

# Local Prejudice in Criminal Trials

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For the purpose of affording relief to a plaintiff in circumstances where testimony is shown to have become unavailable, a paid bill may be admitted as *prima facie* evidence of reasonable value. However, in order to prevent the mere admission of this evidence from becoming conclusive in effect, this procedure, if acceptable at all, should be confined to circumstances of competitive price for proven work from which a defendant may be reasonably expected to obtain any existing evidence in rebuttal. By such essential can defendants be better safeguarded against collusion between the plaintiff and his doctor and mechanic; speculative fees on the part of the physician and repairman; and the indifference of a plaintiff to the amount he has been charged induced by the belief that another has to pay the charges. As between maintenance of tested safeguards for the establishing of a *bona fide* case and the facilitating of *prima facie* presentations by allowing freedom to plaintiffs in accident cases, it would appear that the continuance of the New York requirement of valuation witnesses is to be desired.

HENRY PEYTON WILMOT.

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#### LOCAL PREJUDICE IN CRIMINAL TRIALS

The common law rule that an offence shall be prosecuted in the county or district where it was committed is embodied both in the United States Constitution<sup>1</sup> and in the constitution or statutes of many states.<sup>2</sup> Conditions may arise which imperil the existence of a fair and impartial trial in the county wherein the crime has been committed and a change of venue becomes necessary. The purpose of a change of venue is to provide against a trial before a jury, where there is a prejudice, insidious in its nature, which pervades a community to such an extent that prospective jurors are unconsciously affected by its influence.<sup>3</sup> Local prejudice may arise against the

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<sup>1</sup> U. S. CONST. AMEND. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

<sup>2</sup> LA. CONST. Art. I, § 9; MISS. CONST. Art. III, § 26; PA. CONST. Art. I, § 9; WASH. CONST. Art. I, § 22; MICH. STAT. ANN. (Henderson, 1938) § 28.985; N. H. REV. LAWS (1942) c. 427, § 7; N. Y. CODE OF CRIMINAL PROCEDURE § 284; WIS. STAT. (1943) § 356.01.

<sup>3</sup> *People v. Williams*, 106 Misc. 65, 173 N. Y. Supp. 883 (1919).

accused because of racial,<sup>4</sup> religious,<sup>5</sup> political<sup>6</sup> or personal<sup>7</sup> factors. It may also exist because of the previous history of the case, as when there has been a prior trial of an accomplice, or because of newspaper accounts dealing with the crime.<sup>8</sup> Newspaper articles are not by themselves sufficient evidence of local prejudice as will justify a change,<sup>9</sup> unless public hostility has been so aroused thereby that it is improbable that a fair trial can be had.<sup>10</sup>

At times the state may be unable to receive a fair trial and it desires a change of venue. In Pennsylvania the state is by statute denied the right to apply for a change.<sup>11</sup> In California the same result has been reached by the highest state court declaring unconstitutional a statute permitting the state to apply for a change.<sup>12</sup> This decision has been questioned inasmuch as the state had a right of removal at common law.<sup>13</sup> In Arizona,<sup>14</sup> Delaware,<sup>15</sup> Illinois,<sup>16</sup> and Washington,<sup>17</sup> by statute, and in Alabama<sup>18</sup> and Oklahoma<sup>19</sup> by constitutional provision, the right to the defendant is expressly

<sup>4</sup> Change of venue granted, where defendant, a negro in a white community, had been attacked in numerous newspaper articles. *People v. Lucas*, 138 Misc. 664, 228 N. Y. Supp. 31 (1928).

<sup>5</sup> Affidavits tending to show that defendant, a Roman Catholic, could not secure a fair and impartial trial on a charge of murdering a member of the Ku Klux Klan in the county where the indictment was found, were sufficient to require a change of venue. *People v. Ryan*, 123 Misc. 450, 205 N. Y. Supp. 664 (1924).

<sup>6</sup> Forgery arising from tax frauds in the City of Albany, became an issue in the New York state election of 1930. Change of venue granted. *People v. Nathan*, 139 Misc. 345, 249 N. Y. Supp. 395 (1931). The City Attorney was accused of embezzling funds belonging to the community, he was denounced at political gatherings and through leaflets, and his conduct became a factor in political campaigns. Change of venue granted. *People v. State*, 126 Tex. Cr. 35, 70 S. W. (2d) 193 (1934).

<sup>7</sup> *People v. Georger*, 109 App. Div. 111, 95 N. Y. Supp. 790 (1905). In *Smith v. Commonwealth*, 108 Ky. 53, 55 S. W. 718 (1900), the accused was related to the leading families of Harlan County. The state contended that it was impossible to obtain a fair trial there and it was granted a change of venue. In *McRane v. State*, 194 So. 632 (Fla. 1940), the victim had been a member of one of the most respected and influential families, and was related either by blood or marriage to over fifty percent of the people in the county. The defendant was granted a change of venue.

<sup>8</sup> Horror stories dealing with the details of the crime. *Quinn v. State*, 54 Okla. Cr. 179, 16: (2d) 591 (1932).

<sup>9</sup> *People v. Hines*, 168 Misc. 453, N. Y. S. (2d) 15 (1938); *People v. Birdell*, 194 App. Div. 776, 185 N. Y. Supp. 533 (1921).

<sup>10</sup> *People v. Lucas*, 131 Misc. 664, 228 N. Y. Supp. 31 (1928); *People v. Jackson*, 114 App. Div. 697, 100 N. Y. Supp. 126 (1906).

<sup>11</sup> PURDON'S PA. STAT. ANN. (1939) § 555.

<sup>12</sup> *People v. Powell*, 87 Cal. 348, 25 Pac. 481 (1891).

<sup>13</sup> *Commonwealth v. Reilly*, 324 Pa. 558, 188 Atl. 574 (1936); *People v. Webb*, 1 Hill 179 (N. Y. 1841).

<sup>14</sup> ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 5022.

<sup>15</sup> DEL. REV. CODE (1935) § 5306.

<sup>16</sup> ILL. REV. STAT. ANN. (Smith-Hurd, 1935) c. 146, § 18.

<sup>17</sup> WASH. REV. STAT. ANN. (Remington, 1932) § 2018.

<sup>18</sup> ALA. CONST. Art. I, § 6.

<sup>19</sup> OKLA. CONST. Art. II, § 20.

granted and by implication is denied to the state. However statutes expressly granting the prosecution this privilege have been widely enacted.<sup>20</sup> It has been held that granting a change of venue upon application by the state does not offend the United States Constitution.<sup>21</sup> In New York it has long been held that the venue in a criminal action may be changed on motion of the public prosecutor, if a fair and impartial trial cannot be had in the county where the indictment was found.<sup>22</sup> The District Attorney may also on application remove an indictment from the county court to the supreme court.<sup>23</sup> The objection that to grant a change of venue to the prosecution may make it difficult for an impoverished defendant to bring his witnesses to the new place of trial has been met in New York by imposing as a condition of the change of venue that the District Attorney make a satisfactory arrangement for the payment of additional costs by the county in which the venue was originally laid.<sup>24</sup> The initial court should be satisfied that the new county is not in any way prejudiced against the defendant<sup>25</sup>

A defendant who wishes a change of venue must make application and give notice to the prosecution before trial, although this has often worked substantial injustice upon a defendant, who has not had the aid of counsel until shortly before trial.<sup>26</sup> In New York the application for an order of removal must be made to the supreme court at a special term in the district and must be made returnable at the next special term within the said district, after the motion papers are served, and upon notice of at least five days to the District Attorney of the county where the indictment is pending, with a copy of the affidavit or other papers on which the application is founded.<sup>27</sup> A justice of the supreme court residing in or holding a term of the supreme court in the district in which the indictment is pending, may upon good cause and after reasonable notice to the District Attorney and an opportunity to be heard thereon, make an

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<sup>20</sup> IOWA CODE (Reichman, 1939) § 13910; IDAHO CODE ANN. (1932) § 19-1708; FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 8406; MINN. STAT. (Mason, 1927) § 10804.

<sup>21</sup> *People v. Rich*, 237 Mich. 481, 212 N. W. 105 (1927).

<sup>22</sup> *People v. Webb*, 1 Hill 179 (N. Y. 1841).

<sup>23</sup> *People v. Farini*, 239 N. Y. 411, 146 N. E. 645 (1925).

<sup>24</sup> *People v. Baker*, 3 Abb. Pr. 42, 3 Parker Cr. 181 ( ).

<sup>25</sup> *Smith v. Commonwealth*, 108 Ky. 53, 55 S. W. 719 (1900).

<sup>26</sup> *Downer v. Dunaway*, 53 F. (2d) 586 (C. C. A. 5th, 1931). The defendant did not have the aid of counsel until one hour before the trial. No motion was made for a continuance or change of venue. During the trial two hundred officers and men of the National Guard attempted to keep order. If it had not been for their presence in and about the courtroom, it would have been impossible to hold the trial, and appellant would have been lynched. If he had been acquitted, he would not have been permitted by the mob to leave the courtroom without the protection of the troops. Counsel was prevented from moving for a continuance, for a change of venue, or for a new trial by the fear of mob violence.

<sup>27</sup> N. Y. CODE OF CRIM. PROC. § 346.

order staying the trial of the indictment until such application for removal can be made.<sup>28</sup> It is revealing to examine what a defendant in various states must establish in order to be granted a change of venue. In New York where the most liberal test is used, Section 344 of the Code of Civil Procedure provides for a change of venue when "a fair and impartial trial cannot be had in the county or city where the indictment is pending." This provision has been so interpreted that a defendant may obtain a change of venue if he is even able to demonstrate that there is a strong probability that bias exists in the community where the indictment is pending.<sup>29</sup> In Georgia, however, the defendant must show that there is a "probability or danger of lynching or other violence"<sup>30</sup> The statute does not require this result inasmuch as it provides that the defendant may move for a change of venue whenever in his judgment an impartial jury cannot be obtained in the county where the crime is alleged to have been committed.<sup>31</sup> Yet, even where the danger of lynching seems great, as for instance where sixty-five armed men are required to guard the accused, a Georgia court may refuse a change of venue.<sup>32</sup> In Texas the defendant must demonstrate that it is "improbable" that he will receive a fair trial.<sup>33</sup> In Illinois he need only show that there is "reason for fear" that he will not receive a fair trial.<sup>34</sup>

If the trial court denies an application for a change of venue, there is no right to an immediate appeal.<sup>35</sup> The case will proceed to trial and in the event of a conviction, the order denying the motion for a change of venue may be considered on appeal.<sup>36</sup> However, the granting of a change rests in the discretion of the trial court, and the appellate court will not order one unless it is convinced that this discretion has been abused.<sup>37</sup> The fact that a jury has been obtained has been held to indicate that the prejudice was not sufficient to prevent a fair trial.<sup>38</sup> But elements of force or feeling may influence a jury subconsciously, and cases may well arise where it

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<sup>28</sup> *Id.* § 347.

<sup>29</sup> *People v. Nathan*, 139 Misc. 345, 249 N. Y. Supp. 395 (1931).

<sup>30</sup> *Butler v. State*, 56 Ga. App. 126, 192 S. E. 238 (1937); *Goumas v. State*, 44 Ga. App. 210, 160 S. E. 682 (1931).

<sup>31</sup> GA. CODE ANN. (Park, *et al.*, 1936) tit. 27, § 1201; GA. PENAL CODE § 964.

<sup>32</sup> *James v. State*, 178 Ga. 761, 174 S. E. 237 (1934).

<sup>33</sup> *Pope v. State*, 126 Tex. Cr. 35, 70 S. W. (2d) 193 (1934).

<sup>34</sup> *People v. Anderson*, 350 Ill. 603, 183 N. E. 588 (1932).

<sup>35</sup> *People v. Birndell*, 194 App. Div. 776, 185 N. Y. Supp. 533 (1921), cited *supra* note 9.

<sup>36</sup> *People v. Grout*, 166 App. Div. 220, 151 N. Y. Supp. 322 (1915).

<sup>37</sup> *Stroud v. United States*, 251 U. S. 15 (1919); *People v. Henis*, 168 Misc. 453, 6 N. Y. S. (2d) 15 (1938).

<sup>38</sup> *Haddock v. State*, 141 Fla. 132, 192 So. 802 (1939); *People v. Anderson*, 350 Ill. 603, 183 N. E. 588 (1932).

is as essential to change the situs, as it is to have a jury filling the requirements of the law.<sup>39</sup>

When a change of venue is directed, the question arises as to where the case will be sent. Usually this is left to the discretion of the trial judge,<sup>40</sup> though various states have limited this power. Alabama requires that the cause shall be sent to the nearest county or county seat free from prejudice;<sup>41</sup> Indiana requires the change to be made to the most convenient county;<sup>42</sup> Kentucky to an adjoining county free from objection;<sup>43</sup> Illinois to the nearest county without prejudice;<sup>44</sup> and New Mexico requires a county within a limited contiguous area.<sup>45</sup> This latter requirement seems unfortunate because prejudice rarely respects territorial subdivisions. In New York the ordinary procedure is to select an adjoining county, though if circumstances require a change to a more remote county, it can be so ordered.<sup>46</sup> Under the United States judicial code a federal court of one judicial district may transfer a criminal prosecution to another district generally, but has no power to transfer it to a particular county in the latter district, that being a matter for determination by the court of that district on application after the transfer is made.<sup>47</sup> Most states allow only one change of venue,<sup>48</sup> and this restriction has been held constitutional.<sup>49</sup> This rule appears to be needlessly rigid. The same forces which operated to prevent a fair and impartial trial in the initial county may arise in the second, even though the trial court has been very careful in selecting an unbiased community. To refuse an additional change of venue constitutes an injury to the victim of the prejudice, rather than a deterrent to those forces which threaten the existence of a fair and impartial trial. Venue should be changed whenever local prejudice creates an obstacle to a fair trial; a blanket provision limiting the number of changes is unfair.

In Maryland and Indiana it is required that a requested change of venue be granted automatically in capital offenses.<sup>50</sup> Missouri has taken a step forward by granting changes as a matter of right when

<sup>39</sup> Jones v. Commonwealth, 111 Va. 862, 69 S. E. 953 (1911).

<sup>40</sup> Commonwealth v. Kelly, 266 Ky. 662, 99 S. W. (2d) 774 (1936); Timm v. District Court, 17 N. D. 135, 114 N. W. 472 (1908).

<sup>41</sup> Patterson v. State, 234 Ala. 342, 175 So. 371, *cert. denied*, 302 U. S. 733 (1937).

<sup>42</sup> Burns v. State, 192 Ind. 427, 136 N. E. 857 (1922).

<sup>43</sup> Commonwealth v. Kelly, 266 Ky. 662, 99 S. W. (2d) 774 (1936).

<sup>44</sup> ILL. ANN. STAT. (Smith-Hurd, 1936) c. 146, § 19.

<sup>45</sup> N. M. STAT. ANN. (Courtwright, 1929) § 147-108.

<sup>46</sup> People v. Baker, 3 Abb. Pr., 3 Parker Cr. 181 (N. Y. 1856).

<sup>47</sup> Hale v. United States, 25 F. (2d) 430 (C. C. A. 8th, 1928).

<sup>48</sup> Lee v. State, 164 Md. 550, 165 Atl. 614, *cert. denied*, 290 U. S. 639 (1933); ALA. CODE (Michie, *et al.*, 1941) tit. 15, § 269.

<sup>49</sup> Patterson v. State, 234 Ala. 342, 175 So. 371, *cert. denied*, 302 U. S. 733 (1937).

<sup>50</sup> MD. CONST. Art. IV, § 8; IND. STAT. ANN. (Burns, 1933) § 9-1305.

the forum is in a county of less than 75,000.<sup>51</sup> One whose life is at stake is entitled to every possible guarantee that he will be given a fair and impartial trial. It is undeniable that if an absolute right to a change of venue in cases involving felonies were to be granted, it would at times be used as a dilatory tactic. But this is far outweighed by the added assurance that the trial would be conducted on its merits rather than on preconceived notions of guilt. Another desirable safeguard is the vesting of power in the trial judge to order a change on his own motion without the concurrence of either counsel.<sup>52</sup> This power should be liberally exercised to rectify the omissions of incompetent or disinterested counsel, or counsel who fears that he will be the victim of mob violence if he should venture to move for a change of venue.<sup>53</sup> Alabama has adopted a statute whereby the trial judge may with the consent of the defendant, *ex mero motu*, direct and order a change of venue whenever in his judgment there is danger of mob violence, and it is advisable to have a military guard to protect the defendant.<sup>54</sup> It is submitted that the trial judge should be granted the power of ordering a change of venue, in the event that counsel fails to do so, long before local prejudice assumes the proportions of a danger of mob violence. The New York Code of Criminal Procedure makes no provision for the trial judge to order a change of venue on his own motion. It may well be that denial of a change of venue in certain cases is in effect a denial of the right to trial by jury as guaranteed by state constitutions.<sup>55</sup>

Responsibility for a fair trial lies fundamentally upon the states. However resort to the federal courts may both prevent injustice in individual cases and aid the states in the achievement of higher procedural standards. Where the highest court of the state has affirmed a conviction allegedly surrounded with prejudice, appeal may be had to the United States Supreme Court on the ground the defendant has been denied the due process of law required by the Fourteenth Amendment. A writ of *habeas corpus* may also be sought from a federal district court,<sup>56</sup> but it is necessary for the petitioner to have exhausted his remedies in the state courts.<sup>57</sup> The Supreme Court held in *Moore v. Dempsey* that the Fourteenth Amendment renders a "mob-dominated trial" void.<sup>58</sup> For as Justice

<sup>51</sup> Mo. STAT. ANN. (1932) p. 3194, § 3630.

<sup>52</sup> *Parrish v. State*, 134 Tex. Cr. 545, 116 S. W. (2d) 706 (1938); GA. CODE ANN. (Park, *et al.*, 1936) tit. 27, § 1201.

<sup>53</sup> *Downer v. Duraway*, 53 F. (2d) 586 (C. C. A. 5th, 1931).

<sup>54</sup> ALA. CODE (Michie, *et al.*, 1941) tit. 15, § 268.

<sup>55</sup> Some state constitutions require an impartial trial by jury, *e.g.*, ALA. CONST. ART. I, § 6. The absence of this adjective, however, seems immaterial, for a requirement of impartiality should be inferred, particularly in view of the due process clause in many state constitutions.

<sup>56</sup> U. S. CODE (1934) tit. 28, § 453.

<sup>57</sup> *Wilson v. Lanagan*, 99 F. (2d) 554 (C. C. A. 1st, 1938), *cert. denied*, 306 U. S. 634 (1939); *Mooney v. Holahan*, 294 U. S. 103 (1935).

<sup>58</sup> 261 U. S. 86 (1923).

Holmes said, "if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong—neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate out-break of the mob can prevent this court from securing to the petitioners their constitutional rights"<sup>59</sup> However it is not clear whether prejudice of a less tangible nature will result in a trial being declared void. In *Frank v. Mangum*, the Supreme Court held that a trial during which disorders occurred in and about the courtroom, was not violative of the due process clause of the Fourteenth Amendment.<sup>60</sup> The increased willingness of the United States Supreme Court to examine the practice of state courts as they affect civil liberties has been pronounced during the past two decades. That Court has held that a trial wherein negroes have been excluded from the jury constituted a denial of the equal protection clause of the Fourteenth Amendment,<sup>61</sup> that a conviction based upon a confession obtained by compulsion,<sup>62</sup> or by the presentation of testimony known to the prosecuting authorities to be perjured,<sup>63</sup> or wherein the accused has not had a fair opportunity to secure counsel of his own choice and the assignment of counsel has not been timely,<sup>64</sup> is not consistent with the due process clause. In *Herbert v. Louisiana*, the Court held that the Fourteenth Amendment required that state action shall be consistent with the fundamental principles of liberty and justice.<sup>65</sup> And as was said by former Chief Justice Hughes in *Brown v. Mississippi*, "the state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".<sup>66</sup> It is to be hoped that this recent tendency to pass judgment upon the procedural standards of state courts will bring forth a broadening of the holding of *Moore v. Dempsey*.

In 1866 Congress passed a statute providing for removal to a federal court when "any criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any

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<sup>59</sup> *Id.* at 91.

<sup>60</sup> 237 U. S. 309 (1914).

<sup>61</sup> *Smith v. Texas*, 311 U. S. 128 (1940); *Pierre v. Louisiana*, 306 U. S. 354 (1939); *Hale v. Kentucky*, 303 U. S. 613 (1938); *Norris v. Alabama*, 294 U. S. 587 (1935).

<sup>62</sup> *Vernon v. Alabama*, 313 U. S. 547 (1941); *White v. Texas*, 310 U. S. 530 (1940); *Canty v. Alabama*, 309 U. S. 629 (1940); *Chambers v. Florida*, 309 U. S. 227 (1939); *Brown v. Mississippi*, 297 U. S. 278 (1935).

<sup>63</sup> *Mooney v. Holohan*, 294 U. S. 103 (1935).

<sup>64</sup> *Powell v. Alabama*, 287 U. S. 45 (1932).

<sup>65</sup> 272 U. S. 312 (1926).

<sup>66</sup> 297 U. S. 278, 285 (1935).

rights secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction of the United States".<sup>67</sup> This statute was intended to supplement the Fourteenth Amendment and its constitutionality has been upheld.<sup>68</sup> It was initially construed to give a right to removal because of local prejudice.<sup>69</sup> The Supreme Court subsequently held it to apply only to cases where the defendant was unable to enforce his civil rights because of a state statute, and not where this was prevented by administrative or judicial action.<sup>70</sup> Local prejudice has been expressly held not to be within the statute.<sup>71</sup> In *Virginia v. Rivers* the Supreme Court held that a defendant cannot know that the equal protection of the laws will not be extended to him until the trial has taken place.<sup>72</sup> However this disregards two of the fundamental principles of venue, *i.e.*, that when there is sufficient belief to warrant the improbability of a fair and impartial trial in a particular locality the situs will be changed, and that it is never necessary to have an experimental trial to determine the existence of prejudice. It is to be hoped that the Supreme Court, in view of its concern with civil liberties, will restore the removal statute to its original function, so that in the event that a state is unable to give a fair and impartial trial to an accused, a federal court will.

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#### INCOME TAX DEDUCTIONS FOR MEDICAL EXPENSES

The advent of war, coupled with the necessity of extraordinary governmental expenditure, has brought increasing consciousness of the necessity to finance and control our national economy through tax legislation. Under the pressure of group controversy, pressure politics, and lobbies for selected interests, each particular law achieves its passage and represents a compromise between various opposing forces. Moreover, it very often happens that there is a last minute rush provoked by national urgency to meet the needs of emergencies. The result is invariably some progressive measures interspersed with

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<sup>67</sup> U. S. CODE (1934) tit. 28, § 74.

<sup>68</sup> *Ex parte Virginia*, 100 U. S. 339 (1879).

<sup>69</sup> *State v. Dunlap*, 65 N. C. 491 (1871).

<sup>70</sup> *Kentucky v. Power*, 201 U. S. 1 (1906); *Gibson v. Mississippi*, 162 U. S. 565 (1896); *Bush v. Kentucky*, 107 U. S. 110 (1882); *Virginia v. Rivers*, 100 U. S. 313 (1879); *State of New Jersey v. Weiberger*, 38 F. (2d) 298 (D. C. N. J. 1930).

<sup>71</sup> *Commonwealth v. Millen*, 289 Mass. 441, 194 N. E. 463 (1935); *Lewson v. Superior Court*, 12 F. Supp. 812 (N. D. Cal. 1935); *California v. Chue Fan*, 42 Fed. 865 (C. C. N. D. Cal. 1890); *Texas v. Gaines*, 23 Fed. Cas. 869, No. 13847 (C. C. W. D. Tex. 1874).

<sup>72</sup> 100 U. S. 313 (1879).