

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. LOUIS T. GRANT, AND WILLIAM KENNEDY, DEFENDANTS AND APPELLANTS.

G.R. No. 5786. December 29, 1910

Ponente: TRENT, J.

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TRENT, J.:

The information filed in this case against the two accused is as follows :

"The undersigned accuses Louis T. Grant and William Kennedy of the crime of illegal importation, committed as follows :

"That on or about the 28th day of July, 1909, in the city of Manila, Philippine Islands, the said Louis T. Grant and William Kennedy, conspiring between themselves, did then and there, wilfully, unlawfully, knowingly, fraudulently and feloniously import and bring into the Philippine Islands from a foreign country, and assist in importing and bringing into the Philippine Islands from a foreign country, contrary to law, goods, wares and merchandise, to wit; two hundred ten (210) kilos of prepared opium, of the value of P19,000, and eleven (11) kilos of cocaine, a derivate of opium, of the value of P1,500, all of the total value of P20,500, equal to and the equivalent of 102,500 pesetas, Philippine currency, and did then and there receive and conceal, and assist in receiving and concealing said goods, wares, and merchandise after importation knowing same to have been imported and brought into the Philippine Islands contrary to law.

"All in violation of section 341 of Act No. 355 of the Philippine Commission.

(Sgd.) "L. M. South worth,
"Acting Prosecuting Attorney.

"Subscribed and sworn to before me this eighth day of October, 1909, in the city of Manila, Philippine Islands, by L. M. Southworth, acting prosecuting attorney for the city of Manila.

(Sgd.) "Charles S. Lobingier,
"Judge, Court of First Instance.

"A preliminary investigation has heretofore been conducted under my direction, having examined the witnesses under oath, in accordance with the provisions of section 39 of Act No. 183 of the Philippine Commission, as amended by section 2 of Act No. 612 of the Philippine Commission.

(Sgd.) "L. M. SOUTHWORTH,
"Acting Prosecuting Attorney,

"Subscribed and sworn to before me this eighth day of October, 1909, in the city of Manila, Philippine Islands, by L. M. Southworth, acting prosecuting attorney for the city of Manila.

(Sgd.) "Charles S. Lobingier,
"Judge, Court of First Instance."

The case having been called for trial on the 18th of October, 1909, the assistant prosecuting attorney appeared for

the Government; O'Brien, De Witt and Waite for the defendant Kennedy; Haussermann, Ortigas, Fisher & Conn for the defendant Grant. The defendant Kennedy refused to plea. The court, pursuant to section 24 of General Orders, No. 58, directed that a plea of not guilty be entered for this defendant. Mr. Cohn, one of the counsel for the defendant Grant, made the following statement in open court in the presence of his client:

"The defendant Grant enters a plea of 'guilty to the charge under circumstances which he desires the court to take into consideration before imposing sentence upon him. As there is a co-defendant in this case who has entered a plea of 'not guilty,' or for whom a plea of not guilty has been entered, it would be improper to make a statement of these circumstances at this time. For that reason the defense asks the court for an opportunity to be heard for a consideration of the circumstances, which the defense considers have a bearing upon the penalty to be imposed, prior to fixing the penalty upon the defendant Grant." Plea of guilty entered.

"The Court. The defendant Grant having pleaded guilty and a plea of not guilty having been entered as to the defendant Kennedy and he having announced himself ready for trial the trial will now proceed."

After hearing the proofs adduced and arguments of counsel the trial court found these accused guilty as charged in the complaint and sentenced each of them to one year's imprisonment and to pay one-half the costs. The defendants appealed and have filed separate briefs with their corresponding assignment of errors. In view of the exhaustive briefs filed by both the appellants and the Government we think it pertinent to set forth in full the assignment of errors of each one of the appellants.

(Appellant Kennedy.)

"1. The court erred in refusing to grant the accused Kennedy a preliminary investigation in the presence of accused and his attorney, and in having the testimony taken thereat reduced to writing and attached to the record;

"2. The court erred in refusing to dismiss the complaint against the accused Kennedy because no evidence taken on the preliminary investigation was before the court upon which to base a probable cause for his arrest; and in not holding that the accused was entitled to appear and defend either in person or by counsel at every stage of the proceedings, it not appearing affirmatively that the accused was present at any of the proceedings previous to his arrest;

"3. The court erred in overruling the demurrer, based upon the ground that the complaint does not conform substantially to the prescribed form and that more than one offense is charged;

"4. The court erred in overruling the motion for a bill of particulars;

"5. The court erred in holding that the accused Kennedy was guilty of conspiracy as charged, in the absence of any statute penalizing the acts complained of as a conspiracy;

"6. The court erred :

"(a) In finding and attaching a significance to the fact that between five and six thousand pesos was paid to the defendant Grant (to buy some contraband goods) on the date of his first telegram to the representative in Hongkong;

"(b) In accepting the evidence of the accused Grant as true after he had admitted that he had perjured himself in his former testimony, giving it full credence and weight as against the accused Kennedy;

"(c) In finding that the defendant Kennedy waived his privilege of not testifying against himself and presenting evidence which showed his moral delinquency in connection with the illegal importation;

"(d) In finding that the cablegram quoted on page 6 of the sentence, differs from the defendant's testimony, and that Kennedy's agent was to obtain the opium and have it shipped to Grant through Barker as an intermediary;

"(e) In attaching any credence whatever to the testimony of detective Cooley in regard to what Mr. Grant said in his presence;

"(f) In finding that the accused Kennedy provided funds for the purchase and shipment of the opium;

"(g) In finding that the terms of the agreement was as Grant and Cooley testified, after Grant's admission of his having perjured himself in regard to the whole matter, instead of taking the accused Kennedy's testimony as corroborated by the cablegrams;

"7. The court erred in concluding that the defendants knowingly conspired together to import and bring into the Philippine Islands the merchandise in question, and that the accused Kennedy knowingly assisted in importing and bringing and facilitating the bringing of the said opium and cocaine into the Philippine Islands;

"8. The court erred in allowing a new complaint to be filed against the accused Kennedy without his consent, before the dismissal of No. 5374, after issue was joined;

"9. The court erred in permitting the co-defendant Grant to testify for the Government after the defendants had entered upon their defense without discharging him; "The court erred in failing to give the accused Kennedy the benefit of article 11 of the Penal Code."

At the close of the Spanish typewritten brief filed on behalf of the defendant Kennedy the following assignment of error is made which does not appear in the printed English brief:

"The court erred in taking jurisdiction of this cause for the reason that, according to article 1718 of the Compiled Laws of the Commission, 'all criminal violations, by any person, of this title, or any of the Acts or laws mentioned in section 1668, shall be prosecuted by order and under the supervision of the Insular Collector of Customs.' It does not appear in the complaint that the Collector of Customs did at any time order the prosecution of this case, or that the trial of the same was had under his inspection, nor has it been proven that the same has been done by his order."

(Appellant Grant.)

"1. The Court of First Instance of the city of Manila was without jurisdiction to hear and determine the above entitled cause.

"2. The Court of First Instance erred in denying the motion of appellant for leave to withdraw his plea of 'guilty' herein and to substitute therefor a plea of 'not guilty.'

"3. The court erred in failing to declare the appellant acquitted of the offense of which he was charged." At the opening of the trial of this case in the court below, Mr. O'Brien, counsel for the defendant Kennedy, made the following statement:

"We wish to have it understood that all motions, demurrers and the orders ruling on the same and the same plea entered in the separate case against Kennedy, are offered in this case."

No objection appears in the record to this offer, so the motions, demurrers, and orders referred to by Mr. O'Brien form a part of the record and will be so considered.

Before proceeding to a consideration of the questions of law raised by the defendants we will note the proceedings which took place in the trial of this case in the court below, and then consider the facts.

On July 30, 1909, a complaint was filed against Louis T. Grant (criminal case No. 5270 of the Court of First Instance of the city of Manila). On August 20, 1909, a complaint was filed against William Kennedy in the same court (criminal case No. 5374), both complaints being exactly the same. Kennedy appeared by his counsel in this case, No. 5374, and on the 25th of August asked for a preliminary investigation to be held in the presence of the

accused and his attorneys and that the testimony in this preliminary investigation be reduced to writing and attached to the record. This petition was denied on the 28th of that same month. On the same day the attorneys for Kennedy filed a motion asking the court to dismiss this criminal case for the following reasons; first, that the warrant was issued for the arrest of the defendant Kennedy without any sworn evidence in support thereof; and, second, that no evidence taken on the preliminary investigation was before the court upon which to base the order of arrest. This motion to dismiss was denied on the 7th of September. On the 8th of that month a demurrer was filed, based upon two grounds; first, that the complaint did not conform substantially to the prescribed form; and, second, that more than one offense was charged. This demurrer was overruled on the 9th of the same month, and on the 11th a motion was filed asking the court to direct the prosecuting attorney to furnish the accused with a bill of particulars, setting forth whether or not he is going to be placed on trial for voluntarily, illegally, and criminally importing and bringing into the Philippine Islands, or aiding and assisting in the illegal importation of merchandise, or receiving and concealing this merchandise. This motion was likewise denied on the 11th of the same month. The accused being arraigned upon this complaint on the 17th day of that month pleaded not guilty. On the 8th of September counsel for the defendant Kennedy moved the court and demanded that, owing to the fact that the two complaints against Kennedy and Grant were identical in character and wording except only the dates and the names of the defendants, the prosecuting attorney file a new complaint against these two accused, charging them jointly and severally with the commission of this crime. Subsequently thereto, and on the 8th of October, the prosecuting attorneys asked that this complaint against Kennedy be dismissed for the reason that he had filed a new complaint against said Kennedy, this new complaint being the one upon which he was tried.

The defendant Grant went to Hongkong in June, 1909, for the purpose of buying some machinery for the Philippines Gold Dredging Company, and remained in Hongkong from the 15th to the 19th, arriving in Manila on his return on the 21st of that month. He bought part of the machinery from the Wampoo Dock Company and a part of it from William Barker and Co. Barker was to ship this machinery to Manila. Grant wrote E. B. Morris & Co, customs brokers in Manila, asking them to see that this machinery be transhipped from the S. S. Tean to the S. S. Begonia, bound for Paracale where this mining machinery was to be used, stating to Morris & Co. that he had arranged with the customs authorities for the inspection of this machinery at the boat and that everything would go through quickly and easily. On the 23d of July Grant received the invoices for this machinery from Barker & Co., which invoices included the main bulk and also items numbered in said invoices from 25 to 34, inclusive.

In a letter which Grant received about July 25th Barker explained the shipment of the extra nine pieces of machinery and requested Grant to hand them over to a Mr. Francisco. Grant then told Morris & Co. that certain parts of the machinery, referring to the nine pieces above enumerated, were to be landed at the custom house wharf. Eight of these nine pieces, consisting of four shaftings and four columns, or boiler supports, were landed and moved to the shop of Mr. Taylor. There the shaftings and columns were opened by the employees of Mr. Taylor in the presence of two inspectors of the Bureau of Customs, and also in the presence of Mr. Taylor and Mr. Earnshaw, and it was found that these shaftings and columns had been bored out and the hollow tubes filled with tins of opium. Later, the other piece, a steam hoisting winch, was examined at the custom-house and found to contain bottles of cocaine and morphine.

There were 210 kilos of opium and 11 kilos of cocaine and morphine. The legitimate price of opium in Manila at this time was from fifty to sixty pesos per kilo; that is, when opium was imported for pharmaceutical purposes, but opium sold illegitimately was worth from two to four hundred pesos per kilo. These nine extra pieces of machinery which contained the opium, morphine, and cocaine were landed in Manila on the 24th of July, 1909, and the defendant Grant was arrested on this charge on the 30th of the same month. The defendant Kennedy was arrested on the 20th of August, 1909.

Before any of the machinery or the nine extra pieces were taken off of the S. S. Tean, Grant, according to his testimony, had a conversation with Kennedy with reference to these nine extra pieces, and in this conversation Kennedy informed him that there was opium aboard the boat concealed in that machinery; that after this conversation he, Grant, arranged to have these nine extra pieces of machinery landed on the river front. Morris testified that he landed these nine pieces of machinery on the river front in accordance with instructions from Grant. So the opium, cocaine, and morphine was brought into the Philippine Islands and landed without the intervention of the customs authorities, except the granting of the permit, not knowing at the time this permit was granted that these nine extra pieces contained contraband goods.

That this opium, cocaine, and morphine was illegally brought into the Philippine Islands from a foreign country there can be no question. The defendant Kennedy insists that he had nothing whatever to do with the importation of this opium, but admits that he did enter into an agreement to purchase, when safely landed and delivered to him and after an examination to be made by him, the four tubes and the opium contained in them for P8,800, or P10,000, Hongkong money.

The defendant Grant was called as a witness for the prosecution and testified on first examination that he did not purchase these nine extra pieces of machinery in Hongkong and knew nothing about them until he received the letter, Exhibit J, from Barker & Co. explaining the shipment of the same; that on receipt of this letter he called on Francisco and afterwards consulted at various times with Kennedy about these pieces and their contents. These nine pieces were included in the regular invoice of machinery, dated in Hongkong the 15th of July, 1909, and the letter from Barker & Co. was dated in the same city on the 23d of that month.

Grant was recalled by the prosecution near the close of the trial and admitted that he had testified falsely with reference to his prior knowledge of the nine pieces of machinery and their contents, and stated that he did know about this matter as the same had been arranged by prior agreement between himself, Kennedy, and another party. After Grant had been arrested an arrangement was made for him and Kennedy to have a conversation about the illegal importation of this opium, and in pursuance of this arrangement Kennedy went to Grant's hotel a little after eight p. m. on August 7, 1909, and there the matter was discussed. By previous arrangement Cooley, a member of the secret service force of the Philippines Constabulary, was secreted in the room where the conversation took place. The presence of Cooley was not known to Kennedy. Cooley admits that he was anxious to find out who were connected with the importation of this opium and counsel for defendant Kennedy insists that for this reason, and also for the further reason that Cooley was a secret service agent, his testimony is not worthy of credit as against that of Kennedy. As to what he heard during this conversation Cooley testified:

"When he [Kennedy] first came in they passed the time of day and Grant asked Kennedy what the news was from Hongkong. Kennedy replied that everything was all right. He had just received a cable that the only people—the custom house people—the only thing that the custom people had done was to take Mr. Barker before the United States consul in Hongkong (p. 60).

"And then Grant asked him if he was not afraid they would get some of the people connected with it in Hongkong. He said no, that all parties interested in Hongkong had been notified by him both by cable and letter and had gone to Manchuria. On that point I am not sure whether he said on the Manchuria or gone to Manchuria (p. 61).

"Q. Did he say anything about the money; where the money came from? I mean by he, Mr. Kennedy—A. Mr. Grant asked Mr. Kennedy if the parties who had prepared the machinery with the opium for shipment had any financial interest in the matter and Kennedy replied that they had two thousand pesos in the enterprise and that he, Kennedy, had furnished the rest of a total of ten thousand five hundred pesos, two thousand of which had been furnished by the Hongkong people.

"Q. Who furnished the other?—A. Kennedy said he, Kennedy, did.

"Q. Now did he say anything to Mr. Grant as to what Mr. Grant should do in regard to the matter?—A. Yes, sir. Mr. Grant asked him the question, I want to talk to you and find out what you want me to do in this matter. Mr. Kennedy replied make a strong fight. I have already lost a good deal of money but I will stand attorney fees. I will pay all lawyer's fees and fine. Do not implicate me in the matter. Mr. Grant said then, you want me to stand pat and he said yes, I want you to stand pat (pp. 61, 66).

"Q. State to the court then the conversation that occurred between Mrs. Grant and Kennedy.—A. Mrs. Grant asked Kennedy if his brother was named Kennedy. Kennedy said he is not my real brother. He is my foster brother. No, he has a Chinese name, and Mrs. Grant then asked him— Mr. Kennedy you say you want Mr. Grant not to talk. Suppose he goes to Bilibid what are you going to do then? He said there is no danger of that. I have had the best lawyers tell me he can only get a fine" (p. 62).

Kennedy was called as a witness and testified in his own behalf. He stated that he had known Grant about ten months, having met him for the first time in Hongkong in November, 1908; that Grant came to his office about the 22d of June, 1909, and asked him to buy four tubes made in Hongkong especially for the smuggling business. The price was to be P3,000 for the tubes and P2,500 more for bringing them over to Manila and landing them with their contents. He did not deny having a conversation with Grant on the 7th of August, 1909, in Grant's room at the hotel, but stated that Grant called him by telephone and when he went there to have this interview Grant called him into his, Grant's, bedroom and told him that he was in trouble and would have to make a hard fight and asked him (Kennedy) to loan him P2,000, he, Grant, having invested P2,000 in this opium deal while in Hongkong; that he refused to loan Grant this money. Kennedy flatly denied that he made the statements to Grant in that conversation as set forth in Cooley's testimony. In consequence of Kennedy's first agreement with Grant, he (Kennedy), on the 22d of June, 1909, wrote to Hoyman, his correspondent in Hongkong. This letter stated substantially Grant's offer and that the tubes were then kept by Barker, Grant's agent, in Hongkong. A letter of introduction to Barker from Grant was inclosed. In reply Kennedy received a letter, dated the 29th of June, 1909, from his agent stating that he had called upon Barker with regard to the tubes and that Barker refused to allow the writer of the letter to see the tubes unless he, Barker, received five hundred pesos Mex. A third letter was sent July 6, 1909, from Kennedy to Hoyman. This letter, among other things, contained the following:

"Fe informed me that the goods in tubes must be ready so that it can meet the steamer which is scheduled to sail on July 20, 1909, and must not put anything on delay. Per instruction of Fe you can go to see Barker and collect from him 6,500 dollars Mex.

"Fe also informed me that the 2,000 dollars Mex. for his shares can be collected from Bar as he has money deposited with him. You procure cloth for him, turn over to him and let him pack and send. In case the amount is insufficient, you can collect sufficient amount from Bar. We have formed a capital amounting to 10,000 dollars Mex., in equivalent to 8300 pesos Conant, with a view of buying this lot of cloth.

"Mr. On has the share of 2,000 dollars Mex. Fe takes 2,000 dollars Mex., but the 2,000 dollars taken by Fe shall be included in the Hongkong shares of 8,000. The rate of exchange is 88. The rest of it amounting to 6,000 dollars Mex., can be sold to the Hongkong people.

"From this date in either our letters or cable we should use the word cloth instead of opium. Fe means Mr. Grant, Bar means Mr. Barker. We should use these signs in our letters or cables" (Exhibit 3, p. 17.)

"Fe" refers to the defendant Grant; "Bar" to Barker, the former's Hongkong correspondent; and "cloth" to the opium. In reply to Kennedy's letter of July 6th Hoyman said:

"I will arrange everything with Mr. Barker in an early possible date. I will get money from Mr. Barker to buy goods and then turn over to the same. In reference to the capital amount to be raised for the purchase of the

goods at Manila, my friends at Hongkong have already put up 8,000 dollars Mex. which includes Fe's shares of 2,000 dollars Mex., and the rest, 2,000 dollars Mex. to be distributed by Manila."

To Hoyman, Hongkong (cable):

"Being agreed upon by Fe, you can only deliver the cloth to Bar. Let him pack and ship it by himself. Need not pay price for tube. General charges whatsoever between Hongkong and Manila shall be paid by Fe himself. Collect at once from Bar 2,000 if Bar agree upon, May order cloth and turn over to him, otherwise stop business. 14 July, 1909. W. Kennedy."

Hoyman's reply (cable):

"Now Bar agrees to invest 2,000 on Fe's own account but Bar is not to take any more than he has already invested. The price 3,000 is to be paid by Fe at Manila. It has been calculated that about 4,500 dollars worth of cloth can be packed with a capital of 8,800, which may be sufficient. 14 July, 1909. Wong Hoyman."

To Hoyman, Hongkong (cable) :

"Collect from Bar on Fe's account of 2,000 and hand over the cloth to Bar for packing and shipping as soon as the 2,000 collected. Need not collect from Bar's share any more. 15-7-09. W. Kennedy."

Kennedy further testifies that he, on June 1st, paid Grant between five and six thousand pesos and that this was "to buy some contraband goods;" but later stated that it had nothing to do with this opium deal. This money was paid to Grant on the day that the following cablegram was sent to Grant's representative in Hongkong:

"Mietz Weiss (untranslated) sixty 5600, free on board, freight and insurance paid, July-August delivery no tank and shaft."

Kennedy contends that his agreement with Grant was simply an undertaking to purchase the four tubes of opium on delivery to him in Manila. He denies all responsibility for the purchase of the opium in Hongkong and its importation, and disclaims all knowledge whatever of the opium contained in the other four tubes and of the morphine in the winch.

Aside from the testimony of Grant, Cooley, an unbiased witness, heard Kennedy voluntarily confess his guilt to Grant in the aforementioned conversation. To rebut the testimony of Grant and Cooley, Kennedy took the stand in his own behalf and introduced the various letters and cable-grams. These documents were presented by Kennedy of his own volition, and it is perfectly correct to consider them in this case. It appears from the first letter that Grant approached Kennedy with a proposition for the importation of the opium. Kennedy wrote this letter to his correspondent in Hongkong, setting forth Grant's proposition, and including a letter of introduction from Grant to Barker. The reply to this letter shows that Kennedy's agent was moving in the matter and asked for further instructions. These instructions were given by Kennedy in his letter of July 6, the principal part of which we have heretofore quoted. In this letter Kennedy gave specific instructions to his agent to procure the cloth (opium) for Barker, Grant's agent, and turn it over to him (Barker) and let him pack and send it. Kennedy instructed his agent to thereafter use the word "cloth" instead of "opium," and to use the other words given in his letter in place of the names of Grant and Barker. Kennedy's agent replied to this letter that: "I will arrange everything with Barker in an early possible date." So it is clear from these communications and the testimony of Cooley, Grant, and Kennedy himself that Kennedy and his agent did provide the opium in Hongkong, and that Grant's agent did pack the same and attend to its transportation. This was the agreement entered into between Grant and Kennedy. The procuring of the opium was of more importance than the packing and shipping of same. The fact that Kennedy did on June 1 pay a large sum of money to Grant, according to his own testimony, is a circumstance showing the intimate relations existing between the two parties at that time, and that they were acting together in business. Kennedy

says that he paid this money for contraband. This money was paid on the very day that the cablegram quoted was sent to Grant's agent in Hongkong. Some significance should be attached to this testimony. Some of the words in that cablegram are untranslated, but it certainly referred to the shipping of goods of some kind. Kennedy's testimony, including the letters and cablegrams presented by him, expose in greater detail the relations existing between himself and Grant in this deal and the part taken by each than does the testimony of Grant. He showed that Grant was more involved than Grant himself was willing to admit at first. The cablegrams above quoted, between Kennedy and his agent at Hongkong, show detailed instructions and the completion of the transaction as far as Kennedy was concerned. This testimony shows beyond any question of a doubt that Kennedy and Grant entered into an agreement to bring this opium, cocaine, and morphine into the Philippine Islands; that they both acted together in the entire transaction, and that Kennedy with the assistance of his agent in Hongkong furnished the opium, while Grant with the assistance of Barker packed and shipped it. The opium was landed in Manila in this manner. Grant and Kennedy agreed to do this and did do it. They completed the act of bringing contraband goods into the Philippine Islands contrary to law.

What we have said with reference to the facts refers to Kennedy's trial. It is not necessary to discuss the facts with reference to Grant for the reason that he pleaded guilty to the charge and was sentenced under this plea. The defendants having agreed to commit this crime of illegal importation of the opium, morphine and cocaine, each was responsible for all the acts of the other defendant, or any agent of either of them, done in performance of the common purpose, and once this agreement or conspiracy existed between them it became immaterial whether the physical acts were done by Grant or Kennedy, since each was responsible for every act done in furtherance of the conspiracy.

It is urged that the court erred in attaching significance to the testimony that there had been a previous payment of a considerable amount of money by Kennedy to Grant. We have said that some significance should be attached to this transaction. It will be noticed that this evidence was first opened up by the defendant himself in his cross-examination of Grant and was pursued without objection as long as he desired. The next time it is referred to is in the defendant's own testimony on direct examination. The defendant Kennedy himself is responsible for having injected this testimony into the record.

It is argued that the court erred in finding that the defendant Kennedy waived his privilege of not testifying against himself. Whatever may have been the defendant's motives in taking the stand he can not now complain inasmuch as he did so voluntarily in the exercise of a right which he had under the law. He was in the same position as any other person charged with the commission of a crime. He was given all opportunity to prepare his defense and was represented by able counsel. This disposes of the assignments of error which relate to the questions of fact. It is urged in support of the first assignment of error that section 2 of Act No. 612 is unconstitutional; first, because it is inconsistent with the laws on the same subject that apply to the rest of the Philippine Islands; and, second, because it does not make any provision for the presence of an accused person, either by himself or by counsel, during the investigation held by the prosecuting attorney, thereby depriving the accused of his liberty without due process of law. The second assignment of error is necessarily involved in the first.

In determining whether or not this law is unconstitutional or repugnant to those provisions of the Philippine Bill which establish the rights of accused persons, we start out with the proposition that: "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained." (Munn vs. Illinois, 94 U. S., 123.) If this Act is unconstitutional, it must be so by reason of its being repugnant to those provisions of the Philippine Bill which provide:

"That no law shall be enacted in said Islands which shall deprive any person of life, liberty, or property, without due process of law, or deny to any person therein the equal protection of the laws: * * * that in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him; * * * that no person shall be held to answer for a criminal offense without due process of law; * * * that the right to be secure against unreasonable searches and seizures shall not be violated; * * * that no warrant shall issue but upon probable cause supported by oath or affirmation."

All these provisions are found in section 5 of the Act of Congress of July 1, 1902.

The pertinent part of section 2 of Act No. 612, enacted February 3, 1903, provides as follows:

"* * * In cases triable only in the Court of First Instance in the city of Manila, the defendant shall have a speedy trial, but shall not be entitled as of right to a preliminary examination in any case where the prosecuting attorney, after a due investigation of the facts, under section thirty-nine of the Act of which this is an amendment, shall have presented an information against him in proper form: Provided, however, That the Court of First Instance may make such summary investigation into the case as it may deem necessary to enable it to fix the bail or to determine whether the offense is bailable."

By Virtue of the authority conferred upon the prosecuting attorney by section 39 of Act No. 183, as amended by section 2 of Act No. 612, the acting prosecuting attorney filed in the Court of First Instance of the city of Manila a complaint against the defendants in this case. This complaint was sworn to by him. This officer testified that he had held a preliminary investigation, as required by the above provisions of law, by examining the witnesses under oath. This certainly was process, and we must now determine whether it was "due process of law."

Act No. 183, known as the Manila Charter, passed July 31, 1901, created, among others, the law department. This department consists of the office of city attorney and the prosecuting attorney. Section 39 of this Act provides that the prosecuting attorney shall investigate all charges of crimes, misdemeanors, and violations of ordinances, and prepare the necessary informations, or make the necessary complaints against the persons accused. This section further provides that the prosecuting attorney, or any of his assistants, may, if he deems it wise, conduct an investigation in respect to crimes, misdemeanors, and violations of ordinances by taking oral evidence of reputed witnesses, and for this purpose may, by subpoena, summon witnesses to appear and testify under oath before him, and the attendance of such witnesses may be enforced by application to the court. This section, as amended by section 2 of Act No. 612, makes such investigation made by the prosecuting attorney sufficient, and says:

"The defendant * * * shall not be entitled as of right to a preliminary examination in any case where the prosecuting attorney has made such investigation of the facts; * * *"

The prosecuting attorney and his assistants are appointed by the Governor-General, with the advice and consent of the Philippine Commission, and their salaries are specifically and definitely fixed by law. No officer or employee of the office of the prosecuting attorney receives his compensation by way of fees, but all have fixed salaries. The office of prosecuting attorney, taking into consideration the fact that Manila is a cosmopolitan town with a population of over 220,000, is of great importance. The prosecuting attorney and his assistants are presumed to be men learned in the law, of a high character, and to perform their duties impartially and with but one object in view, that being that justice may be meted out to all violators of the law and that no innocent man be punished. There is no reason why any of these officials should present frivolous and unfounded complaints, but there is every reason to presume that a thorough investigation into the facts will be and is made before an information is presented, charging any person with a serious crime as their official or professional standing as officers of the court and servants of the Government would not be enhanced by a large number of acquittals.

The same Act (No. 183) created a municipal court and a justice of the peace court for the city of Manila. Both of

these courts have power to issue warrants of arrest and to hold preliminary examinations for any offense without regard to the limits of punishment, and may release, commit, and bind over any person charged with such offense to secure his appearance before the proper court. The justice of the peace has no other criminal jurisdiction and the municipal judge has no civil jurisdiction, except for forfeiture and collection of bonds given in cases or proceedings pending in that court. It is not, says the law, within the power of the defendant in the municipal court, in a case triable in that court, to demand a preliminary examination, except a summary one, the extent of which shall be within the discretion of the court, to enable the court to fix the amount of bail. Both the municipal judge and the justice of the peace are appointed by the Governor-General and have fixed salaries. The justices of the peace outside the city of Manila have both civil and criminal jurisdiction; they also have power to issue warrants of arrest and to conduct preliminary examinations in the same manner as the justice of the peace in the city of Manila. They receive fees for their services and the amount of such fees depends upon the number of cases tried and the number of preliminary examinations held. Preliminary examinations conducted by the municipal judge and justice of the peace in the city of Manila, and also those conducted by justices of the peace outside the city, are necessarily held in the presence of the accused, who has a right under the law governing these examinations to be heard by himself and by counsel and to present witnesses on his own behalf. When the accused is committed or bound over to the Court of First Instance he can be, and generally is, placed upon trial without any further inquiry. There are two steps in these preliminary proceedings; first, an inquiry to determine whether or not the warrant of arrest should issue; and, second, the preliminary examination which takes place after the accused person is apprehended by virtue of the order of arrest and brought before the court; while, we might say that, under the provisions of section 39 of Act No. 183, as amended by section 2 of Act No. 612, there is only one step in the proceedings; that is, the prosecuting attorney, after an investigation into the facts as required by law, files his complaint in the Court of First Instance, and upon this complaint alone the warrant can be issued, the accused arrested, brought into court, and placed upon trial, without any further investigation being made. In the first class of cases section 3265 of the Compiled Laws of the Commission provides that:

"It shall be the duty of every justice of the peace (and this applies with equal force to the municipal judge in the city of Manila) when a written complaint, under oath, has been made to him that a crime has been committed within his municipality, and there is reason to believe that any person has committed the same, which complaint the justice believes to be well-founded, or when he has knowledge of facts tending to show the commission of the crime, to issue an order for the arrest of the person charged."

While in the second class of cases the judge of the Court of First Instance can issue the warrant upon the sworn complaint of the prosecuting attorney. Not only does the prosecuting attorney swear to the best of his information and belief that the allegations in the complaint are true, but he also swears that he has examined into the facts of the case by taking the testimony of witnesses under oath. There can' certainly be no objection to this procedure adopted for the municipal and justice of the peace courts. Supposing that the procedure followed by the prosecuting attorney in the case at bar was had for the purpose of securing the order of arrest only, then it could not be seriously contended that it did not comply with that part of the Philippine Bill which provides that: "No warrant shall issue but upon probable cause supported by oath or affirmation." As to what constitutes probable cause is a judicial question and must be determined by the judge or justice of the peace issuing the warrant. Upon this point this court in the case of *United States vs. Ocampo et al.*, page 1, *supra* said:

"The question whether 'probable cause' exists or not must depend upon the judgment and discretion of the judge or magistrate issuing the warrant. It does not mean that particular facts must exist in each particular case. It simply means that sufficient facts must be presented to the judge or magistrate issuing the warrant to convince him, not that the particular person has committed the crime, but that there is probable cause for believing that the person whose arrest is sought committed the crime charged. No rule can be laid down which will govern the discretion of the court in this matter. If he decides, upon the proof presented, that probable

cause exists, no objection can be made upon constitutional grounds against the issuance of the warrant. His conclusion as to whether 'probable cause' existed or not is final and conclusive? If he is satisfied that 'probable cause' exists from the facts stated in the complaint, made upon the investigation by the prosecuting attorney, then his conclusion is sufficient upon which to issue the warrant for arrest,"

When the judge issued the warrant in the case now under consideration he then and there decided that probable cause had been shown to exist. The decision on this point does not appear in a separate and specific order. This is not required by General Orders No. 58 and Act No. 194, nor is it required by section 39 of Act No. 183, as amended by section 2 of Act No. 612, or any other provision of law. The probable cause in this case was supported by oath; but conceding that it was absolutely necessary for the court to hold some kind of investigation to determine that probable cause existed, and then so decide in a separate order before issuing the warrant for the arrest of the defendant, this would only render the arrest illegal and could not affect the validity of the judgment. The defendant was before the court during the trial and the court had a legal right to try him upon the complaint presented, provided no other part of the procedure was in conflict with the "due process" clause. If his arrest were illegal, whether he could have been released upon a writ of habeas corpus or now has a civil action for damages against the person who arrested him we need not decide. It is sufficient to say that such irregularities are not sufficient to set aside a valid judgment rendered upon a sufficient complaint and after trial free from error. (In re Johnson, 167 U. S., 120; Ker vs.. Illinois, 119 U. S., 436; Mahon vs.. Justice, 127 U. S., 700.)

In the case of Ker vs.. Illinois, supra, Ker having committed the crime of larceny, escaped and went to Peru. He was kidnaped in Peru and brought back to the State of Illinois without any pretense of authority. Passing upon the question of the constitutionality of the arrest of Ker, the Supreme Court of the United States, speaking through Mr. Justice Miller, said:

"We do not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution; but for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. He may be arrested for a very heinous offense by persons without any warrant, or without any previous complaint, and brought before a proper officer, and this may be in some sense said to be 'without due process of law.' But it would hardly be claimed that after the case had been investigated, and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested 'without due process of law.' "

Conceding again that the warrant issued in this case was void for the reason that no probable cause was found by the court before issuing it, the defendant waived all his rights to object to the same by appearing and giving bond. (2 Humphreys [Tenn.], 445; 15 Barb. [N. Y.J, 26; 24 Vt., 506.)

The determination in any case that probable cause had been shown to exist, and the issuing of the warrant of arrest subsequently thereto, is certainly one stage of the proceedings. It can not be seriously contended that an accused person has a right to be present during this stage of the proceedings. To hold that he had such a right and to reverse a judgment of conviction on this ground would have the effect of destroying the very purposes of that part of the criminal law. It would be against public policy. It is frequently essential that such investigations be kept secret and that the accused should have no suspicion of any complaint against him, otherwise he might avoid punishment for his crime by escaping before arrest.

The objection most strongly urged to section 2 of Act No. 612 is that it deprived the defendant of his right to be present by himself and counsel and to present witnesses in his own behalf during' the investigation into the facts made by the prosecuting attorney.

The object or purpose of a preliminary investigation, or a previous inquiry of some kind, before an accused person

is placed upon trial, is to secure the innocent against hasty, malicious, and oppressive prosecutions, and to protect him from an open and public accusation of crime, from the trouble, expense, and anxiety of a public trial, and also to protect the State from useless and expensive trials.

This court has held in the case of *United States vs. Ocampo et al.*, supra, and numerous other cases cited therein, that an accused person in the city of Manila is not entitled as a matter of right to a preliminary investigation. On examination of these cases it will be noted that the court had in mind, when it said that the accused is not entitled as a matter of right to a preliminary investigation, that kind of preliminary investigation provided for in General Orders No. 58 and Act No. 194. The court did not say, nor did it intend to say, that no inquiry whatever should be made into the facts by some member of the judiciary before the accused was placed upon trial. It is evident that the Commission in enacting section 2 of Act No. 612 had the same object in view. The Commission substituted the investigation made by the prosecuting attorney for that kind of a preliminary examination made by a justice of the peace (and this court in those cases held that this substitution was valid). That this was the intention of the Commission and the holding of the court, is clearly shown when we remember that both the municipal judge and the justice of the peace in the city of Manila have the power to conduct the very kind of preliminary examinations that the defendants complain having been deprived of.

Whether or not an accused person is entitled as a matter of right to a preliminary investigation, or some previous inquiry, before he is placed upon trial, and whether or not the failure to give him such preliminary examination or investigation would violate the provisions of the Philippine Bill and render a judgment of conviction void, we need not now decide, for the reason that in this case an investigation into the facts was made prior to the time the defendant was arrested and placed upon trial, and the only question on this point to determine is, whether or not such investigation, as made by the acting prosecuting attorney, is a compliance with the said Philippine Bill.

We will state, however, that we believe that some investigation or examination of the facts by a person duly authorized should be made in every criminal case wherein the accused is charged with a serious crime before he is placed upon trial.

The fifth amendment to the Constitution of the United States provides that—

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * * nor be deprived of life, liberty, or property, without due process of law;" The sixth amendment provides that—

"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, * * * and to be informed of the nature and cause of the accusation."

The fifth amendment was introduced into the Constitution of the United States as a limitation upon the powers of the National Government. The guarantee contained in this amendment is confined to the Federal courts. (*Hurtado vs. California*, 110 U. S., 516.) The States are left free to adopt any mode of procedure in criminal, as well as in civil cases, which is consonant with the principles of jurisprudence and calculated to promote the ends of distributive justice. (*Kalloch vs. Superior Court*, 56 Cal., 229; *Rowan vs. State*, 30 Wis., 129; *Walker vs. Sauvenet*, 92 U. S., 90; *Missouri vs. Lewis*, 101 U. S., 22; *Hurtado vs. California*, supra; *Bank of Columbia vs. Okely*, 4 Wheaton, 235, 244.)

The fourteenth amendment provides that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; 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."

This is a guaranty against any encroachment upon the acknowledged rights of citizens by the legislatures of the States. All of the States have provided in their constitutions that no person shall be deprived of life, liberty, or property, without due process of law, or the law of the land. Several of them have also provided in their constitutions that no person shall be held to answer for a capital or otherwise infamous crime (felony), unless on a presentment or indictment of a grand jury. In some of the States the provision is simply that the accused shall have a speedy and public trial. In most, if not all of the States, there is a provision that all persons accused of capital or otherwise infamous crimes (felonies) shall have a speedy and public trial by an impartial jury. So a person living in the State of California who is charged with having committed an infamous crime (felony) in that State against the laws of the United States can not, under the Constitution of the United States, be placed upon trial unless by a presentment or indictment of a grand jury. The same person committing the same crime (felony) in the same State in violation of the State law can be legally brought to trial after a preliminary investigation by a justice of the peace. He has a constitutional right in the first case to have a grand jury determine whether or not he should be tried, while in the second case he has no such right. (*Hurtado vs.. California*, supra.) A person charged with having committed a crime (felony) in the Philippine Islands has no constitutional right under the Philippine Bill to have a grand jury determine whether or not he should be tried, neither has he a right to a trial by jury. (*Dorr vs.. U. S.*, 11 Phil. Rep., 706, 195 U. S., 138.) These rights depend upon the provisions by which they are specifically secured, rather than on the phrase "due process of law."

In all of those cases in the United States where the constitution of the nation or of the state provides that no person accused of a capital or otherwise infamous crime shall be placed upon trial, unless on a presentment or indictment of a grand jury, such person has no right, under the law providing this specific procedure, or under the Constitution of the United States, to be present, either by himself or counsel, or take any part whatever in the proceedings before the grand jury. In fact these proceedings, in so far as the accused is concerned, are carried on behind closed doors and in absolute secrecy. Every juror is sworn to not divulge the result of their investigations. The accused person against whom a true bill is made is not informed of this fact until he is placed under arrest, and after his arrest he is put upon trial without any further inquiry.

In the case of *Hurtado vs.. California*, supra, Hurtado was charged by the district attorney of Sacramento county with the crime of murder. Upon this information, and without any previous investigation of the cause by any grand jury, the plaintiff in error was arraigned on the 22d of March, 1882, and pleaded not guilty. A trial of the issue was thereafter had, and on the 7th of May, 1882, the jury rendered its verdict, in which it found the plaintiff in error guilty of murder in the first degree. Upon this verdict Hurtado was sentenced to the death penalty. From this judgment an appeal was taken, and the supreme court of the State of California affirmed the judgment. The plaintiff, by counsel, objected to the execution of said judgment and to any order which the court might make fixing a day for the execution of the same, upon the following grounds:

"That it appeared upon the face of the judgment that the plaintiff in error had never been legally, or otherwise, indicted, or presented by any grand jury, and that he was proceeded against by information made and filed by the district attorney of the county of Sacramento, after examination and commitment by a magistrate of the said county.

"That the said proceedings, as well as the laws and constitution of California, attempting to authorize them, and the alleged verdict of the jury, and judgment of the said superior court of said county of Sacramento, were in conflict with and prohibited by the fifth and fourteenth articles. of amendment of the Constitution of the United States, and that they were therefore void.

"That the said plaintiff in error had been held to answer for the said crime of murder by the district attorney of the said county of Sacramento, upon an information filed by him, and had been tried and illegally found guilty of the said crime, without any presentment or indictment of any grand or other jury, and that the judgment

rendered upon the alleged verdict of the jury in such case was and is void, and if executed would deprive the plaintiff in error of his life or liberty without due process of law."

The court overruled these objections, whereupon the plaintiff in error sued out a writ of error to the Supreme Court of the United States, where the judgment of the superior court and the supreme court of the State of California was affirmed, the Supreme Court of the United States holding that section 9 of article 1 of the constitution of the State of California, wherein it was provided that: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law," was not in violation of the fourteenth amendment to the Constitution of the United States. The Supreme Court of the United States, speaking through Mr. Justice Matthews, among other things, said:

"We are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."

It is apparent from this quotation that, the constitution of the State of California and sections 858 et seq. of the penal code of that State, the laws governing the examination made by the magistrate (justice of the peace), gives the defendant a right to be present, with the aid of counsel, to cross-examine the witnesses presented by the prosecution and to present witnesses on his own behalf during such examination. These rights were guaranteed to him by the constitution and penal code of that State. Such rights were not guaranteed by the fourteenth amendment to the Constitution of the United States, unless it can be said that to deprive him of these rights would be repugnant to the "due process" clause in that amendment.

When the examination is held by a justice of the peace in the Philippine Islands the accused person has the same rights, under the law governing these examinations in this country, as Hurtado had in California; and the only difference between these examinations and that held by the acting prosecuting attorney in the case at bar, is that the law conferring power upon the prosecuting attorney to hold such investigation makes no provision that the same shall be held in the presence of the accused, nor does this law specifically give the accused the right to be heard, either by himself or counsel, nor to present witnesses in his own behalf. We, therefore, realize that section 2 of Act No. 612, amending section 39 of Act No. 183, is not exactly the same as the constitution and penal code of the State of California, in that section 2 of Act No. 612 does not give the accused the right to be present and to be heard during such investigations. The proceedings before a grand jury in the absence of the accused is due process of law. A preliminary examination held by a justice of the peace in the presence of the accused and with the right to be heard is likewise due process of law. Justices of the peace, as a rule, are not men versed in the law. One is appointed for each municipality for the convenience of the people. They are not furnished with clerks, stenographers, nor interpreters, neither do they have, in a great majority of the cases before them, the assistance of attorneys. They are not required to reduce to writing the testimony of witnesses in preliminary examinations, except that of the accused when he testifies in his own behalf. In these preliminary examinations the accused is charged with a certain crime and for this he is called upon to answer. But when the record reaches the Court of First Instance the prosecuting officer can and does frequently charge him with the commission of a different and more serious crime. So it will be seen that from the very nature of these proceedings such examinations do not partake of the solemn formalities of a regular trial. Justice of the peace courts are not courts of record. The prosecuting attorney and his assistants are lawyers; they are equipped with all the necessary machinery to enable them to make a thorough investigation into the facts in every case before filing a complaint. If they are not satisfied that they have a reasonably sure chance of securing a conviction they do not enter court. They act in a quasi-judicial capacity. Their procedure is speedy and free from technicalities. There is no reason to presume that

every accused has not been given a "square deal," and when he gets this he certainly has no right to complain. Between the examinations held by justices of the peace and those investigations made by the prosecuting attorney, the latter appear to be more thorough and preferable to all concerned.

The phrase "due process of law," used in the Philippine Bill, should receive a comprehensive interpretation, and no procedure should be treated as unconstitutional which makes due provision for the trial of the criminal before a court of competent jurisdiction, for bringing the party against whom the proceeding is had into court, and notifying him of the case he is required to meet, for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court, and for an appeal from that judgment to the highest tribunal of the State for hearing and judgment there, (*Hurtado vs.. Cal.*, supra; *Kennard vs.. Louisiana*, 92 U. S., 480; *Davidson vs.. New Orleans*, 96 U. S., 97; *Foster vs.. Kansas*, 112 U. S., 202.)

The law which the defendant in this case seeks to have declared unconstitutional applies to the city of Manila only, and its provisions do not extend to the people of the Islands generally. This fact does not invalidate the law. (*Munn vs.. Illinois*, supra.) But it might be insisted that this" law does apply with equal force to the inhabitants of Manila, inasmuch as it might be said that it is within the power of individuals whether accused persons shall be brought under this law or not. If a complaint, charging a person with a felony be filed directly in the Court of First Instance (and this can be done in Manila), the judge could either hold the preliminary investigation himself, send it to the prosecuting attorney for this purpose, or to the justice of the peace or municipal judge. By so doing, it is insisted that he would deprive even the people of Manila of the equal protection of the laws. The same might be said with reference to inhabitants outside the city of Manila, inasmuch as if a complaint should be filed (which can be done) in the Court of First Instance in any province, the judge could either conduct the preliminary investigation himself or send it to a justice of the peace for this purpose. This is a mere question of procedure and we can not see in what way it could affect the substantial rights of a person charged with a crime.

Section 39 of Act No. 183 is a general statute. It defines the powers and duties of the prosecuting attorney. It affects all persons alike. A general statute is defined to be one which affects all the people, or all of a particular class. When it concerns a class in distinction from individuals, it is treated as general. A private or special statute (and these words appear to be used interchangeably) is one which affects only particular individuals or things. (*Bish. Writ. Law*, cited in the case of *Territory vs.. Cutinola*, 4 N. Mex., 305.)

The defendant Kennedy was arraigned upon a sworn complaint in a legally constituted court. He was informed of the nature of the accusation against him; he was present with his counsel during the entire trial, presented witnesses and testified in his own behalf; he was convicted by the trial court and had an opportunity and did appeal to the highest tribunal in the Islands. We therefore conclude that the proceedings had before his arraignment were not in violation of the provisions of the Philippine Bill.

In the third assignment of error it is insisted that the complaint was not drawn according to law and that there is more than one offense charged therein. This prosecution was brought under section 341 of the Customs Act, No. 355, which provides in part as follows:

"If any person shall fraudulently or knowingly import or bring into the Philippine Islands, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be seized and forfeited and the offender shall be fined in a sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both."

This section is identical with section 3082 of the Revised Statutes of the United States. In the case of *Keck vs.. U.*

S. (172 U. S., 434), relied upon by the defendant Kennedy, the opinion is devoted principally to an interpretation of section 2865 of the Revised Statutes of the United States, and to defining the crime of smuggling; and it was there held that where the illegal shipment is seized before landing the said section was not violated. In this decision, section 3082 is referred to because one of the three counts in the indictment against Keck was drawn under this section. There can be no doubt that this section 355 [341], *supra*, contains all the essential elements, of the crime charged and it is obvious that the complaint follows substantially the language of this statute.

"A complaint will be sufficient if it describes the offense in the language of the statute whenever the statute contains all the essential elements constituting the particular offense." (U. S. vs.. Salcedo, 4 Phil. Rep., 234; U. S. vs.. Gatmaitan, 4 Phil. Rep., 265; U. S. vs.. Vecina, 4 Phil. Rep., 529; U. S. vs.. Sarabia, 4 Phil. Rep., 566.)

This section (355) [341] is intended to cover the complete act of importing goods and disposing of them, all as a part of a single violation of the law. If a man should cause property, such as a diamond for example, to be brought into the country, and then receive it from his agent, carry it to his store, and, in the course of time, secretly dispose of it, such a man, the defendant claims, could be prosecuted for several crimes, and a separate information would have to be filed against him for each of the acts involved; for bringing the diamond into the harbor, for transporting it from the ship to his shop, for having it in concealment, and finally for selling it. This is not the purport of the Act. It intends to make all of these elements a part of the single crime of defrauding the customs, although it is so widely drawn that it includes and penalizes, as principals, every person who is responsible for or of assistance in effecting all or any of the illegal acts, which together constitute the crime. The defendant Kennedy caused and assisted in the importation of opium from Hongkong, its concealment in tubes, and its transportation to Taylor's shop. Under these facts he might have had a valid protest if he had been arrested on three distinct complaints and had been sentenced to three separate penalties.

With reference to the fourth assignment of error, it appears that the defendant was specifically charged in the complaint with the commission of all the acts for which he was tried and sentenced. He had specific knowledge of the case against him and there was no necessity for a bill of particulars. The defendant was not entitled as a matter of right to such a bill. (U. S. vs.. Schneer, 7 Phil. Rep., 523.)

The fifth, sixth, seventh, and eighth assignments of error have been disposed of in the finding of facts.

The defendant argues in his ninth assignment of error that his codefendant, Grant, should not have been allowed to testify for the Government. This was not error.

"A defendant can not be a witness for or against another defendant, even on a separate trial, until the case as to himself is disposed of by a plea of guilty, or a verdict of conviction or acquittal, or a discharge on a plea of abatement ; then he may be, whether sentence is rendered against him or not." (Bishop's New Criminal Procedure, p. 650, and numerous cases cited therein.)

"The accomplice who has pleaded guilty is competent to testify without judgment being entered against him (State vs.. Jackson, 106 Mo., 174), and it seems that he ought to be remanded to await sentence until after he has testified." (State vs.. Russell, 33 La. An., 135.)

With reference to the tenth assignment of error, it is sufficient to say that this court has decided in numerous cases that the provisions of the Penal Code are not necessarily applicable to crimes created by laws of the Commission. (U. S. vs.. Glefonea, 5 Phil. Rep., 570; U. S. vs.. Lineses, 5 Phil. Rep., 631; U. S. vs.. Hutchinson, 5 Phil. Rep., 343; U. S. vs.. Ang Kan Ko, 6 Phil. Rep., 376; U. S. vs.. Cortes, 7 Phil. Rep., 149; U. S. vs.. Macasaet, 11 Phil. Rep., 447; U. S. vs.. Servillas, 12 Phil. Rep., 12.)

The last assignment of error was not made nor argued in the defendant's printed brief, but only appears in a type-written document attached to the record which purports to be a translation into the Spanish language of his printed

brief. As this same assignment of error was made by the defendant Grant we will determine the question in the consideration of his assignments of error and the conclusion there reached upon this point will be applicable to the defendant Kennedy's last assignment.

In the first assignment of error the defendant Grant claims that the Court of First Instance never acquired jurisdiction over this case, so that at this stage of the proceedings he may object on that ground. The exact question raised is whether jurisdiction to commence these proceedings is in both the Attorney-General and the prosecuting attorney, or in the Attorney-General alone. This question was not raised in any way by either Grant or Kennedy at the trial below. If it relates only to procedure, and the substantial rights of the defendant have not been prejudiced, such objection made for the first time on appeal comes too late; but if the court below had no jurisdiction in the premises this question can be raised at any time. On this point Judge Cooley says in his work on Constitutional Limitations, 7th ed., 576:

"The law creates courts, and upon consideration of general policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties. Accordingly where a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action either by voluntarily commencing the proceeding as plaintiff or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all. Consent is sometimes implied from failure to object but there can be no waiver of rights by laches in a case where consent would be altogether nugatory."

Prior to the passage of Act No. 1773 we had in this country certain crimes known as "private crimes." The right to prosecute these crimes was conferred upon certain persons specifically named in the law. This court has constantly held that when these crimes were not prosecuted at the instance of the persons authorized to do so, the whole proceedings were null and void for lack of jurisdiction of the subject-matter, and that this question can be raised at any time. This court, upon its motion, has dismissed such proceedings in cases where the question was never raised by the parties. This proposition is too well settled to require the citation of authorities to support it.

So a careful examination of the law upon the question raised in this first assignment of error should be made.

Section 39 of Act No. 183 provides that the prosecuting attorney of the city of Manila shall have charge of the prosecution of all crimes, misdemeanors, and violations of city ordinances in the Court of First Instance and the municipal court of the city of Manila. The illegal importation of merchandise into the port of Manila and the landing of the same in the city is a crime committed within the city limits, and it would appear that the prosecuting attorney was the proper officer to prosecute the defendants, unless other subsequent provisions were made.

In Act No. 355, the Philippine Customs Administrative Act, under chapter 23, entitled "Protests and Appeals," a court of customs appeals was organized (sec. 289), with certain well-defined duties and powers; but primarily to entertain appeals, from decisions of the Insular Collector (sec. 290), and in cases where the penalty of imprisonment should be imposed, to entertain proceedings instituted by the Attorney-General in the nature of and with procedure similar to ordinary criminal proceedings (sec. 291). Under chapter 25, entitled "Searches and Seizures," there is a further provision that if a fine, forfeiture, or penalty can not be collected by the respective collectors, either from lack of statutory authority or because no property was held by them under a lien which could be enforced in any way but by suit or criminal prosecution, then in such case the facts should be reported to the proper prosecuting officer of the district (sec. 344). The duty of such officer was then to institute proceedings

for such collection (sec. 345). It is to be noticed that no particular court was designated in which the prosecuting officer was to enforce collection.

Subsequently, Act No. 653 amended this method of collection by providing that the reports of such uncollectible fines, forfeitures, or penalties should be made to the Insular Collector who should institute proceedings in the Court of Customs Appeals (secs. 1 and 2). There is nothing so far intimating that a criminal prosecution for violation of the Customs Act could not be instituted and carried on in the Court of First Instance like other crimes. This jurisdiction of the Court of First Instance is recognized and reaffirmed in an Act extending the powers of the Court of Customs Appeals. Act No. 864, section 4, repealed sections 290 and 291 of the original Act, as amended by sections 1 and 2 of Act No. 653, and provided as follows:

"Sections two hundred and ninety and two hundred and ninety-one of the Customs Administrative Act are hereby repealed, and in lieu thereof the following is substituted:

"Sec. 290 The Court of Customs Appeals shall have jurisdiction concurrent with that of the Courts of First Instance to consider all criminal prosecutions begun under this Act and under the immigration laws of the Philippine Islands, including the Act of Congress approved March third, nineteen hundred and three, entitled "An Act to regulate the immigration of aliens into the United States," and the Chinese Exclusion Acts, and under the customs and navigation laws; and the procedure in such cases shall be the same as in criminal causes in Courts of First Instance. The court first taking jurisdiction hereunder shall thereafter have exclusive jurisdiction of the prosecution thus begun. * * *"

This Act has never been repealed by express provision, although a later section of the Customs Act was passed which was apparently inconsistent in one respect. Act No. 864, section 7, provides:

"Sections three hundred and forty-four and three hundred and forty-five of Act Numbered Three hundred and fifty-five, as amended by Act Numbered Six hundred and fifty-three, are hereby repealed and the following substituted therefor:

" 'Sec. 344. All criminal violations, by any person, of this Act or of the other Acts mentioned in section two hundred and ninety, as above amended, shall be prosecuted by order and under the supervision of the Insular Collector. Such violations shall be reported by the collector in whose district the violation occurred, either to the proper prosecuting officer of the province where the violation occurred, for prosecution in the proper Court of First Instance, or through the Insular Collector to the Attorney-General for prosecution in the court of customs appeals, and, where fines or penalties are imposed by law for such violations and the Insular Collector shall certify that they can not be satisfied out of property seized under the proceedings in rem provided in section three hundred and thirteen, as amended, and sections three hundred and thirteen (a) and three hundred and thirteen (b) herein, they may, in the discretion of the trial court, be made part of the sentence in the criminal proceedings against the offender, if convicted. In such cases the judgment shall provide for imprisonment at hard labor until the fine or penalty is paid, together with the costs of prosecution, either in money or by labor, at not less than forty centavos, Philippine currency, a day, the rate to be fixed by the court imposing sentence."

Under these Acts if such a violation of the Customs Administrative Act occurred in the provinces the procedure for prosecution of such offense was either to report the case to the provincial fiscal for prosecution in the Court of First Instance, or to make the report to the Insular Collector for prosecution in the Court of Customs Appeals in Manila; but with respect to violations committed in the port of Manila, counsel for the defendant argues in such a way as necessarily to imply that the only method of procedure was to report such an offense to the Insular Collector for prosecution under his direction by the Attorney-General. But the courts are reluctant to find that the Legislature inserted one paragraph in an Act granting jurisdiction, and in the same Act inserted another paragraph intending to take away that jurisdiction. The true interpretation of these Acts is that in Manila as well as in the

provinces a violation of Act No. 355 could be prosecuted either by a report to the prosecuting attorney of Manila, or to the Attorney-General through the Insular Collector, for the institution of proceedings in the Court of First Instance or Customs Appeals, respectively.

Act No. 1405 subsequently abolished the Court of Customs Appeals, and by sections 4 and 5 gave the Court of First Instance of Manila the identical powers and jurisdiction which the Customs Court previously had. There is no specific repeal of Act No. 864, section 4, so that the presumption is that the Court of First Instance for the city of Manila would acquire jurisdiction of such offense in the two ways previously prescribed for the two courts. In Act No. 1405, section 4, after reciting the jurisdiction of the court, there is the following clause: "Its procedure in such (criminal) cases shall be the same as in other criminal cases in the Courts of First Instance." Act No. 1405, section 8, amends Act No. 864, section 7, simply by striking out the words "in the Court of Customs Appeals" and inserting in their place "in the Court of First Instance for the city of Manila."

It therefore follows that a criminal prosecution for violation of the Customs Administrative Act may be instituted in the Court of First Instance of Manila in two ways: (1) By report to the Attorney-General through the Insular Collector in the manner provided for the old Customs Court; and (2) by report of the facts by the Collector to the proper prosecuting officer for prosecution in the Court of First Instance in the usual manner. It is not disputed that this case was reported by the Collector to the prosecuting attorney for the city of Manila.

On arraignment, the defendant Grant entered a plea of guilty. His counsel then asked the court "for an opportunity to be heard for a consideration of the circumstances, which the defense considers have a bearing upon the penalty to be imposed." Judgment was suspended and the trial of Kennedy commenced. Kennedy was sentenced on October 25, 1909. Grant filed, on October 22, a motion asking leave of the court to withdraw his plea of guilty and substitute in lieu thereof a plea of not guilty. This motion was opposed by the prosecuting attorney and denied by the court. It is now urged that the denial of this motion was an abuse of discretion and that this abuse constitutes an error of law. In support of this alleged error counsel for the defendant said:

"It is well known that an application for permission to substitute a plea of 'not guilty' for that of 'guilty,' when the latter has been once entered is addressed to the discretion of the trial court. Nevertheless that discretion is one for judicial exercise, and an abuse thereof constitutes error of law. In the present case the denial by the court of the permission to make the desired substitution of pleas has deprived the appellant of the opportunity for a fair and just trial of this cause upon its merits. It has deprived him of the right to be present at his own trial. It has deprived him of the right to confront the witnesses who testified to his guilt and to subject said witnesses to cross-examination. It has deprived him of the right to refuse to testify as to his own guilt. It has deprived him of the right to except to errors of the trial court and to submit those errors for review upon appeal. It has accomplished those things by refusing to permit the appellant to withdraw a plea entered into under a misapprehension of its effect, and in reliance upon an express agreement with the prosecuting attorney. This agreement the prosecuting attorney was permitted to repudiate in toto without restoring the appellant to the status which was lawfully and justly his in the absence of such an agreement."

When the court denied this motion it had already tried and sentenced the defendant Kennedy and had before it Exhibit A which was presented by the prosecuting attorney without objection. This Exhibit A is a part of Grant's testimony in the case against Kennedy in which he, Grant, testified on the question of the agreement with the prosecuting attorney as follows:

"Q. Now Mr. Grant have you been made any promises to testify in this case? If so state to the court what?—

A. I was told that if I told my connection and give the facts of the case that the prosecuting attorney would recommend that in passing sentence upon me that such statement would be taken into consideration.

"Q. Were you also told that the court had declined to make any arrangement or agree to anything?—A. I was,

yes, sir.

"Q. Was it not understood by you that there was to be some specific amelioration of penalty in this case, Mr. Grant, if you should testify in this matter?—A. No, sir.

"Q. Wasn't it arranged that no penalty by way of imprisonment should be imposed upon you if you pleaded guilty?—A. No, sir.

"Q. Was that not referred to in any way?—A. I don't think it was.

"Q. Isn't it what you specifically asked of them?—A. No, sir; I did not ask anything of them.

"Q. Who arranged the matter of your giving your testimony, yourself or Mr. Cohn ?—A. Through my counsel.

"Q. Then you don't know exactly what was agreed to?—

A. Only what he told me.

"Q. Only what was told you by Mr. Cohn ?~A. Yes, sir.

"Q. What did you understand from Mr. Cohn was the specific arrangement that was made as to amelioration of penalty in case you should plead guilty to this charge and aid the Government with your evidence?—A. Well, I did not understand that there was any specific arrangement— that there could not be any specific arrangement, that the court would simply take my plea of guilty into consideration in passing sentence."

Not only did the court have this part of Grant's testimony before it in passing upon defendant's motion, but it had heard all the testimony of the witnesses presented at the trial of Kennedy, including that of the defendant Grant, wherein he openly, freely and in detail admitted his guilt. Such testimony was not necessary to establish Grant's guilt. This he had admitted in his plea; but the court could take into consideration all of these facts and circumstances in determining whether or not Grant should be allowed to withdraw his plea of guilty and substitute in lieu thereof a plea of not guilty. The basis of this motion which was filed in the court below is an alleged agreement which the defendant had with the prosecuting attorney, in consideration of. his entering a plea of guilty. According to this motion at the time Grant entered his plea of guilty there existed between him and the prosecuting attorney an agreement whereby it was mutually stipulated and agreed that for and in consideration of this plea of guilty, and for and in consideration of the unreserved and unqualified cooperation of the defendant in the prosecution of this cause, the prosecuting attorney would unqualifiedly recommend to the court that the punishment to be inflicted upon this defendant be limited to a moderate fine. It is further stated in this motion that at the trial of this case (Kennedy's) the defendant Grant was a witness to his own guilt, and that the prosecuting attorney, after Grant had entered his plea of guilty and after he had testified as a witness for the prosecution in the case against Kennedy, declined to carry out that agreement by refusing to make such recommendations to the court. In reply to these allegations in this motion the prosecuting attorney said:

"That the plea of guilty was entered by the accused herein deliberately, under the guidance and advice of his counsel, after having been fully advised in open court that the court declined to recognize or be bound by any agreement that he might have made with the prosecuting attorney, * * *

"That the determination and cancellation of the agreement and arrangement under which the said accused, Louis T. Grant, entered his plea of guilt was by his own act and self-confessed perjury and failure to give the prosecuting attorney his 'unreserved and unqualified cooperation' in the prosecution of his codefendant, Kennedy. But should this court esteem that the said Louis T. Grant, accused, has not by such acts and failure on his part to carry out said agreement released the prosecuting attorney from obligation thereunder, then the court has full power to give the accused the full benefit of said agreement under his plea of guilty herein, and

impose punishment upon the said accused in accordance with said agreement, in which case the accused would not be prejudiced."

So the prosecuting attorney did, in fact, enter into a certain agreement with counsel for the defendant with reference to his entering a plea of guilty and assisting the prosecution. The prosecuting attorney does not say what this agreement was. Counsel for the defense says that the prosecuting attorney agreed to recommend that the court impose a moderate fine only; while the defendant himself testifies that he was told that the prosecuting attorney would recommend that the court take into consideration his plea of guilty and the fact that he testified for the prosecution against Kennedy. The defendant further testified that he was told that the court declined to be bound by any agreement and that he did not understand that there was to be any specific amelioration of penalty in his case. Grant failed to carry out his agreement with the prosecuting attorney and for this reason the prosecuting attorney declined to make any recommendation. Before Grant entered this plea he was given to understand that the court would not be bound by any agreement and after this understanding he, upon the advice of able counsel, entered his plea of guilty and in his testimony confessed his guilt.

A voluntary plea of guilty is a confession of guilt, and the court must accept the plea and pronounce the proper judgment and sentence. On entering such a plea an accused' person waives those rights and privileges set forth in the statement of counsel heretofore copied.

"It is wholly in the discretion of the court whether a plea of any sort may be withdrawn. Permission may always be granted, but unless an abuse of discretion is shown the refusal of permission to withdraw a plea is not error." (12 Cyc, 350.) "But abuse of discretion in refusing to allow his plea of guilty to be withdrawn is reversible error." (12 Cyc, 352.)

Did the trial court abuse its discretion in refusing to allow the defendant to withdraw his plea of guilty and substitute therefor a plea of not guilty? We think it did not. Before this plea was entered the defendant was represented by able counsel and he had full opportunity to consult with them.

In the case of State vs.. Yates (52 Kan., 566), an information was filed against Yates charging him in several different counts with having violated the liquor law in his drug store in the city of Hiawatha. Subsequently thereto the county attorney filed an amended information charging Yates with keeping a place wherein intoxicating liquors were received and kept for the purpose of use as a beverage. To this amended complaint Yates pleaded guilty. He was thereupon sentenced to pay a fine of \$300 U. S. currency and costs and to be committed to jail until the fine and costs were paid. Yates presented a motion to set aside his plea of guilty, alleging that he was induced to plead guilty upon promise of the county attorney that only a fine of \$100 U. S. currency, would be imposed. This motion was denied and Yates appealed. The plea of guilty was not entered because of anything said or done by the trial judge. The court said:

"We can not perceive from a careful reading of the evidence that the county attorney acted in bad faith in any way toward the defendant; nor was the trial court under any duty to inflict the minimum sentence permitted by the statute by anything said or done by the county attorney."

The judgment was affirmed.

In Neeley's case (27 Texas Criminal Appeals, 324), the court said:

"Having violated his agreement to testify in behalf of the State, the defendant was not entitled to exemption from prosecution by virtue of said agreement. It is well settled that where a particeps criminis, for the purpose of securing exemption from prosecution, agrees to testify in behalf of the State against his accomplice in crime, and violates such agreement by; refusing to testify, in good faith, fairly and fully to facts within his knowledge, he can not claim the benefit of such agreement and may be prosecuted and convicted, regardless

thereof." (Citing Bish. Crim. Proc., sec. 1174; 1 Greenl. on Ev., sec. 379; Rose. CrimsEv., sees. 132, 133; Whart. Crim. Ev., sees. 443, 656; Holmes vs.. State, 20 Texas Criminal Appeals, 517.)

The prosecuting attorney says that the termination and cancellation of the agreement with the defendant Grant was by his own act and failure to give the prosecuting attorney his unreserved and, unqualified cooperation. In reply to this, counsel for Grant insists that if the prosecuting attorney had had just cause to repudiate this agreement, even then the prosecution should not insist upon the plea of guilty standing. Grant's attorneys did not insist in the court below that their client had given the prosecution unreserved and unqualified cooperation in the case against Kennedy; while, on the other hand, the prosecuting attorney says that Grant did not do this and he, therefore, declined to make any recommendations and submitted the whole matter to the court.

The accused must give a reason for, and full evidence of a request to withdraw a plea of guilty. (Griffith vs.. State, 36 Ind., 406; Commonwealth vs.. Winton, 108 Mass., 485.)

The mere fact that the punishment which Grant received is greater than he expected (Mastronada vs.. State, 60 Miss., 86), or that the prosecution proved aggravating circumstances (Mounts vs.. Commonwealth, 89 Ken., 274) is not sufficient cause to require permission to withdraw his plea.

In support of the third assignment of error it is insisted that, under the rule established by the law of criminal procedure in this jurisdiction, the calling of the defendant, am a witness, by the prosecution, as a matter of right, constitutes a discharge and an acquittal of the defendant so called. In support of this proposition counsel cite the provisions of paragraph 3, section 5 of the Act of Congress of July 1, 1902, and sections 15, 24, and 26 of General Orders, No. 58. Section 5 of the Act of Congress of July 1, 1902, provides that no person held to answer for a criminal offense shall be compelled to be a witness against himself. The same provision is contained in section 15 of General Orders No. 58. Section 24 of this General Orders deals with the different kinds of pleas which may be entered by a defendant, one of which is that of guilty, and section 26 provides that when a defendant shall have been convicted, acquitted, or once placed in jeopardy upon an information or complaint, such act is a bar to another information or indictment for the same offense. So it will be seen that these two sections are hardly applicable to the question under consideration.

Sections 34, 35, and 36 of General Orders, No. 58 provide for the exclusion of a codefendant on application of the prosecuting attorney to be used as a witness for the prosecution, and also for the discharge of such codefendant when in the opinion of the court there is not sufficient evidence to put him upon his defense. When a defendant is excluded or discharged, the order excluding or discharging him shall amount to an acquittal and be a bar to a future prosecution for the same offense. Neither the provisions of the Philippine Bill, nor those of General Orders, No. 58 prohibit the calling of a defendant to testify for the prosecution against his codefendants after he himself has entered a plea of guilty, when such defendant testifies of his own free will. To hold that a defendant, after he has entered a plea of guilty and testified as a witness for the prosecution, must be discharged or acquitted would be placing the power in the hands of criminals to escape punishment by reason of their own acts. It is perfectly legal to permit a defendant, after he has pleaded guilty, to testify against his codefendants. (Authorities cited under ninth assignment of error of defendant Kennedy.) The defendant Grant having voluntarily elected to enter a plea of guilty and then testify as a witness for the prosecution against his codefendant, can not now complain.

The two defendants, Kennedy and Grant, are intelligent men, with broad experience. They well knew the gravity of the offense which they committed. They committed this crime after much planning and deliberation, and in doing so not only violated the Customs Act but brought into this country articles which unauthorized persons (such as the defendants in this case) are absolutely prohibited from having in their possession. Section 31 of Act No. 1761, known as the Opium Law, provides that any unauthorized person, owning, holding, having, controlling, having possession of, or knowingly having on his premises, any opium, cocaine, etc., on and after March 1, 1908,

shall be punished by a fine not exceeding P10,000, or by imprisonment for not exceeding five years, or both such fine and imprisonment in the discretion of the court. The very intention of the legislative body in enacting this law was to rid this country of the deadly vice of opium smoking. So we think that, under all the facts and circumstances in this case, especially considering the enormous quantity of opium, morphine and cocaine which these two defendants brought into this country, strict justice requires a more severe penalty than that imposed by the court below.

We, therefore, modify the judgment and sentence of the lower court in so far as it imposes a penalty of one year's imprisonment on each of these defendants, and instead thereof we sentence each of the defendants herein, William Kennedy and Louis T. Grant, to two years' imprisonment. With this modification the judgment and sentence of the trial court is affirmed, with the costs of this instance against the appellants. So ordered.

Arellano, C. J., Torres, Johnson, and Moreland, JJ., concur.

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