growing on the soil of Ireland a wealth of grain, and roots, and cattle, far more than enough to sustain in life and in comfort all the inhabitants of the island, That wealth must not leave us another year-not until every grain is fought for in every stage, from the tying of the sheaf to the loading of the ship.

Why was it to be fought for? How is it possible for you to avoid coming to any other inference, from language of that kind, than that he had contemplated the people rising to arms, and that what he was compassing, imagining, and intending was, the levving of war?

Gentlemen, he then goes on :

"Will you not gird up your loins for this great national struggle, and stand with your countrymen for life and land? Will you, the the sons of a warlike race, the inheritors of couquering memories-with the arms of freemen in all your homes, and relies of the gallant republicans of Nivety eight for ever before your eyes-will you stand folding your hands in helpless 'loyalty,'-and while every nation in Christendom is seizing on its birthright "-

How ?

6891

[688

"With armed hand, will you take patiently your rations of yellow meal, and your inevitable portion of eternal contempt?"

Gentlemen of the jury, I have gone through, as I have felt it my duty to do, the various passages that bear also on that second intent. I have been enabled, and indeed it was my duty, perhaps, to have intimated the opinion that presses upon my mind as to the natural import and meaning of these expressions. I told you before, that you ought not to pay the slightest attention to any opinion that I have expressed or intimated, except so far so again; it must be by your own deliberate judgment, and the exercise of your own sound sense and reason, that this verdict is to be pronounced. Gentlemen, if you think, after a careful and deliberate revision and review of all those publications, you can safely and conscientiously come to the conclusion, that Mr. Mitchel did not intend both, or either, of the intents that have been attributed to him, you ought, gentlemen, without hesitation, to find him not guilty. If, gentlemen, you think that the intents are not clear; if you think they are ambiguous; if you think the expressions used are of a doubtful nature, and that conviction is | you agreed on your verdict? not brought home to your minds as to

careful review and revision of all the passages in these publications, to which a meaning has been assigned in the indictment, to which a meaning has been assigned by the counsel for the prosecution, and no opposite meaning has been attempted to be assigned by the counsel for the prisoner; if you come to the deliberate conclusion that they do sustain the allegations in the indictment, and that as honest men, in the exercise of your judgment, you can lay your hands on your hearts and say, we do think these expressions demonstrate the intent with which the prisoner at the bar is charged. I would not insult you for a moment, by fancying that honest men like you would hesitate in that solemn and sacred duty which has been intrusted to you, which you are bound to execute under the solemn obligation of an eath.

Foreman: May we have a copy of the indictment, my lord ?

Moore, J.: Certainly.

A copy of the indictment was handed

to the Jury.

Foreman: The indictment is laid in the parish of St. Thomas, and the publication appears to have been in the parish of St. Andrew.

Moore, J.: There is evidence of both ; the Custom House is in the parish of St. Thomas. Two papers were lodged in the Custom House, which is in the parish of St. Thomas; and two other papers were purchased in the parish of St. Andrew The lodging in the Custom House office would be as much a publication as the vending in the parish.

Clerk of the Orown : Here are the two copies that were got at the office, and the two that were lodged at the Custom House.

Sir C. O'Loghlen: I do not know whether the papers are to go up to the jury, or only the articles themselves. If they have as it concurred with your own. I tell you a printed copy of the indictment I should think that is enough.

LEFROY, B.: I think you are right in that, Sir Colman.

At twenty minutes past four the jury

At ten minutes to six, the judges sent the sheriff to inquire whether the jury had agreed on their verdict.

After a short time the sheriff returned and stated, that the jury had not agreed. but that there was a probability of their doing so.

At ten minutes to seven the jury came into Court and answered to their names. Clerk of the Crown: Gentlemen, have

Foreman: We have.

6931

Clerk of the Crown: How say you, is the | you were put upon your trial, and upon prisoner guilty or not guilty ?

691]

Foreman: Guilty. LEFROY. B.: Let the prisoner stand by till to-morrow.

Saturday, May 27, 1848.

Mitchel. John Mitchel, have you anyshould not be passed upon you?

your sentencing me to any punishment.

protection of the Court.

to sentence being passed on me.

high sheriff, I must, in justice to him. state to be most unwarranted and un- them on the face of the indictment. Upon founded-not upon my own judgment, but | this evidence, thus furnished by yourself, upon the verdict of two indifferent triers | the jury have found you guilty. With on their oaths, empanelled, chosen, and that verdict, therefore, however you may appointed to examine into the very sub- be advised, or think yourself justified in ject and question whether the panel was calling it the verdict of a packed jury, impartially and legally ordained and and thus imputing perjury to twelve of framed. They, upon their oaths, have your countrymen—deliberate and wilful found that it was, and therefore the sheriff. far from being subject to the imputation that has been cast upon him, has only done his duty as became him. [Addressing the prisoner] —John Mitchel—I cannot at the outset but express the feelings of regret, in which I am sure my brother judge participates, to see a person in your condition standing at that bar under the circumstances in which you are now placedyou have been found guilty upon an indictment which charged you with feloniously compassing, imagining, and intending to deprive the Queen of the style, honour, and royal name of the Imperial Crown of the United Kingdom; and with purposes and intentions, by publishing a certain writing in a public newspaper, published by you, called the United Irishdetail. There are other counts in the indictment, of which you have also been found guilty, of a felonious intent and purpose to levy war against the Queen, manifested by a publication made by yourself, in the same newspaper and under the same circumstances stated in the former counts. These are the charges upon which

which the jury have found you guilty. The evidence was furnished by yourself, publications coming out of your own hands, deliberately published at an interval of time which gave you full leisure and opportunity to consider what you Clerk of the Crown: Put forward John were about, and to reflect upon what might be the consequences of your own thing to say why the sentence of the Court acts. The case turned upon the meaning and interpretation of these publications; Mitchel: I have I have to say, my that meaning and interpretation was lord, that I have been found guilty by a equally furnished by yourself, and came packed jury—by the proceedings of a par-tisan sheriff—by a jury not empanelled themselves have done. The meaning and according to the laws even of England- intent was collected from the language of empanelled, not by a sheriff, but by a the publications themselves; not confined juggler. That is the reason why I object to to one, but to be collected from the successive publications, so as to leave no High Sheriff: My lords, I claim the doubt upon the words interpreted by yourself, as to the meaning and intent of these Mitchel: That is the reason why I object | publications. The very able and learned counsel who defended you was not able to LEFROY, B.: The imputation cast on the offer any other interpretation, any other meaning, than that which was assigned to perjury---

Mitchel: My lord, I did not impute perjury to the jury-I beg your lordship's

LEFROY, B.: I understood that you had stated in arrest of judgment that you had been found guilty by a packed jury.

Mitchel: I did.

LEFROY, B.; Well, I shall make no further observation upon that; but I owe it to the jury to state, that upon the evidence, furnished thus by yourself, no juror who had the slightest regard to the oath he had taken, could, by possibility, have come to a different conclusion. What ground of doubt was even suggested with uttering and giving publicity to those respect to the fact of the publication by yourself, or with respect to the interpretation and the meaning of these publications? As I have observed not even man. Those publications are set forth in your own able counsel was able to suggest a doubt or a meaning different from what is imputed to them-no, not even to suggest an apology, or at least an apology which could be attended to in a court of for the purpose of compelling her, by force justice-but an apology amounting to and constraint, to change her measures this, that you had a right to violate the and counsels, and that those felonious intents and purposes were published and lishing your guilt of the offence stated upon the face of this judictment, even you yourself cannot fairly quarrel.

And now, what is the nature of the offence of which you have been thus found

guilty? I will not say the greatest, but | published, deliberately, this first article, it is next to the grentest offence—it is upon which so much has been already near akin to the very greatest offence said, that it is quite unnecessary for me to which any subject can be guilty of to- recall or reiterate the highly objectionable wards his sovereign, or towards his passages it contains to sustain both the country. By the law of England, up to a one count and the other. late period, the offence you have been found guilty of, was high treason. At the present moment, both in England and Ireland, it is a treasonable felony; and I cannot but hope and trust, that notwithstanding the deliberate perseverance in the course, which, unhappily you have has been effectually withdrawn destroyed. been pursuing-I cannot but hope and and done away with in the second. The trust that you may yourself one day or second publication, which was at an interother be struck with the awful conse- val of another week, leaves it utterly imquences, the awful results, to which that possible for the greatest stretch of course must of necessity have led, if it had | ingenuity, or the greatest perversion of not been checked in its progress. Surely, interpretation to protect you. On the to use your own language, "a provisional government taken from a howling mob" -surely a "practical enforcement of an monarchy, and to establish in its place a argument sustained by a hundred thou- republic in the country. To render defisand pikes," must have been attended nite what was vaguely expressed, perhaps with the most desolating and appalling in the first, what might have been, and consequences to your country. Surely, surely, that must have been the result.

of this crime, look at the circumstances connected with it. I will not go into any extraneous circumstances, but look at the circumstances which were brought before the Court, and to which we could not shut our eyes, connected with this offence. It originated in a speech. Well, great allowance might be made for a speech delivered under excitement; and though the time and the place were badly chosen, upon an occasion where excitement would do more mischief, perhaps, than upon a going to speak plainly, in this second more sober occasion, however, if it had rested upon that, there might be great allowance and great apology. But, after time for deliberation, you thought fit to publish that speech, so full of exciting and objectionable matter, so charged with these felonious compassings and intentions, which are here stated upon the face of the indictment; you thought fit, after deliberation, to publish it, to take away from it all the apology of momentary excitement, and to take away from it all the apology of limited effect; you put it into a position calculated to give it circulation through every corner of the land, to diffuse the poison through every excitable mind in the whole country. The law makes, even upon the matter of high treason, a great distinction; it does, indeed, in every branch of it, make a great distinction between words spoken and words published. You have deprived yourself of every mitigation which the law allows, and of every favourable distinction which it has established as be-

But upon comparing the two publications, the first of the 6th of May, and the second of the 13th of May, this observation arises, that whatever possible mitigation might arise from the tenor of the first, or from any thing occurring in it. second the charge is (you have expressed it vourself,) of intending to overthrow the would, no doubt, if the case had rested on that alone, have been a circumstance of Well, then, independently of the nature | mitigation, at least some apology for that publication, that you have in it disclaimed the intention of a war of plunder or assassination; in the first you have disclaimed that, and it would have been a disclaimer which would have been to your credit and advantage if you had left it to be made use of on your behalf. But what appears in the second, from the man who disclaimed a war of plunder, or a war of assassination? He tells his countrymen, and he tells it by a preface that he is publication that—

"There is growing on the soil of Ireland a wealth of grain, and roots, and cattle, for more than enough to sustain in life and in comfort all the inhabitants of the island. That wealth must not leave us another year- not until every grain of it is fought for in every stage, from the tying of the shenf to the loading of the ship; and the effort necessary to that simple act of self-preservation will, at one and the same blow, prostrate British dominion and landlordism together."

Now, how is it possible that advice could be acted upon in any way that must not of necessity have led to plunder and assassination, to the violent taking by force and arms the property justly belonging to others, or withholding it from them by force and violence by the use of arms?

Thus it is, then, that you appear from one stage to another to have advanced in a bold, deliberate, determined opposition to the law, in language more and more unmeasured, and more and more mischievously exciting. I express myself not, tween words spoken and published. You at least it is not my purpose, to hurt your

feelings, but merely to discharge the duty; has corrected the view that I was taking which is now cast upon the Court to admeasure, in proportion to the nature of correction-I shall say no more upon it. the crime, the punishment which it may be our duty to inflict. It is, therefore, from the possible suspicion that we could that I have of necessity stated strongly sit here and acquiesce in a line of defence those passages of the publications, and the manner of them, and the perseverance of them, and the deliberation of them, as the grounds by which we are bound to measure our judgment, and to discharge the solemn duty which we owe to the law, to the public, and to the peace and welfare of the country.

But has there been attempted, in the the course of this trial, any explanation, any interpretation, any apology for these publications, or any thing tending to show, or to raise a doubt upon their bear-

them by the indictment?

in your defence, we desire it, and I from the observations which I meant to especially desire it to be understood, that have confined to your own case, by referthe observations I am about to make, and ence to a subject which I did not think I in which I am following up some of the could avoid adverting to after what had observations in the charge of my learned passed yesterday. But to return to your brother, in every word of which I concur; own case: I wish you to understand, that but in the observations I am about to we have with the utmost anxiety, and make upon the line of defence that was with a view to come to a decision upon adopted -- I make them not now to aggra- the measure of punishment which it is our vate in the least, the punishment which duty to impose in this case, postponed it may be our duty to impose, any more passing the sentence until this morning. than he did to aggravate the case before We have examined it with the utmost the jury—but I make the observations in deliberation, and with the utmost anxiety respect to the line of defence that was to duly discharge the duty we owe to the taken for you, to mark its irrelevancy; prisoner, of not awarding a punishment and that the Court might not appear to beyond the just measure of the offence; acquiesce in that line of defence, we felt as well as the duty we owe to the Queen, it our duty, though not to put a stop to it, and to the public, that the measure of to interpose with a view to reprobate and to check it as a line of defence, which, in carry with it the effect of all punishment, our judgment, was not warranted by the privilege given to a prisoner for his de- upon the individual, but the prevention of fence, and which, as was too plainly crime—that the punishment should carry shown, was as injudicious as it was in- with it a security, as far as possible, to jurious to the prisoner. No interpretation the country, that one who appeared so was offered, no meaning was ascribed, no perseveringly, and so deliberately a vioeffort was made, in the least, to show that later of the law, should not be permitted you were not guilty in the sense imputed to continue the course he had entered by the indictment. The line of defence. not only impliedly, but expressly stated. that although you might be statutably guilty, yet that you were justified in what you did. The Court, though we did not with a view to all these considerations, interpose to put a stop to that line of defence, yet we cannot but desire -

Holmes: What I said, with the greatest respect, my lords, was, though the prisoner was statutably guilty, he was not, in

my opinion, morally guilty. LEFROY, B.: I should be very glad indeed to find that I had mistaken altogether the drift of that defence; I should be very glad to find that I had mistaken it alto-

of it, I am exceedingly glad to adopt his I only adverted to it to absolve the Court which appeared to us at the time, very little short-though not involving the prisoner in a participation of it-but yet taking a line of defence which amounted very nearly to matter as objectionable as that for which the prisoner stood at the bar.

Holmes: My lord, I am answerable for that under the Act of Parliament (cheers). LEFROY, B.: Mr. Sheriff, it is strange, the number of police I see in Court can-

not keep order.

High Sheriff: Police, if you see the slightest ebullition of feeling from any ing the interpretation that is put upon person, remove him from the Court.

LEFROY, B.: No, but make a prisoner of Now, in adverting to the course taken him. I have been somewhat withdrawn punishment should be such as should which is not the infliction of suffering upon, for the disturbance of its peace and prosperity; that it should have time, if possible, to recover from the infliction which that course had imposed upon it; and to the magnitude of the crime; taking also into consideration that, if it had not been the first adjudication upon the Act, we might have felt ourselves obliged to carry out its penalties to the utmost extent; still taking into consideration that this is the first adjudication, though the offence is as clearly proved, and is as enormous as it can be anticipated almost that any offence of the kind can be proved to gether; and so far as the learned counsel be hereafter, the sentence of the Court is,

that you be transported beyond the seas | from the efforts of his friends to shake for the term of fourteen years.

On the motion of the Attorney General the judgment was entered separately on each count.

Mitchel: May I address a few words to the Court?

LEFROY, B.: Certainly.

Mitchel: The law has now done its part. and the Queen of England, and the Crown and Government in Ireland are now secure, pursuant to Act of Parliament. I have done my part also. Three months ago, I promised Lord Clarendon, and his Government in this country, that I would provoke him into the courts of justice, as places of this kind are called; that I and perhaps, under this late Act of Parliawould force him, publicly and notoriously, to pack a jury against me, to convict me. or else that I would walk a free man out of this court, and provoke him to a contest in another field. My lord, I knew I was setting my life on that cast; but I knew in either event the victory should be to say every thing I did say; and I say with me; and it is with me. I presume now, after deliberation, with respect to neither the jury, nor the judges, nor any other man in this court imagines that it is a criminal who stands in this dock. I have shown what this law is made of in Ireland—I have shown that her Majesty's Government sustains itself in Ireland by packed juries-by partisan judges-by perjured sheriffs-

LEFROY, B.: The Court cannot sit here to hear you arraign the jurors of the country, the sheriff of the country, the administration of justice—the tenure by which the Crown of England holds this country. It cannot sit here and suffer you to proceed thus, because the trial is over: every thing that you had to say, previous to the judgment, the Court was ready to hear, and did hear as much as you pleased to offer. It cannot suffer you to sland at that bar to commit, I must say, very nearly a repetition of the offence for which you have been sentenced.

Mitchel: I will not say any thing more of

that kind-but I wish to say this, my lord-LEFROY, B.: Any thing you wish to say we will hear; but I trust you will keep yourself within the limits which even your own judgment must suggest to you.

Mitchel: I have acted in all this business. from the first, under a strong sense of duty. I do not repent of anything I have done; and I believe that the course which I have opened is only commenced. The Roman, who saw his hand burning to ashes before the tyrant, promised that three hundred should follow out his enterprise. Can I not promise for one --- for two -for three -aye, for hundreds? ---

LEFROY, B. : Officer, remove the prisoner. IThe judges left the bench, and the prisoner was removed, great confusion arising | Dict. Nat. Biog. Art., " Mitchel, John."

hands with him.(a)

The Court having resumed, Thomas Francis Meagher and Mr. Doheny, a barrister, were committed for contempt in disturbing the proceedings, but were re-

leased after an apology.]

Holmes: Now that peace is restored, which I hope will long continue, in consequence of some observations which fell from his lordship, and which his lordship had a perfect right to make use of, I merely wish to say this; that what I said vesterday, and every thing I said vesterday, I adopt this day as my own opinions and sentiments. I avow that advisedly: ment, her Majesty's Attorney General, if 1 have violated the law, may think it his duty to proceed against me in that way. But if I did not violate the law in any thing I said, I must, with great respect to the Court, say, that I had a perfect right England, and the treatment of England tothis country, that those are my sentiments, and I avow them openly.

LEFROY, B.: Clerk of the Grown, call on the next case.

MATERIALS MADE USE OF .- The report of the preliminary proceedings is taken from 3 Cox. C.O. I and from the Freeman's Journal and Dublin Evening Mail; the report of the trial from the official report printed for private circulation.

(a) A scene of the utmost confusion here took place in consequence of a number of the prisoner's friends rushing to the bar to shake hands with bim. The exact object not being known, the police, by the direction of the sheriff, ran towards the dock lest an attempt should be made to rescue Mr. Mitchel, and in the course of the scutte Mr. T. F. Meagher, Doheny and others, were arrested

for contempt of court .- Evening Mail. At four o'clock on the same afternoon Mitchel was removed in irons and under an armed escort. to the North Wall, Dublin, and put on board the Shearwater a man-of-war, which conveyed him to Spike Island. He was thence removed to the hulks at Bermuda. In 1849 ho was transferred to the Cape, but the colouists having refused to allow convicts to land, he was sent to Van Dieman's land, from which he escaped in 1858. See "Jail Journal," by John Mitchel, New York, 1854. In 1874 Mitchel returned to Ireland, and in February, 1875, was elected member of Tipperary, but the seat was declared vacant by resolution of the House of Commons. He was again returned, but died shortly after, March 20. 1875. On May 26, 1875, the Court of Queen's Bench in Ireland decided that Mitchel being an alien, and not having served his sentence for felony, was incapable of being elected, and awarded the seat to his opponent, 9 J.R.C. L. 219. See "Life of John Mitchel," by W. Dillon, and

(vii)

108 F. 805, *; 1901 U.S. App. LEXIS 3826, **

WRIGHT et al. v. UNITED STATES

No. 978

Circuit Court of Appeals, Fifth Circuit

108 F. 805; 1901 U.S. App. LEXIS 3826

April 30, 1901

PRIOR HISTORY: [**1]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants appealed a decision from the Circuit Court of the United States for the Eastern District of Louisiana, which overruled defendants' demurrers to the government's indictment for conspiracy to defraud the United States of the title and possession of land.

OVERVIEW: The government issued an indictment against defendants that charged a conspiracy by defendants to defraud the United States. Defendants objected to the indictment by demurrer, which the circuit court overruled. Defendants appealed, and the court affirmed the circuit court's decision. The court held that the government's indictment against defendants for conspiracy was not insufficient because it clearly informed defendants of the nature and cause of the accusation and did not prejudice defendants. In addition, the court held that no one who read the indictment could have come to any other conclusion than that defendants did conspire together to defraud the United States.

OUTCOME: The court affirmed the circuit court's decision to overrule defendants' demurrers to the indictment for conspiracy brought by government.

CORE TERMS: indictment, conspiracy, conspire, murder, confederate, combine, unlawfully, common law, imperfection, defraud, amongst, commit, criminal pleading, demurrer, aforethought, prepense, malice, district attorney, concerted action, matter of form, construing, set forth, new trial, accusation, killing, sworn, interrupted, overruling, dictionary, prejudiced

LexisNexis(TM) HEADNOTES - Core Concepts - + Hide Concepts

- Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy HN1 1 If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than \$ 1,000 and not more than \$ 10,000, and to imprisonment not more than two years. U.S. Rev. Stat. § 5440.
- Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy HN2 ± A conspiracy to defraud the United States of the title and possession of large tracts of lands by means of false, feigned, and fictitious entries of lands under the homestead laws is a conspiracy within U.S. Rev. Stat. § 5440.
- Criminal Law & Procedure > Accusatory Instruments > Indictments HN3 to indictment found and presented by a grand jury in any district or circuit or

other court of the United States shall be deemed insufficient, nor shall a trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of a defendant. U.S. Rev. Stat. § 1025.

- Criminal Law & Procedure > Accusatory Instruments > Indictments

 HN4 While a defendant should be clearly informed in an indictment of the exact and full charge made against him, yet no defect or imperfection in matter of form only, including the manner of stating a fact, which does not tend to his prejudice will vitiate the indictment.
- ☐ Criminal Law & Procedure > Accusatory Instruments > Indictments

 HN5 ★ Where no one reading an indictment could come to any other conclusion in regard to its meaning, an indictment is good enough.
- Criminal Law & Procedure > Trials > Defendant's Rights > Right to Remain Silent > Prosecutor's Comments on Defendant's Silence
- The act of Congress which permits a defendant at his own request to be a witness provides that his failure to make such request shall not create any presumption against him. 20 Stat. 30, ch. 37. To prevent such presumption being created, no hostile comment on the defendant's silence should be permitted in argument before the jury. Any allusion by counsel to the fact that the defendant on trial has failed to testify is improper. The trial court should promptly stop any comment or allusion to the failure of a defendant to testify as a witness. Where such comment is made, and, on objection by the defendant, the court fails or refuses to interfere, and evinces no disapprobation of the course of counsel, and gives no instruction to the jury to remove the probable impression of such comment, the defendant, on writ of error, would be entitled to a new trial.

COUNSEL: Girault Farrar and John D. Rouse (Wm. Grant and Rufus E. Foster, on the brief), for plaintiffs in error.

W. W. Howe, U.S. Atty. (Charles P. Cocke, Asst. U.S. Atty., on the brief).

OPINIONBY: SHELBY

OPINION: [*808] Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, delivered the opinion of the court.

Did the circuit court err in overruling the demurrers to the indictment? At common law a conspiracy was the combination of two or more persons to do something, the act to be done, or the means of doing it, being unlawful, or, as more elaborately expressed, a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful, by criminal or unlawful means. There are no common-law offenses against the United States. We therefore look for a statute to sustain every indictment in a federal court, though we often look to the common law for aid in construing the statutes. The indictment in this case is for conspiracy. In some of the counts a conspiracy to defraud the United States is charged, [**2] and in others a conspiracy to commit an offense against the United States. The indictment is framed on the following statute:

HNITHII two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years." Rev. St.

U.S. (2d Ed.) § 5440.

The indictment charges a conspiracy by the defendants to defraud the United States of the title and possession of large tracts of land by means of false, feigned, and fictitious entries of lands under the homestead laws. It is settled by the supreme court that HN2 such a conspiracy is within the statute. Dealy v. U.S., 152 U.S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545. Several of the counts in the case at bar follow substantially the indictment set out in the Dealy Case, where a conviction was sustained. The indictment here differs from the Dealy indictment in the words used to charge the conspiracy. There it [**3] is charged that the defendants "did falsely, unlawfully, and wickedly conspire, combine, confederate, and agree together and among themselves to defraud the United States," etc. Here the charge is that the defendants (naming them) "unlawfully did conspire to defraud the United States," etc. The learned counsel for the defendants point out the alleged defects in the indictment in this case, so that their contention is made clear. They assert:

"The indictment is without precedent. Wharton furnishes the most approved form of an indictment for conspiracy. The charging part is that the defendants 'fraudulently, maliciously, and unlawfully did conspire, combine, [*809] confederate, and agree together, between and amongst themselves,' etc. 2 Precedents of Indictments and Pleas, No. 607. The English form, as furnished by Archb. Cr. Prac. & Pl. p. 1048, is, 'did amongst themselves unlawfully conspire, combine, confederate, and agree together,' etc. 'Did unlawfully conspire, combine, confederate, and agree together,' is the language of Crown Circuit Companion, 267. The form furnished by every writer on criminal law is substantially the same, and so is that found in every reported [**4] case, where the form appears, that has been examined by us. In all of them the charge is that the defendants did 'confederate and agree together,' or 'between and amongst themselves.' Here it is not averred that the defendants 'confederated or agreed together,' or 'between and amongst themselves'; neither is there any allegation of concerted action alleged, nor any agreement for concerted action of any kind whatever."

In another argument other counsel for the defendants say:

"We challenge the citation of a single specimen indictment in any reported case or book of forms or treatise on criminal pleading, in which a conspiracy is sought to be charged without some once or other of the connective or conjunctive prepositions, 'with,' 'among,' 'between,' 'amongst,' or 'betwixt,' or the adverb 'together,' or the phrase 'each other' preceded by a conjunctive preposition."

An examination of the form books will sustain the contention of counsel that it is usual in charging a conspiracy to use other verbs with the word "conspire," such as "combine" and "confederate" and "agree," and also that it is usual to follow such words, especially the word "agree," by the words "between and among [**5] themselves," or similar words. After stating that such words as the foregoing are appropriate to describe the offense, it is said in Wright, Cr. Consp. (Carson) 187, "But others of the same import are equally proper." The statute on which the indictment is framed uses only the word "conspire," --"if two or more persons conspire." Rev. St. U.S. § 5440. In numerous acts of congress providing for the punishment of conspiracies the same, or substantially the same, language is used. Rev. St. U.S. §§ 5336, 5406, 5407, 5508, 5518, 5519, 5520. These acts show that the word "conspire" is used by the congress as being sufficient to show combination or confederacy, as equivalent to "agree among themselves." In so using the word congress is sustained by the dictionaries and by the best usage. Webster's Dictionary defines "conspire": "To make an agreement, especially secret agreement, to do some act; as to commit treason or a crime, or to do some unlawful deed; to plot together." And the following example is given: "You have conspired against our royal person.' Shakespeare." Another definition is given as follows: "To concur to one end; to agree." And the following example is given: [**6]

"'The press, the pulpit, and the stage Conspire to censure and expose our age.'

Roscommon."

In the Century Dictionary we find the following definition of "conspire":

"(2) To agree, by oath, covenant, or otherwise, to commit a reprehensible or illegal act; engage in a conspiracy; plot; especially, hatch treason. 'The servants of Ammon conspired against him, and slew the king in his own house.' 2 Kings, xxi. 23. 'The very elements conspire * * * against him.' Cowper, The Task, ii. 139."

When congress enacted that if two or more persons "conspire to defraud the United States," etc., it used the word "conspire" as it is [*810] used by English writers and speakers, and it would have added nothing to the meaning of the act to have added the word "together," or the words "between themselves." The same may be said of the indictment. To charge that the three defendants (naming them) "did conspire" means that they agreed together or among themselves. While other verbs may be used, the verb "conspire" is certainly the most appropriate to charge a conspiracy. It is not necessary to use other words that are synonyms. While it is true that, along with the phrase "with force and [**7] arms," we find in the common-law precedents the word "conspire" accompanied by "confederate, combine, and agree amongst themselves," yet we are cited to no case to show that the word "conspire" would not be sufficient of itself. Forms taken from text-books, or precedents copied from forms, are alone cited as showing the indictment insufficient. If it be conceded that the indictment does not follow the usual and established forms, would that make it subject to demurrer? There is a statute to be considered in this connection:

**No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." Rev. St. U.S. (2d Ed.) § 1025.

The omission of words that would add nothing to the meaning of an indictment seems so clearly a defect of form only that the application of this statute is apparent. The alleged defect, however, is insisted on with such earnestness that it may not be improper to cite some of the cases construing [**8] this curative statute:

In <u>U.S. v. Rhodes (C.C.) 30 Fed. 431, 434, Mr. Justice Brewer, then circuit judge, construing this statute, said:</u>

**While a defendant should be clearly informed in the indictment of the exact and full charge made against him, yet no defect or imperfection in matter of form only -- and this includes the manner of stating a fact -- which does not tend to his prejudice will vitiate the indictment."

In U.S. v. Chase (C.C.) 27 Fed. 807, Mr. Justice Gray said:

"The first two objections taken to it [the indictment] are that the letter alleged to have been deposited in the mail is imperfectly described, and that the allegation that the defendant knowingly deposited an obscene, lewd, and lascivious letter is defective, because, construed by the technical rules of criminal pleading, the averment is only that the defendant knowingly deposited the letter, and not that he knew its character. * * * But both these objections relate to defects or imperfections in matter of form only, not tending to the prejudice of the defendant, and therefore, under section 1025 of the Revised Statutes, affording no ground for a motion in arrest of judgment after a plea of guilty." [**9]

Judge Lowell, in U.S. v. Jackson (C.C.) 2 Fed. 502, 504, construing this statute, said:

"I have held that a particular intent, which made an act a crime by the words of a statute, is part of the substance. On the other hand, mere mistakes, however serious, in

expressing the substance of a crime, if the meaning can be understood, I look upon as formal."

In U.S. v. Jolly (D.C.) 37 Fed. 108, 111, Judge Hammond said:

"The last objection is that the second count should be complete within itself, and should not refer to the other count in aid of its averments. That [*811] is undoubtedly the best form of good pleading. Whether a count drawn as this is could be sustained at common law is very doubtful. Perhaps it could not, and there seems to be authority both ways. But our Revised Statutes (section 1025) forbid us to quash the indictment for that defect of form, as I think this clearly is; and we must therefore amend it by overlooking the defect, and reading the averments as if the words of the first count referred to as describing the warrant were inserted in this second count itself. It is not a technical amendment, but amounts to the same thing."

In Connors v. U.S., [**10] 158 U.S. 408, 411, 15 Sup. Ct. 952, 39 L. Ed. 1034, Mr. Justice Harlan, referring to defects in an indictment, said:

"Nor, if made by demurrer or by motion and overruled, would it avail on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the court to require a more restricted or specific statement of the particular mode in which the offense charged was committed. Rev. St. § 1025. There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he was in doubt as to what was the precise offense with which he was charged."

A defendant, of course, has the constitutional right to be informed of the nature and cause of accusation against him. No statute could make valid an indictment that deprived him of such right. But it seems to us that it cannot be doubted that this indictment fully informed the defendants of the nature and cause of accusation. When it was charged that they "conspired" to defraud the United States, the indictment setting out the nature and purpose of the conspiracy, they must have understood that the criminal agreement charged was among themselves. No other [**11] person was named. The language is that William H. Wright, A. S. Cornet, and Robert H. Cox "did conspire." No other word was needed to show the alleged members of the conspiracy. It meant that they had agreed together. To apply the language of Mr. Justice Peckham, HN5 no one reading the indictment could come to any other conclusion in regard to its meaning, "and when this is the case an indictment is good enough." Price v. U.S., 165 U.S. 311, 315, 17 Sup. Ct. 368, 41 L. Ed. 729. We think that the circuit court did not err in overruling the demurrer to the indictment. So far as it is necessary to protect the real rights of defendants, we cannot adhere too closely to the technicalities of the old common-law practice; but in matters of form, not involving substantial rights, the rigor and technicality of such practice "must yield to the more enlightened jurisprudence of the present." U.S. v. Clark (C.C.) 37 Fed. 106.

We next consider the assignment of error based on the argument of the United States attorney. We cannot more briefly state the point than to quote the entire incident complained of, as it appears in the bill of exceptions:

"The United States attorney, prosecuting in its [**12] behalf, in making his closing argument before the jury recalled and analyzed from his notes the testimony of a large number of witnesses for the prosecution, and also analyzed and criticised the testimony of one of the defendants, William H. Wright, who at his own request had taken the stand and testified on his own behalf, and then, proceeding with his address, said: 'Neither Cox nor Cornet has taken the stand in this case -- Whereupon counsel for defendants Cox and Cornet interrupted him before his sentence was concluded, and objected to his making any comment upon the fact that the defendants named had not testified in their own behalf. The United States attorney then continued: 'I have not made a single comment yet. I have not a right to make a comment, [*812] and I do not propose to make a comment, upon the fact that they did not testify. The counsel for the defendants cannot guess what I was going to say. I say that these defendants sat like graven images and

made no explanation whatever,' -- when counsel for defendants again interrupted him and made objection, when he added, 'by calling other witnesses on their side.' The court said: 'The line is very clearly drawn [**13] in such cases, and it is this: As has been stated by the district attorney, he has no right to comment -- he did not comment -- upon the fact that the two defendants did not take the stand; but he has a perfect right to discuss at any length the fact that they did not call witnesses or produce evidence to discredit the government's case. Any reference made to their not taking the stand themselves is not proper, but a reference to their not calling witnesses to testify in their behalf is proper.' The United States attorney continued: 'I have not commented, and do not comment, upon the fact that these defendants did not get upon the stand. I have no right to do so. The law is perfectly plain that the fact does not create any presumption against them. But I do comment upon the fact that they called no witnesses. I do comment upon the fact that here is a case which, upon the face of the testimony, has excited the whole parish of Ascension for the past three years, and witnesses up there are as plentiful as blackberries, and they have not called a single witness to weaken or demolish the fabric that the government has built against them.' Counsel for defendant Cox then said to the [**14] United States attorney: 'You stated that Cox called no witnesses. As a matter of fact, he called five in connection with Mr. Wright, and they were put upon the stand for the special purpose of discrediting the statement made by Stevens as to matters that transpired at Mr. Cox's house.' The United States attorney then continued: 'Well, I will state this: That neither Cox nor Cornet called any witnesses as to any substantial fact set forth in these indictments. Of course, they called some witnesses, but they did not call such witnesses as they might have done.' To all of which statements of the United States attorney and of the court the defendants Cox and Cornet then and there, when made in the presence of the jury, excepted, and still except."

#N6€ The act of congress which permits a defendant at his own request to be a witness provides "that his failure to make such request shall not create any presumption against him." 20 Stat. 30, c. 37. To prevent such presumption being created, no hostile comment on the defendant's silence should be permitted in argument before the jury. Any allusion by counsel to the fact that the defendant on trial has failed to testify is improper. The trial [**15] court should promptly stop any comment or allusion to the failure of a defendant to testify as a witness. Where such comment is made, and, on objection by the defendant, the court fails or refuses to interfere, and evinces no disapprobation of the course of counsel, and gives no instruction to the jury to remove the probable impression of such comment, the defendant, on writ of error, would be entitled to a new trial. Wilson v. U.S., 149 U.S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. In this case the district attorney did allude to the failure of two of the defendants to take the stand. He was immediately interrupted by opposing counsel, when he admitted that he had no right to make such comment. The important part of the incident is that the court immediately held that the district attorney had no right to comment on the failure of the defendants to testify. Both the district attorney and the court expressed themselves to the effect that such comment was improper. But it is said that the colloquy necessarily reminded the jury that two of the defendants had not testified. That is probably true. The fact, however, that one of the three did testify necessarily called to their attention [**16] the fact that two of the defendants did not take the [*813] stand. If the incident had closed here, it would scarcely have appeared that the defendants were prejudiced substantially. But it did not close here. The court, after the case had been argued, instructed the jury as follows:

"The court is requested to instruct the jury that the fact that neither of the defendant Cox nor Cornet testified in his own behalf must not be considered by the jury. The law gives to a defendant in a criminal case the right to testify in his own behalf, but it does not compel him to do so, and, if he does not, that fact must not be construed in any way to his prejudice." And the court added: "This has already been stated once by the court, and twice by the United States attorney."

In U.S. v. Snyder (C.C.) 14 Fed. 554, the United States attorney made remarks conceded to be improper, but McCrary, circuit judge, held that the error was cured by the correcting charge of the court. In Ruloff v. People, 45 N.Y. 213, it appears that the trial judge repeatedly referred to and commented on the failure of the defendant to be sworn as a

witness. But later, his attention being called to his error, [**17] he corrected it by telling the jury that there was no law requiring the defendant to be sworn, and no inference to be drawn against him from the fact of his not being sworn. The court held that this corrected the error. It seems to us that both at the time of the colloquy, and subsequently in the charge given, the position assumed by the court conformed to the law. A motion was made for a new trial, based in part on this matter, and the motion was overruled by the court. If it had appeared that the defendants had in any way been prejudiced by this incident, it was the duty of the trial court to grant a new trial. It may be well to note that the exception reserved is to "all of the statements of the United States attorney and of the court." The rulings of the court, at least, seem to have conformed to the wishes of the defendants. We do not think that, on principle or authority, the remarks of the United States attorney and the rulings of the court would justify a reversal of the case. Willingham v. State, 21 Fla. 761; Cross v. State, 68 Ala. 476; Endleman v. U.S., 30 C.C.A. 186, 86 Fed. 456; Nite v. State (Tex. Cr. App.) 54 S.W. 763, 769; State v. Parker, 7 La. Ann. 83.

There [**18] are several exceptions raising questions as to the admissibility of evidence offered by the government on the trial. We have carefully considered the several assignments of error based on them. The evidence in each instance was, we think, properly admissible under some one of the counts of the indictment. We do not deem it necessary to discuss these assignments separately. We think that the record contains no reversible error, and that the judgment of the circuit court must be affirmed.

DISSENTBY: PARDEE

DISSENT: PARDEE, Circuit Judge (dissenting). In my judgment, the trial court erred in overruling the demurrers to the indictments, and to each count thereof, and for this error the judgment of the circuit court should be reversed, and a new trial ordered.

In U.S. v. Cruikshank, 92 U.S. 557, 558, 23 L. Ed. 593, the court said:

"In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause [*814] of the accusation.' Const. Amend, 6. In U.S. v. Mills, 7 Pet. 142, 8 L. Ed. 637, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty to [**19] apprise the accused of the crime with which he stands charged'; and in U.S. v. Cook, 17 Wall. 174, 21 L. Ed. 539, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species. It must descend to particulars. 1 Archb. Cr. Prac. & Pl. 291. The object of the indictment is -- First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, [**20] and circumstances."

Again, in U.S. v. Carll, 105 U.S. 612, 613, 26 L. Ed. 1135, the court said:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words, of themselves, fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislation, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

And in Pettibone v. U.S., 148 U.S. 197, 203, 13 Sup. Ct. 545, 37 L. Ed. 422:

"A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

In U.S. v. Britton, 108 U.S. 193, 204, 2 Sup. Ct. 534, 27 L. Ed. 700, the supreme court said:

"The offense charged in the counts of this indictment is a conspiracy. This offense [**21] does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy merely affords a locus penitentiae, so that, before the act done, either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that, in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. Reg. v. King, 7 Q.B. 782; Com. v. Shedd, 7 Cush. 514."

Taking the definition of "conspiracy," as given in Pettibone v. U.S., supra, and applying the rules declared in U.S. v. Cruikshank, U.S. v. Carll, and U.S. v. Britton, supra, the indictments in this case, and every count in the same, should be held bad, because the charge made in each is only general, to wit, that the defendants "did conspire," etc., without charging the defendants with any combination or agreement or confederation with each other [**22] or with any other person or persons, and there is no equivalent to show concerted [*815] action. To have committed the offense of conspiracy, they must have combined and agreed together or combined and agreed with some other person or persons; and such combination and agreement should be averred, so that the court and trial jury can determine whether the acts constituting the crime have been committed. To merely charge that the defendants "did conspire" is not to charge specific facts, but to charge a legal conclusion. An indictment, to be sufficient, must inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. See U.S. v. Cruikshank, supra. In regard to defects or imperfections in matters of form under section 1025, Rev. St., so much relied on by my Brethren, I need only again quote from U.S. v. Carll, where an indictment was held bad because, while the defendant was charged that at a certain time and place, feloniously and with intent to defraud, he did pass, utter, and publish a falsely made, forged, counterfeited, and altered [**23] obligation and security of the United States, following the statute literally, the court held that the same was defective, because the indictment failed to expressly charge scienter with regard to the passing, uttering, etc.; and the court used this expressive language:

"This indictment, by omitting the allegation contained in the indictment in U.S. v. Howell, 11 Wall. 432, 20 L. Ed. 195, and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of section 1025 of the Revised Statutes."

And so I say that this indictment, by omitting the allegations contained in the indictment in Delay v. U.S., 152 U.S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545, and in all approved precedents, that the defendants did conspire, combine, confederate, and agree together among themselves, or equivalent thereto, fails to charge any crime, and that the omission is a matter of substance, and not a defect or imperfection in form, within the meaning of section 1025, Rev. St. If we had before [**24] us an indictment under section 5339, Rev. St. U.S., which provides that "every person who commits murder" upon the high seas, etc., within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, etc., shall suffer death, and which indictment charged that one Richard Roe, in the peace, etc., and on the high seas, etc., within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular

state, did unlawfully murder John Doe, it would seem that nearly all the reasons given by my Brethren in favor of sustaining the indictment in the instant case would be as applicable, and I think as plausible, to maintain the supposed indictment charging Richard Roe with murder. We could say that the statute on which the indictment is framed uses only the word murder, -- "every person who commits murder"; and in numerous acts of congress providing for the punishment of homicides the same or substantially the same language is used by the congress as being sufficient to show the killing of a human being with malice prepense or aforethought, [*816] express or implied, and that in so using the word congress [**25] is sustained by the dictionaries and by the best usage; for, if we turn to Webster's Dictionary, we find "murder" defined as "the offense of killing a human being with malice prepense or aforethought, express or implied"; and the same, or its equivalent, can doubtless be found in all the dictionaries extant. If we turn to the Bible, we find that from Genesis to Revelations the malicious killing of a human being is recognized as murder; and the sixth commandment, as found in the standard Prayer Book, is, "Thou shalt do no murder." The ancient Chaucer, the father of English poetry, says "Mordre will out;" and in Shakespeare we find, "Macbeth does murder sleep," as he did murder his benefactor King Duncan; and we might say that, when congress enacted that "every person who commits murder," it used the word "murder" as it is used by English writers and speakers; and it would have added nothing to the meaning to have added the words "with malice prepense or aforethought." We can further say, which I have no doubt would be true, that we are cited to no case to show that the word "murder" is not sufficient of itself, and that forms and text-books or precedents copied from forms can alone [**26] be cited as showing the indictment insufficient. And I think that we could also cite section 1025, Rev. St., to say that the words omitted in the indictment related only to form, or, as Mr. Justice Brewer expresses it, "mere manner of stating a fact"; and we could go still further, and say that the defendant must have understood, from the use of the word "murder," that the killing charged against him was with malice prepense or aforethought, and that no one reading the indictment could come to any other conclusion than that the indictment charged murder, and cite Mr. Justice Peckham in Price v. U.S., 165 U.S. 315, 17 Sup. Ct. 368, 41 L. Ed. 729: "When this is the case, the indictment is good enough." In the case supposed, notwithstanding the cogency of these reasons, the indictment would be held bad in every court in this country; but the suggested case well illustrates the danger of departing in criminal pleading from wellrecognized principles, and particularly from that declared in U.S. v. Carll, supra:

"The fact that the statute in question, read in the light of the common law and of other statutes on a like matter, enables the court to infer the intent of the legislature, does [**27] not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

(viii)

854 F. Supp. 254, *; 1994 U.S. Dist. LEXIS 7526, **

UNITED STATES OF AMERICA, v. OMAR AHMAD ALI ABDEL RAHMAN, a/k/a "Omar Amed Ali," a/k/a "Omar Abdel Al-Rahman," a/k/a "Sheik Rahman," a/k/a "The Sheik," a/k/a "Sheik Omar," EL SAYYID NOSAIR, a/k/a "Abu Abdallah,: a/k/a "El Sayyid Abdul Azziz," a/k/a "Victor Noel Jafry," IBRAHIM A. EL-GABROWNY, SIDDIG IBRAHIM SIDDIG ALI, CLEMENT RODNEY HAMPTON-EL, a/k/a "Abdul Rashid Abdullah," a/k/a "Doctor Rashid," MOHAMMED ABOUHALIMA, ABDO MOHAMMED HAGGAG, AMIR ABDELGANI, a/k/a "Abdou Zaid," FARES KHALLAFALLA, a/k/a "Abdou Fares," TARIG ELHASSAN, FADIL ABDELGANI, MOHAMMED SALEH, a/k/a "Mohammed Ali," VICTOR ALVAREZ, a/k/a "Mohammed," MATARAWY MOHAMMED SAID SALEH, a/k/a "Wahid," EARL GANT, a/k/a "Abd Rashid," a/k/a "Abd Jalil," a/k/a "Abdur Rasheed," Defendants.

53 93 Cr. 181 (MBM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

854 F. Supp. 254; 1994 U.S. Dist. LEXIS 7526

June 7, 1994, Decided June 7, 1994, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Defendants filed motions to strike references to a murder and an assassination plot from a portion of the indictments against them charging them with sedition, under 18 U.S.C.S. § 2384; one defendant filed a motion to sever the charges against him. All defendants filed motions to sever their trials.

OVERVIEW: Defendants were charged with a seditious conspiracy based on their participation in the 1993 bombing of the World Trade Center and other terroristic acts. The overt acts taken in furtherance of the conspiracy included the murder of an Israeli rabbi and the proposed assassination of the Egyptian president during his visit to the United States. Defendants sought to strike all references to the murder and assassination plot and to sever their trials. The court found that the prosecution failed to establish how the foreign rabbi's murder was an overt act that furthered the goals of the alleged seditious conspiracy. However, as the assassination plot would have had a direct impact on the United States' ability to conduct foreign relations, it could have been deemed an act in furtherance of the conspiracy. The court refused a defendant's request to sever several counts on the basis that the charges were unrelated to sedition because the charges at issue were admissible to prove an overarching plan, association, and motive for the sedition charge. Finally, neither the number of defendants nor the potential prejudice from joinder warranted severance of defendants and separate trials.

OUTCOME: Defendants' motion to strike the reference to the Israeli rabbi's murder from the sedition charge was granted, but the motion to strike the reference to the plot to assassinate the Egyptian president was denied. A defendant's motion to sever the charges against him was denied; all defendants' motions to sever their trials were denied.

CORE TERMS: conspiracy, murder, indictment, seditious, severance, furtherance, narcotic, overt act, sedition, bombing, distribute, admissible, oppose, flour, codefendant, assassination, participating, prejudicial, convicted, terrorism, joinder, sever, foreign relations, memorandum, slaying, planned, proffer, blow, levy, conspirators

LexisNexis(TM) HEADNOTES - Core Concepts - * Hide Concepts

- Explanation Criminal Control C
- HN1±See 18 U.S.C.S. § 2384.
- Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Espionage & Treason
- The kind of war punishable under 18 U.S.C.S. § 2384 does not require the presence of a foreign power, or an actual war in the sense of forcible conquest of territory and supplanting of the government.
- © Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Espionage & Treason
- *18 U.S.C.S. § 2384 requires no furthering at all of the goal of sedition for liability to attach because the crime is the agreement to promote the ends the law forbids. Indeed, the statute contains no requirement of an overt act. The question for the jury is what the defendants intended, in the sense that because the gist of the crime is agreement, the defendants' intent determines whether or not they committed it.
- Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Espionage & Treason
- The appropriate inquiry regarding what conduct furthers a seditious end within the meaning of 18 U.S.C.S. § 2384 is whether the evidence the government seeks to introduce is, considered in the context of all the proof to be offered, would form an adequate basis for a rational juror to conclude that a defendant intended to levy war on the United States or oppose its authority by force.
- ☐ Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy
 ☐ Criminal Law & Procedure > Evidence > Admission, Exclusion & Preservation

 HN5 → Not all conduct admissible to prove the existence of a charged conspiracy is necessarily conduct in furtherance of that conspiracy.
- Examinal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy

 HN6 ★ An overt act in furtherance of the conspiracy must occur within the limitations period, and such an act must not be merely an ancillary act of concealment performed after the objects of the conspiracy have been achieved; a court is thus required to examine the objective nature of an overt act.
- Examinal Law & Procedure > Pretrial Motions > Joinder & Misjoinder

 HN7 → Fed. R. Crim. P. 8(b) permits joinder of defendants only when they are charged with participating in the same act or transaction or in the same series of acts or transactions, notwithstanding that when the counts proposed to be severed relate to the movant alone the standard might be the more permissive joinder standard of Fed. R. Crim. P. 8(a), which requires only that the charged offenses be of the same or similar character or parts of a common scheme or plan.
- There is a rebuttable presumption against trying more than 10 defendants together in a trial likely to last longer than four months. Nonetheless, the court's inquiry in the end remains whether, on balance, the fair administration of justice will be better served by one aggregate trial of all indicted defendants or by two or more trials of groups of defendants. Weighing heavily in that balance is the familiar principle that defendants who have been indicted together should be tried together, a principle informed by considerations of both efficiency and fairness, including promotion of accuracy in the assessment of relative culpability, and avoidance of: (i) repetitive proceedings with attendant inconvenience and trauma; (ii) random favoritism to later tried defendants; and (iii) inconsistent verdicts.

Criminal Law & Procedure > Pretrial Motions > Severance > Severance of Defendants

HN9 When defendants have been joined properly under Fed. R. Crim. P. 8(b), a

district court should grant a severance under Fed. R. Crim. P. 14 only if there is
a serious risk that a joint trial would compromise a specific trial right of one of
the defendants, or prevent the jury from making a reliable judgment about guilt
or innocence.

Criminal Law & Procedure > Pretrial Motions > Severance > Severance of Defendants

#N10 * Mutually antagonistic defenses are not prejudicial per se. Fed. R. Crim. P. 14

does not require severance even if prejudice is shown; rather, it leaves the
tailoring of the relief to be granted, if any, to the district court's sound
discretion.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy
Criminal Law & Procedure > Pretrial Motions > Severance > Severance of Defendants

HN11 Differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials. Proof of the full nature and scope of a conspiracy is admissible even at the trial of lesser participants. A defendant cannot claim improperly prejudicial spillover from the introduction of such proof.

COUNSEL: [**1] ROBERT S. KHUZAMI, ESQ., ANDREW C. MCCARTHY, ESQ., ALEXANDRA REBAY, ESQ., Assistant U.S. Attorneys, New York, NY.

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JUDGES: Mukasey

OPINIONBY: MICHAEL B. MUKASEY

OPINION: [*257] OPINION AND ORDER

MICHAEL B. MUKASEY, U.S.D.J.

Defendant El Sayyid Nosair has moved to strike from Count One of the indictment references to the murder of Meir Kahane, and to sever Counts Five, Six, Seven, Eight and Ten. n1 Further, defendant Mohammed Abouhalima has moved to strike from Count One references to a plan to assassinate Egyptian president Hosni Mubarak, and to bar all reference at trial to either of these incidents as unduly prejudicial under Fed. R. Evid. 403. In addition, Nosair, Omar Ahmad Ali Abdel Rahman, Mohammed Abouhalima, Fares Khallafalla, Mohammed Saleh and Matarawy Mohammed Said Saleh have moved to sever all counts against them and for separate trials. All defendants have been permitted to join in one another's motions to the extent those motions relate to them, with the exception of

| Ibrahim El-Gabrowny, who disclaimed any motions other than those he made, a waiver apparently in aid of his unsuccessful motion for a severance and an early trial. |
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| |
| n1 Nosair has moved also to dismiss those counts as barred by the double jeopardy clause of the Fifth Amendment. That motion is treated in a separate opinion being filed contemporaneously with this one. |
| [**3] |
| The government has responded with an unusually detailed and lengthy brief meant to serve as a partial evidentiary proffer in opposition to the motions. |
| [*258] For the reasons set forth below, the motion to strike the references in Count One to the Kahane murder is granted. The other motions are denied. |
| I. |
| Count One of the indictment charges a seditious conspiracy to levy a war of urban terrorism against the United States through a series of violent acts principally in New York, both accomplished and proposed. These violent acts, set forth in that section of Count One listing the means allegedly used by the defendants to further the objects of the conspiracy (Indictment PP 10-15), include the bombing of the World Trade Center in February 1993, the planned bombing of buildings and vehicular tunnels in June 1993, and the assassination of various public figures. They include also the commission of unspecified "acts of terrorism designed to undermine the foreign relations of the United States." (Indictment P 15) |
| The overt acts allegedly taken in furtherance of this scheme include both the murder in November 1990 at a New York hotel of Meir Kahane (Indictment P 16 f) a rabbi and leader of [**4] a small radical group opposed, among other things, to any Arab presence within the biblically defined borders of Israel n2 and the proposed assassination of Egyptian president Hosni Mubarak during his 1993 visit to the United Nations (Indictment P 16 t, u). |
| |
| n2 See, e.g., Gershom Gorenberg, "Burning Gush", The New Republic, Apr. 18, 1994., at 21. |
| |
| II. |
| Defendants argue as to the assassination of Kahane and the planned assassination of Mubarak that, whatever those acts might accomplish or assist, they are simply unrelated |

Defendants argue as to the assassination of Kahane and the planned assassination of Mubarak that, whatever those acts might accomplish or assist, they are simply unrelated to any goal reasonably defined as sedition, and therefore they cannot be included within a count that charges conspiracy to commit sedition. Defendants note that Kahane was not a federal official (indeed, he was an Israeli citizen), that the shooting of the postal officer after the Kahane slaying was entirely unrelated to that officer's governmental function, and that Mubarak is an Egyptian; they argue that killing foreign citizens and incidentally related acts cannot be sedition against the [**5] United States. (Nosair Mem. 13, Abouhalima Mem. 65-66, 69-71)

The government's response is that the conspirators themselves saw both acts as furthering a seditious goal: Thus, for example, they regarded Kahane as a proponent of Jewish emigration to Israel and the United States as a supporter of Zionists and pro-Israeli groups (Gov't. Mem. 69), and Kahane presumably as one who fit in one or both categories. Therefore, a blow against Kahane, the government argues, was a blow that

was "part of a greater struggle" (Gov't Mem. 70) against the "'infidel' West, of which the United States was deemed the leader" (Gov't Mem. 69), a struggle that included the bombing of the World Trade Center. (Gov't. Mem. 70) Further, the conspirators allegedly regarded Mubarak as a puppet of the United States, and thus a blow against him presumably was a blow against the United States. (Gov't. Mem. 70-71) The crux of the government's argument, however, is not the actual connection between either Kahane or Mubarak and official acts and policies of the United States. The government argues that because both acts were on the agenda of the conspirators and were perceived by them as furthering a goal that included [**6] sedition, they should be provable as acts in furtherance of a conspiracy to accomplish sedition:

Aside from the fact that there need have been no furthering [of the goal of sedition] at all for [statutory] liability to be established, . . . the material issue in this case is not what the government (or, for that matter, defense counsel or the Court) believes, however objectively, might advance a war against the United States. The question for the jury is what the defendants intended -- and the appropriate inquiry is whether the evidence the government seeks to introduce, considered in the context of all the proof to be offered, would form an adequate basis for a rational juror to conclude that the defendants intended to levy war on the United States or oppose its authority by force.

(Gov't. Mem. 72) (emphasis in original).

An evaluation of the parties' arguments requires a comparison of the charges in the [*259] indictment with the statute that defines and proscribes seditious conspiracy, HN1

18 U.S.C. § 2384:

If two or more persons in any State . . . conspire to overthrow, put down, or to destroy by force the Government of the United States, [**7] or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States . . . they shall each be fined not more than \$ 20,000 or imprisoned not more than 20 years, or both.

The theory of the indictment is that the defendants conspired "to levy a war of urban terrorism against the United States, to oppose by force the authority of the United States, and by force to prevent, hinder and delay the execution of laws of the United States." (Indictment P 9) The indictment charges that the defendants planned to commit five separate kinds of acts in furtherance of the conspiracy's objectives (Indictment PP 10-15): bombings of government and landmark buildings and of vehicular tunnels and bridges; kidnapping of particular government, law enforcement and judicial officers; obstruction of justice designed to secure the release of imprisoned members of the organization; concealment of their unlawful activities; and opposition to the federal government through unspecified "acts of terrorism designed to undermine the foreign relations of the United States." (Indictment P 15)

To be sure, **N2** the kind of "war" punishable [**8] under § 2384 does not require the presence of a foreign power, or an actual war in the sense of forcible conquest of territory and supplanting of the government. "Congress enacted Section 2384 to help the government cope with and fend off urban terrorism." United States v. Rodriguez, 803 F.2d 318, 320 (7th Cir. 1986). The interests to be protected by enforcing the statute include the government's interest "in safeguarding public security." Id. That is perhaps the most basic function of government, and is what those who established our government had in mind when they drafted a Constitution whose purpose, among others, was "to insure domestic Tranquility." U.S. Const. pmbl.

However, although this statute protects basic societal interests and must be read to cover a wide spectrum of activities, for the reasons summarized below I cannot agree with the government when it argues, as it seems to in the above quoted portion of its memorandum (see p. 4, supra), that the law has no objective limits whatever. Oddly, the government seems to have arrived at this mistaken view through a series of correct arguments strung together to reach an incorrect [**9] result. Thus, the government is correct when it insists that the statute **HN3***requires "no furthering at all" of the goal of sedition for liability to attach because the crime is the agreement to promote the ends the law forbids. (Gov't. Mem. 72) Indeed, the statute contains no requirement of an overt act. The government is correct also when it points out that "the question for the jury is what the defendants intended," (id.) in the sense that because the gist of the crime is agreement, the defendants' intent determines whether or not they committed it.

The government is correct as well when it states that "HNA* the appropriate inquiry is whether the evidence the government seeks to introduce, considered in the context of all the proof to be offered, would form an adequate basis for a rational juror to conclude that the defendants intended to levy war on the United States or oppose its authority by force." (Id.) But it is here that the government's argument goes astray, conflating the issue of what conduct furthers a seditious end within the meaning of the statute with the entirely separate issue of what evidence may be admissible to help prove an agreement to achieve that end. HNS* Not [**10] all conduct admissible to prove the existence of a charged conspiracy is necessarily conduct in furtherance of that conspiracy. If it were, there would be no such thing as other crimes evidence in a conspiracy case. See Fed. R. Evid. 404(b).

The Kahane murder, if it were proved to have been the act of more than one of these defendants, would be admissible for a variety of reasons at a joint trial, even if had not been charged in a separate substantive count or mentioned in the conspiracy count.

[*260] Those reasons include to show that defendants associated with one another, to demonstrate a common scheme of which the conspiracy charged in Count One was a part, to prove that defendants intended to do more than talk about acts of violence, to explain why other defendants were intent on freeing Nosair after he was convicted on weapons charges relating to the murder, and perhaps for other reasons as well. In that sense, proof of the murder would help prove the seditious conspiracy — but in that sense only. The murder of Kahane could not be in itself an overt act tending to accomplish the goals of a seditious conspiracy unless, objectively, that murder could further an end that the statute [**11] prohibits agreeing to further, wholly apart from what the defendants thought or believed. Were the rule otherwise, the seditious conspiracy statute would expand infinitely to embrace the entire agenda of anyone who violated it, whether or not that agenda also included an objectively non-seditious plan.

The flaw in the government's argument may be illustrated by an example having nothing to do with this case. Consider a defendant charged with conspiracy to distribute narcotics. If that defendant distributes a package that contains only flour, in the belief that the substance in fact is heroin, he can be convicted of conspiracy because he intends to distribute heroin and has agreed to do so, United States v. Murray 527 F.2d 401, 411-12 (5th Cir. 1976); United States v. Senatore, 509 F. Supp. 1108, 1110-11 (E.D. Pa. 1981), and cases cited therein, although he cannot be convicted of the substantive offense. See Murray, supra (stressing distinction between conspiracy and substantive charge). In such a case, a conspiracy count properly could allege the overt act of distributing flour, because [**12] the defendant thought the flour was heroin. But if it is alleged that he knew the package contained flour, and that he agreed to distribute it in the belief that flour is a narcotic drug, then such an act could not be alleged as one in furtherance of the conspiracy.

Moreover, he could not be convicted of conspiring to distribute narcotics if the distribution of flour is the only proof of his agreement to distribute narcotics. Cf. <u>Grunewald v. United</u> States, 353 U.S. 391, 396-97, 401-02, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957), requiring that **M6**an overt act in furtherance of the conspiracy occur within the limitations period, and that such an act not be merely an ancillary act of concealment performed after the

objects of the conspiracy have been achieved, a holding that necessarily requires a court to examine the objective nature of an overt act. Even if there is other proof of the hypothetical defendant's agreement to distribute narcotics, the knowing distribution of flour cannot be transformed into an overt act in furtherance of that agreement simply because the defendant has been shown by other proof to have agreed also-to [**13] distribute narcotics.

The subject of proof is significant because the indictment has charged that the Kahane murder was an overt act in furtherance of the seditious conspiracy, and a jury presumably would be asked to consider it as such, and not merely as evidence tending to establish the conspiracy in the more remote ways suggested above. See p. 7, supra. However, the government's extensive memorandum does not suggest any way in which the Kahane murder could have furthered the goals of a seditious conspiracy beyond the statement that the defendants thought it did. That is not enough.

Nor does the equation change simply because the statute in question does not require the commission of an overt act. The government chose to put before the grand jury an indictment that included an allegation that certain overt acts were taken in furtherance of the conspiracy. Presumably, the government intends the jury to consider such acts, if proved, as evidence that the defendants agreed not simply to engage in miscellaneous criminal conduct, but agreed specifically to oppose the United States government in the ways the statute forbids. Once the acts have been alleged in the indictment, the [**14] government is not relieved from the rigors of logic simply because the statute did not require that the acts be included in the first place.

The alleged plan to assassinate Mubarak presents a different issue, even though [*261] the government has argued for its inclusion as an overt act on the same basis as it argues for inclusion of the Kahane murder: that the defendants thought of Mubarak in essence as a representative of the United States, and therefore thought of his murder as a blow against the United States. The indictment charges that one of the means employed by the conspirators to further the objects of the conspiracy was to "oppose by force the government of the United States by planning and committing acts of terrorism designed to undermine the foreign relations of the United States." It is at least objectively plausible that the plot to murder a foreign head of state while he was on United States soil would have a direct impact on this country's ability to conduct its foreign relations, and thus would constitute an agreement "to oppose by force the authority" of the United States to conduct its foreign relations. Therefore, the alleged plan to assassinate Mubarak, accompanied [**15] by proof of animus against the United States, may be proved as a step in furtherance of the seditious conspiracy charged in the indictment. Proof of such animus is crucial, however, because without it the defendants would be shown merely to have engaged in conduct that conflicted incidentally with some policy of the United States. If that were enough to constitute sedition, then our hypothetical defendant charged with narcotics conspiracy (see pp. 7-8, supra), if he were armed, could be charged with sedition as well, because in agreeing to traffic in narcotics with the aid of force he would be agreeing, albeit incidentally, to oppose by force a policy of the-United States.

Accordingly, the motion to strike from Count One reference to the Kahane murder is granted, but the motion to strike the reference to the Mubarak assassination plan is denied.

III.

Nosair's motion pursuant to Fed. R. Crim. P. 14 n3 to sever the counts charging the murder of Kahane (Count Five), the contemporaneous attempted murder of a postal officer (Count Six) and corresponding weapons charges (Counts Eight, Nine and Ten) is based on the claim that those charges are unrelated to the principal charge in [**16] the indictment, the seditious conspiracy charged in Count One.

| n3 Rule 14 provides in relevant part: "If it appears that a defendant is prejudiced by a |
|---|
| joinder of offenses or of defendants in an indictment or by such joinder for trial |
| together, the court may order an election or separate trials of counts, grant a severance |
| of defendants or provide whatever other relief justice requires." |

Nosair's severance motion will be measured against the more restrictive joinder standard of HN7%Fed. R. Crim. P. 8(b), permitting joinder of defendants only when they are charged with participating "in the same act or transaction or in the same series of acts or transactions," notwithstanding that when the counts proposed to be severed relate to the movant alone the standard might be the more permissive joinder standard of Fed. R. Crim. P. 8(a), which requires only that the charged offenses be "of the same or similar character" or "parts of a common scheme or plan." The government's memorandum proffers evidence that the conspiracy [**17] charged in Count One antedated the Kahane murder, including allegations that Nosair and others participated in paramilitary training (Gov't. Mem. 9-10), that such activities were reported to Rahman (Gov't. Mem. 10-11), that Mahmud Abouhalima -- a defendant convicted of participating in the World Trade Center bombing, United States v. Salameh, et al., 93 Cr. 180 (KTD), and brother of Mohammed Abouhalima, a defendant in this case -- was supposed to drive Nosair away from the scene of the Kahane slaying (Gov't. Mem. 12) and that the fingerprints of two other defendants convicted in the World Trade Center case were found on Nosair's car after the slaving (id.). This proof suggests at least that the Kahane murder was carried out as part of a common plan that included the alleged conspiracy. (Gov't. Mem. 10-14)

Accepting that proffer, as I must for current purposes, it is apparent that evidence of the Kahane murder and the related charges would be admissible even at a trial that included only Count One, as evidence of the over-arching plan, to show association, to [*262] demonstrate motive for other acts, and the like. See p. 7, supra. Once such proof is shown to be admissible, [**18] there is no potential prejudice to be avoided by severing the charges to which that proof relates.

Nosair's assertion that proof of the Kahane murder and associated charges would constitute a separate trial within a trial is unconvincing. As noted above, such proof is admissible to help prove the conspiracy charged in Count One. To exclude this proof entirely would be unfair to the government. To sever the counts charging the substantive crimes but permit some lesser amount of proof on both sides would be unmanageable. Just as the government would wish to present proof Nosair committed the substantive offenses, he would wish to present contrary proof, and would be allowed to do so. Thus, a severance of the underlying charges would accomplish little of advantage to Nosair. However, to say that these substantive charges will remain joined to the other charges does not mean that unlimited proof will be permitted from either side. The court retains discretion to limit proof, Fed. R. Evid. 403, and will exercise it as appropriate.

For the above reasons, Nosair's motion to sever counts is denied.

IV.

None of the defendants who have moved pursuant to Fed. R. Crim. P. 14 to sever all charges [**19] against each of them has moved to sever some group of defendants. Each appears to be seeking his own trial. Even if that were not the case, all defendants are charged with participating in the seditious conspiracy described in Count One. For the reasons set forth below, neither the numerosity of the remaining defendants scheduled for trial, who now total 13, nor relevant considerations of potential prejudice from joinder, warrant a severance for any moving defendant. It is convenient to treat these severance motions together with Abouhalima's motion, pursuant to Fed. R. Evid. 403, n4 to bar all reference to the Kahane and Mubarak incidents as unduly prejudicial.

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n4 Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Considered dictum in United States v. Casamento, 887 F.2d 1141, 1151-52 (2d Cir. 1989), [**20] cert. denied, 493 U.S. 1081, 107 L. Ed. 2d 1043, 110 S. Ct. 1138 (1990), appears to have created what amounts to HN8 a rebuttable presumption against trying more than 10 defendants together in a trial likely to last longer than four months. Nonetheless, the court's inquiry in the end remains what it has always been -- namely, "whether, on balance, the fair administration of justice will be better served by one aggregate trial of all indicted defendants or by two or more trials of groups of defendants." Id. at 1151, quoted in United States v. DiNome, 954 F.2d 839, 842 (2d Cir.), cert. denied, 121 L. Ed. 2d 56, 113 S. Ct. 94 (1992). Weighing heavily in that balance is the familiar principle that defendants who have been indicted together should be tried together, United States v. Ventura, 724 F.2d 305, 312 (2d Cir. 1983), a principle informed by considerations of both efficiency and fairness, including promotion of accuracy in the assessment of relative culpability, and avoidance of (i) repetitive proceedings with [**21] attendant inconvenience and trauma, (ii) random favoritism to later tried defendants, and (iii) inconsistent verdicts. Richardson v. Marsh, 481 U.S. 200, 210, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987).

By those standards, the government's detailed proffer in its memorandum, which does not purport to be exhaustive (Gov't. Mem. 2), is more than sufficient to rebut whatever presumption may be created by Casamento against joint trials of defendants based on sheer numerosity and projected length of the trial. All defendants, 13 rather than the 22 who stood trial in Casamento, are charged with participating at least in the conspiracy described in Count One, which appears to be less intricate than the interlocking and geographically dispersed relationships that constituted the narcotics distribution and money laundering network proved in Casamento. [*263] 887 F.2d at 1148. The seditious conspiracy charged here is easily comprehended and involves discrete incidents that are easily separable in a juror's mind. Unlike repeated narcotics transactions, which may be easily confused without the aid of [**22] charts or other devices, the actual and projected incidents charged here are not difficult to keep straight. A juror is unlikely to confuse the murder of Kahane (Gov't, Mem. 11-12) with the planned assassination of Mubarak (Gov't. Mem. 28-30, 44-46), or either of those with the planned bombing of vehicular tunnels (Gov't. Mem. 37-40) or the actual bombing of the World Trade Center. (Gov't. Mem. 21-24)

Nor has any defendant convincingly alleged prejudice of the sort that necessitates severance. The type of prejudice alleged by a defendant to justify severance is important because the Supreme Court has held that "hyper when defendants have been joined properly under Rule 8(b), as I have found these defendants are, "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. United States, 122 L. Ed. 2d 317, 113 S. Ct. 933, 938 (1993). No such risk has been described here.

The closest any defendant has come is the allegation in the briefs of Abouhalima [**23] and Matarawy Mohammed Said Saleh ("Matarawy Saleh") that the joinder of each raises the risk ("near-certainty" in Abouhalima's estimation (Abouhalima Mem. 77)) of inconsistent defenses. At best, however, these allegations are not specific and do not show convincingly that whatever improper prejudice might result from such defenses cannot be mitigated or avoided by jury instructions or redaction of evidence.

Abouhalima argues that he, unlike others, spoke to the FBI and warned them about codefendant Siddig Ibrahim Siddig Ali, and that he ultimately withdrew from the conspiracy. (Id. 77-78) Although he does not say so explicitly, his argument suggests that

any attempt to introduce the statement about Siddig Ali would raise problems under Bruton v. United States, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968), and that to exclude such evidence would hamstring Abouhalima's defense. But the Bruton problems, if they develop, can be avoided by redacting Siddig Ali's name from the statement in question and instructing the jury. So far as Abouhalima's withdrawal from the conspiracy, to the extent evidence of such [**24] withdrawal puts him in conflict with his codefendants and makes him their antagonist at trial, that seems more prejudicial to Abouhalima's codefendants than to him, and in any event is not the kind of prejudice Rule 14 was designed to remedy:

HN10%

Mutually antagonistic defenses are not prejudicial per se. Moreover, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion.

Zafiro, 113 S. Ct. at 938.

Matarawy Saleh alleges only that his defense necessarily will inculpate other defendants because he will show that he "was lured into the safehouse through the deception of [government informant] Emad Salem and [codefendant] Siddig Ali. Once in the safehouse, he was held at gunpoint by another man" (Matarawy Saleh Mem. 39), presumably another codefendant. But this defense, again more prejudicial to his codefendants than to the moving defendant, includes no proffer of evidence that would be inadmissible at a joint trial and no prospect of impermissible prejudice.

These defendants, and Khallafalla and Mohammed Saleh, also [**25] claim that they are alleged to have played a lesser role than the others, are otherwise distinguishable from the others, and that they did not participate directly in some of the criminal incidents attributable to others. However, the Court of Appeals has iterated and reiterated the observation that "HN11" differing levels of culpability and proof are inevitable in any multidefendant trial and, standing alone, are insufficient grounds for separate trials." United States v. Carson, 702 F.2d 351, 366-67 (2d Cir.), cert. denied, 462 U.S. 1108 (1983) (quoted in United [*264] States v. Scarpa, 913 F.2d 993, 1015 (2d Cir. 1990) and United States v. Chang An-Lo, 851 F.2d 547, 557 (2d Cir.), cert. denied, 488 U.S. 966, 102 L. Ed. 2d 530, 109 S. Ct. 493 (1988)). Proof of the full nature and scope of a conspiracy is admissible even at the trial of lesser participants. Scarpa, supra, 913 F.2d at 1015; United States v. Nersesian, 824 F.2d 1294, 1304 (2d Cir.), cert. denied, 484 U.S. 957 (1987). [**26] A defendant cannot claim improperly prejudicial spillover from the introduction of such proof. United States v. Rosa, 11 F.3d 315, 341 (2d Cir. 1993), cert. denied, 128 L. Ed. 2d 211, 114 S. Ct. 1565 (1994). Moreover, it bears mention that even the least of these defendants is charged with knowingly agreeing to and, according to the government's memorandum (Gov't. Mem. 37-40, 51-57), with actually assisting conduct which, if it had been fully carried out, would have resulted in mass murder. Such a charge makes it particularly difficult to credit claims of prejudicial spillover from evidence of, for example, an incident such as the Kahane slaying or the plan to assassinate Mubarak, or even the bombing of the World Trade Center.

Nothing in DiNome is to the contrary. In that case, the Court held that a mistrial should have been granted as to two defendants who were convicted of mail and wire fraud but were acquitted on motion at the close of the government's case of the underlying RICO charges. 954 F.2d at 844-45. However, the basis for that holding was that none of the evidence [**27] relating to the alleged RICO enterprise, which included "vicious murders, loansharking, auto theft, pornography, and firearms trafficking and the very nature of [the RICO enterprise]," was admissible as to them. Id. at 844. Here, each of the moving defendants except for Nosair is charged principally if not exclusively with participating in the seditious conspiracy charged in Count One. As to Nosair, the charges surrounding the Kahane slaying are admittedly of lesser magnitude than the seditious

conspiracy charge in Count One. However, they simply do not look so disproportionately innocuous alongside the seditious conspiracy charge as the mail and wire fraud counts looked alongside the murder and other predicates underlying the RICO charge in DiNome, in which the defendants there were not alleged to have had any role.

Rahman's motion rests on nothing firmer than the claim that there are counts in which he is not named, that evidence against others would not be admissible as to him, and that improper prejudice would result if he is tried together with others. He, however, is alleged to have been the leader of all the other defendants and a source of [**28] authority for committing the acts and forming the plans charged in the indictment. Among all the defendants, he is the one least able to argue for severance.

Because the charges are properly joined and the defendants are properly joined, the severance motions are denied.

Abouhalima's motion to bar reference to the Kahane and Mubarak incidents as unduly prejudicial does not merit extended discussion. Again, all defendants are charged with participating in the seditious conspiracy charged in Count One. For the same reasons the Kahane and Mubarak incidents cannot justify severance, they are not so prejudicial as to warrant exclusion under Rule 403. Next to the bombing of buildings, tunnels and bridges, one actual murder and another proposed murder are not inflammatory. Accordingly, Abouhalima's motion to exclude reference to those incidents is denied as well.

SO ORDERED:

Dated: New York, New York June 7, 1994

Michael B. Mukasey

U.S. District Judge

257 F. 378, *; 1919 U.S. App. LEXIS 2212, **

(ix)

BRYANT et al. v. UNITED STATES

No. 3250

Circuit Court of Appeals, Fifth Circuit

257 F. 378; 1919 U.S. App. LEXIS 2212

March 24, 1919

PRIOR HISTORY: [**1]

In Error to the District Court of the United States for the Northern District of Texas; George W. Jack, Judge.

CORE TERMS: conspiracy, conscription, indictment, convention, overthrow, destroy, resist, levy, levying, complain, co-operation, resistance, acquitted, indicted, conspire, treason, charging, membership, convicted, arms, good character, put down, conspirators, codefendant, treasonable, accomplish, delegates, forcible, violent, pardon

OPINIONBY: GRUBB

OPINION: [*380] Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The plaintiffs in error were indicted, tried, and convicted in the District Court of the United States for the Northern District of Texas for an alleged conspiracy to overthrow, put down, and destroy by force the government of the United States and to levy war against them. The indictment included originally 55 defendants and 8 counts. A verdict of guilty was returned against the 3 plaintiffs in error only of all those originally indicted, and fixed their guilt under the first count of the indictment alone. This count charged the plaintiffs in error with a violation of section 6 of the Penal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1089 [Comp. St. § 10170]), by conspiring to overthrow, put down, and destroy by force the government of the United States and to levy war against them. That section provides, among other things, that if two or more persons in any state or territory, or in any place subject to the jurisdiction of [**2] the United States, conspire to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, they shall each be fined not more than \$5,000, or imprisoned not more than 6 years, or both. No overt act is required to complete the offense created by this section.

The plaintiffs in error were officials of a secret organization called the Farmers' and Laborers' Protective Association, which was organized [*381] in Texas in the year 1914 or 1915, and it was in connection with their activities as officials of this organization that the charges were preferred. The contention of the government is that the plaintiffs in error, together with the defendants jointly indicted, who were acquitted, and others not indicted, formed a conspiracy to prevent the enforcement of any conscription law that might be passed by Congress, and to overthrow the government of the United States, in the event such a law was enacted and sought by the government to be enforced.

The government contends that, to accomplish the result of the conspiracy, the conspirators created or used the machinery of the organization named and its membership, and that, whatever might [**3] be said of the guilt of the members of the association other than the three plaintiffs in error, the evidence, as to them, satisfied the jury, and was sufficient for that purpose, that they did conspire to overthrow the government and levy war against it, if conscription was attempted by it to be enforced; that the plaintiffs in error introduced and urged in the conventions of the association the adoption of resolutions looking to that end; urged the procuring by the members of highpower rifles, in anticipation of forcible resistance to conscription, if it became necessary, and the sending of delegates to the adjoining state of Oklahoma to secure the cooperation of such organizations as the Working Class Union and the Industrial Workers of the World in this intended purpose; that they urged upon the local lodges of their own organization and their members resistance to conscription by force and arms, and the procuring of arms to that end; and that, in obedience to such urging, members of the organization did actually procure rifles, and some few, after so arming themselves, took a position in a canyon, prepared there to offer resistance to the officers of the government, if any attempt [**4] to conscript them was made.

The government contends that, but for the timely interruption of the conspiracy by the apprehension of its leaders, actual resistance would have come about. The greater part of the evidence relied upon by the government to establish the conspiracy related to facts which occurred before the passage of the Selective Draft Act.

The defendants, in the District Court, admitting the organization of the Farmers' & Laborers' Protective Association and their membership therein, denied that it or its members entertained any treasonable designs against the United States government, and asserted that its object was to benefit the working and farming classes by the use of cooperative stores and other lawful methods. The trial consumed many weeks, and the evidence is so voluminous as to make a narrative of it, in even a condensed form, impracticable in an opinion. It suffices to say that, at least as to the plaintiffs in error and some of the other defendants, there was substantial evidence that they designed something more than an innocent association of workingmen and farmers to profit by cooperation in lawful ways, and that they combined with the purpose to [**5] produce among the members an uprising against any enforcement of any conscription or draft law [*382] that might be enacted, and to prevent such enforcement, by violence, if necessary.

The plaintiffs in error question the sufficiency of the indictment, under which they were convicted, upon two grounds. The first count of the indictment, on which alone a conviction was had, is only to be considered. It is contended that the averment of the date of the commission of the offense is not alleged with sufficient certainty in this count. The averment is that it was committed "on or about the 5th day of April 1917." The indictment was sufficiently definite in respect of time, and any imperfection in this respect is cured by section 1025, Revised Statutes (Comp. St. § 1691). United States v. McKinley (C.C.) 127 Fed. 168; United States v. Lair, 195 Fed. 47, 115 C.C.A. 49; United States v. Aviles (D.C.) 222 Fed. 474.

The plaintiffs in error further criticize the first count of the indictment upon the ground that it is duplicitous, in charging separate offenses in the same count. The count charges but one conspiracy, though its purposes were more than one. Conceding that to overthrow [**6] and destroy the government is a separate offense from levying war against it, it does not follow that a conspiracy to do both constitutes more than one offense. The conspiracy is the gist of the offense, and but one is charged. The offense itself is therefore single. John Gund Brewing Co. v. United States, 206 Fed. 386, 124 C.C.A. 268, and cases cited; United States v. Aczel (D.C.) 219 Fed. 917.

The plaintiffs in error complain of the admission, over their objection, of evidence tending to show facts which would constitute crimes against the state, or the United States, different from the accusation for which they were being tried. It is true that the law does not permit one crime to be proved in order to raise the probability that another has been committed. If, however, the facts which tend to show the independent crime are also material to show the offense being tried, they do not become incompetent because they tend to prove the commission of an independent crime. The evidence objected to was pertinent to establish the existence of the conspiracy relied upon by the government, and was properly admitted. The court instructed the jury as to the only legitimate effect of the [**7] evidence. Jones v. United States, 179 Fed. 584, 103 C.C.A. 142.

The plaintiffs in error complain of the admission in evidence of an alleged statement

testified to by the government witness Williams to have been made by their codefendant, Bergfeldt, who was acquitted, that he had papers in his possession that might put him in the penitentiary if it were known. The admissibility of this statement, as against the defendant who made it, is clear. If admissible as to Bergfeldt, the other defendants should have requested that its effect be limited to Bergfeldt, in order to put the court in error for not so limiting it. However, Bergfeldt was acquitted, and, in order to reach that result, the jury must have found that he did not conspire with any of the plaintiffs in error, for the indictment charged no other offense against him. The court did charge the jury that they should consider declarations of defendants only against themselves, or those of their codefendants who were shown to have been present and to [*383] have heard them, unless they first found a conspiracy to have existed between the defendant making the declaration and those against whom it was asked to be considered. [**8] The jury, therefore, as they were instructed, must have considered the statement objected to against Bergfeldt only, since they found the plaintiffs in error had not conspired with him, by their verdict of acquittal. Its admission, therefore, worked no injury to the plaintiffs in error.

The plaintiffs in error complain that they were compelled to be witnesses against themselves, in violation of their constitutional right. The contention is based upon the action of the District Judge in permitting the government to trace certain letters and documents to the possession of certain of the defendants on trial, and then permitting secondary and oral evidence of their contents to be introduced. The constitutional guaranty does not go to the extent of preventing the government from proving by secondary evidence the contents of a document it cannot produce because it is in the possession of a defendant. That fact authorizes the introduction of secondary evidence, and, to lay a predicate for its introduction, the government must necessarily establish to the court's satisfaction the possession of the defendant. No demand for the production of any document was made upon any defendant in [**9] the presence of the jury. McKnight v. United States, 122 Fed. 926, 61 C.C.A. 112; Heinze v. United States, 181 Fed. 322, 104 C.C.A. 510; Trent v. United States, 228 Fed. 648, 143 C.C.A. 170; Watlington v. United States, 233 Fed. 247, 147 C.C.A. 253. The record also shows that the defendants concerned, testifying in their own behalf, proved the destruction of all the documents, except a letter, which their attorney stated was in his files, and which he stated he would produce, but was unable thereafter to locate. The District Judge also instructed the jury to disregard the evidence tracing the documents to the possession of defendants. The plaintiffs in error's rights were fully protected.

The plaintiffs in error also complain of the admission of the evidence of a pardon granted to the government witness Garner by the Governor of Texas. The defendants sought to impeach the evidence of Garner by showing his conviction and sentence to the state penitentiary on a charge of robbery. In explanation the witness Garner testified, without objection, to the facts attending the securing of his pardon. The objection was made to the pardon itself. We think it was competent in rebuttal [**10] of the evidence of conviction. As the defendants who were alone affected by Garner's evidence were all acquitted, no harm was done by its admission, in any event.

The plaintiffs in error demurred to the government's evidence, and also requested an instruction directing their acquittal, upon the close of all the evidence. The evidence is too extensive to abstract or analyze. There was evidence sufficient to justify the jury in determining that the plaintiffs in error, together with other of the defendants, not convicted, but apparently no less guilty, were active in their opposition to the conscription of citizens of the United States to take part in foreign wars. This opposition began in the organization of which plaintiffs in error were officers prior to the date of what is [*384] called the first Cisco convention in February, 1917. At that convention a resolution, called the Haskell county resolution, was passed. In its original shape it contained these words:

"And we oppose the United States government in the prosecution of a foreign war."

Upon the suggestion that this might be treasonable, it was amended, after adoption, by substituting for the words "United States [**11] government" the words "capitalistic

classes." This resolution had been previously adopted in its original form by local and county lodges in Haskell county. In May, 1917, a second state convention of the order was called and assembled at Cisco. One of the purposes for which this convention was called was to discuss the question of conscription. At this convention a committee on resolutions was selected by the plaintiff in error Risley, who was president of the order. It was open to inference that a majority of this committee were known to Risley to be men of radical views. The evidence tended to show that Risley suggested to the committee that the radical report be made the majority report, and it was so presented to the convention. It is true that Risley testifies his purpose in making the suggestion was to procure the defeat of the majority report on the floor of the convention. His good faith in this respect was for the jury, and it probably decided that question adversely to him. The minority report was the one adopted by the convention. It is a matter of fair inference, however, that the conservative action of the convention was distasteful to the leaders of the order, and [**12] that they did not acquiesce in it, but immediately took steps to continue the agitation for radical and violent measures against conscription. The first was the selection of the radical majority of the resolutions committee as delegates to go to Oklahoma to seek the co-operation of the radical organizations there operating.

The failure of the radical majority resolution of adoption by the convention would indicate that the order was not willing to adopt violent measures, and if the conspiracy charged had been coextensive with the membership of the order, or a majority thereof, it might have been fatal to the government's contention. The conspiracy charged was not necessarily so broad. It might include any part of the membership, though less than a controlling majority. The jury acquitted all but the three plaintiffs in error, and, by so doing, found against the conspiracy, so far as its scope included the order as an organization, only implicating its officers. The fair inference to be drawn from the verdict is that the jury believed that the plaintiffs in error had formed an inner conspiracy, the purpose of which was to use the machinery of the order to resist any draft law [**13] that might be enacted, even to the extent of overthrowing the government, if necessary, and to accomplish this by overcoming the conservatism of the majority and committing them to their own views. A tendency of the evidence, if believed, would authorize a finding that certain of the members of the organization, including plaintiffs in error, were not dissuaded from such action by the adverse vote on the majority resolution, but agreed [*385] to continue agitation to accomplish, through the organization, violent opposition to the government, in the event it should attempt to enforce conscription. The evidence tends to show that these members considered that such action was to be deferred only until co-operation with other kindred orders could be obtained, and their power so strengthened. The report of the delegates, on their return from Oklahoma, of the impracticability of such co-operation, was not accepted as final, since, after their return and report, the letter to the local lodges signed by the plaintiff in error Powell clearly indicates the continuance of the opposition to conscription, even up to the day of the enactment of the Selective Draft Law.

The evidence also [**14] tends to show that, after the adjournment of the Cisco convention in May, forcible opposition to conscription continued to be advocated in the locals; that high-power guns were procured by members in response to urging by leaders, to be used in resisting conscription; and that certain members, armed to resist, left their homes and took position in a canyon, to resist the conscription officers. The record tends to show that the conspiracy continued to progress until it was interrupted by the indictment and arrest of certain of the defendants, on and after May 18, 1917, the date of the enactment of the selective draft act (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2044a-2044k]). There is evidence, aside from the official connection of the three plaintiffs in error, tending to connect them with such an inner conspiracy. Powell's letter to the locals, dated May 16 or 18, attached to which was a petition in opposition to conscription, to be signed by the members, is some evidence of his connection, and that it continued up to the date of the enactment of the law. Risley's conduct, as presiding officer, at the second Cisco convention, was, of itself, evidence tending [**15] to show his connection, if the jury believed from it that he then advocated the adoption of the majority resolution, and it was open to them to so find. Bryant's utterances in the locals in the course of his position as organizer was evidence of his connection, the sufficiency of

which was for the jury to determine. The record contains other evidence to the same effect.

The fact, if it be a fact, that codefendants of the plaintiffs in error, against whom the evidence was equally persuasive, were acquitted by the jury, is no reason for setting aside the judgment of conviction against plaintiffs in error. It was necessary for the government to go no further than to establish a conspiracy as against any two or more of the defendants on trial. The organization was not on trial, but certain of its members, and a conspiracy of the kind charged, proven between any two of its members, as individuals, answered the requisition of the indictment.

The plaintiffs in error contend that a conspiracy to resist the enforcement of anticipated conscription was not forbidden by law: (1) Because the law was not in effect when the conspiracy was formed; (2) because it was not shown by the evidence [**16] to be a conspiracy to levy war against or overthrow the government of the United States, as charged in the first count of the indictment; and (3) because the [*386] evidence showed merely individual resistance, and not a general plan to prevent the enforcement of the draft law.

- 1. We are not prepared to say that a conspiracy to prevent the general enforcement of a law, formed in advance of its enactment, cannot become illegal unless and until it is enacted. The threat implied in the conspiracy may operate to prevent the enactment of the law, and so interfere with an operation of the government as much as would an attempt to prevent its enforcement when enacted. The purposes of this case do not require a decision of that question. The Selective Draft Law was enacted. A conspiracy aimed at its enforcement, though entered into before its passage, would become illegal, upon its passage, if it was not before so. Otherwise the government would have no redress against preparation by force and arms to resist the enforcement of a proposed law until after its passage, when it might well be too late. Unless such a conspiracy is shown to have been abandoned before the law against which [**17] it is aimed takes effect, it would be none the less punishable because entered into in advance of the passage of the law. In this case the jury might well have inferred from the evidence that the conspiracy, though formed before May 18, 1917, the date of the enactment of the Selective Service Law, continued up to and after that date, and was only interrupted then by the interposition of the government and the arrest and indictment of the alleged conspirators.
- 2. The plaintiffs in error contend that, if a conspiracy is proven by the evidence in the record, it is not a conspiracy to levy war, or to destroy or overthrow the government, and so not the conspiracy charged in the first count of the indictment, on which alone conviction was had. The motive of the conspirators does not necessarily determine the character of the conspiracy. Their object may have been to prevent the enforcement of a specific law. If, to attain that object, they conspire to overthrow or destroy the government, as a means to that end, the conspiracy is one to destroy or overthrow the government. There is evidence in the record tending to show that, to defeat conscription, if necessary, an attempt was to be [**18] made to supplant the administration by a provisional government. If the jury so found, a conspiracy to destroy or overthrow the government would be proven. The evidence also tended to show that there was a conspiracy to prevent the enforcement of conscription and the act of Congress providing for the selective draft. A conspiracy to prevent altogether the enforcement of a statute of the United States has been held to be a conspiracy to commit treason by levying war against the United States. In the case of United States v. Fries, Fed. Cas. No. 5,127, Circuit Judge Chase, speaking for the Circuit Court, said, in charging the jury:

"The court are of opinion that, if a body of people conspire and meditate an insurrection, to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor, but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war; and the quantum of the force employed neither lessens nor increases the crime -- whether by 100 or by 1,000 persons is wholly immaterial."

[*387] This extract was quoted with apparent approval by Chief Justice Marshall in [**19] the opinion of the Supreme Court in the case of Ex parte Bollman, 4 Cranch, 75, 127, 2 L.Ed. 554. In the case of United States v. Mitchell, 2 Dall. 348, 355, 1 L.Ed. 410, Justice Paterson, in charging the jury, said:

"The first question to be considered is: What was the general object of the insurrection? If its object was to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation, the offense, in legal estimation, is high treason; it is an usurpation of the authority of government; it is high treason, by levying of war."

In charging the grand jury in the Fries Case, Circuit Judge Iredell defined treason by levying war as follows:

"But I think I am warranted in saying, that if, in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of any act of the Congress of the United States altogether (as, for instance, the land tax act, the object of their opposition), any forcible opposition calculated to carry that intention into effect was a levying of war against the United States, and of course an act of treason."

The opinions of Judges Paterson and Iredell are [**20] referred to approvingly by Chief Justice Marshall in the case of Ex parte Bollman. It is true that, in order to constitute treason, as distinguished from a treasonable conspiracy, an actual assemblage of men in force is necessary, as was held in Ex parte Bollman, supra, and in United States v. Burr, 25 Fed. Cas. 162. The plaintiffs in error were, however, indicted and convicted for a conspiracy under a statute not even requiring proof of an overt act in order to convict.

3. It is also true that the cases cited hold that the resistance or the conspiracy to resist the enforcement of the law must be general, and not limited to a particular instance, or against a particular officer, or from a private or personal motive. There is evidence, however, in the record, which, if believed by the jury, was sufficient to show a conspiracy on the part of the plaintiffs in error to prevent the enforcement of conscription under the Selective Service Act all over the United States, not alone in their individual cases.

We think the record contains evidence, the sufficiency of which was for the jury to determine, that the plaintiffs in error conspired to overthrow and destroy the government of the [**21] United States and to levy war against it, as charged in the first count of the indictment. The government was not required to establish both, though both were averred. It established the conspiracy, as alleged, by proof of either.

The plaintiffs in error complain because evidence as to the good character of some of them was limited to the finding of the indictment. Proof of good character as to being lawabiding citizens might properly have been limited to the date of the commission of the offense. 16 Corpus Juris, 581. No restriction, as to date, was placed upon evidence of reputation for truth and veracity of those defendants who testified in their own behalf.

The District Judge fully and fairly charged as to the effect of evidence of good character, and was justified in refusing the requested instructions on this subject-matter for that reason.

[*388] The federal courts do not follow the practice of the state courts of the states in which they sit, in criminal matters, and there was no obligation to permit argument to follow the court's charge in conformity with the Texas practice.

The special instructions requested by the defendants have been examined. They were [**22] either covered by the court's general charge, or properly refused, because not asserting correct propositions of law, or were not applicable to the facts of the case. The questions presented by the motion in arrest of judgment have been heretofore considered.

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We conclude that there is no reversible error in the record, and the judgment of the District Court is affirmed.

(x)

277 F. 129, *; 1922 U.S. App. LEXIS 1735, **

SKEFFINGTON, Immigration Com'r, v. KATZEFF et al.

No. 1508

Circuit Court of Appeals, First Circuit

277 F. 129; 1922 U.S. App. LEXIS 1735

January 11, 1922

PRIOR HISTORY: [**1]

Appeal from the District Court of the United States for the District of Massachusetts; George W. Anderson, Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant challenged a decree of the District Court of the United States for the District of Massachusetts, ordering that appellees be discharged upon a petition for a writ of habeas corpus.

OVERVIEW: Appellees were arrested on warrants charging that they were within a class of persons, covered by an act of Congress that excluded them from admission to the United States. The act excluded aliens who were members of or affiliated with an organization that believed in, taught, and advocated the overthrow by force and violence of the government. After a hearing, a warrant was issued for appellants' deportation. The district court ordered appellees discharged because there was no evidence tending to show that the Communist Party, to which they belonged advocated the violent overthrow of the government, as used by the act. The appellate court reversed. The court found substantial evidence that the Communist Party, of which appellees were confessed and avowed members, taught and advocated the overthrow of the government by force and violence, which justified the deportation order.

OUTCOME: The decree was reversed, the petition for writ of habeas corpus was denied, and the writ was discharged. Appellants were remanded into the custody of the Commissioner of Immigration because there was substantial evidence justifying the deportation order.

CORE TERMS: deportation, proletariat, overthrow, violence, bourgeoise, manifesto, substantial evidence, teaches, communist, alien, inspector, army, reason assigned, proletarian, revolutionary, arming, rules of evidence, findings of fact, writ of habeas corpus, order of deportation, working class, habeas corpus, fair hearing, recommendation, disarmament, immigration, affiliated, discharged, conclusive, capitalist

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Immigration Law > Deportation & Removal > Grounds

*It is too well settled by the decisions of the Supreme Court of the United States to require any citation of authorities that an alien resident in the United States may be deported for any reason which Congress has determined will make his residence here inimical to the best interests of the government.

Immigration Law > Deportation & Removal

Deportation, when ordered by the proper executive officer of the government, is not visited upon the alien as a penalty for any crime, and the fact that the reason assigned for his deportation may constitute a crime under the local law

does not make the hearing upon deportation a trial in a criminal case, to be conducted under the rules of evidence that apply to such a trial.

- Immigration Law > Judicial Review > Scope & Standards of Review HN3 * It has also been definitely settled and is not controverted that the decisions of the executive officers charged with the execution of the Deportation Act, if arrived at after a fair hearing and upon substantial evidence and with no abuse of the discretion committed to them by the statute, are final.
- Immigration Law > Judicial Review > Scope & Standards of Review HN4 A series of decisions in the court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final.
- Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction Immigration Law > Judicial Review > Scope & Standards of Review HN5 Review by the district court, or on appeal by the appellate court, is limited to habeas corpus. Such review extends only to the inquiry whether the discretionary powers of the executive, large as they are, have been exceeded. There is no judicial power to review or reverse a finding of fact based upon evidence. The appellate court has recently pointed out that, while we may inquire on habeas corpus as to whether the deportation proceedings have been fair, the rules of evidence do not in strictness apply, and the hearing, though it must be fair, may be summary, and the findings of fact made by the executive department are conclusive.
- Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction Immigration Law > Deportation & Removal > Administrative Proceedings > Evidence HN6 If the court below did not have before it all the evidence considered by the Secretary of Labor relating to the ground upon which the deportation was ordered, it was not within the power of that court, nor is it within the power if this court, to say whether the evidence before the Secretary was sufficient to warrant the finding upon which the deportation was ordered or not.

OPINIONBY: JOHNSON

OPINION: [*130] Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

JOHNSON, Circuit Judge. This is an appeal from a decree of the District Court of the United States for the District of Massachusetts ordering the discharge upon a petition for a writ of habeas corpus of William T. Colyer and Amy Colyer. Frank Mack and Lew Bonder were the relators in another petition and, the issue upon appeal being the same in both cases, they have been heard as one case.

The relators were arrested on January 3, 1920, upon warrants issued by the Department of Labor on the charge that they were included within the class of persons covered by the Act of Congress approved October 16, 1918, Comp. Stat. Ann. Supp. 1919, § 4289 1/4b (1), which, so far as material, is as follows:

"Aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthow by force or violence of the government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all

[**2] organized government * * * shall be excluded from admission into the United States."

The reasons assigned for their arrest and deportation were, in substance, that they were members of or affiliated with an organization that believed in, taught and advocated the overthrow by force and violence of the Government of the United States.

A hearing in accordance with this statute was had before the immigration inspector and his findings were submitted to the Commissioner General of Immigration and the Acting Secretary of the Department of Labor, together with his recommendation that they be deported. His findings and recommendation were reviewed and approved by the Assistant Secretary of Labor and a warrant for the deportation from this country of each of the relators was issued by him.

The District Court has ordered the relators discharged on the ground that there was no evidence before the immigration inspector tending to show that the Communist Party, to which the relators admitted they belonged, believes in, advocates, or teaches the overthrow of the United States government by force or violence, within a fair [*131] meaning of the words "overthrow, force, and violence" as [**3] used in this act.

It is conceded that the relators were all aliens, three of them subjects of Great Britain, and one a subject of Russia. It was found by the District Court that they were all afforded a fair hearing before the inspector, and this finding is admitted to have been warranted by the facts.

HN1 → It is too well settled by the decisions of the Supreme Court of the United States to require any citation of authorities that an alien resident in the United States may be deported for any reason which Congress has determined will make his residence here inimical to the best interests of the government.

HN2→Deportation, when ordered by the proper executive officer of the government, is not visited upon the alien as a penalty for any crime, and the fact that the reason assigned for his deportation may constitute a crime under the local law does not make the hearing upon deportation a trial in a criminal case, to be conducted under the rules of evidence that apply to such a trial. Bugajewitz v. Adams, 228 U.S. 585, 591, 33 Sup. Ct. 607, 57 L. Ed. 978; Sibray v. United States, 227 Fed. 1, 7, 141 C.C.A. 555; United States v. Uhl (C.C.A.) 266 Fed. 34, 39.

It has also been definitely [4] settled and is not controverted that the decisions of the executive officers charged with the execution of the Deportation Act, if arrived at after a fair hearing and upon substantial evidence and with no abuse of the discretion committed to them by the statute, are final.

In Low Wah Suey v. Backus, 225 U.S. 460, 468, 32 Sup. Ct. 734, 735 (56 L. Ed. 1165), the court said:

MA*** A series of decision in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

In United States v. Uhl (C.C.A.) 271 Fed. 676, a case decided February 2, 1921, in the Second Circuit, it was said:

Review by the District Court, or on appeal by this court, is limited to habeas corpus. United States v. Sing Tuck, 194 [5] U.S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; and

such review extends only to the inquiry whether the discretionary powers of the executive (large as they are) have been exceeded. There is no judicial power to review or reverse a finding of fact based upon evidence. * * * and this court has recently pointed out that, while we may inquire on habeas corpus as to whether the deportation proceedings have been fair, the rules of evidence do not in strictness apply (Diamond v. Uhl [C.C.A.] 226 Fed. 34), and the hearing, though it must be fair, may be summary, and the findings of fact made by the executive department are conclusive (Rakics v. Uhl [C.C.A.] 266 Fed. 646)."

While the findings of fact by executive officers are final, yet, if such findings are not authorized by the act or are not sustained by [*132] substantial evidence, they may be reversed. Zakonaite v. Wolf, 226 U.S. 272, 274, 33 Sup. Ct. 31, 37 L. Ed. 218; Kwock Jan Fat v. White, 253 U.S. 454, 457, 40 Sup. Ct. 566, 64 L. Ed. 1010.

The question, then, presented upon this appeal is narrowed to this: Whether there was any substantial evidence which justified the order of deportation for the reason assigned.

The [**6] record contains no report of any oral testimony taken before the Inspector and reported to the Secretary of Labor. The only evidence reported consists of the government exhibits which contain the manifesto and program of the Communist International and the manifesto program and constitution of the Communist Party of America.

It is not clear that the judge sitting in the District Court had before him all the evidence that was presented to the Secretary of Labor and upon which he based his order of deportation, and it does not affirmatively appear in the record that he did. HN6 If the court below did not have before it all the evidence considered by the Secretary of Labor relating to the ground upon which the deportation was ordered, it was not within the power of that court, nor is it within the power if this court, to say whether the evidence before the Secretary was sufficient to warrant the finding upon which the deportation was ordered or not. For this reason alone we think the court below erred in discharging the respondents. But if it be assumed that the District Court had all the evidence before it that was before the Secretary of Labor, and that it consisted solely of the [**7] government exhibits containing the manifesto and program of the Communist International and of the manifesto program and constitution of the Communist Party of America, the question is whether these documents offered substantial evidence to justify the deportations for the reason assigned.

We have carefully examined these exhibits for the purpose of ascertaining whether they contain statements which, giving to language its ordinary meaning, would warrant any reasonable mind in reaching the conclusion that the Communist Party teaches or advocates the overthrow by force and violence of this government as now constituted.

Following are some of the declarations of purposes and program which, whether found in the manifesto of the Communist International or in the manifesto and constitution of the Communist Party of America, are binding upon a member of the latter, for in the application for membership the applicant declares "his adherence to the principles and tactics of the party and the Communist International":

"Communism does not propose to 'capture' the bourgeoise parliamentary state, but to conquer and destroy it. As long as the bourgeoise state prevails the capitalist class [**8] can baffle the will of the proletariat. * * *

"The state is an organ of coercion. * * *

"Therefore it is necessary that the proletariat organize its own state for the coercion and suppression of the bourgeoise. Proletarian dictatorship is a recognition of that fact; it is equally a recognition of the fact that in the communist reconstruction of society the proletariat alone counts as a class. * * *

"The proletarian class struggle is essentially a political struggle. It is a political struggle in the sense that its objective is political -- overthrow of **[*133]** the political organizations upon which capitalist exploitation depends, and the introduction of a proletarian state power. The object is the conquest by the proletariat of the power of the state. * * *

"The organized power of the bourgeoise is in the civil state, with its capitalistic army under control of bourgeoise-junker officers, its police and gendarmes, jailers and judges, its priests, government officials, etc. Conquest of the political power means not merely a change in the personnel of ministries, but annihilation of the enemy's apparatus of government; disarmament of the bourgeoise, of the counter-revolutionary [**9] officers, of the white guard; arming of the proletariat, the revolutionary soldiers, the red guard of workingmen. * * *

"The revolutionary era compels the proletariat to make use of the means of battle which will concentrate its entire energies, namely, mass action, with its logical resultant, direct conflict with the governmental machinery in open combat. All other methods, such as revolutionary use of bourgeois parliamentarism, will be of only secondary significance. * *

"Civil war is forced upon the laboring classes by their arch-enemies. The working class must answer blow for blow, if it will not renounce its own object and its own future, which is at the same time the future of all humanity.

"The communist parties, far from conjuring up civil war artificially, rather strive to shorten its duration as much as possible -- in case it has become an iron necessity -- to minimize the number of its victims, and above all to secure victory for the proletariat. This makes necessary the disarming of the bourgeoise at the proper time, the arming of the laborer, and the formation of a communist army as the protector of the rule of the proletariat and the inviolability of the [**10] social structure. Such is the red army of Soviet Russia, which arose to protect the achievements of the working class against every assault from within or without. The Soviet army is inseparable from the Soviet state."

We think it would be going far afield to say that, from such statements of purpose, no reasonable man could reach the conclusion that force and violence are the necessary instrumentalities for its accomplishment and are contemplated, and that, if consummated, it would overthrow government as now instituted. On the contrary, it seems to us that a program which advocates the disarmament of the armed forces of the existing state, the arming of the laborer and the formation of a Communist army to protect the rule of the proletariat, affords substantial evidence that the Communist Party, of which the relators are confessed and avowed members, teaches and advocates the overthrow of government by force and violence.

The entry in each case must be:

The decree of the District Court is reversed, the petition for writ of habeas corpus is denied, the writ is discharged, and the relators are remanded into the custody of the Commissioner of Immigration.

(xi)

265 F. 17, *; 1920 U.S. Dist. LEXIS 1104, **

COLYER et al. v. SKEFFINGTON, Com'r of Immigration. KATZEFF et al. v. SAME (three cases). In re HARBATUK et al. In re MACK et al.

No. 1833; No. 1835; No. 1837; No. 1845

District Court, D. Massachusetts

265 F. 17; 1920 U.S. Dist. LEXIS 1104

June 23, 1920

CASE SUMMARY

PROCEDURAL POSTURE: Numerous aliens, admittedly members of the Communist Party, petitioned for writs of habeas corpus against the Commissioner of Immigration (Commissioner), challenging the Commissioner's orders to deport the aliens on the grounds of the aliens' membership in an organization that advocated the violent overthrow of the United States government. The aliens contended that their deportation proceedings violated their due process rights.

OVERVIEW: Petitioners were several aliens ordered deported by the Commissioner of Immigration (Commissioner) on the grounds that the aliens belonged to the Communist Party, which the Commissioner contended advocated the violent overthrow of the United States government, within the meaning of U.S.C.S. § 4289 (1919). Petitioners admitted to being members of the organization. With the exception of four of petitioners, petitioners were not appraised of their right to counsel at the beginning of their deportation hearings, pursuant to an administrative rule. Petitioners sought writs of habeas corpus, arguing primarily that their deportation proceedings violated their due process rights, under U.S. Const. amends. V and XIV. The court granted, holding: (1) because evidence presented by Commissioner failed to establish that the Communist Party advocated the violent overthrow of the United States government, all petitioners ordered deported were entitled to be discharged from the custody of the immigration authorities; (2) with the exception of four petitioners, all of the deportation orders were vitiated by lack of due process of law for failure to appraise petitioners of their right to counsel.

OUTCOME: The writs were granted. Petitioners that were ordered deported were entitled to be discharged from the custody of the immigration authorities because there was insufficient evidence establishing that the Communist Party advocated the violent overthrow of the United States government. Further, because several petitioners were not appraised of the right to counsel, those orders of deportation were vitiated by lack of due process of law.

CORE TERMS: alien, arrest, inspector, membership, immigration, violence, arrested, deportation, overthrow, secretary, night, custody, deported, raid, process of law, manifesto, duty, general strike, revolutionary, platform, searched, weapon, capitalist, bureau, affiliated, spy, habeas corpus, questionnaire, working class, proletariat

LexisNexis(TM) HEADNOTES - Core Concepts - → Hide Concepts

Immigration Law > Deportation & Removal > Grounds

☐ Immigration Law > Judicial Review

HN1 The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare. This power to exclude and to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

- Immigration Law > Deportation & Removal > Grounds
- Immigration Law > Judicial Review
- Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction

 HN2 Courts have no jurisdiction, on habeas corpus proceedings, to interfere with the proceedings in the Department of Labor concerning the exclusion or the expulsion of aliens, unless and until there is some error of law in that department. Unless the proceedings in that department are unfair, thus lacking some of the essential elements of due process of law, or are based upon some misconstruction of the statute or disregard of the rules made pursuant thereto, or on other vitiating error of law, the courts have no jurisdiction.
- Immigration Law > Judicial Review > Habeas Corpus
- Immigration Law > Judicial Review > Scope & Standards of Review
- In habeas corpus proceedings challenging the proceedings in the Department of Labor concerning the exclusion or the expulsion of aliens, the primary function of a court is to try, not the right of the alien to enter or to remain in the United States, but to try the trial of the alien in the Department of Labor; if that trial was fair and legal, even though the result was, in the opinion of the court, erroneous on the facts, the court has no right to interfere; it may not, in habeas corpus proceedings, usurp the function that Congress has delegated by statute to the Department of Labor.
- Immigration Law > Judicial Review > Habeas Corpus
- Immigration Law > Judicial Review > Scope & Standards of Review
- While the courts have no jurisdiction on habeas corpus to substitute their judgment on pure questions of fact for that of the Secretary of Labor, it is equally well settled that if the proceedings in the Department of Labor are shown to the unfair, or otherwise lacking in the essential elements of due process of law, or it the Secretary of Labor is proceeding on an erroneous view of the law, then the courts must review.
- Immigration Law > Judicial Review > Habeas Corpus
- **While deportation proceedings are not criminal proceedings, aliens who are thereby deprived of their liberty may have their legal right to liberty tested on habeas corpus proceedings.
- Immigration Law > Judicial Review > Habeas Corpus
- HN6 A full and fair hearing on the charges which threaten an aliens' deportation, and an absence of all abuse of discretion and arbitrary action by the inspector, or other executive officer, are indispensable to the lawful deportation of an alien. Where, by the abuse of the discretion, or the arbitrary action of the inspector or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or is about to be deported, the power is conferred and the duty is imposed upon the courts of the United States to issue a writ of habeas corpus and relieve him.
- Immigration Law > Judicial Review > Constitutional Considerations Immigration Law > Judicial Review > Habeas Corpus
- *Aliens have constitutional rights. U.S. Const. amends. IV, V, VI, and XIV are not limited in their application to citizens. They apply generally to all persons within the jurisdiction of the United States.

| Constitutional Law > Search & Seizure Constitutional Law > Procedural Due Process Immigration Law > Judicial Review > Constitutional Considerations HNS One of the most fundamental of the body of liberties guaranteed the inhabitants of the United States by the Constitution of the United States is freedom from unreasonable search and seizure, and from arrest without due process. |
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| ☐ Immigration Law > Deportation & Removal > Administrative Proceedings **HN9** The administration of the immigration laws has been intrusted by Congress to the Department of Labor not to the Department of Justice. The latter department has no more legal right or power to deal with the exclusion or the expulsion of aliens than has the Department of the Interior. The department of Justice prosecutes for crime. But deportation proceedings are not criminal proceedings. |
| Immigration Law > Judicial Review Administrative Law > Separation & Delegation of Power > Legislative Controls HN10* The mandate of Congress, intrusting immigration matters to the Labor Department, is binding upon all government departments, including the courts. |
| ☐ Immigration Law > Deportation & Removal > Administrative Proceedings ☐ Administrative Law > Separation & Delegation of Power > Legislative Controls ☐ Administrative Law > Judicial Review HN11 Under the immigration laws authority is vested in the Secretary of Labor to provide rules and regulations for enforcing the provisions of the acts. Of these rules, which have the effect of law, the court must take judicial notice. They are binding upon the Department of Labor as part of the law of the land. |
| ☐ Immigration Law > Deportation & Removal > Administrative Proceedings HN12★ Officers shall make a thorough investigation of all cases when they are credibly informed or have reason to believe that a specified alien in the United States is subject to arrest and deportation on warrant. All such cases, by whomsoever discovered, shall be reported to the immigration officer stationed nearest the place where the alien is found to be. The word "officers" means immigration inspectors. |
| Immigration Law > Deportation & Removal > Administrative Proceedings Immigration Law > Judicial Review > Constitutional Considerations HN13 Due process of law requires that trials before immigration inspectors should be fair, unbiased, dispassionate. They may be summary, lacking in formalities of judicial procedure; but they must be conducted in an honest and reasonably intelligent attempt to ascertain and report the truth; otherwise the alien is deprived of the rights which the statutes of Congress contemplate that he shall have, including the right to have his appeal passed on by the Secretary of Labor with an adequate and truthful record before him. |
| Immigration Law > Deportation & Removal > Administrative Proceedings Immigration Law > Judicial Review > Constitutional Considerations Immigration Law > Rights of Aliens > Legal Representation HN14 See Immigration Rule 22(b)(5) (1919). |
| Immigration Law > Deportation & Removal > Administrative Proceedings > Burdens of Proof Immigration Law > Judicial Review > Scope & Standards of Review HN15★ Decisions of administrative officials to be valid must have some competent evidence to support them. |
| Immigration Law > Judicial Peview > Scope & Standards of Review |

- The construction of the statute, the applicability of the statute to the particular case, and the question whether or not the reasons given by the Secretary of Labor for the deportation agree with the requirements of the act are questions of law which are reviewable by the courts.
- ☐ Immigration Law > Judicial Review > Scope & Standards of Review

 HN17★ The decision of the Secretary of Labor is final on questions of fact.
- ☐ Immigration Law > Judicial Review
- Administrative Law > Separation & Delegation of Power > Legislative Controls

 Governments > Legislation > Interpretation
- **Statutory restrictions on immigration, like all other statutes, are, if possible, to be construed in accordance with the spirit as well as within the letter of our Constitution, including the First Amendment, U.S. Const. amend. I, and its declaration for freedom of speech, press, and assemblage.
- Immigration Law > Deportation & Removal > Grounds
- Governments > Legislation > Interpretation
- HN19 ± U.S.C.S. § 4289 (1919) does not outlaw the general strike as a political weapon.
- Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy

 HN20 If the Communist Party is organized for the purpose of overthrowing the
 government of the United States by force or violence, it is plainly a criminal
 conspiracy.
- ☐ Immigration Law > Deportation & Removal > Administrative Proceedings

 HN21★ An alien, in a habeas corpus proceeding, cannot set up errors of procedure to avoid results of acts to which he himself testifies in his deportation proceedings.
- Immigration Law > Judicial Review > Scope & Standards of Review

 HN22★ When error was found vitiating the proceedings in the Department of Labor, the District Court ought not to assume the duties of the immigration authorities, unless no other course can reasonably be taken.
- Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond
- *U.S.C.S. § 4289 (1919) authorizes the Secretary of Labor in his discretion to release on bail not less than \$ 500, pending hearing and final decision.
- Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond
- Immigration Law > Judicial Review > Scope & Standards of Review

 HN24 In the ordinary case the court has no power to interfere with the discretion of the immigration authorities as to granting or refusing bail or as to the amount of bail. Some abuse of the power vested in them by U.S.C.S. § 4289 (1919) must be shown in order to warrant an interference by the court.
- ☐ Immigration Law > Deportation & Removal > Administrative Proceedings
 ☐ Immigration Law > Judicial Review > Scope & Standards of Review

 HN25★ Except under extraordinary circumstances, a court has no right to interfere in behalf of an alien until the deportation proceedings have been completed in the Department of Labor.

OPINIONBY: [**1]

ANDERSON

OPINION:

[*20] ANDERSON, Circuit Judge. These are petitions for habeas corpus brought by or in behalf of 20 aliens against the Commissioner of Immigration at Boston. They were heard together; they fall into two classes: William T. Colyer, Amy Colyer, Frank Mack, Lew Bonder, Frank Matchian, Tehon Lanovoy, Trofim Yarmoluk, Anton Harbatuk, Anton Gessewich, Fred Chaika, Koly Honchereoff, Adam Musky, and Sedar Serachuk have, after appeal to the Secretary of Labor, been ordered by him to be deported. Seven of the aliens were at the time [*21] of the filing of the petitions held at Deer Island by the respondent in default of bail, fixed, on recommendation of Assistant Commissioner of Immigration Sullivan, as follows:

| Ivan T. Hyrnchuk | \$10,000 |
|--------------------|----------|
| Theodore Pashukoff | 5,000 |
| William Maches | 5,000 |
| William Chriupko | 5,000 |
| Joe Sinkus | 5,000 |
| Władimir Serachuk | 5,000 |
| Samuel Drakewich | 5,000 |

Near the end of the long hearing, in which it clearly appeared that none of the aliens were in any way involved, by the use of bombs, guns, or other weapons, in plans of injuring persons or property, and that the cases could not for many months be finally disposed of, the [**2] writs were ordered issued, and all the petitioners admitted by this court to bail in the sum of \$500 each. No such responsibility would have been taken by the court if there had been a scintilla of evidence that any alien thus set at liberty was committed in any way to acts of force or violence against person or property.

At the opening of the trial the cases were said by counsel on both sides to be, in many important aspects, test cases of the legality of an undertaking of the government to deport several thousand aliens alleged to be proscribed by a portion of section 1 of the Act of October 16, 1918 (Comp. St. Ann. Supp. 1919, § 4289 1/4b[1]), as follows:

"That *** aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the government of the United States *** shall be excluded from admission into the United States."

Section 2 (section 4289 1/4b[2]) provides for the deportation of such aliens, irrespective of the time of their entry.

The sole charge against these aliens is membership in the Communist Party or the Communist Labor Party. The proposition of the Department [**3] of Justice, adopted by the Commissioner General of Immigration, as hereafter set forth, is that membership in one of these parties is, alone, enough to bring the aliens within the purview of this provision; that both parties are committed to a scheme to overthrow our government by force or violence. In both classes of cases the petitioners attack, on grounds fatal if sustained, the validity of the proceedings instituted by the government on January 2, 1920, for their deportation.

Under such circumstances, it seemed the plain duty of this court to afford the fullest opportunity both to the petitioners and to the government to present all facts arguably pertinent, in order that there might be a record adequate for a determination of the important issues of law by the Supreme Court or the Circuit Court of Appeals. The case therefore has been heard before me at length on 15 days. The transcript of parol evidence and arguments makes a record of nearly 1,600 pages. In addition, there is a large mass of exhibits. The petitioners were permitted to present practically all the evidence which, in their view, might sustain their contentions. Their counsel [*22] have also had the

assistance [**4] of Professors Felix Frankfurter and Zechariah Chafee, Jr., of the Harvard Law School, who, as amici curiae, have appeared in association with counsel for the petitioners, and assisted both in the presentation of the evidence and in the argument of controlling questions of law.

I desire to express my appreciation of their unselfish and highly professional endeavors to assist in the proper determination of a cause involving, directly, the fundamental rights of a large number of aliens but poorly equipped with means or knowledge to protect their rights, and, indirectly, questions of far-reaching and general importance to all, whether citizens or aliens.

It should be added that, at the close of the hearing, Assistant United States Attorney Lewis Goldberg, who has presented the government's side of the cause with very great ability, urging every possible authority offering any support for the government's proceedings, expressed himself as fully content with the opportunity given the government to present all evidence and arguments which might sustain its view of the law and the facts. No counsel from the departments in Washington has rendered the slightest assistance on the law or [**5] the facts.

In such a case, based upon such a record, it is the obvious duty of the trial judge in his opinion to excerpt from the bulky record the evidence -- particularly the documentary evidence -- of most vital importance, to make relevant findings of fact based upon all the evidence, and thus to present, for the decision of the issues of law for the court above, a record of the facts, accurate, adequate, and yet as brief as possible. Under such circumstances, the opinion of the trial court is obviously, in scope and purpose, closely analogous to the function performed by an adequate master's report. With such a case, presented on such a record, actual brevity has been found impossible of realization. This writing is unpleasantly, but necessarily, lengthy.

Controlling Legal Principles.

A preliminary statement of the well-settled and familiar principles of law on which all of these habeas corpus cases involving the exclusion or deportation of aliens depend will bring into clearer perspective the field of facts in which this court must perform its most important duties.

It has been repeatedly held that "HN1- the right to exclude or to expel all aliens, or any class of aliens, [**6] absolutely or upon certain conditions, in war or in peace," is "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare;" that this "power to exclude and to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene." See Fong Yue Ting v. United States, 149 U.S. 698, 711, 713, 13 [*23] Sup. Ct. 1016, 1021 (37 L. Ed. 905), in which Mr. Justice Gray elaborately reviews the authorities; The Chinese Exclusion Cases, 130 U.S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; Nishimura Ekiu v. United States, 142 U.S. 651, 659, 12 Sup. Ct. 336, 35 L. Ed. 1146; Chin Yow v. United States, 208 U.S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; Lewis v. Frick, 233 U.S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967.

Otherwise stated, there is no constitutional limit to the power of Congress [**7] to exclude or expel aliens. An invitation once extended to the alien to come within our borders may be withdrawn. He has no vested right to remain. This was expressly adjudicated in the Chinese Exclusion Cases, 130 U.S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068, in which the Supreme Court unanimously held that the fact that a Chinese laborer had legally entered the United States conferred upon him no right of which he could not be deprived by a subsequent act of Congress.

It is also familiar and perfectly well-settled law that the HNZ* courts have no jurisdiction,

on habeas corpus proceedings, to interfere with the proceedings in the Department of Labor concerning the exclusion or the expulsion of aliens, unless and until there is some error of law in that department. Unless the proceedings in that department are unfair, thus lacking some of the essential elements of due process of law, or are based upon some misconstruction of the statute or disregard of the rules made pursuant thereto, or on other vitiating error of law, the courts have no jurisdiction. In these habeas corpus cases, therefore, it may be said that HN3 the primary function of the court is to try, not the right of the alien [**8] to enter or to remain in the United States, but to try the trial of the alien in the Department of Labor; if that trial was fair and legal, even though the result was, in the opinion of the court, erroneous on the facts, the court has no right to interfere; it may not, in habeas corpus proceedings, usurp the function that Congress has delegated by statute to the Department of Labor.

But, HN4% while the courts have no jurisdiction on habeas corpus to substitute their judgment on pure questions of fact for that of the Secretary of Labor, it is equally well settled that if the proceedings in the Department of Labor are shown to the unfair, or otherwise lacking in the essential elements of due process of law, or it the Secretary of Labor is proceeding on an erroneous view of the law, then the courts must review. Gegiow v. Uhl, 239 U.S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114; Chin Yow v. U.S., 208 U.S, 8, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Petkos, 214 Fed. 978, 131 C.C.A. 274. Compare American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90; Whitfield v. Hanges, 222 Fed. 745, 138 C.C.A. 199, and cases cited; Kwock Jan Fat v. White, 252 U.S. , [**9] 40 Sup. Ct. 566, 64 L. Ed. , decided June 7, 1920.

HN5 While deportation proceedings are not criminal proceedings, aliens who are thereby deprived of their liberty may have their legal right to liberty tested on habeas corpus proceedings.

In Whitfield v. Hanges, supra, Judge Sanborn, for the Circuit [*24] Court of Appeals for the Eighth Circuit, states the principle as follows:

"HN6TA full and fair hearing on the charges which threaten his deportation, and an absence of all abuse of discretion and arbitrary action by the inspector, or other executive officer, are indispensable to the lawful deportation of an alien. Where, by the abuse of the discretion, or the arbitrary action of the inspector or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or is about to be deported, the power is conferred and the duty is imposed upon the courts of the United States to issue a writ of habeas corpus and relieve him. The Japanese Immigrant Case, 189 U.S. 86, 100, 101, 23 Sup. Ct. 611, 47 L. Ed. 721; Chin Yow v. United States, 208 U.S. 8, 10, 12, 13, 28 Sup. Ct. 201, 52 L. Ed. 369; Low Wah Suey v. Backus, 225 U.S. 460, 468, 32 Sup. Ct. 734, [**10] 56 L. Ed. 1165; Ex parte Petkos (D.C.) 212 Fed. 275; United States v. Chin Len, 187 Fed. 544, 109 C.C.A. 310; United States v. Williams (D.C.) 185 Fed. 598, 604; United States v. Williams (D.C.) 193 Fed. 228."

HN7 Aliens have constitutional rights. The Fourth, Fifth, Sixth, and Fourteenth Amendments are not limited in their application to citizens. They apply generally to all persons within the jurisdiction of the United States. See Yick Wo v. Hopkins, 118 U.S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

In this case an ordinance of San Francisco, made under a state law, was held, as enforced, to involve an unconstitutional discrimination against Chinese laundryment then lawfully in San Francisco. The court, by Mr. Justice Matthews, said:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; [**11] and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."

In Wong Wing v. United States, 163 U.S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140, it was held that Congress could not constitutionally promote its policy of excluding Chinese aliens by administrative orders by subjecting such aliens, found illegally within the United States, to infamous punishment at hard labor, or by confiscating their property, without providing [**12] a judicial trial to establish the guilt of the accused. In the opinion in is pointed out, as held in Fong Yue Ting v. United States, 149 U.S. 730, 13 Sup. Ct. 1029, 37 L. Ed. 905, that an --

"order of deportation is not a punishment for crime. * * * It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government [*25] of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend."

In that opinion the language above quoted from the opinion in Yick Wo v. Hopkins is repeated; the court, by Mr. Justice Shiras, adding:

"Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, not be deprived of life, liberty, or property without due process of law."

In the Japanese Immigrant Case, 189 U.S. 86, 100, 23 [**13] Sup. Ct. 611, 614 (47 L. Ed. 721), the court, by Mr. Justice Harlan, said:

"But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

*One of the most fundamental of the "body of liberties" guaranteed the inhabitants of the United States by our Constitution is freedom from unreasonable search and seizure, and from arrest without due process. The historic basis of these liberties is elaborately dealt with by Mr. Justice Bradley in Boyd v. United States, 116 U.S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. That case involved merely 35 cases of plate glass, seized by the collector of the port as forfeited to the United States under section 12 of the Act of June 22, 1874 (18 Stat. 188), which required the compulsory production of private papers to be used as evidence against the alleged owner. This statute was held repugnant to the Fourth and Fifth Amendments. In a long opinion Mr. Justice Bradley pointed out that the Fourth Amendment [**14] to the Constitution, prohibiting unreasonable searches and seizures, had its roots in the struggle for liberty in the Colonies, one famous incident of which was the attack in Boston in 1761 by James Otis on the writs of assistance issued to revenue officers, "empowering them in their discretion to search suspected places for smuggled goods." See 116 U.S. 625, 6 Sup. Ct. 529, 29 L. Ed. 746. The learned justice also points out that these guaranties of liberty in our Constitution were grounded upon the great decision of Lord Camden in 1765 in the case of Entick v. Carrington, 19 Howell's State Trials, 1029, growing out of the controversy with John Wilkes and the attempt of the English government, through Lord Halifax, Secretary of State, to obtain evidence to convict Wilkes of the charge of criminal libel by searching private houses for the discovery

and seizure of books and papers.

"By authority of the Secretary's warrant Wilkes' house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of # 1,000 against Wood, one of the party who made the search, and \$4,000 against Lord Halifax, the Secretary of State who issued [**15] the warrant. * * * Lord Camden pronounced the judgment of the court in Michaelmas term, 1765, and the law as expounded by him has been regarded as settled from that time to this, and his great judgment on [*26] that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time."

Compare United States v. Wong Quong Wong (D.C.) 94 Fed. 832; Moy Wing Sun v. Prentis, 234 Fed. 24, 148 C.C.A. 40; Robinson v. Richardson, 13 Gray (Mass.) 454; In re Pacific Ry. Co. (C.C.) 32 Fed. 251.

The learned justice also, in a footnote, refers to 3 May's Constitutional History of England (American Edition, vol. 2) c. 11, for an illuminating discussion of the historic struggle for liberty in England, including the use made of the spy system. See page 39, where May says:

"Next in importance to personal freedom is immunity from suspicions, and jealous observation. Men may be without restraints upon their liberty; they [**16] may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators, who shall say that they are free? Nothing is more revolting to Englishmen than the espionage which forms part of the administrative system of continental despotism. It haunts men like an evil genius, chills their galety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. Rulers who distrust their own people must govern in a spirit of absolutism, and suspected subjects will be ever sensible of their bondage."

See, for a careful review of the history of the spy system in industry and in dealing with political movements, Robert C. Hunter's book on "Violence in the Labor Movement," and John Graham Brooks' "Labor's Challenge to the Social Order."

See, also, an account of James Otis' argument against the writs of assistance, written by Mr. Justice Gray and found in the appendix to Quincy's Reports; also, on the same subject, 2 Works of John Adams, appendix A, pp. 523 to 525. One main point [**17] made by Otis was that these writs, though issued on judicial process, were not returnable to any court. They thus authorized petty officers to enter homes, etc., without requiring them to make return of their doings. This, Otis said, "was tyranny, destroying the freedom of one's house."

The principles laid down in these earlier authorities have not passed into oblivion or disuse. They are still the law of this nation. See Silverthorne Lumber Co., Inc., v. United States, 251 U.S. 385, 40 Sup. Ct. 182, 64 L. Ed. , decided January 26, 1920, opinion by Mr. Justice Holmes. This was a proceeding to punish Silverthorne for contempt for refusing to produce books and papers on a summons duces tecum. Refusal was grounded on the rights of the parties under the Fourth Amendment. The Silverthornes were arrested, and, while in custody, "representatives of the Department of Justice and the United States marshal, without a shadow of authority, went to the office of their company and made a clean sweep of all the books, papers, and documents found there." These were subsequently, on petition to the District Court, ordered returned. But meantime the government had [*27] had them [**18] photographed, and used the photographs in obtaining an indictment. On subpoena duces tecum, the production of the originals was then sought. Mr. Justice Holmes said (page 391 of 251 U.S. at page 682 of 40 Sup. Ct. [64 L. Ed.]):

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U.S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U.S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before [**19] the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed. The numerous decisions, like Adams v. New York, 192 U.S. 585, holding that a collateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial, are no authority in the present proceeding, as is explained in Weeks v. United States, 232 D.S. 383, 394, 395. Whether some of those decisions have gone too far or have given wrong reasons it is unnecessary to inquire; the principle applicable to the present case seems to us plain. It is stated satisfactorily in Flagg v. United States, 233 Fed. Rep. 481, 483. In Linn v. United States, 251 Fed. Rep. 476, 480, it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected even [**20] if the same result might have been achieved in a lawful way."

If a corporation has such rights, a fortiori, a person, though an alien, is protected.

In the <u>Flagg Case</u>, <u>233 Fed. 481</u>, 147 C.C.A. 367, cited supra with approval by Mr. Justice Holmes, it appeared that Flagg's books and papers had been illegally seized without warrant and used as the basis of an indictment against Flagg for using the mails in a scheme to defraud, in which the defendant was convicted. The judgment was reversed as grounded on evidence unconstitutionally obtained.

In Weeks v. United States, 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L.R.A. 1915B, 834, Ann. Cas. 1915C, 1177, Mr. Justice Day, speaking for a unanimous court, said, as to the Fourth Amendment:

"The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and [**21] the duty of giving to it force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws."

Other illustrations of the application by the courts of these general principles of liberty to the protection of the rights of aliens are: **[*28]** United States v. Williams (D.C.) 185 Fed. 598; Roux v. Commissioner of Immigration, 203 Fed. 413, 121 C.C.A. 523; Moy Suey v. United States, 147 Fed. 697, 78 C.C.A. 85; Pang Sho Yin v. United States, 154 Fed. 660, 83 C.C.A. 484; Fong Gum Tong v. United States, 192 Fed. 320, 112 C.C.A. 572.

Administration of Immigration Laws Vested by Congress in Department of Labor.

*The administration of the immigration laws has been intrusted by Congress to the Department of Labor -- not to the Department of Justice. The latter department has no more legal right or power to deal with the exclusion or the expulsion of aliens than has the

Department of the Interior. The department of Justice prosecutes for crime. But deportation proceedings are not criminal proceedings. Pang Sho Yin v. United States, supra.

There are obvious reasons why Congress delegated the important and delicate functions of excluding [**22] and expelling aliens to the Labor Department. This department is charged with certain functions pertaining peculiarly to human welfare; it exercises large powers over millions of persons, many of them poor, comparatively helpless, and unacquainted with our language and institutions. As the functions of the Department of Justice and the Department of Labor are radically different, the official personnel of the two departments would naturally have different methods of procedure. But, without elaborating reasons, HN10 the mandate of Congress, intrusting immigration matters to the Labor Department, is binding upon all government departments, including the courts. The Commissioner General of Immigration is a subordinate in the Department of Labor.

HN11% Under the immigration laws authority is vested in the Secretary of Labor to provide rules and regulations for enforcing the provisions of the acts. Of these rules, which have the effect of law, the court must take judicial notice. Caha v. United States, 152 U.S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. They are binding upon the Department of Labor as part of the law of the land. For present purposes, the most important rule is rule 22, entitled [**23] "Arrest and Deportation on Warrant."

Subdivision 2 of rule 22 provides:

"HN12 TOfficers shall make a thorough investigation of all cases when they are credibly informed or have reason to believe that a specified alien in the United States is subject to arrest and deportation on warrant. All such cases, by whomsoever discovered, shall be reported to the immigration officer stationed nearest the place where the alien is found to be."

The word "officers," used in this subdivision 2, means immigration inspectors. They are civil service appointees, most of them of large experience in this sort of work.

Subdivision 3 of the same rule is as follows:

"The application must state facts showing prima facie that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some substantial supporting evidence. If [*29] the facts stated are within the personal knowledge of the inspector reporting the case, they need not be in affidavit form. But if based upon statements of persons not sworn officers of the government (except in cases of public charges [**24] covered by subdivision 4 hereof), the application should be accompanied by the affidavit of the person giving the information or by a transcript of a sworn statement taken from that person by an inspector. In all cases shown in subdivision 1 to be subject to a time limitation the application must be accompanied by a certificate of landing, to be obtained from the immigration officer in charge at the port where landing occurred, unless entry without inspection within such limitation is confessed, or a reason given for its absence. In the absence of such certificate, effort should be made to supply the principal items of information mentioned in the blank form provided for such certificate. Telegraphic application may be resorted to only in case of necessity or when some substantial interest of the government would be subserved thereby, and must state (a) that the usual written application is being forwarded by mail, and (b) the substance of the facts and proof therein contained. The code supplied by the department should be used whenever practicable."

Subdivision 5 in the form in which the rule was before the amendment of December 20, 1919, hereinafter referred to, so far as now [**25] material is as follows:

"(a) Upon receipt of a telegraphic or written warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. Pending determination of the case, in the discretion of the immigration officer in charge, he may be taken into custody or allowed to remain in some place deemed by such officer secure and proper, except that in the absence of special instructions an alien confined in an institution shall not be removed therefrom until a warrant of deportation has been issued and is about to be served.

- "(b) At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing, and to offer evidence to meet any evidence presented or adduced by [**26] the government. Objections and exceptions of counsel shall not be entered on the record, but may be presented by him in accompanying brief. If during the hearing it shall appear to the examining inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien's attention shall be directed to the facts which constitute such reason, and he shall be given an opportunity to show cause why he should not be deported therefor.
- "(c) At the close of the hearing the full record shall be forwarded to the bureau, together with any written argument submitted by counsel and the recommendations of the examining officer and the officer in charge, for determination as to whether or not a deportation warrant shall issue."

Subdivision 6 provides that, pending deportation proceedings, the alien may be released on a \$500 bond unless different instructions are given by the department.

Subdivision 10 is as follows:

"When it is necessary to detain or hold arrested women and girls they shall not be incarcerated by immigration officials in jails or other similar places unless such incarceration is absolutely unavoidable; [**27] but if there is not attached to the immigration station or quarters a room suitable for such [*30] purpose, and if such aliens are not already being held in some proper institution, arrangements shall be made for their detention by some philanthropic or other similar society, preferably under the control of organizations or persons of the same nationality and religion as of the detained aliens."

By section 17 of the Act of February 5, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289 1/4ii), provision is made for the appointment of boards of inquiry to deal with deportation matters, including the right of appeal by the alien to the Secretary of Labor. Appeals are heard "solely upon the evidence adduced before the Board of Special Inquiry."

In rule 17 are provisions for the reopening of cases for additional evidence, a provision possibly applicable in some aspects of this case.

From the foregoing it is apparent that the records upon which the decisions of the Secretary of Labor are based are under the provisions of these rules intended to be made in summary, but fair and adequate, fashion by real trials before immigration inspectors.

HN13*Due process of law requires that [**28] these trials should be fair, unbiased, dispassionate. They may be summary, lacking in formalities of judicial procedure; but they must be conducted in an honest and reasonably intelligent attempt to ascertain and report the truth; otherwise the alien is deprived of the rights which the statutes of Congress contemplate that he shall have, including the right to have his appeal passed on by the Secretary of Labor with an adequate and truthful record before him. Moreover, an unfair or otherwise misleading record is as much a fraud upon the law and upon the Secretary of Labor as upon the alien. It is as much the duty of the Department of Labor to admit aliens impliedly invited by Congress into this country as it is to exclude or expel

those proscribed by Congress. The general policy of the United States towards immigrants has been to admit and to welcome all, except specifically described and limited undesirables. No executive department has any right by strained construction to substitute its theories for those adopted by the national Legislature.

On important inquiry in this case is as to whether the records in the case of 13 of the aliens who have been ordered deported, were [**29] made by labor inspectors acting soberly, conscientiously, and with an unbiased and uncontrolled attempt to find and report the facts on which the rights of these aliens depend. The petitioners urge that in the proceedings here brought in question the Department of Labor abdicated its functions; that those functions were usurped by the Department of Justice, through its Bureau of Investigation, and that the proceedings are therefore void ab initio; that if not absolutely void, at any rate the trials by the inspectors were under such circumstances as to prevent a fair, impartial, conscientious attempt to find and report the facts upon which the rights of many of the aliens must depend. The methods adopted are contended to have deprived the petitioners, many of whom have but a meager knowledge of English and scant education, of any fair opportunity to have their real status determined. This contention makes it necessary to set forth in considerable detail [*31] the facts under which the petitioners, and hundreds of other aliens, were arrested and held for trial.

Initiation and Conduct of the Raid in New England.

On December 27, 1919, Burke, Chief of the Bureau of Investigation [**30] of the Department of Justice in Washington, sent the following letter to Kelleher, head of the local bureau in Boston:

"Department of Justice, Bureau of Investigation.

"Washington, December 27, 1919.

"Strictly Confidential.

"Geo. E. Kelleher, Esq., Box 3185, Boston, Mass. -- Dear Sir: I have already transmitted to you two briefs prepared in this department upon the Communist Party of America and the Communist Labor Party with instructions that these briefs be carefully examined and studied for the purpose of familiarizing yourself and the agents under your direction with the principles and tactics of these two respective organizations.

"You have submitted to me affidavits upon various individuals connected with these respective organizations, stating that these persons are aliens and members of the organizations referred to. I have transmitted to the Commissioner General of Immigration the affidavits submitted by you with the request that warrants of arrest be issued at once. This action is now being taken by the Bureau of Immigration and warrants of arrest are being prepared and will shortly be forwarded to the immigration inspector of your district.

"Briefly the arrangements [**31] which have been made are that the warrants will be forwarded to the immigration inspector who will at once communicate with you and advise you of the names of the persons for whom he has received warrants. You should then place under surveillance, where practicable, the persons mentioned, and at the appointed time you will be advised by me by wire when to take into custody all persons for whom warrants have been issued.

"At the time of the apprehension of these persons every effort should be made by you to definitely establish the fact that the persons arrested are members of either the Communist Party of America or the Communist Labor Party. I have been reliably informed that instructions have been issued from the headguarters of each of these organizations to their members that they are to refuse to answer any questions but to them by any federal officers, and are to destroy all evidence of membership or affiliation with their respective organizations. It is therefore of the utmost importance that you at once make every effort to ascertain the location of all of the books and records of these organizations

in your territory and that the same be secured at the time of the arrests. [**32] As soon as the subjects are apprehended, you should endeavor to obtain from them, if possible, admissions that they are members of either of these parties, together with any statement concerning their citizenship status. I cannot impress upon you too strongly the necessity of obtaining documentary evidence proving membership.

"Particular efforts should be made to apprehend all of the officers of either of these two parties if they are aliens; the residences of such officers should be searched in every instance for literature, membership cards, records, and correspondence. The meeting rooms should be thoroughly searched and an effort made to locate the charter of the Communist Party of America or the Communist Labor Party, under which the local organization operates, as well as the membership and financial records, which, if not found in the meeting rooms of the organization, will probably be found in the homes of the recording and financial secretaries, respectively. All literature, books, papers, and anything hanging on the walls should be gathered up; the ceilings and partitions should be sounded for hiding places. After obtaining any documentary evidence, the same should [**33] be wrapped in packages and marked thereon, the [*32] location of the place, and the name of the persons obtaining the evidence, and the contents of each package.

"Violence towards any aliens should be scrupulously avoided. Immediately upon apprehending an alien, he should be thoroughly searched. If found in groups in meeting rooms, they should be lined up against the wall and there searched; particular effort being given to finding the membership book, in which connection the search of the pockets will not be sufficient. In no instance should money or other valuables be taken from the aliens. All documentary evidence taken from an aliean should be placed in an individual envelope, provided for the purpose, which envelope should be marked showing the contents contained in the same, whether they were found in the possession of the alien or in his room, and if in the latter the address of the house should be given as well as the name of the alien and the officer who obtained the evidence. A duplicate record should be kept of all evidence thus obtained. At the time of the transfer of the alien to the immigration inspector, you should also turn over to the immigration inspector [**34] the original evidence obtained in the particular case, plainly marked so that there may be no complaint by the immigration officers as to the manner in which evidence has been collected by the agents of this bureau.

"I have made mention above that the meeting places and residences of the members should be thoroughly searched. I leave it entirely to your discretion as to the method by which you should gain access to such places. If, due to the local conditions in your territory, you find that it is absolutely necessary for you to obtain a search warrant for such premises, you should communicate with the local authorities a few hours before the time for the arrests is set and request a warrant to search the premises.

"Under no conditions are you to take into your confidence the local police authorities or the state authorities prior to the making of the arrests. It is not the intention nor the desire of this office that American citizens, members of the two organizations, be arrested at this time. If, however, there are taken into custody any American citizens through error, and who are members of the Communist Party of America or the Communist Labor Party, you should immediately [**35] refer their cases to the local authorities.

"It may be necessary, in order to successfully make the arrests, that you obtain the assistance of the local authorities at the time of the arrests. This action should not be taken, unless it is absolutely necessary; but I well appreciate that where a large number of arrests are to be made it may be impossible for the same to be made by special agents of this department, in which event you are authorized to request the assistance of the local police authorities. Such assistance should not be requested until a few hours before the time set for the arrests, in order that no 'leak' may occur. It is to be distinctly understood that the arrests made are being made under the direction and supervision of the Department of Justice.

"For your own personal information, I have to advise you that the tentative date fixed for

the arrests of the Communists is Friday evening, January 2, 1920. This date may be changed, due to the fact that all of the immigration warrants may not be issued by that time. You will, however, be advised by telegraph as to the exact date and hour when the arrests are to be made. If possible, you should arrange with your [**36] under-cover informants to have meetings of the Communist Party and Communist Labor Party held on the night set. I have been informed by some of the bureau officers that such arrangements will be made. This, of course, would facilitate the making of the arrests.

"On the evening of the arrests this office will be open the entire night, and I desire that you communicate by long distance to Mr. Hoover any matters of vital importance or interest which may arise during the course of the arrests. You will possibly be given from seven (7) o'clock in the evening until seven (7) o'clock in the morning to conclude the arrests and examinations. As pointed out previously, the grounds for deportation in these cases will be based solely upon membership in the Communist Party of America or the Communist Labor Party and for that reason it will not be necessary for you to go [*33] in detail into the particular activities of the persons apprehended. It is, however, desirable that wherever possible you should obtain additional evidence upon the individuals, particularly those who are leaders and officers in the local organizations. The immigration inspector will be under instructions to co-operate [**37] with you fully, and I likewise desire that you co-operate in the same manner with the immigration inspector at the time of the arrests, as well as following the arrests. At the hearings before the immigration inspector you should render any and all reasonable assistance to the immigration authorities, both in the way of offering your services to them and the services of any of your stenographic force. It is of the utmost necessity that these cases be expedited and disposed of at the earliest possible moment and for that reason stenographic assistance and any assistance necessary should be rendered by you to the immigration inspectors. An excellent spirit of cooperation exists between the Commissioner General of Immigration and this department in Washington and I desire that the same spirit of cooperation between the field officers of this bureau and the field officers of the Bureau of Immigration also exist.

"I desire that the morning following the arrests you should forward to this office by special delivery, marked for the 'Attention of Mr. Hoover's complete list of the names of the persons arrested, with an indication of residence, or organization to which they belong, and [**38] whether or not they were included in the original list of warrants. In cases where arrests are made of persons not covered by warrants, you should at once request the local immigration authorities for warrants in all such cases and you should also communicate with this office at the same time. I desire also that the morning following the arrests that you communicate in detail by telegram, 'Attention of Mr. Hoover,' the results of the arrests made, giving the total number of persons of each organization taken into custody, together with a statement of any interesting evidence secured.

"The above cover the general instructions to be followed in these arrests and the same will be supplemented by telegraphic instructions at the proper time.

"Very truly yours,

Frank Burke,

"Assistant Director and Chief."

This document is to be read in connection with another document issued two days later by Caminetti, Commissioner General of Immigration, to the Commissioner of Immigration at Boston:

"Strictly Confidential. * * *

"Commissioner of Immigration, Boston, Mass.: The bureau is inclosing herewith 306 warrants of arrest covering aliens to be found in your jurisdiction. The names [**39] of these aliens together with the places at which they are located, or the particular agent of

the Department of Justice through whom they can be located, are set forth in the accompanying list. Prima facie evidence that each and every one of these aliens is a member of the Communist Party of America or of the Communist Labor Party has been secured by agents of the Department of Justice and placed before this department in affidavit form, on the bases of which evidence these (and similar warrants for service throughout the country generally) have issued. The Department of Justice has been requested to instruct its field agents to provide the immigration officials in charge of the jurisdiction where the alien is to be found with copies of these affidavits for the completion of his files.

"For your confidential information, the Bureau has to state that the Department holds the Communist Party of America to be an organization mere membership in which brings an alien within the purview of the Act of October 16, 1918. Therefore the warrants of arrest which have issued covering aliens of this and the similar (Communist Labor Party) group contain charges pertaining to membership merely. [**40] It will accordingly be of prime importance to secure and present, in form and manner to constitute proper and usable evidence when the cases come before the Department for final consideration, evidence [*34] of membership in either one or the other of these organizations. However, individual tenets, beliefs and practices should not be overlooked, and where evidence along these lines is uncovered (or along any other line -- such as entry without inspection, etc.), it should be carefully and fully developed, the alien to be placed on notice of the additional charge or charges in the manner stated in paragraph (b) of subdivision 5 of rule 22. The local agents of the Department of Justice will, it is believed, be in a position to furnish your examining officers with evidence of membership in a considerable number of cases. The connection between such evidence and the particular alien concerned should always be established on the record to the fullest extent possible.

"The Communist Labor Party is, in all essential particulars in so far as the Act of October 16, 1918, is concerned, identical with the Communist Party of America. Evidence on both organizations, in the shape of [**41] official manifestos, copies of platforms, programs, etc., will be furnished for the enlightenment of the officers who will conduct the examinations as soon as it can be prepared. Pertinent extracts from these will be properly read into the minutes of the hearings, when accorded; this, of course, in the presence of the alien, who should be appropriately questioned with respect thereto.

"All agents of the Department of Justice have been definitely and specifically instructed to co-operate with the officials of the immigration service from the outset to the final conclusion of these cases, and to afford the immigration officers every facility which they may possess to the proper, prompt, efficient, and successful handling of these cases. this even to the extent of loaning stenographic help where required. The courteous, full, and hearty co-operation of all officials of the immigration service with the Department of Justice agents is required in this common service, and should be given without stint. The success of the extensive movement which is being inaugurated in this respect hinges on this.

"For your personal information and for the personal information only of those who must [**42] plan with you (for under no consideration must a 'leak' occur due to any officer of this service), you are advised that the Department of Justice is arranging (and has so advised its appropriate field officers) to themselves accomplish the arrest of the aliens covered in the warrants which have issued on the night of January 2, 1920. The aliens will be held on local charges and opportunity afforded that night and the following day for service upon them of the administrative arrest warrants. Where bond, as prescribed in the warrants, is not furnished, the alien will be held in custody -- in an immigration station where available; otherwise, in jail or other appropriate place of detention. The Department of Justice agents will assist in serving the warrants, perfecting detention arrangements, provide you with such evidence as they may possess, etc. They may not conduct the hearings prescribed by section 16, however, and such evidence as they may offer, whether in the shape of sworn statements previously secured by them, or of some other character, should be properly incorporated in the record in the usual manner, viz. by reading to the alien during the course of the hearing and questioning [**43] him with

respect thereto.

"Not later than noon on the appointed day you should have a properly qualified officer or officers (where more than one can be spared) of your jurisdiction report in person armed with the warrants to be served, to the Department of Justice agent in charge of the district where the alien, or group of aliens, is to be arrested. In the event of a change of date for the general arrests you will be promptly wired to that effect. Under no circumstances should an officer proceed in the matter of the arrests except in cooperation with a Department of Justice representative. To do so would be to invite disaster.

"In the event you find, after carefully considering the matter, that you have not sufficient officers to serve the warrants in the various localities at the proper moment, please immediately wire (or phone if practicable or advisable) the bureau, when an endeavor will be made to meet the emergency by temporarily drawing upon a neighboring district which may not have been called upon to handle a considerable number of such cases.

[*35] "The bureau desires that it be promptly advised of the progress of these cases at all stages. The general result [**44] of the efforts to serve the warrants and obtain custody of the aliens, together with any other information of possible interest, should be telegraphed to the bureau at the earliest possible moment. as soon as it can be done, a list showing the aliens arrested should be prepared and mailed to it, under special delivery stamp. Additional warrants, where the necessary prima facie showing is made, may be applied for telegraphically or by mail, as the circumstances may seem to warrant, the procedure outlined in the bureau's general telegram of November 10, last, to control.

"The above cover the general instructions to govern the immigration officers in serving the warrants and conducting the hearings in these cases. They will be supplemented, telegraphically or by letter as occasion may seem to require, at the proper time.

"Respectfully, [Signed] A. Caminetti, Commissioner General.

"NOTE. -- Please wire the bureau immediately upon receipt of the warrants, in order that it may know that all is in readiness.

"Publicity must be avoided."

The briefs referred to in the first part of Burke's letter are printed in "Sedition, Serial 16, Hearing before the Committee of the Judiciary, [**45] H.R. 65th Cong." p. 44, Exhibit K, dealing with the status of the Communist Party, and page 98, dealing with the Communist Labor Party.

It is unnecessary here to reproduce these briefs.

The warrants referred to in Commissioner General Caminetti's letter, supra, appear to have been issued and signed by John W. Abercrombie as Acting Secretary of Labor.

These circular letter instructions sent by Burke to Kelleher were supplemented by two telegrams, each dated December 31, 1919, not apparently of vital importance, but for the sake of completeness set forth in the margin. n1

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n1 "Kelleher, Winthrop Bldg., Boston, Mass.: You should at once make every effort to ascertain whether any aliens connected with editorial boards your territory of Communists papers. Particularly desirous that these persons be taken into custody at time of arrests. If affidavits have not already been submitted upon these persons advise reason and delay and same should have been covered in original lot of affidavits. Desire that you at once submit copies of affidavits already forwarded to this department to local immigration inspector. Immigration inspectors under instructions communicate with you Friday

morning January second for the purpose of co-operating in arrests of Communists. Warrants for arrests of all Communists have been mailed the immigration inspectors. Same will be delivered to you by immigration inspectors and you will serve these warrants at time which will later be designated. No change in present plan for arrests to be made evening January second. You will however be advised definitely as to this date. Every effort should be made by you to definitely establish fact of subject being an alien and member of Communist Party or of Communist Labor Party before arrests. Policy of bureau is to have perfect case rather than a large number of arrests. Particular attention should be given to form in which evidence is collected in order that same may be immediately turned over to immigration inspectors and hearings started at once. You should give all co-operation and assistance to immigration inspectors in these matters. No seizure of personal effects or belongings not necessary for evidence should be made by you. Documentary evidence connecting subject with party or documentary evidence on party is the only evidence which should be taken. You should be guided in securing same by local authorities, conditions and as pointed out in my confidential letter. You should obtain search warrants where necessary. Wire at once whether all arrangements in your territory have been made and whether your office is in condition to adequately handle the matter when ordered to proceed. Five,

Burke, Chief."

"Kelleher, Winthrop Bldg., Boston, Mass.: Re arrests of Communists warrants for members of Communist Labor Party and Communist Party new in hands of immigration inspector your district. Confer ar once with inspector for purpose of co-operation arrests of members covered by warrants and arrests are to be made Friday evening, January second, nineteen twenty, at nine p.m. Eastern time. No arrests should be made of persons not aliens and who are not members of or affiliated with Communist Party of America and Communist Labor Party.

"Under no condition are American citizens to be apprehended. Where any mistake nature is made and a citizen is taken into custody his case is to be immediately referred to state authorities for action. Desire that each subject taken into custody be thoroughly examined and you should prepare at once a set of questions to be asked each subject bringing out facts that subject is alien, date of arrival in the United States, and affiliation or membership with either of the parties under investigation. This statement should be taken stenographically and sworn to or affirmed by alien. Effort has been made to supply sufficient agents for the purpose of carrying out arrests in your district. Assistance of local police authorities should only be used where absolutely necessary and should not be requested until a few hours before arrests in order to avoid any leak. Of utmost importance that charge of membership be proven in each case. Where alien refuses to admit membership detailed examination should be made to bring out Communist views of subject, basing examination on contents of memorandum brief forwarded to you. Particular attention should be given to the manner in which evidence is collected in order that immigration authorities have no difficulty in handling of the hearings in the case. No arrests should be made of any persons connected with other organization than the Communist Party and the Communist Labor Party. Arrests should all be completed and examinations concluded by Saturday morning, January third, nineteen twenty, and full reports forwarded by special delivery addressed attention Mr. Hoover. I desire that you wire this office by nine a.m., Saturday morning, January third, nineteen twenty, giving number of persons arrested, nationality, and any other interesting and important pieces of evidence secured. The department in Washington will issue statement Saturday January third on national raid. Statement may be issued by you covering local situation this Saturday. Should not be given out before ten a.m. Saturday morning, January third, nineteen twenty. Make every effort to obtain perfect case and to fully conduct and conclude the arrests in your district. Five. Stop.

| Burke, | Chief | . 11:55 | 5 P.M." | | | | | | | |
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| | | | | -End | Footno | tes | - | - | | [**46] |

[*36] The quoted documents are, as to most, perhaps all, of the vital issues in this case, the most significant evidence adduced. They require detailed study, analysis, and consideration, in all their parts. They should not here be summarized. They need not here be characterized. They speak for themselves.

A single necessary conclusion from these documents may, however, here be appropriately set forth: They contemplate that the general conduct and control of this wholesale deportation undertaking shall be assumed by the Department of Justice, relegating the Department of Labor to the function, almost purely formal, of making records of cases, in effect predetermined by the Department of Justice.

[*37] These instructions were summarized by Kelleher, and copies delivered to his local agents. These summarized instructions in two overlapping sets are copied in the margin. n2 It should be noted that the fifth paragraph of the first set is a distinct mandate to hold these aliens incommunicado until otherwise ordered by the Department of Justice; that the eighth paragraph contemplates the arrest of citizens and throws upon them the burden of proof of their citizenship [**47] by documentary evidence.

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- n2 "Instructions to Agents.
- "1. Each person named in the warrant shall be taken into custody.
- "2. Upon taking person into custody try to obtain all documentary evidence possible to establish membership in the Communist Party, including membership cards, books, papers, correspondence, etc.
- "3. Also try to secure charters, meeting minutes, membership books, due books, membership correspondence, etc., in possession of such person, which may lead to further investigations of members not yet known.
- "4. All such evidence secured, as above, to be properly marked and sealed as belonging to such person, with name of arrestee, place where secured, date secured, and by whom secured marked plainly on same.
- "5. Person or persons taken into custody not to be permitted to communicate with any outside person until after examination by this office and until permission is given by this office.
- "6. Upon making arrest, person in custody to be brought to the place designated by this office for a preliminary examination.
- "7. Preliminary examination to be made by agent making arrest on forms provided for that purpose by this office. This form to be followed closely and filled out in detail. The form then to be read to person in custody for him to sign and swear to. If he refuses to swear and sign to same, then agent, in presence of one witness to examination, to sign and swear to same and to have witness do the same.
- "8. If a person claims American citizenship, he must produce documentary evidence of same. If native-born, through birth records. If naturalized, through producing for agent copy of naturalization papers. Be sure that these papers are final papers, containing words 'and is hereby admitted to become a citizen of the United States.'
- "9. In case of any uncertainty as to citizenship or noncitizenship of persons taken into custody, or for any other reason, consult the office.
- "10. Absolutely no publicity or information to be given by an agent. All such requests for information to be referred to division superintendent. Also request observance above by assisting officers."

- "1. At time of apprehension, every effort must be made to establish definitely the fact that one arrested is a member of either the Communist Party of America or Communist Labor Party.
- "2. It is of utmost importance to make effort to ascertain location of all books and records of these organizations, and that same be secured at time of arrest.
- "3. Upon making arrests, endeavor to secure admissions as to membership in Communist and Communist Labor Parties, together with any possible documentary proof.
- "4. Endeavor apprehend officers of either party if aliens, searching residences for literature, membership cards, records and correspondence.
- "5. Search meeting rooms and endeavor to locate charters of Communist or Communist Labor Parties, as well as membership and financial records, which, however, may be found at homes of recording and financial secretaries. Literature, books, papers and anything on the walls should be gathered up, and ceilings and partitions sounded for hiding places. Wrap anything taken and mark the location of place, names of persons obtaining evidence, and contents of each.
- "6. Upon apprehension, aliens should be searched thoroughly; if found in groups in meeting rooms, line them up against the wall and there search them. Take anything which tends to establish connection with either Communist or Communist Labor Parties; in other words, only such material referring to these parties, and nothing distinctly personal, such as money and other valuables. Mark envelopes showing contents; whether found in possession of alien or in his room, with address as well as names of those obtaining evidence. Duplicate record of all this should be kept; original evidence obtained in the cases to be turned over to the immigration officers.
- "7. Only aliens should be arrested; if American citizens are taken by mistake, their cases should be immediately referred to the local authorities.
- "8. Arrest of members covered by warrants to be made Friday at 9 p.m. Only aliens, and connected with Communist and Communist Labor Parties; make preliminary examination as per office memorandum.
- "NOTE. -- These instructions are extremely confidential, are issued only for the guidance of authorized agents of this office, are charged to such agents and must be returned to this office upon completion of assignment."

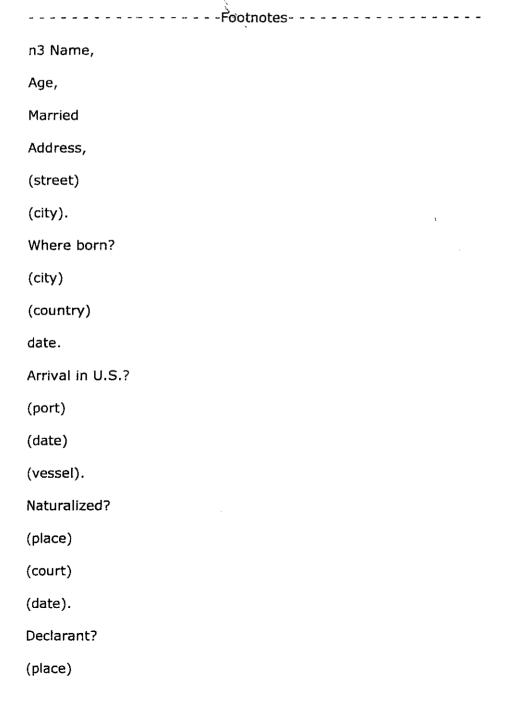


Thus equipped with explicit written instructions from the Department of Justice in Washington, the local Bureau of Investigation made arrangements with the police forces in the cities and towns in which the alleged Communists were for the arrests on the night of January 2, 1920. The officials, both of the Department of Justice and of the Department of Labor, described these proceedings, properly enough, as a "raid" and as "catching the Communists in the net." The word "raid" seems appropriate, and will hereafter be used in this report.

It was arranged to have at what were called "concentration points" -- generally a police station -- an inspector of the Labor Department; [*38] in some cases, apparently having possession of the warrants intended for service in that neighborhood; in other cases, apparently not. It is difficult from the evidence to ascertain what function, if any, was actually performed by these inspectors of the Labor Department. The arrests were in fact made by the representatives of the Department of Justice, assisted by the local police authorities, all of whom acted under the direction of the agents of the Department of Justice. The raids were made on [**49] the evening of January 2, 1920, in the following cities and towns: Boston, Chelsea, Brockton, Bridgewater, Norwood, Worcester,

Springfield, Chicoppe, Holyoke, Gardner, Fitchburg, Lowell, Lawrence, Haverhill, all in Massachusetts; Nashua, Manchester, Derry, Portsmouth, Claremont, Lincoln, all in New Hampshire. In some cities several halls were raided. In most communities, homes were invaded.

Kelleher says that he had operating, practically under his control, for this raid, from 300 to 500 men. This may fairly be assumed to be a moderate estimate. Most of these were agents of the Department of Justice and policemen of the various cities and towns. The plan was to make up a list of the persons intended to be arrested in a particular community; for the police and Department of Justice agents thereupon, generally without warrants, to go about to the halls or homes where these people were, arrest them, and bring them to the concentration point -- commonly a police station. When halls were raided, the occupants were, as required by the instructions, lined [*39] up against the wall and searched. Many citizens were gathered into the net in this fashion, and brought to the various [**50] police stations. At the concentation points the sifting process went on during the night. Blanks for questionnaires had been prepared, answers to which were sought and generally obtained from the arrested persons. A copy of this questionnaire is in the margin. n3



| (date) |
|--|
| Where employed? |
| (company) |
| (address). |
| Ever arrested? |
| (where) |
| (date) |
| (cause). |
| Are you a member of the Communist Party? |
| If so, to what local, branch, or organization? |
| When did you become a member? |
| Have you a membership card? |
| Do you hold any office in the Communist Party? |
| Office? |
| Do you contribute financially to the support of the party? |
| Do you attend the membership meetings of the party? |
| Do you read its papers and publications? |
| If so, which? |
| Are you affiliated with any other organizations? |
| Which? |
| Were you a member of the Socialist Party? |
| Papers, correspondence, etc., found in possession of above by agent: |
| I, the undersigned, not a citizen of the United States, on oath depose and say that I have read the above questions and answers, or have had the same read and interpreted to me and state the same are true: |
| (Signature of Alien) |
| Above questions and answers noted by |
| Witness: |
| [** 51] |
| Assistant Superintendent West of the Boston Bureau of Investigation estimates that the total number of persons actually arrested on this raid was approximately 600. This also must be taken to be a moderate estimate. The circumstances under which the raid was |

carried on make it impossible for him or any other person to know with any approximate accuracy the number of persons arrested. Weighing his evidence in connection with the other testimony adduced before me, I am convinced that a much larger number of people was arrested -- probably from 800 to 1,200.

Much credible evidence, as, for instance, that from the witness Liberman, bears out this estimate. Liberman testified that, at the close of a publicly advertised mass meeting held at the Finnish Hall in Mulberry street, Worcester, plain clothes agents held up the entire audience of about 200 and asked each one whether he was a citizen or not; that they held those who answered that they were not citizens, taking about 100 to the jail; later during the night all but 16 were released after being booked and answering the typical questionnaire. Steiner's and Ryder's evidence, post, points to the same conclusion.

The evidence [**52] as to the exact number of warrants then in the possession of the agents of the Department of Justice or the inspectors of [*40] the Bureau of Labor is somewhat confusing. Apparently, however, 463 warrants had been received in Boston, dated December 29, 1919. But, assuming that this number of warrants was in Boston, over 100 of them could not have been served; for the evidence is explicit that out of the 440 persons arrested and taken to Deer Island warrants for about 100 were not at that time outstanding. For persons thus taken and held, telegraphic warrants were applied for and in most cases subsequently received. These people (100 or thereabouts) were seized on the theory that, although warrants had not then been received, there was evidence that they were alien members of the Communist or Communist Labor party, and were therefore, under the instructions, to be held and warrants thereafter obtained.

After the sifting process at the various concentration points, at which at least one-third to one-half of the total number of persons arrested were discharged after various periods of detention in cells (from a few hours to two or three days), about 440 persons were transported [**53] to Deer Island and there locked in cells. A considerable number of citizens arrested were discharged; the evidence is not clear as to whether more than one citizen was actually taken to Deer Island and there imprisoned in a cell.

The methods by which the raids were carried out may, I think, be fairly described by setting forth the substance of the evidence of Henry G. Steiner, who seemed to me to be an intelligent, accurate, and reliable witness.

Steiner is a clerk, 35 years of age, a citizen born in Manchester, N.H., and was arrested in No. 885 Washington street, Boston, on the evening of January 2, 1920, where he was in attendance at a committee meeting, there being no public meeting at that hall that night. He describes what occurred as follows:

"The committee members were not all there; so some of us sat down in one of the rear rooms to wait. We were talking, when about 9 o'clock three men came in through the back door, having guns in their hands, and about the same time the front door was thrown open and we saw some of these men there. The men in charge of the railding party ordered those in the back room brought into the front room, and we were herded up against one [**54] side of the room with commands to hold up our hands and to get over there. We held up our hands until a preliminary search for weapons had been made. After that search had been made we were searched; I might mention this, incidentally, that while we were being herded up against the wall one of the men in the room fainted. After the preliminary search for weapons had been made we were searched for other evidence which we might have on our persons, which was placed in envelopes with our names marked on them as described by various witnesses. We were then taken down stairs and crowded into vans."

No questions were asked as to whether those arrested were American citizens. "They simply went ahead and proceeded to do these things. We were jammed into these vans and taken to Station 4. At Station 4 we were lined up in front of the desk and booked." The men who stood them up against the wall and searched them did not say whom they represented. "As I recall it, they were all in civilian clothes. I did not see a man in uniform

until we got down to the street, and then we had to pass through a double row of uniformed officers." They were shown no authority whatever for their arrests. [**55] "After being booked we were taken into one of the [*41] available rooms at Station 4 and brought out one at a time, examined by Department of Justice officers in accordance with the questionnaire that has been spoken of here."

This examination took possibly until after midnight. In the meantime others that had been apprehended at the same place were brought in, perhaps a dozen or 15, some of them American citizens. About 27 in all were taken at 885 Washington street. The witness saw no warrants of arrest anywhere that night, nor had seen any up to the time of his testimony.

Describing the later occurrences, the witness continued:

"After answering the questionnaire and signing it, which most of us agreed to do, we were taken down stairs and assigned to cells. I with ten others was assigned to one cell. I remained in that cell until the afternoon of the following day, which was Saturday, about half past 4. Four names were called out, and I was one of the four. We were taken up stairs, brought before the clerk or captain or sergeant in charge -- I don't know just what he was -- and we were asked as to our names. We were then handed our property. I didn't know just [**56] what that meant, so that I inquired if that meant that we were released, and I was told, 'Yes.' I went home. I didn't hear anything further from the Department of Justice until Monday night. On Monday night an inspector came to my home. * * * He came in and asked me if I was Henry G. Steiner, and I told him that I was. He said that he had received orders to come and get me and to make a search of the house. I said to him, 'I don't know who you are; have you any credentials or warrant?' He displayed his badge and said that was all the warrant he required. * * * It was a gilt badge, and I think it said 'Department of Justice' on it, as near as I could make out. He then proceeded to search; that is, he did ask me where I kept my books, literature of various kinds. I told him he would find everything right out in plain sight in the bookcase. He went to the bookcase and proceeded to search that for anything he thought he could use. He went to a table where I had books and papers of various kinds and went through them. He went up to another rack, another part of the room, and he took what he wanted from that. He pulled open several drawers, but he found they contained other than [**57] books or pamphlets, and he finally inquired if that was all I had. I said, 'You will find everything that I have got right there.'

"Q. Did he show you any search warrant? A. He did not.

"Q. Did he ask your permission to look at the property? A. He did not. In fact while I don't know as I explicitly told him not to search, but I did ask him for his credentials or search warrant, and he simply stated that the badge was all the search warrant that he required. I did not argue the matter with him further. He then took me down to the Department of Justice office ---

"Q. Did he take anything with him, any of your books? A. Oh, yes; they were all wrapped up in a robe that they had in the auto, about as much as he could carry. He took me down to the Department of Justice offices. We got down there about half past 11, I should judge.

"The Court: At night?

"The witness: At night. We found that everybody had gone home except the cleaners, the porters, so that he left me there a few minutes, and he came back, and said he had found instructions that he did not require me any further that night. So that I went home. The next day they came to my place of business. He again [**58] took me to the Department of Justice. * * * The same inspector that had come to the house, came to the offices and told me that I was wanted down at Water street.

"Q. This is at your place of business? A. At my place of business. I went there, and I saw a

gentleman that I think was Mr. West, and he said that some hitch had developed about my citizenship; that is, they were unable [*42] to verify my birth record. So I suggested that possibly they had it recorded under the wrong name; that is, they did not spell the name correctly. And he got Manchester on the long distance and found that that was correct. He then told me that he did not require me any further, and I suggested that he return to me the books and pamphlets that they had taken the previous night, which he said would be done with the exception of those papers required for evidence. A few days later all the books and pamphlets were returned, but certain papers belonging to me have been kept by them. I have never seen them since.

"Q. Is that all? A. That is all."

On cross-examination Steiner said that at No. 885 Washington street was the headquarters of the Communist Party, and he had gone there that [**59] night to attend a committee meeting that never took place; that at one time he was the business manager of the "Revolutionary Age," edited by Fraina; that the meeting he was attending that night was a defense committee meeting; that he was absolutely certain that some of the men who came in at the time of the raid had guns in their hands.

In fairness, perhaps, it should be stated that Robert M. Volkenburg, an agent of the Department of Justice called by the government, testified that he was in charge of the raid at 885 Washington street, and gave strict instructions that no guns should be drawn, and was positive that none were exhibited. Without imputing mendacity, I find Steiner's evidence the more credible.

Inspector Ryder's account of the raid in Brockton shows practically the same methods. He testifies:

That he was assigned to Brockton; that he had, "roughly, about ten" warrants; "I don't remember of identifying anybody with those warrants;" that he was in the city marshal's office.

- "Q. About how many people did they bring before you for identification?
- A. Oh, they were being brought in all night by the police. Nearer 100 than 50, that night and the next day." [**60]
- "Q. But that night you did not serve a single warrant? A. No.
- "Q. Were they all released? A. No.; 18 or 19 were brought to Boston the next day. For these or most of them warrants were wired for.
- "Q. And were they examined by the Department of Justice agent on the questionnaire? A. Yes, sir.
- "Q. And those who answered that they were members of the Communist Party, were those the ones for whose arrest you applied for warrants? A. Well, I did not take any direct part in that examination. I knew they were examining the aliens. Once in a while I would stroll over and I might butt in and say something. I did not think I had any connection with that.
- "Q. Of the men you brought to Boston for whom you applied for warrants, how many of them had answered and signed questionnaires properly? A. Oh, I believe there were questionnaires for all those who were brought in. * * *
- "Q. (by the Court). Where did they pick up these people around Brockton? In the halls or in their homes? A. In their homes. I might explain that very simply. The financial secretary having been brought in with his books and membership cards of the Communist Party of America, there was found [**61] to be about 200 on his register. So that they went looking up some of those people. And the Communist card was apparently good

evidence against them to apply for a warrant at least.

- "Q. Well, you said they were doing it all night and a part of the next day? A. Yes, sir; the police.
- [*43] "Q. Did they take these people out of bed and bring them to the police station during the night? A. Why, there was a group of police officials assigned to assist the Department of Justice, and they knew the territory and they were sent out.
- "Q. Well, that went on in the evening and all through the late hours of the morning? A. Yes; your honor.
- "Q. You stayed there at the station to see if you could fit any of these people to the warrants you had? A. Yes, sir.
- "Q. And you did not find a single fit in your case? A. No; I was up stairs and they were brought in and detained down stairs, and a great many would be brought in without my knowledge.
- "Q. What did they do with them? Locked them up? A. After a few moments; then each one would be brought up stairs and questioned and let go in many cases.
- "Q. In other cases what did they do? A. Held them there.
- "Q. Locked [**62] them up? A. Yes, your honor.
- "Q. About how many did they take and lock up in that fashion? A. Well, not many more than the 18 or 19 that came to Boston.
- "Q. Well, does that mean 25 or 30 in all, do you think? A. I don't believe there were over 25 locked up.
- "Q. Did you have any search warrants down there? A. Not to my knowledge.
- "Q. Well, you were in a position where you would have heard of it, if any application had been made for search warrants? A. I think so. I would have heard of it.
- "Q. And they went into these homes, took the literature, and whatever they could find that they thought might be evidence, and brought that with the alien to the police station? A. Yes, your honor; the police.
- "Q. Well, how many of the Department of Justice agents were down there? A. Two. But they were working about all night in the station. They were interrogating these men.
- "Q. You sent the police out to get them and bring them in? A. Yes, your honor."
- I refrain from any extended comment on the lawlessness of these proceedings by our supposedly law-enforcing officials. The documents and acts speak for themselves. It may, however, fitly be observed that **[**63]** a mob is a mob, whether made up of government officials acting under instructions from the Department of Justice, or of criminals, loafers, and the vicious classes.

Necessarily a raid of this kind, carried out with such disregard of law and of properly verified facts, had many unexpected and some unintended results. For instance, in a hall in Lynn 39 people were holding a meeting to discuss the formation of a co-operative bakery. About half of them were citizens. But the Lynn police, acting under the instructions of the Department of Justice, raided this hall and arrested the entire 39, held them over night in cells at the police station, and then had them docketed as "suspects" and 38 of them discharged.

There were also incidents of the arrests of women under conditions involving great hardship. For instance, the witness Mrs. Stanislas Vasiliewska, the mother of three children, aged 13, 10, and 8, was arrested in a hall in Chelsea, taken in the police patrol wagon with her eldest girl to the police station, and both put with another woman into one cell. About midnight they took her child and sent her home alone to a remote part of the city. Mrs. Vasiliewska was [*44] [**64] taken the next day to the wharf, where, with Mrs. Colyer, she was confined for about 6 hours in a dirty toilet room. She was then taken to Deer Island, where she was kept 33 days. Such treatment of women by the Department of Justice contrasts with that contemplated by rule 22, subd. 10, supra, when women are taken by the Department of Labor, which has a lawful right to arrest alien women.

The witness Minnie Federman was arrested at her home at 6 o'clock in the morning. Several men, showing her no warrant, entered her room where she was in bed. She was told to get out of bed and dress, which she did in a closet. Then she was taken in a police wagon to the police station after they had searched her premises, apparently for I.W.W. literature. When they found that she was a naturalized citizen, she was allowed to go.

In Nashua a hall was raided and about 13 women taken, 6 or 7 of whom were released at the police station; 5 of them were kept from Friday night to Saturday afternoon in one cell, without a mattress.

It was under such terrorizing conditions as these that these aliens were subjected to questionnaires, subsequently used as, and generally constituting an important part <code>[**65]</code> of, the evidence adduced against them before the immigration inspectors. Pains were taken to give spectacular publicity to the raid, and to make it appear that there was great and imminent public danger, against which these activities of the Department of Justice were directed. The arrested aliens, in most instances perfectly quiet and harmless working people, many of them not long ago Russian peasants, were handcuffed in pairs, and then, for the purposes of transfer on trains and through the streets of Boston, chained together. The Northern New Hampshire contingent were first concentrated in jail at Concord and then brought to Boston in a special car, thus handcuffed and chained together. On detraining at the North Station, the handcuffed and chained aliens were exposed to newspaper photographers and again thus exposed at the wharf where they took the boat for Deer Island. The Department of Justice agents in charge of the arrested aliens appear to have taken pains to have them thus exposed to public photographing.

Private rooms were searched in omnibus fashion; trunks, bureaus, suit cases, and boxes broken open; books and papers seized. I doubt whether a single search warrant [**66] was obtained or applied for. There is some hearsay or inferential evidence as to obtaining so-called "gun warrants" in Worcester and Lawrence. At the trial the court stated that, if such warrants had been issued, a certified copy of the records should be produced. No such record evidence was produced. I therefore doubt the truth of this inferential evidence. But, if it was true, these "gun warrants" were obtained by an abuse of process - most likely by the use of knowingly false affidavits. "Gun warrants" could not be legally obtained or used for the purpose of searching for and seizing documentary evidence.

It is of some significance that Congress has never armed the Department of Justice with broad powers for the use of search warrants. The only search warrant statute of present significance [*45] is found in Espionage Act June 15, 1917, tit. 11 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496 1/4a-10496 1/4v). This statute carefully and specifically limits, as our Constitution requires, the use of search warrants. On the doctrine of "inclusio unius exclusio alterius," it prohibits the use of search warrants in cases like the present.

At Deer Island the conditions [**67] were unfit and chaotic. No adequate preparations had been made to receive and care for so large a number of people. Some of the steam pipes were burst or disconnected. The place was cold; the weather was severe. The cells were not properly equipped with sanitary appliances. There was no adequate number of guards or officials to take a census of and properly care for so many. For several days the

arrested aliens were held practically incommunicado. There was dire confusion of authority as between the immigration forces and the Department of Justice forces, and the city officials who had charge of the prison. Most of this confusion and the resultant hardship to the arrested aliens was probably unintentional; it is now material only as it bears upon the question of due process of law, shortly to be discussed. Undoubtedly it did have some additional terrorizing effect upon the aliens. Inevitably the atmosphere of lawless disregard of the rights and feelings of these aliens as human beings affected, consciously or unconsciously, the inspectors who shortly began at Deer Island the hearings, the basis of the records involving the determination of their right to remain in this country. [**68]

In the early days at Deer Island one alien committed suicide by throwing himself from the fifth floor and dashing his brains out in the corridor below in the presence of other horrified aliens. One was committed as insane; others were driven nearly, if not quite, to the verge of insanity.

After many days of confusion, the aliens themselves, under the leadership of one or two of the most intelligent and most conversant with English, constituted a committee, and represented to Assistant Commissioner Sullivan, that, if given an opportunity, they would themselves clean up the quarters and arrange for the orderly service of food and the distribution of mail. This offer was wisely accepted, and thereupon the prisoners created a government of their own, called, ironically, I suppose, "The Soviet Republic of Deer Island." Through the assistance of this so-called Soviet government, conditions orderly, tolerable, not inhumane, were created after perhaps 10 days or 2 weeks of filth, confusion, and unnecessary suffering. It is not without significance that these aliens, thus arrested under charges of conspiracy to overthrow our government by force and violence, were, while under arrest, [**69] many of them illegally, found to be capable of organizing amongst themselves, with the consent of and in amicable co-operation with their keepers, an effective and democratic form of local government.

Were the Hearings Fair or Unfair?

By the methods thus briefly described, the Department of Justice had gathered at Deer Island, nominally in the custody of the Department [*46] of Labor, some 440 aliens. In order to carry out the plan of wholesale deportation, it was then necessary that these aliens be given hearings before inspectors of the Labor Department. It was recognized that legal hearings could not be conducted, in form at any rate, by agents of the Department of Justice. Burke's long letter of December 29, 1919, to Kelleher, expressly enjoined the agent of the Department of Justice that --

"At the hearings before the immigration inspector you will render all reasonable assistance to the immigration authorities both in the way of offering your services to them and the services of any of your stenographic forces."

This was construed as requiring the Department of Justice agents to be present at the hearings of the aliens before the immigration inspector, practically [**70] in many instances undertaking to participate or even give direction to those hearings. These Department of Justice agents were particularly active in producing and putting before the trial tribunal documents and publications claimed to have been obtained under such circumstances as to be evidence against the particular alien. Many of the records show that, after the hearings were practically closed, the Department of Justice agents were given opportunity to present further evidence and to express their opinions as to the conclusion that ought to be reached by the trial inspector.

In dealing with these hearings, it is necessary to consider with care the extraordinary circumstances surrounding the change of rule 22, subd. 5 (b), as quoted above. Just prior to the initiation of this raid, this rule read:

"At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be

apprised that he may be represented by counsel."

Under date of December 31, 1919, Commissioner General Caminetti, two days after the date of his confidential letter of instructions to the [**71] Boston Commissioner of Immigration setting forth the plan of the proposed raid, issued a circular letter modifying this rule. The pertinent part of this circular letter is as follows:

"December 31, 1919.

"Commissioner of Immigration and Inspectors in Charge: By direction of the Acting Secretary, paragraph (b) of subdivision 5, rule 22, Immigration Rules, is hereby amended, effective immediately, to read as follows:

"HN14 Preferably at the beginning of the hearing under the warrant of arrest or at any rate as soon as such hearing has proceeded sufficiently in the development of the facts to protect the Government's interests, the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued and shall be apprised that thereafter he may be represented by counsel."

The practical result of this changed rule, it is to be observed, was to cut the alien off from any representation by counsel, until the inspector, co-operating with or advised by the agent of the Department of Justice, was of the opinion that the hearing had proceeded "sufficiently in the development of the facts to protect the government's interests." This left these aliens, [**72] many of them uneducated and seriously [*47] hampered by their inability to understand English, or even the interpreters, many of whom were but meagerly equipped with knowledge of the language and dialects used by these aliens, entirely unprotected from the zealous attempts of the Department of Justice agents to get from them some sort of apparent admission of membership in the Communist or Communist Labor Party. It should not be overlooked that many of these aliens were arrested in boarding houses or halls in which were found large quantities of literature and pamphlets, the origin and ownership of which were necessarily largely matters of guesswork. In cases of doubt, aliens, already frightened by the terroristic methods of their arrest and detention, were, in the absence of counsel, easily led into some kind of admission as to their ownership or knowledge of communistic or so-called seditious literature.

The picture of a non-English-speaking Russian peasant arrested under circumstances such as described above, held for days in jail, then for weeks in the city prison at Deer Island, and then summoned for a so-called "trial" before an inspector, assisted by the Department [**73] of Justice agent under stringent instructions emanating from the Department of Justice in Washington to make every possible effort to obtain evidence of the aliens's membership in one of the proscribed parties, is not a picture of a sober, dispassionate, "due process of law" attempt to ascertain and report the true facts.

The modification of the rule, by the authority of the Acting Secretary of Labor, continued in force about a month, during which substantially all the hearings at Deer Island were practically completed. But on January 28, 1920, the Secretary of Labor, who is stated to have been absent because of illness on December 31, 1919, when the change in the rule was made cutting off the right of the alien to have any real assistance from counsel, by telegram (copy below) ordered the old rule restored:

"Jan. 28.

"Immigration Service, Boston, Mass.: By direction of secretary paragraph B subdivision five rule twenty-two restored to form in which it existed previous to amendment December thirtieth nineteen nineteen. In other words amendment of December thirtieth nineteen nineteen should be disregarded from and after receipt this telegram.

Abercrombie."

This amendment [**74] shows the clear purpose of the Secretary of Labor to have these aliens properly treated, guarding their constitutional rights and insuring the Secretary, as the final tribunal, in having before him, as the basis for the discharge of his important duties, records representing at least a fair, dispassionate, and intelligent attempt to ascertain and report th facts of controlling importance. But it must not be overlooked that this restoration of the old rule came too late to protect the rights of the petitioners in these cases. They had already been tried.

It is difficult to conceive a case in which the right of aliens to be represented by counsel could be more vital. These particular aliens were charged with affiliation with political or economic organizations [*48] with the purposes of which most of them had little or no comprehension. As pointed out hereafter, the Communist and the Communist Labor Parties were the result of an internal row or split in the old Socialist Party, and many of the members of the Communist Party and the Communist Labor Party became such automatically. In the minds of many of them there was no change but in name. They supposed they had joined [**75] an organization or a political movement which to them represented, dimly and obscurely, sympathy with the forces in Russia that had overthrown the tyranny of the Czar from which many of them had sought escape by emigrating to the United States. Deliberately to plan to cut these aliens off from the advice and assistance of counsel until they were involved in apparent admissions that they were members of or affiliated with an organization teaching the overthrow of this government by force and violence, the practical equivalent of a charge of treason if against citizens, is utterly inconsistent with every notion involved in the conception of "due process of law."

I hear from the government no convincing answer to Mr. Frankfurter's proposition that these petitioners had a right to the --

"protection that rule 22 afforded them as it stood before the ad hoc repeal of that rule for the purpose of these cases. Now, if there is one thing that is established in the law of administration, I take it that it is that a rule cannot be repealed specifically to affect a case under consideration by the administrative authorities; that is, if there is an existing rule which protects certain rights, [**76] it violates every sense of decency, which is the very heart of due process, to repeal that protection, just for the purpose of accomplishing the ends of the case which come before the administrative authority. * * * And there was a sudden, calculated, and surreptitious deprivation of that safeguard which was sought to protect the rights of all, and particularly protect those who were innocent."

As the hearings before the immigration inspectors progressed, it became evident that the preliminary investigations made before arrests, not, as contemplated by the rules of the Department of Labor, by the experienced inspectors of that Department, but by agents of the Bureau of Investigation of the Department of Justice, were wholly inadequate and unreliable.

Although, as set forth above, the number of persons actually arrested was probably two or three times the number taken or Deer Island (about 440), against the majority of these thus detained the immigration inspectors found no evidence warranting detention. They were therefore constrained to recommend the cancellation of the warrants or that the aliens be discharged on their own recognizance, a proceeding which the statutes and rules [**77] do not appear to contemplate, but which seems, on the basis of practical justice, to have been adopted and used in the Department of Labor. The testimony of Inspector Ryder as to his experience may be taken as fairly illustrative of the conditions found: On April 8, 1920, he testified that he had heard at Deer Island 75 cases and had then disposed of between 30 and 35; that of these 35 cases he estimated that in 25 he had recommended a cancellation of warrants; that he had recommended [*49] deportation in only 4 to 7 cases out of the 30 to 35 disposed of; also that he had recommended release on their own recognizance in from 30 to 40 cases, including most of the women; that these recommendations were made after a preliminary hearing, generally with an agent of the Department of Justice present.

The manifest result of this lack of evidence adequate on the government's own theory to hold these aliens for deportation was to discredit the activities of the Department of Justice that had promoted this spectacular raid and furnished to Acting Secretary of Labor Abercrombie the evidence upon which the hundreds of warrants used in this district had been issued by him. Accordingly, [**78] as the necessity for discharging the great majority of those arrested became increasingly obvious, the pressure to make a record adequate to hold those against whom any evidence whatever could be found increased. As discharges increased, the chances of discharge of the aliens within the realm of reasonable doubt decreased. As the number of aliens available for deportation decreased, pressure upon the trial tribunals to resolve all doubts against those who remained would naturally increase.

I note again that with the inspector at the hearing was an agent of the Department of Justice that had initiated and carried on this great raid, and that the alien had no counsel to represent him until the hearing was practically closed. Under such circumstances, it is not to my mind conceivable that these immigration inspectors could do justice to these ignorant, non-English-speaking, bewildered aliens.

It is not necessary to attack the purposes or character of the immigration inspectors. I would say of them nothing unjust or harsh. They were in a most uncomfortable position. Weighing fairly the conditions, perhaps they could not be expected adequately to resist the pressure put upon them **[**79]** to find evidence of membership in the Communist Party when there was no real evidence. At any rate, after a careful consideration of their testimony and of the records they made, in the light of their appearance before me, I am satisfied that they did not extend to a large share of the aliens a fair and impartial trial. The conditions under which these aliens were tried for their right to live in America were, in my view, inconsistent with due process of law conditions.

In order properly to weigh the evidence concerning the status of these alleged Communists, it is necessary also to sketch the origin and general relations of the Communist and Communist Labor Parties to the old Socialist Party.

These two organizations, proscribed by the Department of Justice, are the result of a factional split or row in the summer of 1919 in the old Socialist Party. In the spring of 1919 the Socialist Party is alleged to have had a membership of approximately 100,000; membership meaning those who pay dues, not those who vote the Socialist ticket, generally many more in number. Both the Socialist Party and its offshoots and fragments, the Communist and Communist Labor Parties, are constituted [**80] somewhat like a ramifying fraternal or [*50] lodge organization, with a central controlling body consisting of delegates, and locals existing in various cities and towns scattered, although rather sparsely, throughout the country.

In the spring of 1919 the Socialist Party divided into Left Wing Socialists and Right Wing Socialists. The Right Wing Socialists, though, as the event proved, less in number, seem to have gotten possession of the party machinery. At any rate, they expelled wholesale most of the local situated in this section of the country. In other sections, the Left Wing seceded, naturally under the guidance of the officials and other leaders. As the result of this disruption, perhaps 50,000 of the Socialists took the name of Communists; perhaps 25,000 remained Socialists and in the control of the old name and party machinery. Of the balance of 25,000, perhaps half formed the Communist Labor Party, and the other half dissolved or went into still smaller differing and discordant groups.

The reason for this civil war and disruption do not very clearly appear in the evidence and documents before me. If apparent, they would probably have little bearing upon the <code>[**81]</code> issues here. But it is material and important, when considering the status and rights of many of the less intelligent, particularly the non-English-speaking alleged members of the Communist Party, to have in mind that, especially in New England, the controversy resulted in the wholesale expulsion from the Socialist Party of these New England locals, and the practically automatic adoption by these locals of the name Communist and the new Program. The result was that the rank and file of the less

educated membership knew little or nothing about the controversy, or the nature and extent of the change, if any, in the Program and principles of the party. Some of them regarded it simply as a change of name; others knew there was some sort of little understood change in Program and purpose. But the great mass of the former Socialists who had thus become alleged Communists had no real comprehension of any important or material change either in their associations or in the political or economic purposes sought to be achieved by their negligibly weak organizations. Social, educational purposes, and race sympathy, rather than political agitation, constituted the controlling motives with [**82] a large share of them. They joined the local Russian or Polish or Lithuanian Socialist or Communist Club, just as citizens join neighborhood clubs, social or religious, or civic, or fraternal.

The Russians appear to have regarded the Bolshevists as the successful revolutionists in their native land, who had overthrown the brutal tyranny of the Czars, from which they had fled, and for which they cherished a sincere and well-warranted hatred. For instance, the witness Sidor Serachuk, through an interpreter, testified that he had never heard of the Nihilists, but that he did know about the fight against the Czars:

"I know that for years during the reign of the Czar we had to work for 15 kopecs a day, and they drove us with whips." $\$

"Q. (by the Court). Drove them to work, he means? A. Well, it means that we have to work for 15 kopecs a day, as we had to live.

[*51] "Q. Does he mean literally that they drove them with whips, or is that a metaphorical, or rhetorical, or revolutionary phrase? A. 'Yes, literally so, with whips,' replied the interpreter, after asking the witness."

This witness had left a country in which he was driven to work "with whips" at 7 1/2 cents [**83] a day. He was earning, when arrested, 45 cents an hour; he naturally had no notion of overthrowing the government under which he was then living.

The Issues Presented.

Notwithstanding its length, the foregoing covers none too adequately the facts that must be considered in order to determine the issues involved. I come now to deal with the chief contentions of the petitioners:

1. As above stated, counsel for the aliens ask me to hold the whole proceeding void, ab initio, because initiated and conducted by the Department of Justice, and not by the Department of Labor, to which the statute has delegated the power and duty of investigating and deporting aliens of the proscribed classes. The contention is that the deportation warrants, although signed and issued by the Acting Secretary of Labor, are void, because grounded on investigations and proceedings not authorized by the statute. I am unable to support this proposition. It is plausible, but I think not sound. It goes too far. While, as stated above, the Department of Justice has no more legal right and power to deal with the immigration and deportation of aliens than has the Department of the Interior, or any other [**84] department, it does not follow that the Department of Labor may not, if it chooses, avail itself of investigations made and evidence obtained by the agents of the Department of Justice or of any other government department, or even by nonofficial volunteers. Preliminary investigation by its own inspectors cannot, I think, be held a legal condition precedent to the issuance of a warrant for the arrest and for the subsequent hearing of the alien. Wholesale assumption, as in this case, of the important duty of preliminary investigation, by the agents of another department, who do the work very badly and produce results very unreliable, may go far to deprive the hearings before the inspectors of the essential characteristics of due process of law, and may thus invalidate the warrants of deportation based thereon. The whole undertaking is brought under just suspicion. But such invalidity does not, I think and rule, arise strictly as matter of law from the method by which these proceedings originated in the Department of Justice. I am therefore constrained to hold, in spite of their suspicious genesis, that the

warrants of deportation now before the court may have legal validity, notwithstanding [**85] the fact that all the preliminary investigations and arrests were really made by the Department of Justice and not by the Department of Labor. It is enough now to rule that they are not plainly void ab initio.

2. A second contention -- which, if sustained, disposes of all the cases -- is that the Secretary of Labor is wrong in holding the Communist [*52] Party a force and violence party within the purview of the act of October 16, 1918, and that this court has, on habeas corpus proceedings, jurisdiction to reverse the secretary's decision. This amounts to saying, either that the Secretary's holding is wrong in point of law in the construction or application of the statute, or that there is no evidence before him that the Communist Party is a force and violence party. Of course no contention can be or is made that the court may reverse the immigration authorities on pure questions of fact.

The questions involved in this fundamentally important contention I regard as not entirely free from doubt. I regret that it is necessary for this court to rule on these questions. If, under the federal statutes, the District Court could reserve or report these questions for the court [**86] above -- as a trial judge sitting in equity may, under the Massachusetts statutes, reserve and report a case to the full court -- I should thus dispose of this part of the present problem. But I have no power to reserve or report. A ruling one way or the other is a condition precedent to a final judgment, grounding the right to one side or the other by appeal to take the case to the Supreme Court or to the Court of Appeals, where the real decision must obviously be made. The case cannot be taken up in fragments. Oneida Co. v. Job Co., Inc., 252 U.S. , 40 Sup. Ct. 357, 64 L. Ed. decided April 19, 1920; Collins v. Miller, 252 U.S. 364, 40 Sup. Ct. 347, 64 L. Ed. , decided March 29, 1920.

As pointed out below, the cases of some of the aliens may be disposed of without questioning the soundness of the Secretary's ruling as to the obnoxious character of the Communist Party, because the records upon which the Secretary grounded his holdings adverse to these aliens are vitiated by lack of due process. But in other cases -- of the Colyers, Mack, and Bondar -- the issue of the validity of the Secretary's rulings in probably squarely presented, reserving, however, [**87] for later comment the questions as to whether the Platform and Manifesto on which the Secretary based his adverse ruling may not be under just suspicion of being in part a product of the government's "under-cover informants" or pretended members of the Communist Party.

Do the authorities sustain the contention of the petitioners that the court on this habeas corpus proceeding may go behind the Secretary's ruling, and, if so, determine it to be wrong?

The case which lends most support to this contention is Gegiow v. Uhl, 239 U.S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114, a unanimous decision by the Supreme Court of the United States in 1915, opinion written by Mr. Justice Holmes. The immigration authorities excluded Russian immigrants on the ground that they were --

"liable to become public charges for the following, among other reasons: That they arrived here with very little money (\$40 and \$25, respectively), and are bound for Portland, Or., where the reports of industrial conditions show that it would be impossible for these aliens to obtain employment; that they have no one legally obligated here to assist them, and upon all the facts the said aliens were upon the said grounds duly [**88] excluded."

[*53] The court said:

"We assume the report to be candid, and, if so, it shows that the only ground for the order was the state of the labor market at Portland at that time; the amount of money possessed and ignorance of our language being thrown in only as makeweights. It is true that the return says for that 'among other reasons.' But the state of the labor market is the only one disclosed in the evidence or the facts that were noticed at the hearing, and the only one that was before the Secretary of Labor on appeal; and as the order was

general for a group of 20 it cannot fairly be interpreted to stand upon reasons undisclosed. Therefore it is unnecessary to consider whether to have the reasons disclosed is one of the alien's rights. The only matter that we have to deal with is the construction of the statute with reference to the present case.

"The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner [**89] of immigration is exceeding his power, the alien may demand his release upon habeas corpus. The conclusiveness of the decisions of immigration officers under section 25 is conclusive upon matters of fact. This was implied in Nishimura Ekiu v. United States, 142 U.S. 651, relied on by the government. As was said in Gonzales v. Williams, 192 U.S. 1, 15, 'As Gonzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary.' Such a case stands no better than a decision without a fair hearing, which has been held to be bad. Chin Yow v. United States, 208 U.S. 8. See further Zakonaite v. Wolf, 226 U.S. 272; Lewis v. Frick, 233 U.S. 291, 297. * * *

"The statute deals with admission to the United States, not to Portland, and section 40 contemplates a distribution of immigrants after they arrive. It would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked."

(Italics mine.)

This decision is a flat holding that questions of law involving the construction of the act are reviewable by the courts. This [**90] decision has the more significance in that it overruled both the Court of Appeals and the District Court below.

Gonzales v. Williams, 192 U.S. 1, 15, 24 Sup. Ct. 171, 48 L. Ed. 317, involved a question of law as to whether citizens of Porto Rico were aliens within the meaning of the immigration statutes, and this was held within the court's jurisdiction.

Compare Commonwealth v. Sullivan, 146 Mass. 142, 15 N.E. 491.

The decision in American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, rests on the principle that HN15* decisions of administrative officials to be valid must have some competent evidence to support them.

That case involved the validity of a "fraud order" made by the Postmaster General against the plaintiff's mail. The order operated, of course, as a destruction of the plaintiff's business. The plaintiff alleged in effect that its business methods were grounded "almost exclusively on the physical and practical propositon that the mind of the human race is largely responsible for its ills, and is a perceptible factor of treating, curing, benefiting, and remedying thereof," and, after more to the same effect, asserted as a conclusion [**91] that its [*54] business was not a fraud, and that therefore the acts of the Postmaster General were invalid.

The Court below sustained a demurrer and dismissed the bill. This decision was reversed by the Supreme Court, which held the government might show at the trial, if it could, that the business of the plaintiff, as in fact conducted, amounted to a violation of the statutes. This decision clearly is to the effect that questions of law are for courts, and that it is a question of law whether there is any evidence to support an administrative mandate. This principle is obviously nothing but the familiar doctrine, arising in personal injury cases, to the effect that it is a question of law for the court as to whether there is any evidence of negligence or of due care.

Compare Mylius v. Uhl, 210 Fed. 860, 127 C.C.A. 422; Mylius v. Uhl (D.C.) 203 Fed. 152.

The immigration authorities ordered Mylius to be deported on the ground that he had been convicted of a "crime involving moral turpitude," a legal basis for deportation. He had been convicted of criminal libel against the king of England by charging the king with having put away his lawful wife in order to marry a woman [**92] of royal blood. The Court of Appeals for the Second Circuit, affirming a like decision in the District Court, held this question reviewable on habeas corpus, and reversed the immigration authorities, holding this crime not to involve moral turpitude.

It therefore follows that **HN16** the construction of the statute, the applicability of the statute to the particular case, and the question whether or not the reasons given by the Secretary of Labor for the deportation agree with the requirements of the act are questions of law which are reviewable by the courts.

See, also, <u>Turner v. Williams</u>, 194 U.S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979; <u>Whitfield v. Hanges</u>, 222 Fed. 745, 138 C.C.A. 199.

In support of the contrary rule, to the effect that the decision of the Department of Labor is final, are cited such decisions as United States v. Ju Toy, 198 U.S. 253, 262, 25 Sup. Ct. 644, 646 (49 L. Ed. 1040), in which Mr. Justice Holmes stated:

"It is established, as we have said, that the act purports to make the decision of the department final, whatever the ground on which right to enter the country is claimed, as well when it is citizenship as when it is domicil and the belonging to a class [**93] excepted from the exclusion acts" -- citing United States v. Sing Tuck, 194 U.S. 161, 167, 24 Sup. Ct. 621, 48 L. Ed. 917; Lem Moon Sing v. United States, 158 U.S. 538, 546, 547, 15 Sup. Ct. 967, 39 L. Ed. 1082.

In Chin Yow v. United States, 208 U.S. 813, 28 Sup. Ct. 201, 203 (52 L. Ed. 369), Mr. Justice Holmes ends an opinion, sustaining a petition for the writ, with this admonition:

"But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

If the Ju Toy and Chin Yow Cases were inconsistent with the Gegiow Case, the last decision would of course be controlling. I [*55] hold, however, that these cases are not inconsistent. The Ju Toy and Chin Yow Cases, so far as applicable here, merely hold that HN17* the decision of the Secretary of Labor is final on questions of fact. They do not hold that his decisions on questions of law are final or are not reviewable by the courts.

The petitioners also argue that the Secretary of Labor grounded his decision in the Preis Case (set forth in [**94] the margin) n4 entirely upon his [*56] construction of the Communist documents, that the construction of written documents is a question of law for the court, and that the Secretary erred in that construction. They rely on the principle laid down in cases like Hamilton v. Insurance Co., 136 U.S. 242, 255, 10 Sup. Ct. 945, 34 L. Ed. 419, and Smith v. Faulkner, 12 Gray (Mass.) 251.

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n4 Opinion of Secretary Wilson in Preis Case.

"Age, 31; native of Austria; entered the United States at Port Huron, Mich., on November 13, 1915, having arrived in Quebec by steamship Scotan June 14, 1914. This is a case arising under the provisions of the act of October 16, 1918.

"It is alleged that the alien is a member of the Communist Party of America, which is affiliated with the Communist International. The alien admits membership in the Communist Party of America, and that is affiliated with the Communist International. The sole question, therefore, to be determined by the Secretary of Labor is: Is the Communist Party of America such an organization as is described in the act of October 16, 1918,

membership in which makes an alien liable to deportation? The language of the act applicable to this particular case is as follows:

"Section 1. * * * Aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the government of the United States.

"Sec. 2. * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917.'

"It will be observed that belief in, teaching, or advocating the overthrow of the government of the United States is not alone sufficient to bring any organization within the scope of the act. There must, in addition, be a belief in, teaching, or advocacy of force or violence to accomplish the purpose. Bearing that in mind, we may proceed to an examination of the facts.

"The Manifesto and Program and constitution of the Communist Party of America and the Manifesto of the Communist International are submitted in evidence and their authenticity admitted. The constitution of the Communist Party (see page 19 of the Manifesto) requires that:

"Sec. 2. Applicants for membership shall sign an application card reading as follows: "The undersigned, after having read the constitution and Program of the Communist Party, declares his adherence to the principles and tactics of the Party and the Communist International, agrees to submit to the discipline of the party as stated in its constitution, and pledges himself to engage actively in its work."

"An examination of the documents submitted clearly demonstrates the fact that it is the purpose of the Communist Party to overthrow the government of the United States. There are many statements that might be quoted showing that purpose. The two following are typical. On page 9 of the Manifesto and Program the statement is made:

"'Communism does not propose to "capture" the bourgeoise the parliamentary state, but to conquer and destroy it.'

"And again, on the same page:

"The proletarian class struggle is essentially a political struggle. * * * The objective is the conquest by the proletariat of the power of the state.'

"Many other statements of similar purport are to be found in the same document. After having found that it is the purpose of the Communist Party to conquer and destroy the government of the United States, the next point of inquiry is as to how the conquest is to take place.

"It is apparent that the Communist Party does not seek to attain its objective through the parliamentary machinery of this government, established by and operated under the Constitution. That is made sufficiently clear by the following excerpt from page 15 of the Manifesto referred to:

"'(b) Participation in parliamentary campaigns, which in the general struggle of the proletariat is of secondary importance, is for the purpose of revolutionary propaganda only.'

"And again from pages 9 and 10 of the same document:

"'In those countries where the conditions for a workers' revolution are not yet ripe, the same process will go on. The use of parliamentarism, however, is only of secondary importance.'

"And further, on page 10:

"The parliamentarism of the Communist Party performs a service in mobilizing the proletariat against capitalism, emphasizing the political character of the class struggle."

"The parliamentary processes established by our government are to be discarded or used for propaganda purposes only and other means adopted for overthrowing the government of the United States. These means are stated at considerable length and frequently reiterated, seemingly for purposes of emphasis. The conquest of the power of the state is to be accomplished by the mass power of the proletariat.

"Strikers are to be broadened and deepened, making them general and militant, and efforts made to develop their revolutionary implications. The strike is to be used, not simply as a means to secure redress of economic wrongs, but as a means through which the government may be conquered and destroyed. A few excerpts from the Communist Party and Communist International Manifestoes will make these statements evident.

"Thus on page 10 of the Manifesto and Program of the Communist Party of America is the following:

"The conquest of the power of the state is accomplished by the mass power of the proletariat. Political mass strikes are a vital factor in developing this mass power, preparing the working class for the conquest of capitalism. The power of the proletariat lies fundamentally in its control of the industrial process. The mobilizing of this control against capitalism means the initial form of the revolutionary mass action that will conquer the power of the state.'

"And again, on page 11 of the same document:

"'Mass action is industrial in its origin, but it acquires political character as it develops fuller forms. Mass action, in the form of general political strikes and demonstrations, unites the energy and forces of the proletariat, brings proletarian mass pressure upon the bourgeois state. The more general and conscious mass action becomes, the more it antagonizes the bourgeois state, the more it becomes political mass action. Mass action is responsive to life itself, the form of aggressive proletarian struggle under imperialism. Out of this struggle develops revolunionary mass action, the means for the proletarian conquest of power.'

"And further, on page 12, of the same document:

"Strikes of protest develop into general political strikes, and then into revolutionary mass action for the conquest of the power of the state. Mass action becomes political in purpose while extra parliamentary in form; it is equally a process of revolution and the revolution itself in operation."

"Then on page 16:

"'The Communist Party shall participate in mass strikes, not only to achieve the immediate purposes of the strike, but to develop the revolutionary implications of the mass strike.'

"And then, making the purpose still more, clear, we have the following from page 30 of the Manifesto of the Communist International, with which the Communist Party of America is affiliated, and whose Manifesto is accepted as part of the policy of the party:

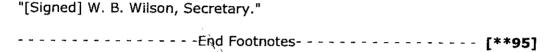
"'The revolutionary era compels the proletariat to make use of the means of battle which will concentrate its entire energies, namely, mass action, with its logical resultant, direct conflict with the governmental machinery in open combat. All other methods, such as revolutionary use of bourgeois parliamentarism, will be of only secondary significance.'

"From these quotations and numerous other statements in the Manifesto, not here

quoted, it is apparent that the Communist Party of America is not merely a political party, seeking the control of affairs of state, but a revolutionary party, seeking to conquer and destroy the state, in open combat. And the only conclusion is that the Communist Party of America is an organization that believes in, teaches, and advocates the overthrow by force or violence of the government of the United States.

"It does not devolve upon the Secretary of Labor officially to determine whether Congress was wise in creating the law, or the Communist Party wise in creating the facts. It is his duty to apply the law to the facts as he finds them. It is mandatory upon him to take into custody aliens who are members of this organization and deport them in the manner provided for in the immigration act of February 5, 1917.

"Your memorandum of January 17, 1920, recommending that the department issue its warrant for the deportation of Englebrert Preis, such deportation to be to Austria, at government expense, is hereby approved.



This contention is plausible. Possibly it is sound. But it seems to me a narrow and unsatisfactory basis for a court review of the Secretary's decision. It is not entirely clear that the Secretary had nothing before him except the Communist documents. If he had, he sat as jury, not as court. Even if he did not, his function seems to be that of drawing inferences of fact from these documents. The problem with which he dealt was to determine the beliefs, the plans, and prospective actions of a large number of people organized into a so-called political party. This seems to be a question of fact. At any rate, I find it unnecessary for this court to base a conclusion that the **[*57]** Secretary's decision is subject to the court's review upon the narrow ground that his construction of the written instruments raised a pure question of law.

But I am constrained by the decisions to hold it the duty of the court to consider whether the construction of the statute adopted by the Secretary of Labor is the fair and reasonable construction thereof, and also whether there was before him any real evidence to support the finding of fact which he must have made in order to warrant the [**96] deportation of these aliens.

The problem falls into two parts:

- (1) What did Congress mean by the words "force," "violence," and "overthrow" as used in this statute?
- (2) Was there before the Secretary of Labor any real evidence upon which he might have found that the Communist Party believed in or advocated "the overthrow of the government of the United States by force or violence"?

[*58] The immigration authorities have no legal right to deport these aliens unless there was some evidence tending to show that the Communist Party "believes in, advocates or teaches the overthrow of the United States by force or violence" within the fair meaning of the words "overthrow," "force," and "violence" as used in this statute.

This problem may be most conveniently approached by considering, first, what the evidence shows that the Communist Party is *not*, and also what it *is*. It is not a militaristic organization. It is antimilitaristic -- pacifist. The seventh item of its Program is: "The United States is developing an aggressive militarism. The Communist Party will wage the struggle against militarism as a phase of the class struggel to hasten the general fall of militarism." [**97] It does not advocate force or violence of the bombing, nihilistic, or anarchistic kind; nor sabotage, nor any other form of destruction of property. Its organization is like that of a fraternal society constituted on the lodge system, with local delegates to a central convention. It meets in halls; openly not secretly; not in armories;

not in laboratories, where explosives might be compounded. Its members contribute dues of 40 cents a month, the proceeds to be divided between locals and centrals. Not much of a revolution can be financed on dues of 40 cents a month levied upon a comparatively small number of wage-earners hitherto prolific in factional discord. Its whole scheme is for propaganda by words, not by deeds. No weapons of the cutting or exploding kind, with which modern wars, insurrections, and revolutions are carried on, were found in this raid. There is therefore not a scintilla of evidence warranting a finding that the Communists are committed to the "overthrow of the government of the United States" by violence or military force or by the use of weapons or bombs or of any other devices for destroying or injuring life or property. "Violence" is no part of their [**98] Program.

Pursuing further the negative side, it also appears that the Communists do *not* rely upon parliamentarism — the ordinary and accepted use of the ballot — as the chief means of attaining their ends. They regard parliamentarism as of only secondary importance. They exhort their members to participate in parliamentary campaigns "for the purpose of revolutionary propaganda only." They denounce the moderate Socialists as having "stultified proletariat political action by limiting it to elections and participations in legislative reform activity." In sum, they seek their ends neither by bullets, bayonets or bombs, nor by ballots.

But their nonreliance upon parliamentarism is not enough to ground an inference that they adopt violence as an alternative. In this regard the Secretary of Labor seems to me to have fallen into error. No organized set of human beings can be found to be committed to the proposition of overturning a great government by violence unless their plan of organization admits at least the possibility of the existence of violence. The organization and the avowed purposes of the Communists exclude such possibility.

On what, then, does the Communist [**99] Party rely for effecting the radical changes in the scope and functions of the government which [*59] it urges; changes which its own Manifesto describes as "revolutionary"? Upon creating "mass consciousness," "mass action," the concrete and effective expression of which is the general strike.

Stated as a generalization, their proposition is that under capitalistic society the mass of the workers, who are alleged to do the really productive work, are exploited and robbed by the minority; that, as a resultant of "mass consciousness" and "mass solidarily," the real workers may say to society: "We will hereafter work on our own terms or not at all." This theory is easy of statement and superficially pleasing and plausible. But, translated into practical, political action, it means nothing but advocacy of the general strike as a political weapon; otherwise, it is nothing but idle words: "Vox, et praeterea nihil."

It is no proper part of the present function of this court to analyze and comment upon the gross errors, historic, economic, and logical, into which the Communists fall in their differentiation of workers from nonworkers, or to depreciate their unconstructive, impractical [**100] motions of a political and economic society managed only by those whom they now erroneously classify as "workers." The present task is merely to determine what "force" they really seek to use in order to effect the changes they urge, and thus to reach a conclusion as to whether that force is the sort of force condemned by the statute of October 16, 1918.

The conclusion is irresistible that the only force worth discussion, believed in or advocated by this party, is the general strike; otherwise, its methods are those of ordinary political and social propaganda. It is true that in the Manifesto and Platform -- the chief documents before the Secretary of Labor in the Preis Case -- are found, as in political platforms in general, some stock phrases concerning "the necessity of revolution" and a "conquest of the power of the state" to new and better uses. But it is notorious that political platforms generally adopt the language of exaggeration.

Both religious and political crusaders commonly use the nomenclature of warfare. Here in the Occident, freedom, and a saving sense of humor and of proportion, have, until recently, saved us from being frightened by crusaders' rhetoric. In [**101] an Oriental

missionary field, "Onward, Christian Soldiers" is said to be regarded as an alien, seditious, war song, the use of which the missionaries had to abandon. Our hymn books may shortly attract the eye and excite the suspicions of the official censor.

At any rate, on fair analysis it is entirely clear that the literature of the present Communist Party is nothing but Marxian Socialism, supplemented by a little sympathetic reference to Bolshevism, and some additional stress laid upon mass solidarity and the resultant influence or force they propose to use, viz. the general strike as a political weapon.

There is little new in this program. As testified by the witness Ferguson, a highly intelligent and enthusiastic Socialist or Communist, practicially all the propositions set forth in the present turgid, [*60] rhetorical Program are found in the Manifesto of 1847 of Marx and Engels. With the chief tenets of Marxian Socialism, of course, every liberally educated student of economics and sociology has for more than two generations been familiar. There is a substantial literature concerning it found in every well-equipped public and university library. Marxian Socialism [**102] has for more than two-thirds of a century evoked the support of a set of radical thinkers and propagandists in most of the countries of Western Europe: Of recent years it has had some followers in this country. But these theories have never commanded the general assent or support of the believers in a sound and progressive democracy. Never, until this raid, were they treated seriously in England or in the United States. Whether our Anglo-Saxon institutions are or are not properly described as "capitalistic," hitherto we have had sufficient confidence in them and in their endurance, so as not to be frightened into intolerance and hysterical lawlessness by the specter of a dominating Marxian Socialism. Bismarck in Germany sought to suppress Marxian Socialism by legislation, with the usual result of promoting it.

See Hunter's "Violence and the Labor Movement," c. IX, pp. 214-228.

In 1890, after 12 years of foolish and futile endeavors to kill thinking and its expression by law, the German Anti-Socialist statute was repealed.

I turn, now, to deal with the statute. What is its fair interpretation? At the outset I note that it is not to be extended by construction. The traditional [**103] policy of the United States is to admit all aliens except specifically designated classes. It is for Congress, not for the Department of Labor, the Department of Justice, or the courts, to determine this important part of our national policy towards other nations and other peoples. And **IN18***statutory restrictions on immigration, like all other statutes, are, if possible, to be construed in accordance with the spirit as well as within the letter of our Constitution, including the First Amendment and its declaration for freedom of speech, press, and assemblage.

Nor should it be overlooked that the words "overthrow the government of the United States by force or violence" are found in a context which indicates that Congress had in mind military insurrections of the ordinary kind, and bombing and assassination attacks on the government. The section in full is as follows:

"That aliens who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the government of the United States or of all forms of law; aliens who disbelieve in or are opposed to all organized government; aliens who advocate or teach the assassination of public officials; aliens who advocate [**104] or teach the unlawful destruction of property; aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all organized government, or that advocates the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the government of the United States or of any other organized government, because of [*61] his or their official character, or that advocates or teaches the unlawful destruction of property shall be excluded from admission into the United States."

Speaking broadly, the whole section is a condemnation of alienbombing anarchy, in all its forms and activities.

The salient words in the present case are "force or violence"; if "force" is not absolutely synonymous with "violence," it is clear that it does not mean "force" of the religious, moral, or political kind. The only remaining question is as to whether it may mean economic force, exercised through the medium [**105] of a general strike; a force analogous to the economic boycott advocated as one of the chief means of keeping peace, if and when we have a peace-keeping League of Nations.

Analysis, then, brings me to this crucial question: Did Congress intend by the use of the word "force" in this statute to condemn the general strike when advocated as a political weapon by aliens? There is clearly no evidence that the Communist Party advocated the use of any other serious kind of force in their attempts to change our political institutions. I pass for the moment the question as to whether their proposed changes really amount to an "overthrow" of the government.

Now, it would be strange to find Congress dealing with the general strike in this inadequate and disguised fashion. Unquestionably, the general strike is a tremendous, almost a terrorizing, force. But it is not violence, although violence may follow as an incident of any strike, general or special. With the general strike as a political weapon, this and other nations may at some time have to deal. No intimation is made that the general strike is a proper weapon to be used in political agitation; the present question is not whether [**106] the general strike be a desirable or undesirable, a proper or an improper, force to invoke in order to obtain changes in the structure of society. The present problem is purely one of statutory construction: Did Congress, by the Act of October 16, 1918, providing for the expulsion of aliens seeking to overthrow our government by force or violence, intend thereby to outlaw the general strike, at any rate when advocated by aliens?

I am unable to believe that such was the purpose of Congress. It is not the natural interpretation of the words. It does not accord with the historic genesis of the statute. Moreover, this statute should be interpreted in the light of legislative precedents and of analogous legislation. It is familiar history that for about a century the tendency of lawmaking bodies has been to legalize and to facilitate, not to outlaw, strikes as forces in the industrial conflict. The trend of American legislation has been to limit the power of the courts to interfere with strikes by injunction.

Compare Coppage v. Kansas, 236 U.S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L.R.A. 1915C, 960, and statutes referred to in note at 236 U.S. 27.

[*62] Sections 6, 9, and [**107] 16 of the Clayton Act of October 15, 1914 (38 Stat. 730 [Comp. St. §§ 8835f, 8602a, 8835o]), are recent legislative provisions enacted by Congress, after a long struggle, intended to make the strike a more effective weapon for labor in its struggle with capital for a larger share of the product. Congress has this past winter refused to make railroad strikes illegal, although the committees on interstate commerce of both houses reported provisions to outlaw railroad strikes. (%compare the Transportation Act of February 28, 1920, and the Esch Act and the Cummins Act as reported to the House of Representatives and the Senate, respectively, and the conference report, the basis of the Transportation Act of finally enacted.) See, also, Bogni conference report, the basis of the Transportation Act of finally enacted.) See, also, Bogni v. Perotti, 224 Mass. 152, 112 N.E. 853, L.R.A. 1916F, 831, and authorities cited; Adair v. United States, 208 U.S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; Pickett v. United States, 208 U.S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. St. Rep. 272, 7 Ann. Walsh, 192 Mass. 572, 78 N.E. 753, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638.

In Wilson v. New, 243 U.S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L.R.A. 1917E, 937, Ann. Cas. 1918A, 1024, the Supreme Court held constitutional the Admanson Act of September [**108] 3, 1916 (39 Stat. 721 [Comp. St. §§ 8680a-8680d]), enacted on recommendation of the President for the purpose of preventing a general railroad strike

then threatened if the eight-hour day was not granted. In the opinion written by the Chief Justice, sustaining a mandatory eight-hour day, there are certainly implications that such a strike would have been a lawful use of force or power on the part of the employes to gain their ends; and that the President in recommending legislative action was recognizing a legitimate force which, if let loose, might, in the language of the Chief Justice, "leave the public helpless, the whole people ruined and all the homes of the land subjected to a

Only in degree is a general strike a greater and more destructive force than a railroad strike. Neither has yet, in plain and apt language, been condemned by the national Legislature. I am forced to the conclusion that, if and when Congress is ready to make the general strike unlawful, language plain, apt and undisguised will be used for that purpose; and that a public policy of that sort will also be made applicable to citizens as well as to

It should [**109] not be overlooked that even during these proceedings Congress has, by the Act of May 10, 1920, added to the deportable classes. And it is significant that, in this new act, Congress did not by name proscribe Communists or alien advocates of the general strike as a political weapon, just as long ago it did proscribe anarchists, whether of the bombing or of the philosophical-pacifist kind. See Turner v. Williams, 194 U.S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979; Lopez v. Howe, 259 Fed. 401, 170 C.C.A. 377.

Historically, governments have been attacked by military forces and by bombing or assassination forces of the Nihilistic and bombing-anarchistic kinds. Against such attacks legislation has been directed. The necessary interpretation of this act seems to me to be that [*63] Congress intended to exclude and expel aliens who advocate force and violence of the life and property destroying kind as a means of changing our political institutions. It was weapons, bombs and the like, that Congress dealt with, not economic

Coming now to the second question in the problem above stated: Was there evidence before the Secretary upon which he might have found the Communist Party [**110] committed to the "overthrow" of our government "by force or violence"? The necessary result of the foregoing analysis of the evidence, in the light of the interpretation of the statute adopted, is to require an answer in the negative.

The deportation cases before me all go upon the assumption that the decision of the Secretary in the Preis Case concludes the Acting Secretary of Labor in these cases. The Preis Case is, of course, not before this court. The evidence on which the Secretary based his ruling in the Preis Case is before this court, and I am forced to the conclusion that in it can be found no legal basis for deporting Communists on the ground that they believe in, advocate, or teach the overthrow of the government of the United States by force or

This conclusion that the statute HN19 does not outlaw the general strike as a political weapon, and that there is no evidence of the advocacy of any other kind of force, makes it unnecessary to determine whether there was any evidence before the Secretary of Labor that the Communists believed in, advocated, or sought the "overthrow" of our

But it is clear that "overthrow" is a very large word, to be carefully [**111] distinguished from radical change in the form and functions of our government. Analysis of the Communist Program tends to the conclusion that the Communist Program is one of radical change, and not of destruction or subversion. Under the caption "Political Action"

"The proletarian class struggle is essentially a political struggle. It is a political struggle in the sense that its objective is political, overthrow of the political organizations upon which capital exploitation depends, and the introduction of a proletarian state power. The objective is the conquest by the proletariat of the power of the state.

"Communism does not propose to 'capture' the bourgeoise parliamentary state, but to conquer and destroy it. As long as the bourgeoise state prevails, the capitalist class can baffle the will of the proletariat.

"In those countries in which historical development has furnished the opportunity, the working class has utilized the regime of political democracy for its organization against capitalism. In all countries where the conditions for a workers' revolution are not yet ripe, the same process will go on. The use of parliamentarism, however, is [**112] only of secondary importance."

Unlike the anarchists, they want a state with more, not with less, power. They would increase, not decrease, the business functions of the state. Their Program seems to me to be one of very radical and, from my point of view, impracticable and fantastic changes in the scope and purpose of our government, not a program for its "overthrow." I doubt whether there is any evidence warranting a finding that the Communists believe in or advocate the "overthrow" of the government of the United States.

Opponents of changes in government generally describe those [*64] changes as "revolutionary" -- as involving a destruction of our ancestral liberties." The Thirteenth, Fourteenth, Sixteenth, and now the Eighteenth Amendments have all been denounced as revolutionary. It is a question of degree and of the point of view. But our government is not yet overthrown. Institutions grounded on liberty and justice under law are too well rooted to warrant us in being terrorized by criticisms and mooted changes. The whole Communist Party is negligible.

At any rate, if correct in my conclusion that the Communists are not engaged in a conspiracy to use force [**113] or violence, the petitioners ordered deported are all entitled to be set at liberty.

The construction of the statute here adopted does not leave the country unprotected from any real alien conspirators for the overthrow of our government.

If proscribed, Communists are proscribed because, by advocating the general strike as a political weapon, they are engaged in a conspiracy to overthrow by force or violence the government of the United States. The act of October 16, 1918, so construed, is the practical equivalent of "seditious conspiracy," long ago made a crime by section 6 of the Criminal Code (Comp. St. § 10170), as follows:

"Sec. 6. If two or more persons in any state or territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than five thousand dollars, or imprisoned [**114] not more than six years, or both."

HN20*If the Communist Party is organized for the purpose of overthrowing the government of the United States by force or violence, it is plainly a criminal conspiracy within the purview of this section. Overt acts in plenty may be found. Hyde v. United States, 225 U.S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. All its members, citizens or aliens, are subject to indictment and criminal trial. If there be really on foot in this country a serious conspiracy of this kind, it should not be dealt with by the immigration authorities, proceeding against aliens alone, the less informed and morally the less guilty. Citizens and aliens thus conspiring should all be haled into the criminal courts and there tried for a statutory offense, akin to treason.

If the Department of Justice is correct in its interpretation and application of the statute of October 16, 1918, to the Communists, it has no occasion to usurp the legal duties of the Department of Labor concerning aliens; it has the power and the duty under section 6,

supra, to prosecute.

As this case, as indicated above, is expected to be finally decided by the court above, which may [**115] not sustain the views just expressed as to force and violence, it is necessary to refer to one other matter bearing upon the basis of the ruling of the Secretary of Labor against Communists. That matter is the evidence concerning the "under-cover informants" or government spies, and their possible relation [*65] to the origin and form of the Communist documents on which the Secretary's ruling is mainly, if not entirely, based.

In Burke's letter to Kelleher of December 27, supra, is this statement:

"If possible, you should arrange with your under-cover informants to have meetings of the Communist Party and the Communist Labor Party held on the night set. I have been informed by some of the bureau officers that such arrangements will be made."

This instruction necessarily implies that the Department of Justice then had, in these two parties, pretended members having sufficient influence so that they could arrange "to have meetings * * * held on the night set." It shows that the government spies were then active and influential in these proscribed parties; they were not mere onlookers.

Kelleher testifies that the Bureau of Investigation had had the Socialists or "Radicals" [**116] under examination for a year or more. In the Attorney General's Report for 1919 it appears that a special bureau to deal with "radical activities" was constituted in August, 1919. The Platform and Manifesto of the Communist Party, on which the Secretary of Labor has based his holding that the party is proscribed by the Act of October 16, 1918, were created and adopted at Chicago in September, 1919, only four months before this raid. Although by the Department of Justice, in its so-called briefs and before me, the Communist and the Communist Labor Parties were treated as indistinguishable so far as present issues are concerned, the Secretary of Labor has not so regarded them. He has ruled in the Miller Case (set forth in the margin) n5 that the Communist Labor Party is not a [*66] force and violence party within the purview of the Act of October 16, 1918. His finding to the contrary as to the Communist Party is based upon the more extreme and so-called revolutionary utterances in its literature.

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n5 In re Carl Miller

Age 38; native and citizen of Germany; arrived at the port of Galveston, Tex., in October 1907.

This is a case arising under the provisions of the Act of October 16, 1918. It is alleged that the alien is a member of the Communist Labor Party of America, and that the Communist Labor Party of America is one mere membership in which makes an alien liable to deportation under the Act of October 16, 1918. Alien admits his membership in the Communist Labor Party, that he pays his dues in advance, and that he is familiar with the Manifesto and Program of the party. The question to be determined by the Secretary of Labor is, therefore: Does the Communist Labor Party come within the purview of the Act of October 16, 1918, making aliens who are members of it liable to deportation?

The language of the act applicable to this case is as follows:

"Section 1. * * * aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the government of the United States * * *.

"Sec. 2. * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the Immigration Act of February fifth, nineteen hundred and seventeen."

In a letter to the Secretary of Labor, dated January 14, 1920, Mr. Swinburne Hale, counsel for the Communist Party and later for the Communist Labor Party, said relative to making arrangements for hearing in the Communist Party Case:

"I have no doubt that if this procedure is satisfactory I can arrange to have similar officials of the Communist Labor Party produced for examination at the same time. You may not, however, feel that this is necessary, since the language of the Communist Labor platform is substantially the same and the number of its members arrested is smaller."

Nevertheless, an examination and comparison of the Communist Party platform and Program with that of the Communist Labor Party platform and Program discloses some very substantial differences. The Communist Party requires its applicants for membership to sign a card reading as follows:

"The undersigned, after having read the constitution and Program of the Communist Party, declares his adherence to the principles and tactics of the party and the Communist International, agrees to submit to the discipline of the party as stated in its constitution and pledges himself to engage actively in its work."

It will be observed that the application for membership requires the applicant to assert that he has read the constitution and Program of the Communist Party, and that he adheres to the principles and tactics of the party and the Communist International.

The Communist Labor Party application for membership is decidedly different. It reads as follows:

"I, the undersigned, recognizing the class struggle between the capitalist class and the working class and the necessity of the working class organizing itself politically and industrially for the purpose of establishing Communist Socialism, hereby apply for membership in the Communist Labor Party. I have no relations as member or supporter with any other politicar party. I am opposed to all political organizations that support the present capitalist profit system, and I am opposed to any form of trading or fusing with any such organizations. In all my actions while a member of the Communist Labor Party I agree to be guided by the constitution and platform of that party."

There is in this application and pledge no intimation that the member is required to accept the tactics of the Communist International or the tactics of the Communist Labor Party, except in so far as they are expressed in the constitution and platform of that party. Yet it is not the principles advocated, but the tactics proposed to be pursued to secure their adoption, which create the deportable condition.

In order that we may clearly understand the duty devolving upon the Department of Labor, it should be pointed out that the recognition of the class struggle between the capitalist class and the working class, the advocacy of the political and industrial organization of the working class to establish Communist Socialism, the declaration that he has no relations as member or supporter with any other political party, or the declaration that he is opposed to political organizations that support the present capitalist profit system, and to any form of trading or fusing with any such organization, does not make an alien deportable under the law.

The Communist Party asserts that "Communism does not propose to capture the bourgeois parliamentary state, but to conquer and destroy it," thereby making clear its intent to use force to attain the end in view. No matter how much mass action or economic power in the form of strikes may be used as a means of propaganda, it would be impossible to conquer and destroy our present form of government without the use of force, unless it is first captured by the parliamentary methods provided by our Constitution and laws.

The Communist Labor Party makes no such definition. On the Contrary, in part 1, section

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2, of the Party and Labor Program, it declares: "The working class must organize and train itself for the capture of state power."

The Communist Party declares that "participation in parliamentary campaigns * * * is for the purpose of revolutionary propaganda only." The Communist Labor Party makes no declaration to that effect.

Because of these differences, the conclusion was reached that the organizations would be passed upon separately and each dealt with in accordance with its own merits.

The principal excerpts from the Communist Labor Party platform and Program relied upon to show that the organization is one mere membership in which makes an alien liable to deportation under the Act of October 16, 1918, are as follows:

"Platform.

"1. The Communist Labor Party of the United States of America declares itself in full harmony with the revolutionary working class parties of all countries and stands by the principles stated by the Third International formed at Moscow."

"Party and Labor Program.

"Part I.

"The Communist Labor Party of America declares itself in complete accordance with the principles of Communism, as laid down in the Manifesto of the Third National formed at Moscow.

- "2. The working class must organize and trail itself for the capture of state power. This capture means the establishment of the new working class government machinery, in place of the state machinery of the capitalists."
- "6. The most important means of capturing state power for the workers is the action of the masses, proceeding from the place where the workers are gathered together -- in the shops and factories. The use of the political machinery of the capitalist state for this purpose is only secondary.
- "7. In those countries in which there is a possibility for the workers to use this machinery in the class struggle, they have, in the past, made effective use of it as a means of propaganda and of defense. In all countries where the conditions for a working class revolution are not ripe, the same process must go on."

"Part II.

- "6. Not one of the great teachers of scientific socialism has ever said that it is possible to achieve the Social Revolution by the ballot.
- "7. However, we do not ignore the value of voting, or of electing candidates to public office, so long as these are of assistance to the workers in their economic struggle. Political campaigns, and the election of public officials, provide opportunities for showing up capitalist democracy, educating the workers to a realization of their class position, and of demonstrating the necessity for the overthrow of the capitalist system. But it must be clearly emphasized that the chance of winning even advanced reforms of the present capitalist system at the polls is extremely remote; and, even if it were possible, these reforms would not weaken the capitalist system."

"Part III.

"1. In America the capitalist class has never had a feudal aristocracy to combat, but has always been free to concentrate its power against the working class. This has resulted in

the development of the American capitalist class wholly out of proportion to the corresponding development in other countries. By their absolute control of the agencies of publicity and education, the capitalists have gained a control over the political machinery which is impossible to break by resorting to this machinery."

"5. It is our duty as Communists to help this process, to hasten it, by supporting all efforts of the workers to create a centralized revolutionary industrial organization. It is our duty as Communists, who understand the class struggle, to point out to the workers that upon the workers alone depends their own emancipation, and that it is impossible to accomplish this through capitalist political machinery, but only by the exercise of their united economic power."

"Program.

- "1. We favor international alliance of the Communist Labor Party only with the Communist groups of other countries those which have affiliated with the Communist International.
- "2. We are opposed to association with other groups not committed to the revolutionary class struggle."
- "7. The party shall make the great industrial battles its major campaigns to show the value of the strike as a political weapon."

In addition to these should be noted the argument by counsel that the tactics of the Communist Party in Russia are the methods intended to be pursued by the Communist Labor Party of America, and that certain statements of prominent Communists relative to the objects of the Communist Labor Party should be taken as showing the intent of the party itself. The tactics of the Communist Party in Russia can have no bearing upon the Communist Labor Party in the United States except in so far as those tactics are accepted or adopted by the Communist Labor Party; nor can the statements made by prominent members of the party be accepted as the expressions of the organization unless the party by its own action adopts the statements.

The excerpts from the Communist Labor Party platform and Program quoted above indicate an extremely radical objective, but there is nothing in them that discloses an intention to use force or violence or that is incompatible with the use of parliamentary machinery to attain the radical end it has in view. The belief in, teaching, and advocacy of the class struggle, mass action, the conquest of political power, the dictatorship of the proletariat, Socialism, Communism, the one big union, shop committees, shop stewards, and other social, industrial, economic, and political changes mentioned in the Communist Labor Party platform and Program, however reprehensible these things may be to the minds of any or all of our people, do not bring the organization within the purview of the act, as long as it does not propose to use force or violence to accomplish the purpose. If the American people are left free to discuss and decide the questions representing themselves for consideration from day to day, uninfluenced by the threat of force or violence, they can be relied upon to protect themselves against any false philosophies, wild-eyed revolutions, or dictatorships of any kind.

The Communist Labor Party of America does not come within the scope of the Act of October 16, 1918.

There being no evidence, other than membership in this party, to show that Carl Miller comes within any of the deportation provisions of the law, the warrant under which he is held is hereby canceled.

The most that can be held is that it does not appear that the government [*67] did,

through its agents, give form and color to the documents upon which the Secretary has based his ruling. It is equally clear that no finding can be made that the government did not, through its agents, give such form and color, and thus lay a foundation for the inference that the Secretary of Labor has drawn against these aliens because of their alleged membership in the Communist Party.

It should be recorded that in this trial every possible opportunity [*68] was given the Department of Justice to explain the nature and extent of the activities of its so-called "under-cover informants." Even after the evidence was closed it was stated by the court, in chambers, counsel on both sides being present, that if Burke desired to appear and give evidence on this subject, an application to reopen the case for that purpose would be entertained by the court with a favoring mind, requiring the petitioners to show good cause why it should not be [*69] granted. No such application was made. The court is government.

I cannot adopt the contention that government spies are and more trustworthy, or less disposed to make trouble in order to profit therefrom, than are spies in private industry. Except in time of war, when a Nathan Hale may be a spy, spies are always necessarily drawn from the unwholesome and untrustworthy classes. A right-minded man refuses such a job. The evil wrought by the spy system in industry has, for decades, been incalculable. Until it is eliminated, decent human relations cannot exist between employers and employes, or even among employes. It destroys trust and confidence; it kills human kindliness; it propagates hate.

Compare Hunter's "Violence in the Labor Movement," c. 11, and the authorities therefor referred to in the appendix, pp. 368, 373; also "Labor's Challenge to the Social Order," by John Graham Brooks, c. 5.

Compare, also, May's Constitutional History (American Ed.) p. 39 et seq., for historical instances of the baneful results of the government spy system in England.

Now that it appears that government spies constituted in December, 1919, an active and efficient part of the Communist Party, it may well be that the Secretary of Labor will [**119] find it desirable, through his own forces, to institute some investigation of the nature and extent of the possible activity and influence of these spies in giving form and color to the documents on which the Secretary based his ruling in the Preis Case.

As the evidence now stands, no important human rights should be determined on the basis of documents whose origin and form are under such well-grounded suspicion.

3. The third contention is that the records on which the Secretary based his decisions adverse to the aliens are vitiated by lack of due process of law. On this issue the aliens ordered deported must be divided into two groups:

If I am wrong in my conclusion, supra, that conscious, avowed, legally proved or admitted, Communists are not members of an organization advocating the overthrow by documents on which the Secretary of Labor based his holdings are, notwithstanding the presence in the Communist Party of government spies, to be held the duly authorized and wife, Frank Mack, and Lew Bonder [**120] the petitions should be denied, the writs discharged, and these aliens remanded into the custody of the respondent; for, in the cases of these four allens, unlike the rest of the aliens who have been ordered deported, I immigration inspectors are not vitiated by lack of due process of law.

The Colyers are citizens of Great Britain, and the most competent of the aliens before me to assert and guard their own rights. Both, [*70] in striking contrast to the treatment afforded the uneducated, non-English-speaking Russians, were afforded treatment

approximately legal. They were arrested at their home in Wellesley by, or at any rate in the presence of, a labor inspector. While perhaps it does not appear affirmatively that they knew their rights, they did not object to the search of their premises. They told the officers where their books and papers were. I do not think their cases before the inspectors were substantially prejudiced by any unreasonable searches and seizures. They refused to answer questions until they had a lawyer present. The evidence does not warrant a finding that the [**121] Colyers were deprived of any substantial rights accruing under the phrase "due process of law" as hitherto applied to the cases of aliens. They are, and frankly avow themselves to be, convinced and enthusiastic Communists. They were English Socialists. They are profoundly and excessively impressed with the defects of present human institutions, and agitating, within what they think are their rights, for radical changes in those institutions.

Frank Mack is also an intelligent Englishman. He knew, and insisted on, most of the rights of a citizen of Great Britain and of the United States. As a result, he obtained the rights which I think material to the validity of the record on which the Secretary of Labor has ordered him deported. This is not a finding that he had proper or legal treatment. Apparently his room was searched, he was taken to Deer Island and held practically incommunicado several days, and was not permitted to see people for about four weeks, although frequently requesting such opportunity. But Mack was admittedly active in the Socialist Party; he was a delegate to the Chicago convention, at which the Communist Party was organized; and on all the evidence I think [**122] must be held responsible as an intelligent, conscious, and avowed Communist. He ***M21***cannot set up errors of procedure to avoid results of acts to which he himself testifies. Motes v. United States, 178 U.S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150.

But none of these three British citizens is an advocate of force and violence as commonly understood. They are propagandists of the word, not "of the deed."

Although Lew Bonder is a very different sort of person from the Colyers and Mack, I think he must be classed with them, as an intelligent, avowed Communist He is a Russian who has been some eight years in this country. He speaks a very indistinct and muddled English, almost impossible to understand. But he is a man of considerable intelligence, and pretty thoroughly imbued with economic and social theories. He thinks he understands Communism. He states that he wants to go back to Russia, but does not want to be deported. There is some ground for suspecting that he is not entirely unwilling to return at government expense. But, on all the evidence, I do not think that a finding that his record is vitiated by lack of due process should be made. His case is not free from doubts which [**123] the Labor Department might, in its own discretion, well resolve by some further examination of him. But his case must by this court be classed with those of the Colyers and Mack.

[*71] But this contention of lack of due process (fair hearing) must be sustained as to the rest of the aliens ordered deported. This includes Matchian, Yarmoluk, Harbatuk, Gessewich, Chaika, Honchereoff, Musky, Sedar Serachuk, and Lanovoy.

It is perhaps true that if the records which went to the Secretary of Labor could be regarded as accurate, adequate, and reliable, there may be in them some evidence warranting the Secretary's conclusion that the aliens are members of the Communist Party. But the difficulties are that these records originated in hearings conducted by the inspectors, in an atmosphere and under conditions which I have already outlined, and which I am constrained to believe prevented the aliens from having a fair, legal, due process of law consideration of their real status.

Bringing the functions of the court strictly within the limits laid down by the authorities cited above, and trying, not the merits of the aliens' cases, but the *trial* of the aliens, I am compelled to [**124] hold that the Secretary of Labor has in these cases, of necessity, grounded his decisions upon records misrepresenting or omitting facts of controlling importance.

I find on all the evidence that the records in these cases are not reliable, and that they originated in proceedings which were unfair and therefore lacking in due process of law.

It would not be fruitful now to analyze and state in elaborate detail the numerous complications and contradictions in the evidence concerning these aliens, brought out before me and appearing in the records made before the inspectors which are exhibits before me. But it is plainly not enough, as argued by the Assistant United States Attorney, to find that an alien, particularly a non-English-speaking alien, in one part of his testimony, either before the court or before the inspector, appeared to admit membership in the Communist Party, assuming that such membership is otherwise held to bring the alien within the purview of the Act of October 16, 1918. For illustration: The alien Chaika, testifying before the court, through an interpreter, was asked on cross-examination:

"Q. Are you a member of the Communist Party? A. I am.

"Q. When [**125] did you become a member of the Communist Party? A. In the month of September."

This would seem to be conclusive. But after a considerable further cross-examination, Chaika was asked by the Assistant United States Attorney:

"Q. How do you know that you are a member of the Communist Party? A. Because a policeman showed me a membership book in the Communist Party; so I said 'Yes.'

"Q. When did you first learn that you were a member of the Communist Party? A. I didn't know until the first meeting. When the policeman showed me the membership book, he asked me whether that was my name, and I said 'Yes.' Then he said it was my book, and said that book was a membership book in the Communist Party.

"Q. Are you referring now to the hearing at Deer Island? A. The one given at Lincoln, N.H., at the time of my arrest."

[*72] This evidence, if true, shows the Chaika never knew until the time of his arrest when called upon to answer the questionnaire, that the club that he belonged to in the paper mill plant had been admitted, in form at any rate, to affiliation with the Communist party. The flat previous admission therefore goes for naught.

This evidence is typical [**126] of the confusion and doubt that arise when an attempt is made to sift the truth out of the records made of the hearings of these bewildered, terrorized, non-English-speaking aliens before the inspectors and out of their evidence before the court.

Assuming for the purposes of the present point that the Secretary's construction and application of the act to the Communist Party may be held to be correct, I accord with what I understand now to be the view of the Department of Labor, that such membership must be a real membership in or an actual affiliation with the proscribed organization. I do not think that Congress meant to authorize the expulsion of aliens who pass from one organization into another, supposing the change to be a mere change of name, and that by assenting to membership in the new organization they had not really changed their affiliations or political or economic activities. For illustration: When, at meetings of a local of the Socialist Party, notice was given that the local had been expelled or had seceded from the Socialist Party and would thereafter take the name "Communist," and that signatures for membership in the new organization were requisite, [**127] nothing more appearing, I could not hold that such new membership, thus created, brings the new members within the purview of the act of Congress. Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously, in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge.

This principle covers many -- perhaps most -- of these 9 aliens. Apart from the fact that

the records in their cases are grounded in unfair hearings and are very unreliable, it is entirely clear that the membership or affiliation of most of these aliens was but artificial and shadowy.

A summary of the evidence of a few of them will suffice to illustrate the basis of the general finding that these records are grounded on proceedings unfair, lacking in due process of law, and unreliable.

The petitioner Adam Musky testified, through an interpreter, that he was arrested at 7 o'clock on the morning of the 2d of January at his home, 87 Endicott street, Worcester, Mass. Five or six men came into the house and began to look through the room, and took everything they [**128] wanted, without asking his permission or showing any search warrant or warrant for his arrest; that he was taken to the police station and kept 24 hours, and afterwards questioned on the train. He was taken to Deer Island. He did not understand English, and when examined at Deer Island he and the interpreter did not understand each other. He spoke Russian, and did not know Lithuanian; that he had no lawyer at the time of the hearing; that after the hearing [*73] he was told that he might have a lawyer. The witness said that he joined the Socialist Party, and then went over to the Communist Party when all the others became members of the Communist Party.

"How did you become a member of the Communist Party?" "I don't know. They said they changed the name, and that's all I know."

That he was a member of the Socialist Party about 9 months and read the newspapers; didn't read the Communist literature; didn't have time. All the difference he understood between the Communist and the Socialist Parties was the difference in name; that he never read the Program and the Manifesto of the Communist Party; did not remember whether he ever read the Manifesto of the Socialist Party [**129] or not. He never thought that by becoming a member of the Communist Party he was obligating himself to advocate or seek the overthrow of the government of the United States by force or violence; that he did not believe in overthrowing the government of the United States by force or violence. He never had any idea that he was to participate in a bloody revolution in the United States for the purpose of overthrowing the government; that nobody ever told him about such ideas; that he never discussed force, violence, or bloodshed with anybody.

In response to the court's suggestion to find out whether he or any of the other Worcester people had any bombs or guns or dynamite, or other implements or devices of that nature, the witness said he never saw any, never had any, or heard any discussion about getting any such things; that he went to the people's village school in Russia and attended evening school in America three evenings in all; that he reads and writes Russian, but English "very poorly"; that he works in a shoeshop. On cross-examination he said that at the time of his arrest he belonged to the Worcester Local Communists and at one time was secretary of that local, but not [**130] at the time of his arrest.

Fred Chaika is one of several Russians taken at Lincoln, N.H., a little paper mill town in the White Mountains. They had a clubroom furnished by the paper company.

Chaika testified, through an interpreter, that he was arrested in his house at 11 o'clock at night by men who came in and began to search his room for Red books; that they arrested him and handcuffed him, in spite of his protest that he had had a broken wrist. No warrant of search or arrest was shown him. He was simply handcuffed, taken to the clubroom, where there were about 14 more arrested people, and kept there until 6 o'clock in the morning; then, handcuffed in pairs, they were taken to the railroad station; thence to Concord, and kept there in jail until Sunday morning; thence to Deer Island. The warrant for his arrest was served on him after he was in jail at Concord. The record of his hearing before the inspector shows that he testified that he became a member of the Socialist Party in April, 1919; that he did not know whether he transferred to the Communist Party or not; he might have read the constitution, buy forgot it. He denied

being a member of or affiliated with any organization [**131] that entertained [*74] a belief in the overthrow by violence of the government. He denied being opposed to organized government. He was, however, willing to be deported, as it appears that he has a wife and child in Russia.

Considering the record of his hearing with his evidence before me, it is clear that this alien had no conception of being affiliated with any organization committed to the overthrow of the government of the United States.

Koly Honchereoff, arrested in Portsmouth, N.H., had been in this country 8 years, and testified, through an interpreter, that he could read and write English a little, but could read and write Russian. He testified before the court that he never read or understood the principles of either the Socialist or the Communist Party. He was a riveter in the shipyard at Portsmouth.

Honchereoff was arrested about 11 o'clock at night in his home with a lot of others and taken to the police station, where the usual questionnaire was presented to him. He testified before the court explicitly that, when asked if he belonged to the Socialist Party, he said, "No." Asked if he belonged to the Communist Party, he said, "No." When asked if he belonged [**132] to some union, "Yes; I belong to a union three years." "I said I belong to the union three years; he put it three years in the Communist Party." His questionnaire, made subsequently a part of the record of his hearing, indicates that he admitted that he became a member of the Communist Party on December 11, 1919, but had not a membership card.

Before the court the witness testified that the interpreter did not speak Russian Well; that the inspector showed him a list of names, but he denied that he was a member of the Communist Party, or that he told the inspector that he was a member of the Communist Party.

Anton Harbatuk was another of the Lincoln paper mill workers, who was arrested and searched, as were Chaika and Serachuk. A membership book of this Russian branch was introduced containing his name; also a record showing that this Russian club had transferred to the Communist Party December 21, 1919. He testified that he did not read the Program or constitution of the Communists, but paid dues of 60 cents a month; that he joined the Communist Party because they were Russians and had been thrown out of the Socialist Party. Being asked whether he had joined the Communist Party [**133] "because the Socialist Party was not radical enough," he replied, "Why, I don't know. I don't know what the meaning of the word 'radical' is." On this being explained to him, he said:

"Why, I got nothing to do against the government, and I have never come to a thought against the government of the United States, only my thoughts of the Russian government."

Before the court he testified that he went to this club.

"I had no other place to go to, and then I thought I ought to belong to some organization." "What did they do at that club?" "They learned how to read and write; also arithmetic. * * * It was a room furnished, belonging to the people who worked in the paper mill." For it they paid "sixty cents a month."

[*75] Some of the money was used to buy books to teach the people to read English and Russian.

Sedar Serachuk is another of the Lincoln paper mill employes arrested under conditions such as Chaika described. When the agent of the Department of Justice began to search his room, he said to them:

"If you want to arrest me, show me your warrant. He showed me his fist, and said, 'This is

your warrant,' and continued to search the room."

This alien testified, [**134] through an interpreter, that at his hearings before the inspector he understood with difficulty; that at this hearing they showed him newspapers and membership cards which were not his; that he had a membership card in the Socialist Party, but did not have one in the Communist Party.

The record of his hearing before Inspector Ryder shows that he testified that he thought the Communist Party and the Socialist Party were all the same; he had not read the paper called "Communist"; and that when extracts and Manifestoes were read to him he answered that "he never heard of it"; that he did not know anything about their being samples of the teachings of the Communist Party. He believed in organized government; he did not know that the teachings of the Communist Party were against the United States government.

"I don't know what it was. A lot of fellows used to go, and so did I. I was approached to buy bonds, and we all bought bonds;" that he knew he "was innocent."

But a card indicating that he had paid three months dues in the Communist Party was apparently held by the inspector as enough to warrant of finding against this alien, and he was ordered deported.

Frank Matchian, of [**135] Norwood, Mass., was born in Lithuania, Russia, and came to the United States in 1912. He was arrested on the night of the 2d of January, 1920, at a hall in Norwood, and taken to the police station, where his pockets were searched. The typical questionnaire was submitted to him, which he signed; then he was taken to Deer Island, where he was kept about 3 months. He was first shown a warrant at his hearing at Deer Island, and was never shown a search warrant. They took letters and newspapers from his room. He was a member of the Socialist Party from January, 1914, and never applied for membership in the Communist Party, but said he became a member of the Communist Party by the resolutions passed at the branch or local; that he did not see any difference between Socialists and Communists, except the name; that he did not read the Manifesto and Program of the Communist Party; he read some of the literature, but did not understand some parts; that he had no idea that by becoming a member of the Communist Party he was obligating himself to engage in force and violence for the purpose of overthrowing the government of the United States; that he had no guns, ammunition, bombs, or ideas [**136] about such things; that he was always against the use of force and violence; that he expected the communistic state [*76] would come if the majority of the people want Communism and put in the Communist Party. "The Communist Party is a political party;" that it "comes by progress." He never heard any discussion of burning, shooting, killing, bombing, or dynamiting; that in the Socialist local at Norwood were 56 members, mostly speaking Lithuanian, laborers in the different mills in Norwood; had had a Lithuanian hall since 1915; many of the men were married. They met in this hall for society and benefit organizations; that there were six or seven Lithuanian organizations around that hall, one of which was the Socialist Club; that all he knew about Communism was that somebody said the Socialist Party became Communists and he went along with the crowd.

On cross-examination, he testified that he was the manager of the Lithuanian hall; that the literature received there was taken charge of by him and distributed to the members; that he was an organizer for the Socialist Branch in 1918, and still held the position after he became a Communist.

The record of Matchian's hearing before [**137] Inspector Ryder indicates that he paid his dues in the Socialist Party up to November, 1919, at 40 cents a month; that this Socialist Club had received a charter for membership in the Communist Party. When his attention was directed to some of the denunciations of capitalism in the Communist literature, he said that he could not "understand all that." Weighing fairly both his evidence before the court and the record made by the inspector of immigration, it is entirely clear that if, and in so far as, he was a Communist at all, it signified to him a

http://www.lovia.com/www.lovia

mere change of name, an automatic shifting of the old Socialist Club into a Communist Club; that he had no conscious affiliation with any organization supposed by him to be committed to any program of force or violence.

There are no sufficient differences in the cases of the rest of the 9 now grouped as to warrant detailed statements of the evidence in their cases.

But it should be added that the case of Tehon Lanovoy is close to the dividing line. He is a Russian who was arrested at Lincoln, N.H. He has been a student at Boston University, and had started to become a Communist, but had not been actually admitted to the party. I [**138] have had some doubt whether he should not be classed with the Colyers, Mack, and Bonder. But on all the evidence I think that the record put before the Secretary of Labor was vitiated by lack of due process of law and ought not to be held a legal basis for an order of deportation.

The result is that as to these 9 aliens it must be held that the orders of deportation hitherto made are invalid and that these petitioners are entitled to be discharged from the respondent's custody on that ground, even if the broader finding and ruling made as to the Colvers, Mack, and Bonder are not sustained. But, if the broader ruling made as to the Colyers, Mack, and Bonder is not sustained, the decision as to these 9 should be without prejudice to the right of the Department of Labor, on new proceedings and on records legally and [*77] properly made, hereafter to issue warrants of deportation for any cause, whether now existent or not. In other words: If it be ultimately determined that membership in the Communist Party, admitted or duly proven, on proceedings not unfair or otherwise lacking in due process of law, brings the aliens within the purview of the Act of October 16, 1918, the present [**139] decision against the validity of the records of these 9 aliens is not to make this question as to them res adjudicata. Under the conditions named, all that is intended now to be decided as to these 9 aliens is that the hearings had hitherto are unfair and the orders based thereon invalid. But the statutory jurisdiction of the Department of Labor, on proceedins properly instituted and conducted, to determine all questions of fact as to the rights of these 9 aliens, is not by this decision to be held impaired.

This disposition of these 9 cases is, mutatis mutandis, accordant with the decision of the Court of Appeals of this Circuit in United States v. Petkos, 214 Fed. 978, 131 C.C.A. 274. It was there held that, HN227 when error was found vitiating the proceedings in the Department of Labor, the District Court ought not to assume the duties of the immigration authorities, "unless no other course can reasonably be taken." Accordingly it was ordered that the discharge of the aliens on habeas corpus be conditioned upon the immigration authorities affording such alien a fair hearing on lawful evidence within a reasonable time. The principle underlying that decision obviously was that the [**140] Department of Labor should be left, so far as practicable, to the performance of the duties delegated to it by Congress; the courts limiting their functions strictly to granting liberty in cases where it was illegally restrained. Applying that principle to the changed conditions before this court, I think the Department of Labor should start its proceedings de novo as against these aliens, after a proper investigation, unaffected by the overzealous agents of any other department. The immigration inspectors ought not to be required to hear these cases under any such circumstances or in any such atmosphere as surrounded the previous hearings. I do not think they would be qualified to do justice under such circumstances. On the other hand, I do not think the records now before this court warrant the court in finding, as facts, that none of these aliens were conscious, avowed Communists.

To repeat, in order to make the point absolutely clear: The finding should be and is limited to a finding that they did not have, before the inspectors, a fair trial of their status.

It remains to consider the cases of the aliens bailed before the end of the proceedings in the Department of Labor. HN23 [**141]

Section 20 of the Immigration Law (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289

I regard it as entirely clear on all the evidence, some parts of which have been abstracted above, that the situation of these aliens at Deer Island was, in most essential respects, within the control of the Department of Justice; that the agents of that department were improperly interfering with the recommendations of the labor inspectors who were conducting the hearings; that [**142] the recommendations of these inspectors were naturally and properly taken by Acting Commissioner Sullivan as of substantial -- generally of controlling -- weight, and that Acting Commissioner Sullivan's recommendations were, as already indicated, controlling with the Secretary of Labor in Washington.

There is no evidence warranting a finding that these aliens, if released on reasonable bail pendente lite, would have endangered in any way the public safety, or that they would not have appeared, when required, for further hearing or to answer deportation warrants. There is no reasonable explanation offered for fixing bail in sums which must have been expected to be prohibitive, thus making the provision of the statute and the general order of the Secretary of Labor of no real effect. The aliens, when bailed by this court, had already been held, as though under sentence for crime, for 3 to 4 months. Some of them were arrested and held for days without any warrant whatsoever. Some of them had very substantial savings, one \$1,500, others less sums, deposited in banks or invested in government bonds. They are mostly wage-earners of good average type -- not loafers or agitators. [**143]

Even if the arrests had been lawful and the proceedings had been regular throughout, it cannot be the law that an alien shall be held, beyond a reasonable time, for trial and determination of his right either to go free and earn his living in this country, or to be deported. The fact that in this instance the government had overloaded itself by the wholesale arrest of hundreds of aliens, only a small fraction of whom was there evidence to hold, and had thus caused an untoward delay in the cases of these particular aliens, was not the fault of these aliens. Their rights were, within reasonable time, either to be deported or to be allowed their freedom. Their detention, under all the unprecedented and extraordinary circumstances of this case, I find and rule was illegal, warranting the issuance of the writs.

In analogy to the proceedings in the Petkos Case, 214 Fed. 978, 131 C.C.A. 274, no final disposition of their rights on the present habeas corpus proceedings can now be made. If, within reasonable time, the immigration authorities reach final decisions in these cases, orders must be made accordingly; that is, in the cases in which the government may order the warrants of arrest [**144] canceled, the aliens [*79] will be ordered discharged; if, in other cases, the conclusions of the Secretary of Labor are that the aliens shall be deported, obviously such aliens must either be returned to the respondent or must apply to the court, either for a further hearing or for an order for the same kind of relief granted to the 13 aliens above named, against whom deportation warrants have already issued.

The principle upon which I have proceeded in these bail cases is closely analogous to that which guided Judge Knox in Weinstein v. Uhl, 266 Fed. 929, decided on January 14, 1920, in the District Court for the Southern District of New York. I recognize fully that, HN25 **Except under extraordinary circumstances, the court has no right to interfere in behalf of an alien until the proceedings have been completed in the Department of Labor. But I find and rule that the extraordinary circumstances under which these aliens were arrested and

detained resulted in an illegal deprivation of their liberty, requiring the court to intervene by the writ of habeas corpus without waiting final disposition of their cases in the Department of Labor.

Summary of the Results Reached.

- (1) There [**145] is no evidence that the Communist Party is an organization advocating the overthrow of the government of the United States by force or violence. Hence all the petitioners ordered deported are entitled to be discharged from the custody of the immigration authorities.
- (2) If the first conclusion be not sustained by the court above, and if the final holding be that duly proved or admitted Communists are obnoxious to the statute, then in the cases of William T. Colyer, Amy Colyer, Frank Mack, and Lew Bonder the petitions should be dismissed, the writs discharged, and the petitioners remanded to the custody of the respondent for deportation, unless in the opinion of the court above further hearing be requisite to determine whether the "under-cover informants" of the Department of Justice were, in any material degree, influential in giving form and color to the documents of the Communist Party on which the Secretary of Labor based his conclusion against said aliens.
- (3) Assuming such final decision to be against duly proved or admitted Communists, then the records in the cases of all the aliens other than the Colyers, Mack, and Bonder, ordered deported, are, on all the evidence, found [**146] to be vitiated by lack of due process of law. These aliens are therefore entitled to be discharged from the respondent's custody, but without prejudice to the right of the Department of Labor on new proceedings hereafter to find said aliens Communists and on that ground to deport them.
- (4) The cases of aliens admitted to bail pending final decision by the Department of Labor are, after final decision by the Secretary, to be disposed of by discharging aliens in whose cases warrants may be ordered canceled, and remitting the other aliens to their right either to apply for a further hearing to determine whether they are to be [*80] classified with the Colyers, Mack, and Bonder, or with those aliens whose records are vitiated by lack of due process.

Ordered accordingly.

Addendum.

Pending decision, the Department of Labor has, in three of the bail cases reached conclusions:

In the case of Ivan T. Hyrnchuk, the conclusion is that he should be deported. A consideration of the evidence adduced before me and of Hyrnchuk's record, on which the Secretary of Labor has based his conclusion, shows that that record is, like those of the nine grouped together, supra, vitiated by lack [**147] of due process. Hyrnchuk's case is therefore grouped with the other nine, sufficiently dealt with above.

In two other cases, William Chriupko and Samuel Drakewich, the decision of the Department of Labor is that the warrants be canceled. Orders may accordingly be made, setting these aliens at liberty, and of course canceling their bail bonds.

26 F. 749, *; 1886 U.S. Dist. LEXIS 28, **; 11 Sawy. 522

In re IMPANELING AND INSTRUCTING THE GRAND JURY

District Court, D. Oregon

26 F. 749; 1886 U.S. Dist. LEXIS 28; 11 Sawy. 522

March 28, 1886

CORE TERMS: treaty, laborers, resident, national government, favored nation, negotiated, immunities, wages, duty, immigration, conspiracy, territory, exemptions, constrain, accorded, violence, lawful, hinder, reside, commit, equal protection, congress passed, evil spirit, lawless, imprisonment, intimidation, treasonable, inhabitants, emigration, foreigner

OPINIONBY: [**1]

DEADY

OPINION: [*749] DEADY, J., (charging grand jury.) An evil spirit is abroad in this land, -- not only here, but everywhere. It tramples down the law of the country and fosters riot and anarchy. Now it is riding on the [*750] back of labor, and the foolish Issachar couches down to the burden and becomes its servant. Lawless and irresponsible associations of persons are forming all over the country, claiming the right to impose their opinions upon others, and to dictate for whom they shall work, and whom they shall hire; from whom they shall buy, and to whom they shall sell, and for what price or compensation. In these associations the most audacious and unscrupulous naturally come to the front, and for the time being control their conduct. Freedom, law, and order are so far subverted, and a tyranny is set up in our midst most gross and galling. Nothing like it has afflicted the world since the Middle Ages, when the lawless barons and their brutal followers desolated Europe with their private wars and predatory raids, until the husbandman was driven from his ravaged field, and the artisan from his pillaged shop, and the fair land became a waste.

The dominant [**2] motive of the movement is some form of selfishness, and its tendency is backward to barbarism, -- the rule of the strongest, guided by no other or better precept than this: "Might makes right." This is not the time or place to inquire into the cause of this condition of society. It may be the natural outcome of the modern political economy, which, assuming that the conflict of private interests will produce economic order and right, has reduced the relation between capital and labor to the mere matter of supply and demand, and limited the duty and obligation of the one to the other to the payment of the minimum of wages for the maximum of labor on the one hand, and the getting the maximum of wages for the minimum of labor on the other. But, whatever the cause, I have faith that the teaching of experience, and the good sense and love of justice of the people, will find a remedy for the evil in time. And in the meanwhile it behooves those of us into whose hands the administration of the law and the conservation of the public peace is confided to do what we can, wisely but firmly, to prevent this evil spirit from destroying the material resources of the country, and making any improvement [**3] in the condition of society, in this respect, still more difficult and doubtful.

Lately, this spirit has been manifesting itself in Oregon, by assaulting, robbing, and driving out the helpless Chinese who are engaged among us at lawful labor for an honest living. The excuse given for this conduct is that the Chinese are taking the bread out of the mouths of their assailants by working for less wages and living cheaper than the latter can. In other words, they complain of the industry and economy of the Chinese as being beyond their competition. As we all know, this statement must be taken with much allowance. True, the Chinaman is industrious and economical, and he has the advantage

of being temperate and faithful to his engagement. But he demands and gets better wages here than white men in any other part of the world, and, save in the matter of whisky and tobacco, he lives as well and is as well clad as the bulk of common laborers anywhere. [*751] But this outcry against the Chinese as laborers is not new. It was heard from 30 to 50 years ago, when the native mobs in our eastern towns and cities undertook to drive out the comparatively "cheap labor" of Ireland and Germany, [**4] particularly the latter, that was then crowding into this country and filling the places of the slothful and shiftless. It is not necessary now to consider the right of a people to oppose or put a stop to an undesirable immigration. For my own part I have no doubt that the United States has the same right to prevent an immigration within its boundaries, of people that it deems objectionable, as it would have to repel an armed invasion by them. But this is a matter for the whole country, represented by the national government, to decide, and not for individuals or neighborhoods, or even states.

The Chinese now in this country are here under the sanction of a solemn treaty with the United States, and any attempt on the part of individuals, acting singly or in numbers, to expel them by any threat, menace, violence, or ill usage is not only wrong but unlawful. Our treaty relations with China extend over a period of more than 40 years. On July 3, 1845, a "treaty of peace, amity, and commerce" was negotiated by Caleb Cushing, on behalf of the United States. Pub. Treat. 116. By it the citizens of this country were granted the right to frequent and reside with their families, and [**5] trade, at the five ports of Kwang Chow, Amoy, Fuchow, Ningpo, and Shanghai. On June 18, 1858, William B. Read negotiated another treaty, in which the government of China agreed to defend the citizens of the United States in China "from all injury or insult of any kind." Pub. Treat. 129. To this there was a supplement, on November 8th of the same year. Pub. Treat. 137. On July 28, 1868, a treaty was negotiated by William H. Seward, containing sundry articles in addition to the last one. Pub. Treat. 147. By article 5 of this treaty "the United States and the emperor cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as permanent residents. The high contracting parties therefore join in reprobating any other than an entirely voluntary emigration for these purposes." Article 6 provides:

"Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there [**6] be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges and immunities and exemptions, in respect to travel or residence, as may be then enjoyed by the citizens or subjects of the most favored nation."

On November 11, 1880, another treaty concerning "immigration" was negotiated. 22 St. 826. Article 1 of this treaty gave the United **[*752]** States the right to "regulate, limit, or suspend," but not to "absolutely prohibit," the coming to or residence of Chinese laborers in the United States whenever it was thought that their residence here was contrary to "the interests" of the country or endangered "the good order" thereof. Article 2 provided that Chinese, other than laborers and Chinese laborers then in the United States, "shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, and immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

Under the concession contained in this treaty congress passed the restriction act of May 6, 1882, (22 St. 58,) [**7] suspending the coming of Chinese laborers to this country for the term of 10 years from the expiration of 90 days after the date thereof.

The significance of the stipulation in the foregoing treaties with China, to the effect that the Chinese in this country shall be entitled to all the privileges and immunities that are "accorded to the citizens and subjects of the most favored nation," will be better understood by a reference to our treaty stipulations with Great Britain on that subject. By article 1 of the treaty of "commerce" with that country of July 13, 1815, (Pub. Treat. 293,)

renewed and continued in force by article 4 of the treaty of October 20, 1818, (Pub. Treat. 299,) and further infinitely continued by article 1 of the treaty of August 6, 1827, (Pub. Treat. 312,) it is provided:

"The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers in the territories aforesaid [of the United States, and Great Britain in Europe] to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively." [**8]

From this brief statement of the treaties bearing on the subject, you will perceive that any attempt to compel or constrain any Chinese resident of this country to remove from or to any particular place, or to refrain from following any lawful occupation, or doing any lawful work that he may find to do, is not only morally wrong, but contrary to the law of the land. It is commonly known that during the past few weeks gangs of masked men have, in the night-time, entered the houses and camps of peaceful Chinese residents, engaged in useful labor at various points in this vicinity, and, by serious intimidation and threats of personal violence, have compelled them to leave their homes and work, and come to Portland. There is no doubt but that this brutal and inhuman conduct is a gross violation of the rights guarantied to these people by the national government through the treaties aforesaid. Nor is there any doubt of the power of congress to provide for the punishment of any person who injures, annoys, or disturbs any subject of a foreign government, resident in any part of the United States, contrary to the treaty stipulations with such government.

[*753] The powers of the [**9] national government, though limited in number and subject, are supreme in their sphere. A treaty with a foreign power is the supreme law of the land; and congress may provide a punishment for its infraction or the deprivation of or injury to a right secured by it, as in the case of an ordinary law. Without this power, the national government would be unable to keep faith with other nations. In all our external relations the individual states are unknown. The government of the Union or United States stands for all, and in this respect may enforce obedience to its authority by the prosecution and punishment of individuals who act contrary thereto.

The next question is, has congress passed any law for the punishment of persons who, contrary to the treaty stipulations, molest the subjects of foreign powers resident in this country? So far as my judgment goes, the matter is not free from doubt. I am quite clear that congress has not passed any act having this object solely and directly in view. The reason for the omission may be that heretofore it was not thought necessary, as each state could and would, in the ordinary course of justice, furnish protection to all persons living [**10] within its borders. But this illusion has been dispelled, and experience has demonstrated that unless the general government furnishes the Chinese on this coast with protection, their treaty rights may be violated with impunity. Section 5519 of the Revised Statutes is broad enough in its terms to cover the case. This is section 2 of the act of April 20, 1871, (17 St. 13,) passed to enforce the fourteenth amendment, and provides for the punishment of persons who "conspire or go in disguise upon the highway, or on the premises of another, for the purpose of depriving" any one of "the equal protection of the laws," etc.

But in *U.S.* v. *Harris*, 106 U.S. 629, S.C. 1 Sup. Ct. Rep. 601, the supreme court held that this section, as regarded the inhabitants of a state simply, was unconstitutional; that the prohibition of the amendment, as to "the equal protection of the law," was directed against the state, and not individuals, and therefore congress could not, by way of enforcing such amendment, provide for the punishment of individuals who commit such acts. Notwithstanding this decision, it has been suggested that, although this section is unconstitutional as an act to enforce [**11] the fourteenth amendment, it is valid as an act to enforce treaty stipulations guarantying a foreigner, living in any state, the protection of the laws therein. The suggestion is a plausible one, to say the least of it, but I do not feel confidence enough in it to adopt it.

Section 5336 of the Revised Statutes, which is also carved out of section 2 of the act of April 20, 1871, (17 St. 13,) to enforce the fourteenth amendment "and for other purposes," provides that --

"If two or more persons, in any state or territory, conspire to overthrow, put down; or destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof; or by force to [*754] prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States, contrary to the authority thereof, -- each of them shall be punished by a fine of not less than \$500 and not more than \$5,000, or by imprisonment with or without hard labor for a period of not less than six months nor more than six years, or by both such fine and imprisonment."

This section has nothing to do with the fourteenth [**12] amendment, and there is no doubt of its constitutionality. It was copied into the act of 1871, aforesaid, from the act of July 31, 1861, (12 St. 284,) "to define and punish certain conspiracies" against the United States of a seditious or treasonable character. And the only question now is, does it include the acts or conduct under consideration?

Speaking only for this occasion, and reserving my final judgment until I may hear the matter fully argued, I think it does. The attempt to drive the Chinese out of the country, or to maltreat or intimidate them with a view of constraining them to depart, is *prima facie* an attempt to prevent and hinder the execution, operation, or fulfillment of a law of the United States, namely, the treaties with China of 1868 and 1880; and a conspiracy or agreement of two or more persons to engage in such conduct may, for that reason, be well characterized as a seditious and treasonable conspiracy against the authority and laws of the United States.

A mere assault, or even robbery, committed on a Chinaman, without any ulterior purpose other than a desire to vex and annoy or to steal, may not be a violation of this section. *Prima facie* such [**13] conduct is not intended to prevent the execution or operation of the law of the United States giving the Chinese the right to reside here indefinitely. But when, as I have said, the purpose of the conduct is to expel the Chinese from the country, either by direct deportation or such intimidation or violence as is likely to constrain them to go, I instruct you that the case comes within that clause in the section which makes it a crime "by force to prevent, hinder, or delay the execution of any law of the United States."

Some cases will be submitted to you by the district attorney of persons charged with mobbing and driving out Chinese in this vicinity who have been held to answer therefor before you. Take these cases and examine them carefully, and, if you find that any of the parties have maltreated, menaced, or intimidated the Chinese for the purpose or with the intent to compel or constrain them to leave the country or to remove from any place therein, it will be your duty to present them to the court for trial.

Trusting that you will do your duty in the premises, and that you will, according to the obligation of your oaths and your duty as citizens, present things truly as [**14] they come to your knowledge, without fear, favor, or affection, I commit the matter to your hands.