CHAPTER XII.

OFFENSES AGAINST PUBLIC JUSTICE AND AUTHORITY.

§ 204. General Statement. Crimes against the administration of public affairs which are not designed to overthrow the government, and which nevertheless prevent or impair its effective operation, are principally: offenses relating to office, obstructing an officer, compounding crime, misprison of felony, escape, prison breach, and rescue, bribery, perjury, embracery, and contempt. Let us consider these in the order named.

CRIMES RELATING TO PUBLIC OFFICE.

§ 205. General Statement. As government cannot exist without officers, it is criminal to refuse office, an offense happily rare. Any act or omission in breach of official duty by one exercising a public office is criminal, especially if the duty is ministerial and does not involve discretion. On this subject see generally 1 Bish. Cr. L. §§ 458-471; 2 Id. §§ 971-982.

Illegal voting: C. v. Silsbee, § 20; C. v. Callaghan, § 20; C. v. Randolph, § 6.

OBSTRUCTING AN OFFICER.

§ 206. General Statement. "Since the public good requires the due performance of official functions, a person who obstructs an officer therein, in any matter of public concern and of sufficient magnitude, is punishable." 1 Bish. Cr. L., § 465.

(Mich. Sup. Ct., 1888.) **Unauthorized Acts.** The sheriff with a writ of attachment against the property of Clements and wife, went to the farm and attempted to levy on a team of horses, wagon, harness, etc., belonging to the wife, and exempt from process; and when Clements discovered the sheriff's purpose he made such resistance that the sheriff left for fear of his personal safety. For these acts Clements and wife were prosecuted for resisting an officer. She was acquitted and he was convicted and sentenced to nine months' imprisonment. He excepted to the refusal of the court to instruct that the property was exempt and defendant entitled to use such force as was necessary to prevent the sheriff taking it; and also to the instruction given, that the law affords tribunals where men may have their rights judicially determined and secured, and does not sanction a man acting as judge in his own cases, and enforcing his own judgment in opposition to an officer. In reversing the judgment, the court said: "No writ in this state authorizes the sheriff to levy on such property, and, when he does it, it is at his own peril. The law will not protect him in doing that which it has expressly commanded him not to do. Neither is the debtor compelled to submit to such trespass without reasonable resistance. If the doctrine contended for by the prosecution, and laid down in the charge, were to obtain, every poor debtor would be at the mercy of the sheriff and constabulary of the county, and the statutory benefits intended by the exemption would be of little avail." Per SHERWOOD, C. J. **P. v. Clements**, 68 Mich. 655, 36 N. W. 792, 13 Am. St. Rep. 373.

Unnecessarily killing the officer in such case was held manslaughter: Cook's Case, § 70; Creighton v. C., § 69. See also, R. v. Thompson, § 106.

BRIBERY.

§ 207. Defined, Etc. Bribery is "the voluntary giving or receiving of anything of value in corrupt payment of an official act, done or to be done." 1 Bish. Cr. L. § 468.

(N. J. Sup. Ct., 1868.) **Offering Bribe to Councilman.** Indictment for offering $50 to a councilman of Hudson City for his vote on an application for a franchise to lay a railway track in a street of the city. On certiorari and motion to quash, defendant claimed that no crime was charged. DALRIMPLE, J. * * * It is said that the common law offense of bribery can only be predicated of a reward given to a judge or other official concerned in the administration of justice. * * * The later commentators, supported, as I think, by the adjudged cases, however, maintain the broader doctrine, that any attempt to influence an officer in his official conduct, whether in the executive, legislative, or judicial department of the government, by the offer of a reward or pecuniary consideration,

is an indictable common law misdemeanor. 3 Greenleaf's Ev. § 71; 1 Bish. Cr. L. § 95, and notes; 1 Russell C. 156.* * * Indeed, the authorities seem to be all one way. Neither upon principle nor authority can the crime of bribery be confined to acts done to corrupt officers concerned in the administration of justice. If in the case now before us, it was no crime for the defendant to offer, it would have been no crime for the councilman to accept the bribe. The result would, therefore, be that votes of members of council on all questions coming before them, could be bought and sold like merchandise in the market. The law is otherwise. The common law offense of bribery is indictable and punishable in this state. Our statutes against bribery merely define and fix the punishment for the offense, in cases of bribery of judicial officers and members of the legislature; they do not repeal or abrogate, or otherwise alter the common law. It is contended, in the next place, that the facts set forth in the indictment constitute no offense, inasmuch as the common council had not jurisdiction to grant the application for which the vote was sought to be bought. In my opinion, it is entirely immaterial whether council had or had not jurisdiction over the subject. * * * Whether the common council had authority to make the grant, or the railroad company the power to avail itself of its benefits, if made, or whether the offer of a bribe was before or after the application in due course of proceeding, had been embodied in an ordinance or resolution is immaterial. The offer of anything of value in corrupt payment or reward for any official act, legislative, executive, or judicial, to be done, is an indictable offense at the common law. * * * Motion denied. **S. v. Ellis,** 33 N. J. L. (4 Vroom) 102, 97 Am. Dec. 707-n, Kn. 305, Mi. 23.

Offer by an alderman to take a bribe and soliciting it is criminal. Walsh v. P., § 60.

COMPOUNDING CRIME.

§ 208. Defined, Etc. "Compounding crime is agreeing with one who has committed it not to prosecute him." 1 Bish. Cr. L., § 710.

(N. Ham. Sup. Ct., 1897.) **At Common Law—Violation of Liquor Law.** Defendant was convicted of compounding a violation of the statute as to selling spirituous liquors. He claimed that no offense by him was shown. It appeared from the evidence that he went to Fernald and informed him that he had a case against him for the illegal sale of liquor; that he read the law to Fernald and told him if he would settle it would save him a good many dollars; that for $30 he would destroy the evidence, which was a bottle of liquor; that he would prosecute unless $30 was paid, and the fine would be $50 and the costs $25; that subsequently Fernald paid him $30 as demanded, and that thereupon the defendant turned the liquor into

the sink, gave Fernald the bottle, and wrote and delivered to him a paper as follows: "Milton, N. H., Sept. 2, 1897. This is to certify that I promise to withdraw all further action against Frank E. Fernald for illegal sale of liquor March 29, 1897. F. E. Carver." There being no statute of the state prohibiting compounding misdemeanors, the court resorted to the common law of England; found it applicable to our institutions; that such an offense would be indictable at common law, though no decision exactly in point was discovered; that the absence of any statute sufficiently indicated the general understanding that such acts are criminal, since it could not be supposed that such an offense should be permitted to go unpunished; and especially as the act defrauded the government of a portion of its revenue, and this of itself would be ground for indictment at common law. "The motion to quash the indictment because it describes the offense for which composition was made as a 'supposed offense,' was properly denied. 'The bargain and acceptance of the reward makes the crime' (S. v. Duhammel, 2 Harr. 532, 533); and in such a case, 'the party may be convicted though no offense liable to a penalty has been committed by the person from whom the reward is taken.' R. v. Best, 9 C. & P. 368, 38 Eng. C. L. 159; R. v. Gotley, Russ. & Ry. 84; P. v. Buckland, 13 Wend. 592; 1 Russ. Cr. *133, 134; 3 Arch. Crim. Pr. & Pl. 623-11." Per BLODGETT, J. Exceptions overruled. **S. v. Carver,** 69 N. H. 216, 39 Atl. 973, Kn. 308.

See also Wren v. C. § 77.

MISPRISON OF FELONY.

§ 209. Defined. "Misprison, whether of felony or of treason, is a criminal neglect, either to prevent it from being committed or to bring to justice the offender after its commission." 1 Bish. Cr. L. § 717. See also Wren v. C. § 77.

ESCAPE, PRISON BREACH, AND RESCUE.

§ 210. General Statement. Escape, prison breach, and rescue are different methods of liberating a prisoner before he is discharged out of custody. Escape is without violence, prison breach by violence, and rescue by aid of third persons. Actual escape is gaining entire liberty; constructive escape is allowing the prisoner more freedom than the law permits. Voluntary escape is the intentional liberation by the officer, or departure by the prisoner. Negligent escape is the mere neglect of the officer. See generally 2 Bish. Cr. L. §§ 1064-1106; 2 Hawkins P. C. p. 18.

(Kan. Sup. Ct., 1877.) **Law, Paw—Guilt, Wilt.**

This defendant, while at large,
Was arrested on a charge
Of burglarious intent,
And direct to jail he went.
But he somehow felt misused,
And through prison walls he oozed,
And in some unheard-of shape
He effected his escape.

Mark you, now: Again the law
On defendant placed its paw,
Like a hand of iron mail,
And resocked him into jail.

Then the court met, and they tried
LEWIS up and down each side,
On the good old-fashioned plan;
But the jury cleared the man.

Now, *you* think that this strange case
Ends at just about this place.
Nay, not so. Again the law
On defendant placed its paw—
This time takes him round the cape
For effecting an escape.

LEWIS, tried for this last act,
Makes a special plea of fact:
"Wrongly did they me arrest,
"As my trial did attest,
"And while rightfully at large,
"Taken on a wrongful charge.
"I took back from them what they
"From me wrongly took away."

When this special plea was heard,
Thereupon THE STATE demurred.
The defendant then was pained
When the court was heard to say
In a cold impassive way—
"The demurrer is sustained."

Back to jail did LEWIS go,
But as liberty was dear,
He appeals, and now is here
To reverse the judge below.
The opinion will contain
All the statements that remain.

Argument, and brief of Appellant:
As a matter, sir, of fact,
Who was injured by our act,
Any property, or man?—
Point it out, sir, if you can.
Can you seize us when at large
On a baseless, trumped-up charge;
And if we escape, then say
It is *crime* to get away?
Please-the-court-sir, what is crime?
What is right, and what is wrong?
Is our freedom but a song—
Or the subject of a rhyme?

Argument, and brief of Attorney for The State:
Please-the-court-sir, how can we
Manage people who get free?

Reply of Appellant:
Please-the-court-sir, if it's *sin*,
Where does *turpitude* begin?

Opinion of the Court—PER CURIAM:
We—don't—make—law. We are bound
To interpret it as found.
The defendant broke away;
When arrested, he should stay.
This appeal can't be maintained,
For the record does not show
Error in the court below,
And we nothing can infer
Let the judgment be sustained—
All the justices concur.

S. v. Lewis, 19 Kan. 260, 27 Am. Rep. 113, printed as abridged by Eugene E. Ware, and printed in 19 Kan. 266, note.

Liability of officer killing to prevent escape: R. v. Dodson, § 66; Reneau v. S., § 66; Head v. Martin, § 66.

EMBRACERY.

§ 211. **Defined.** "Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like." 4 Bl. Com. 140.

(New York Sup. Ct., 1826.) **Definition—By Witness.** Case for saying of plaintiff, "I should have got clear of the charge without the jury going out of the box, if old Gibbs (who was a witness) had not handed papers to Wilson (a juror) to influence the jury; and he ran away or the judge would have shut him up in prison." After verdict for plaintiff defendant moved in arrest of judgment that the words alleged were not actionable, as they impute no offense. SUTHERLAND, J. Embracery is defined to be an attempt by either

party, or a stranger, to corrupt or influence a jury, or to incline them to favor one side, by gifts or promises, threats or persuasions, or by instructing them in the cause, or any other way, except by opening and enforcing the evidence by counsel at the trial, whether the jurors give a verdict or not, and whether the verdict be true or false (3 Bacon Abr. 785; 1 Hawkins P. C. c. 85; Coke Lit. 369); and it is an offense at common law as well as by statute (Id., 1 R. L. 174, 4 Bl. Com. 140); and punishable by fine and imprisonment. * * * Any attempt by a witness to influence a jury, in any other way than by the open delivery of his testimony, is improper; and, in judgment of law, corrupt. A witness has no right to deliver any paper to the jury without the direction of the court. The act is as criminal in a witness as it would be in a bystander. There can be no doubt of the intention of the defendant to charge the plaintiff with the commission of a criminal act; and the terms used by him necessarily import a charge of that character. * * * Motion denied. **Gibbs v. Dewey,** 5 Cowen 503.

(Nev. Sup. Ct., 1866.) **By Juror—Attempt.** Indictment charging "the crime of attempt to commit the crime of embracery," and stating in substance that defendant, as juror in a civil action in Lander district court, approached one of the attorneys and offered for $100 to secure a verdict for defendant therein. Demurrer sustained, and the state appealed. LEWIS, C. J. * * * The only question presented to this court for determination is whether the facts detailed in the indictment constitute an indictable offense. While we are inclined to believe that the defendant might be held under a proper indictment, we do not think the bill presented to us in this record charges the defendant with any crime known to the law. [Here his honor quotes the definition of embracery from Gibbs v. Dewey, above.] * * * As the crime itself consists of a mere attempt to do an act or to accomplish a result, it is difficult to comprehend how there can be an attempt to commit such crime. Any attempt or effort corruptly to influence a juror, whether it be successful or not, is itself embracery. * * * Affirmed. **S. v. Sales,** 2 Nev. 269.

PERJURY.

§ 212. Defined, Etc. "Perjury is a crime committed when a lawful oath is ministered, by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely and falsely, in a matter material to the issue or cause in question, by their own act or by the subornation of others." **3 Coke Inst. 164.**

(Eng. Star Chamber, 1611.) **Recklessly.** Damages were awarded

to the plaintiff in the star chamber according to the value of his goods riotously taken away by the defendant. The plaintiff caused two men to swear the value of his goods that never saw nor knew them. And though that which they sware was true, yet because they knew it not, it was a false oath in them, for the which both the procurer and the witnesses were sentenced in the star chamber. **Gurneis's Case,** 3 Coke Inst. 166, Mi. 960.

(Eng. King's Bench, 1652.) **Extra-judicial and Immaterial.** Gwinn was indicted for perjury in taking a false oath in an affidavit made before the master of the chancery, and found guilty. He moved in arrest of judgment that it does not appear that the master had power to take this oath. ROLLE, C. J. * * * Perjury at the common law is intended to be in some court and legal proceedings. For a false oath made before us not touching the matter in question between the parties, an indictment of perjury lies not; and it appears not here that the chancery took notice of the affidavit, for nothing was done upon it. * * * If one make a false oath, the party is punishable for it by an action upon the case, in case it be not perjury for which he may be indicted for it. A false oath is one thing, and perjury is another thing, for one is judicial, and the other is extra-judicial. And the law inflicts greater punishment for a false oath made in a court of justice than if it be made elsewhere, because of the preservation of justice. Jerman, J., said, that perjury takes its name from perverting of justice, and therefore it is intended to be in a court of justice. The court held the indictment ill, and gave judgment against the Custodes. **Custodes v. Gwinn,** Style 336, Mi. 959.

(Conn. Sup. Ct. of Errors, 1836.) **Judicial and Material.** Information for perjury. Plea, not guilty; verdict, guilty. Motion in arrest of judgment denied. Defendant brings error. WILLIAMS, C. J. The only question in this case is, whether the falsely taking of the poor debtor's oath, before a magistrate authorized to administer it, constitutes the crime of perjury. * * * **Perjury,** as defined by Lord Coke, is when a lawful oath is administered, by any that hath authority, to any person, in a judicial proceeding, who sweareth absolutely and falsely, in a matter material to the issue or cause in question, by their own act, or the subornation of others. 3 Inst. 163. Hawkins says, it seemeth to be a wilful, false oath, by one who, being lawfully required to depose the truth, in any proceeding in a course of justice, swears absolutely to a matter of some consequence to the point in issue, whether he be believed or not. 1 Hawk. P. C. c. 69, § 1. Chitty adopts Lord Coke's definition; and Russell speaks of a proceeding in a court of justice. 2 Russ. 1751. His American editor concurs with Judge Johnson, in the case before cited [S. v. Stevenson, 4 McCord 168], that the word court is substituted for the word course, of justice. And it is believed, that

those who speak of **a judicial proceeding,** and of a proceeding in a court of justice, mean the same thing. It is apparent it cannot be intended that the oath must be administered before a court. It need not be before a court of record. 2 Rol. Abr. 257. It may be before a court baron: 1 Mod. 55, Winch 3; or a court of requests: Hut. 34; or an ecclesiastical court: Cro. Eliz. 609, 1 Sid. 454; or before commissioners: 1 Show. 397, Cro. Car. 97; or in an answer in chancery: Cro. Car. 321, 327, 353; Cro. Eliz. 907; 2 Burr. 1189; or upon a complaint to the chancellor, on account of the arrest of one of the officers of his court: 1 Term 63. So, too, it may be upon some collateral matter, not directly connected with the issue of a cause on trial, as an affidavit to hold to bail: Peake's Cas. 112; or when one, who offers himself as bail, swears his property to be greater than it is: Cro. Car. 146. And the crime may be committed, in some court of justice having power to administer oaths, or before some magistrate or proper officer invested with similar authority, in some proceeding relative to a civil suit, or criminal prosecution. 4 Bl. Com. 137. **In the case before the court,** it is not denied, that the oath was false, the intention wilful, the oath lawfully administered, and the assertion absolute. But it is denied, that it is in the course of judicial proceeding, and that it is material. * * * Here the magistrate had a general power to administer oaths, and the particular power to administer this oath. He was intrusted with a portion of the administratioin of public justice; for he was to decide, in some capacity, whether the oath should be administered. The question is not so much in what character the magistrate acted, as what was to be the effect of his act: would it affect the course of public justice? For that purpose we must look at the situation of these parties. After the usual course of litigation, the creditor had obtained a judgment and execution against his debtor, and had confined him in prison. The debtor wished to be relieved from the inconvenience of this judgment, and to deprive the creditor of one of those means of satisfying it, which the law had given him; and for this purpose, took the oath which has given rise to this inquiry; and the effect of it is to relieve him from the operation of the judicial sentence, and to deprive the creditor of the benefit of it. Is not, then, the immediate effect to interfere with the course of public justice? * * * It was further said that here was **no point in issue,** or in the language of the law, nothing in debate between these parties. So far as regards a formal issue, this is true; and that will apply to every oath collateral to the question at issue. But here the real question between the parties was, shall, or shall not, this debtor be liberated from his imprisonment, unless the creditor will support him? A question of deep interest to one party, and of some importance to the other; a question which the forms of proceeding cannot conceal. * * * Affirmed. **Arden v. S.,** 11 Conn. 408, Mi. 962.

(Ark. Sup. Ct., 1877.) **Against Another Sovereign.** Defendant was indicted for perjury, and all the evidence of the state being excluded on the trial, it appealed. ENGLISH, C. J. * * * Perjury is an offense against the sovereign whose law is violated by the making of the false oath. The courts of no country or sovereign, execute the penal laws of another. Story, on Confl. L. § 621; The Antelope, 10 Wheaton 66, 123. * * * The oath in this case was not taken under or by virtue of any law of the state, nor by an officer acting, in administering the oath, under authority conferred upon him by any law of the state, nor was the affidavit to be used in any court, tribunal, or before any officer of the state. On the contrary, the oath was taken under the homestead act of congress, it was administered by an officer acting under authority of that act, and the affidavit was taken to be used before a United States land officer to procure a homestead entry. If the oath was wilfully false, it was an offense not in violation of a state law, nor against the sovereignty of the state. U. S. v. Bailey, 9 Peters 238. * * * Affirmed. **S. v. Kirkpatrick,** 32 Ark. 117, Kn. 300.

(Me. Sup. Judicial Ct., 1884.) **Extra-judicial.** Indictment in the form prescribed by R. S. (1871), c. 122, § 5, for perjury. Verdict, guilty. Motion in arrest of judgment for insufficient indictment. WALTON, J. The defendant is charged with having committed the cime of perjury "by falsely swearing to material matter in a writing signed by him." The indictment makes no mention of the character or purpose of the writing. Nor does it state what the matter falsely sworn to was. Nor does it contain any averments which will enable the court to determine that the oath was one authorized by law. The question is whether such an indictment can be sustained. We think it cannot. It does not contain sufficient matter to enable the court to render an intelligent judgment. The recital of facts is not sufficient to show that a crime has been committed. All that is stated may be true, and yet no crime have been committed. The character of the writing is not stated, nor its purpose; nor the use made, or intended to be made, of it. For aught that appears, it may have been a voluntary affidavit to the wonderful cures of a quack medicine. Such an affidavit, as every lawyer knows, could not be made the basis of a conviction for perjury. In the language of our statute defining perjury, it is only when one who is required to tell the truth on oath or affirmation lawfully administered, wilfully and corruptly swears or affirms falsely to material matter, in a proceeding before a court, tribunal, or officer created by law, that he is guilty of perjury. R. S. c. 122, § 1. The oath must be one authorized or required by law, to constitute perjury. Swearing to an extra-judicial affidavit is not perjury. * * * Arrested. **S. v. Mace,** 76 Me. 64, B. 32.

CONTEMPT.

§ 213. Nature and Kinds. Contempt is "a wilful disregard or disobedience of public authority." Bouvier L. Dic. "The contempts that are thus punished are either direct, which openly insult or resist the powers of the courts or the persons of the judges who preside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create a universal disregard of their authority." 4 Bl. Com. 283.

(Eng. King's Bench, 1721.) **Jurisdiction of Other Courts.** Habeas corpus to the keeper of Newgate, to bring the body of A. Murray. WRIGHT, J. It appears upon the return of this habeas corpus that Mr. Murray is committed to Newgate by the house of commons "for an high and dangerous contempt of privileges of that house;" and it is now insisted upon at the bar that this is a bailable case within the meaning of the habeas corpus act. To this I answer that it has been determined by all the judges to the contrary, that it could never be the intent of that statute to give a judge at his chamber, or this court, power to judge of the privileges of the house of commons. The house of commons is undoubtedly an high court, and it is agreed on all hands that they have power to judge of their own privileges. It need not appear to us what the contempt was, for if it did appear we could not judge thereof. Lord Shaftesbury was committed for a contempt of the house, and being brought here by an habeas corpus, the court remanded him. And no case has been cited wherever this court interposed. The house of commons is superior to this court in this particular, this court cannot admit to bail a person committed for a contempt in any other court in Westminster hall. DENISON, J. This court has no jurisdiction in the present case. We granted the habeas corpus not knowing what the commitment was. * * * FOSTER, J. The law of parliament is part of the law of the land, and there would be an end of all law if the house of commons could not commit for a contempt; all courts of record (even the lowest) may commit for a contempt. * * * **Murray's Case**, 1 Wils. 299, B. 854.

(Eng. King's Bench, 1821.) **Indictment** for saying of a justice of peace, in the execution of his office, "You are a rogue and a liar." Wearg moved after verdict pro rege, in arrest of judgment, that though the justice might have committed him for the contempt, yet the words are not indictable, since it is not to be presumed they would provoke a justice of peace to a breach of the peace, which is the reason why indictments have been held to lie for words. Sed PER CURIAM. The allowing he might be committed shows they were indictable. It is true the justice may make himself judge, and

punish him immediately; but still if he thinks proper to proceed less summarily by way of indictment, he may; the true distinction is, that where the words are spoken in the presence of the justice, there he may commit; but where it is behind his back the party can be only indicted for a breach of the peace. Cases cited, Salk. 698; 3 Mod. 139; 2 Show. 207; 1 Roll. Rep. 79; R. v. Langley, Soley, Nuns, and Legasseck. Judgment pro rege. **R. v. Revel,** 1 Strange 420, B. 854.

(U. S. Sup. Ct., 1885.) **Right of Appeal and Review.** Petition for writ of habeas corpus. In a suit against petitioner in the supreme court of New York he was ordered to appear and submit to examination before a judge of the court before trial pursuant to Cod. Civ. Proc. §§ 870-3, appeared accordingly and gave testimony, the hearing was continued, he removed the case to the U. S. C. C., the hearing was ordered continued before a master of the court, and he refused to testify further, claiming that the court had no jurisdiction to proceed in that way. For this refusal the court declared him in contempt, ordered him to pay a fine of $500, and committed him to custody till he paid it. MILLER, J. * * * There can be no doubt of the proposition that the exercise of the power of punishment for contempt of their orders by courts of general jurisdiction is not subject to review by writ of error, or appeal to this court. Nor is there in the system of federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power. This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties. and to enable it to enforce its judgments, and orders necessary to the due administration of law, and the protection of the rights of suitors. When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of habeas corpus, discharge the prisoner. It follows necessarily that on a suggestion by the prisoner that, for the reason mentioned, the order under which he is held is void, this court will, in the language of the statute, make "inquiry into the cause of the restraint of liberty." Rev. St. § 752. [The court then proceeded to show that the court below had no jurisdiction to continue the examination because the New York Code Civ. Proc. is in conflict with U. S. R. S. § 861.] * * * Prisoner released. **Ex parte Fisk,** 113 U. S. 713, 5 S. Ct. 724.

(N. Ham. Superior Ct. of Judicature, 1844.) **Summary Jurisdic-**

tion of Inferior Courts. Indictment for resisting a deputy sheriff in discharge of his duty. It appeared that defendant as a spectator at a trial before a justice of the peace took a seat very near the justice, who asked him to move off; and this request being disregarded, ordered the deputy acting as officer of the court to remove him, which he did with the assistance of three others. Defendant kicked and struck as he was able in resistance of execution of this order, and this is the offense here charged. He was found guilty, and this is a motion in arrest of judgment. GILCHRIST, J. * * * It is also contended that the justice had no authority to make the order in question. The power of keeping order, and of requiring a decorous and proper demeanor in a court room during the progress of a trial, lies at the very foundation of the administration of justice. Without it there can be no law and no justice, for if the law will not authorize the means necessary to insure its observance and proper administration, it must remain a dead letter. But the law never intended that the prisoner should have the power of stationing himself in any position he might desire during the trial. If it rested with him to select the location he might find most convenient, he might see fit to place himself upon the bench or in the jury box. He was present at this trial, neither as a party nor as a witness. He went there to gratify his curiosity, and it behooved him so to conduct as not to disturb the proceedings of those who had duties to perform. These duties cannot be discharged unless the justice possesses the power upon an emergency to direct the removal of any individual whose presence he may think prejudicial to the interests of justice. The law does not, indeed, authorize any court to act arbitrarily, and unreasonably exclude persons, but the right to have the courts open is the right of the public and not of the individual. If every person for whom there is sufficient space, has a right to be in court, he has a right to be in any part of it where there is sufficient space, and the inconvenience resulting from the exercise of such a right is a strong argument against its existence. It will be in many cases impossible that a proceeding should be conducted with due order and solemnity, and with the effect that justice demands, if the presiding magistrate, by whatever name he may be called, has not the control of the proceeding, and the power of admission or exclusion, according to his own discretion. It is better that this discretion should be exercised by a person acting under the responsibility of an official oath, than that it should be left to a crowd of lounging bystanders to enter and depart as their humors might dictate; and far better than that a court of justice should be desecrated by such lawless conduct as was exhibited by the prisoner. Garnett v. Ferrand, 6 B. & C. 611. We think this objection should be overruled. * * * **S. v. Copp**, 15 N. H. 212, B. 865.

(U. S. Sup. Ct. 1888.) **Contempts in Open Court.** Application for

a writ of habeas corpus, alleging that petitioner had been unlawfully imprisoned by an order of the circuit court of the United States for the northern district of California. The order, which was made a part of the application, showed that petitioner was committed for contempt of court in the court room by resisting the marshal of the court in executing the order of the court to remove the petitioner's wife from the room, and also for contempt by petitioner in assaulting the marshal with a deadly weapon in the face of the court. HARLAN, J. * * * What, then, are the grounds upon which the petitioner claims that the circuit court was without jurisdiction to make the order committing him to jail? They are: 1. That the order was made in his absence; 2. That it was made without his having had any previous notice of the intention of the court to take any steps whatever in relation to the matters referred to in the order; 3. That it was made without giving him any opportunity of being first heard in defense of the charges therein made against him. The second and third of these grounds may be dismissed as immaterial in any inquiry this court is at liberty, upon this original application, to make. For, upon the facts recited in the order of September 3, showing a clear case of contempt committed in the face of the circuit court, which tended to destroy its authority, and, by violent methods, to embarrass and obstruct its business, the petitioner was not entitled, of absolute right, either to a regular trial of the question of contempt, or to notice by rule of the court's intention to proceed against him, or to opportunity to make formal answer to the charges contained in the order of commitment. It is undoubtedly a general rule in all actions, whether prosecuted by private parties, or by the government, that is, in civil and criminal cases, that "a sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." Windsor v. McVeigh, 93 U. S. 274, 277. But there is another rule, of almost immemorial antiquity, and universally acknowledged, which is equally vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of individuals. It has relation to the class of contempts which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned at the discretion of the judges, without any further proof or examination. But in

matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge, and thereupon the court confirms and makes absolute the original rule." 4 Bl. Com. 286. * * * It was within the discretion of that court, whose dignity he had insulted, and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed at once to punish him, or postpone action until he was arrested upon process, brought back into its presence, and permitted to make defense. Any abuse of that discretion would be at most an irregularity or error, not affecting the jurisdiction of the circuit court. We have not overlooked the earnest contention of petitioner's counsel that the circuit court, in disregard of the fundamental principles of Magna Charta, in the absence of the accused, and without giving him any notice of the accusation against him, or any opportunity to be heard, proceeded "to accuse, to try and to pronounce judgment, and to order him to be imprisoned; this, for an alleged offense committed at a time preceding, and separated from, the commencement of his prosecution." We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindicating of public and private rights, nor the officers charged with the duty of administering them. To say, in case of a contempt such as is recited in the order below, that the offender was accused, tried, adjudged to be guilty and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence. Nor, in our judgment, is it an accurate characterization of the present case to say that the petitioner's offense was committed "at a time preceding, and sepa-

rated from, the commencement of his prosecution." His misbehavior in the presence of the court, his voluntary departure from the court-room without apology for the indignity he put upon the court, his going a few steps, and under the circumstances detailed by him, into the marshal's room in the same building where the court was held, and the making of the order of the commitment, took place, substantially on the same occasion, and constituted, in legal effect, one continuous complete transaction, occurring on the same day, and at the same session of the court. The jurisdiction, therefore, of the circuit court to enter an order for the offender's arrest and imprisonment was as full and complete as when he was in the court-room in the immediate presence of the judges. * * * Writ denied. **Ex Parte Terry,** 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405, B. 869.

(U. S. Sup. Ct., 1873.) **Disbarment Without Hearing.** Petition for writ of mandamus to compel the judge of the U. S. D. C. for W. Ark. to vacate an order disbarring petitioner for contempt of court, and to compel him to restore petitioner to the roll of attorneys. Petitioner, the U. S. marshal, and another, having been charged with contempt, the petitioner filed a response for the marshal; and being reminded that there was a rule against himself also, said: "I am here to respond; I don't know what there is for me to answer; it (the report of the grand jury) says I saw Silas Stephenson." The judge: "You must answer in writing, Mr. Robinson." R.: "The rule itself does not require me to respond in writing." J.: "It should have done so; you will amend the order if it does not, Mr. Clerk." R. declined to answer till the rule was amended. J.: "Well, I will make the order for you to respond in writing now. Mr. Clerk, you will make an order requiring Mr. Robinson to answer the rule in writing." R.: "I shall answer nothing"—and without time for another word, the judge ordered the clerk to strike R.'s name from the roll of attorneys and the marshal to remove him from the bar. The petition says that the interview with Stephenson had no reference to any matter in court. FIELD, J. * * * No act of his is mentioned which could constitute within the statute a contempt either of the court or of its judge. The allegation that the witness Stephenson, after seeing Robinson, had suddenly absented himself, amounted to nothing more than an insinuation that possibly he may have been advised to that course by Robinson. There was no averment of any fact which the court could notice or the attorney was bound to explain. Whatever contempt was committed by the petitioner consisted in the tone and manner in which his language to the court was uttered. On this hearing we are bound to take the statements in that respect of the judge embodied in his order as true, for the question before us is not whether the court erred, but whether it had any jurisdiction to disbar the petitioner for the alleged contempt. The law happily prescribes the punishment which the court can impose for contempts. The seventeenth section of the

Judiciary Act of 1789 declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbarring the petitioner, treated as a punishment for a contempt, was, therefore, unauthorized and void. The power to disbar an attorney proceeds upon very different grounds. This power is possessed by all courts which have authority to admit attorneys to practice. But the power can only be exercised where there has been such conduct on the part of the parties complained of as shows them to be unfit to be members of the profession. Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications both in character and learning. They become by such admission officers of the court, and as said in Ex parte Garland, 4 Wallace 378, "they hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded." Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. And such has been the general, if not the uniform, practice of the courts of this country and of England. There may be cases undoubtedly of such gross and outrageous conduct in open court on the part of the attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged. That mandamus is the appropriate remedy in a case like this to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter, was decided in Ex parte Bradley. * * * Mandamus awarded. **Ex Parte Robinson,** 86 U. S. (19 Wall.) 505, 22 L. Ed. 205, B. 882.