EXAMINATION OF WITNESSES IN FEDERAL CRIMINAL CASES

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Interview With Witness

A lawyer for the defense may properly interview a witness for the Government.[1] A court quoted Canon 39 of the *Canons of Professional Ethics:* "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party." But Rule 16 of the *Federal Rules of Criminal Procedure* makes no provision for the granting of an order requiring the Government witness to submit to an interview before trial.[2]

The defendant may interview his own witness before trial. In a court martial case Judge Learned Hand stated that the custom "of interviewing one's witness before trial" is "universal," and it would be a "fantastic extreme" to consider such custom unprofessional.[3] But Professor Schlesinger has concluded that "this view is incorrect insofar as civil law countries are concerned."[4]

Oath

In a prosecution for refusing to submit to induction into the armed forces, the trial court's refusal to permit the defendant and his witnesses to testify upon their refusal on religious grounds to take oath or make affirmation does not constitute denial of a fair trial.

The requirement of the testimonial oath has been embedded in the principles of the common law for hundreds of years, VI Wigmore on Evidence, § 1815, and, as relaxed, by Rule 43 (d) of the

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* See Contributors' Section, p. 254, for biographical data.

[1] United States v. Soblen, 203 F. Supp. 542, 554 (S.D.N.Y. 1961). See Hagan, *Interviewing Witness in Criminal Cases,* 27 BROOKLYN L. REV. 207 (1962); 3 WIGMORE, EVIDENCE § 788 (3d ed. 1940) [hereinafter cited as WIGMORE]. See also United States v. Spagnuolo, 168 F.2d 768, 771 (2d Cir.), *cert. denied,* 335 U.S. 824 (1948); Solar v. United States, 94 A.2d 34, 36 (D.C. Munic. Ct. App. 1953).

[2] Orfield, *Discovery and Inspection in Federal Criminal Procedure,* 59 W. VA. L. REV. 221, 249 (1957).

[3] Becker v. Webster, 171 F.2d 762, 765 (2d Cir. 1949).

[4] SCHLESINGER, COMPARATIVE LAW 217 n.11 (1959).

> Rules of Civil Procedure . . . which permits 'a solemn affirmation' in lieu of the oath, is a part of the common law of criminal procedure applicable in the Federal Courts. . . . The court may not exclude the testimony of witnesses who have been duly sworn and are competent to testify.[5]

A witness should be sworn before he testifies. But no reversible error is committed when the defendant himself later testifies to the same facts as the unsworn Government witness did.[6] A dissenting judge has asserted that it is not good practice to swear witnesses en masse; and that the oath should be administered to each witness after he has taken his place in the witness box.[7]

With respect to the form of the oath a court has stated: "And if our form of oaths is not binding upon persons of other religious beliefs, the form which is recognized as binding can be administered. A Jew may be sworn on the Pentateuch or Old Testament, with his head covered; a Mohammedan on the Koran; a Gentoo, touching with his hand the foot of a Brahmin or priest of his religion; a Chinese by breaking a china saucer."[8]

When an oath is taken by a witness who can speak only Spanish and the defendant and his counsel knowing this raise no objection that the oath should have been interpreted into Spanish, the defendant is not entitled to a new trial.[9]

A defendant may not first object on appeal that a witness testified without being sworn where he knew of such fact so that he could have objected earlier.[10] But if there was no knowledge, there is reversible error.[11]

Interpreters

In an early case where testimony in Spanish was involved a general interpreter was sworn.[12] It was left to the defendants to bring

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[5] United States v. Moore, 217 F.2d 428, 430 (7th Cir. 1954). See on oaths UNDERHILL, CRIMINAL EVIDENCE 712-15 (4th ed. 1935) [hereinafter cited as UNDERHILL]; 3 WHARTON, CRIMINAL EVIDENCE 197-200 (12th ed. 1955) [hereinafter cited as WHARTON]; 6 WIGMORE §§ 1815-29.

[6] Sears v. United States, 264 Fed. 257, 263(1st Cir. 1920).

[7] Wilcoxon v. United States, 231 F.2d 384, 388 (10th Cir.), *cert. denied*, 351 U.S. 943 (1956).

[8] United States v. Miller, 236 Fed. 798, 799 (W.D. Wash. 1916).

[9] Wilcoxon v. United States, 231 F.2d 384, 386 (10th Cir.) (one judge dissenting), *cert. denied*, 351 U.S. 943 (1956).

[10] Beausoliel v. United States, 107 F.2d 292, 294 (D.C. Cir. 1939).

[11] Langford v. United States, 4 Ind. Terr. 567, 76 S.W. 111, 113 (1903), 4 Am. & Eng. Ann. Cas. 1021, 1023 (1907).

[12] United States v. Gilbert, 25 Fed. Cas. 1287, 1312 (No. 15204) (C.C.D. Mass. 1834). See also Case of Fries, 9 Fed. Cas. 826, 847 (No. 5126) (C.C.D. Pa. 1799). See on interpreters UNDERHILL §§ 81, 376; 3 WHARTON 201-06; WIGMORE §§ 571, 668, 751, 811, 1393, 1710, 1810, 1818, 1824, 1910, 2317.

in other interpreters in their own employ. It was held that the general interpreter might take advantage of the suggestions of others, who were not sworn, with regard to the proper interpretation of testimony, stating the result to the court as his own interpretation. A witness in a case may serve as interpreter.[13]

Where the defendant consents that a member of the jury shall act as interpreter for a witness speaking a foreign language, no prejudicial error is committed.[14] The defendant had previously objected to the regular interpreter as being inaccurate. An interpreter for the defendant's witness and one for government witnesses may be appointed.[15] It makes no difference that an interpreter was a blood relative of some of the witnesses.

The Supreme Court has held that the trial judge did not err in refusing to appoint an interpreter when the defendant was testifying, as this is a matter resting largely in the discretion of the trial judge and it did not appear from the answers made by the witness that there was any abuse of discretion.[16] It is discretionary whether to appoint an interpreter for the defendant's mother, when the trial court after preliminary inquiry finds that one is not needed.[17]

Under Rule 6 (d) of the *Federal Rules of Criminal Procedure* "Interpreters when needed" may be "present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

The Advisory Committee on Criminal Rules of the Judicial Conference of the United States in December 1962 proposed the following amendment to Rule 28 of the Federal Rules of Criminal Procedure: "(b) INTERPRETERS. The court may appoint an interpreter of its own selection and may determine the reasonable compensation of such interpreter, and direct its payment out of such funds as may be provided by law."

Sequestration of Witnesses

In an early case the court refused to order the witnesses for the Government to be sent out of court after they had been examined and while the defendant's witnesses were under examination.[18]

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[13] United States v. Gardiner, 25 Fed. Cas. 1245, 1247 (No.15186a) (C.C.D.C. 1853).

[14] Thiede v. Utah Terr., 159 U.S. 510, 519 (1895).

[15] Lujan v. United States, 209 F.2d 190, 192 (10th Cir. 1953).

[16] Perovich v. United States, 205 U.S. 86, 91 (1907); Suarez v. United States, 309 F.2d 709, 712 (5th Cir. 1962).

[17] Pietzrak v. United States, 188 F.2d 418, 420 (5th Cir. 1951).

[18] United States v. Woods, 28 Fed. Cas. 762, 763 (No. 16760) (C.C.D.C. 1834). See on sequestration of witnesses UNDERHILL 821-25; 3 WHARTON 206-10, 6 WIGMORE §§ 1837-42; 46 IOWA L. REV. 889 (1961); 13 RUTGERS L. REV. 610 (1959).

But while the Government witnesses were being examined, the court at the request of the defendant ordered that each such witness be examined separately, the others being excluded.

On motion of the defendant the court may order some of the government witnesses to be taken out of the court while other witnesses are under examination, although such witnesses who are removed need not be kept apart.[19]

The trial judge may in his discretion refuse the request of the defendant for sequestration of a hostile witness subpoenaed by the defendant.[20] The sequestration of Government witnesses is a matter of the trial judge's discretion.[21] As to both Government and defendant witnesses the trial judge may refuse to exclude.[22] There will be no reversal in the absence of manifest prejudice.[23] Sequestration of Government witnesses may be refused even though the defendant alleges that their testimony will be corroborative or cumulative of other witnesses.[24]

Where one of several defendants charged with conspiracy remains in the courtroom hearing the testimony of a Government witness and then pleads guilty and then testifies as a Government witness, there is no error because sequestration of witnesses had been ordered at the outset of the trial.[25] It is discretionary with the trial judge to permit a co-defendant, who had pleaded guilty, and who was to testify for the Government, to remain in the courtroom after the rule was invoked excluding witnesses.[26] A particular witness may be excepted from the rule in the trial judge's discretion.[27]

It has been held reversible error to require a witness who on cross-examination refused to answer questions on the ground of self-incrimination, to leave the stand and the courtroom.[28]

When identifications of the defendant were positive, a failure to

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[19] United States v. White, 28 Fed. Cas. 572, 573 (No. 16679) (C.C.D.C. 1838); United States v. White, 28 Fed. Cas. 550, 551 (No. 16675) (C.C.D.C. 1836).

[20] Bromberger v. United States, 128 Fed. 346, 353 (2d Cir. 1904).

[21] Bostwick v. United States, 218 F.2d 790, 792 (5th Cir. 1955); Brown v. United States, 228 F.2d 286, 287 (5th Cir. 1955); Hood v. United States, 23 F.2d 472, 475 (8th Cir. 1927), *cert. denied*, 277 U.S. 588 (1928).

[22] Tinkoff v. United States, 86 F.2d 868, 879 (7th Cir. 1936).

[23] Kaufman v. United States, 163 F.2d 404, 408 (6th Cir. 1947); Mitchell v. United States, 126 F.2d 550, 553 (10th Cir.), *cert. denied*, 316 U.S. 702 (1942).

[24] Charles v. United States, 215 F.2d 831, 832 (9th Cir. 1954).

[25] Poliafico v. United States, 237 F.2d 97, 114 (6th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957). See also Carrado v. United States, 210 F.2d 712, 718 (D.C. Cir. 1953).

[26] Cagle v. United States, 3 F.2d 746 (6th Cir. 1925).

[27] Matz v. United States, 158 F.2d 190, 192 (D.C. Cir. 1946); Raarup v. United States, 23 F.2d 547 (5th Cir. 1928).

[28] Crinnian v. United States, 1 F.2d 643, 646 (6th Cir. 1924).

sequester witnesses was not reversible error when the defendant applied for sequestration after the trial had proceeded over a week and a half and several witnesses had already identified the defendant.[29]

The trial judge is justified in denying a defendant's motion for sequestration of Government witnesses when the facilities for witnesses are inadequate and each witness testified to separate incidents giving rise to the charge.[30]

In the Sixth Circuit it is the regular practice that the officer in charge of the case is permitted to sit in the courtroom through the trial and to advise the government, even though he himself testifies as a witness.[31] The trial judge may over the defendant's objection permit an F.B.I. agent to remain in the courtroom and sit at a table with Government counsel, particularly when his testimony does not duplicate that of any other witness.[32] The prime purpose of the exclusionary rule is to prevent witnesses from matching narratives. Of course, when the F.B.I. agent does not testify there can be no claim of prejudice.[33] The Court of Appeals will reverse where the trial judge acts arbitrarily as when he states that he has abandoned the rule of sequestration.[34]

It is not reversible error to allow a Government witness to remain in the courtroom with the jury while the court hears an offer of proof made by the defendant although the defendant objects to her presence.[35]

In a narcotics prosecution where it was possible that the informer's testimony might be colored by that given by agents of the narcotics bureau on the witness stand, the court properly excluded him from the courtroom during their testimony.[36] But it was not necessary to exclude the agents or a government chemist.

When the defendant invokes sequestration, the error, if any, of the trial judge in ruling that if the defendant testified in his own behalf he must precede all other defense witnesses to the stand, is

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[29] Kaufman v. United States, 163 F.2d 404, 408 (6th Cir. 1947).
[30] Moses v. United States, 297 F.2d 621, 623 (8th Cir. 1961).
[31] Roberson v. United States, 282 F.2d 648, 651 (6th Cir. 1960); Powell v. United States, 208 F.2d 618 (6th Cir. 1953), *cert. denied*, 347 U.S. 961 (1954). See also Talbert v. United States, 42 App. D.C. 1, 13 (1914). In this case the testimony of the policeman was formal, and concerned matters not testified to by others.
[32] Schoppel v. United States, 270 F.2d 413, 416 (4th Cir. 1959); Robertson v. United States, 263 F.2d 872, 874 (5th Cir. 1959); United States v. Cephas, 263 F.2d 518, 521 (7th Cir. 1959); Johnston v. United States, 260 F.2d 345, 347 (10th Cir. 1958); Witt v. United States, 196 F.2d 285 (9th Cir. 1952).
[33] Johnston v. United States, 260 F.2d 345, 347 (10th Cir. 1958).
[34] Charles v. United States, 215 F.2d 825, 828 (9th Cir. 1954).
[35] Lii v. United States, 198 F.2d 109, 112 (9th Cir. 1952).
[36] Bann v. United States, 260 F.2d 313, 316 (8th Cir. 1958).

harmless error under Rule 52 (a).[37]

The Supreme Court held in a murder case that the question of excluding a witness is within the discretion of the trial court.[38] If a witness disobeys the order of withdrawal, he is not thereby disqualified, but may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct. The refusal to exclude is clearly proper where the objection is not made until after the witness has testified, other testimony has been given, and he is recalled as to another matter. In an early capital case the court had rejected the witness.[39] The court suggested that there might be discretion as to other cases. The exclusion of a witness who disregards the rule of exclusion is not necessarily grounds for a new trial when the evidence would not have affected the verdict; one defendant wished to call the witness and a co-defendant objected.[40] If the defendant creates the situation, he cannot complain.[41] If the witnesses for the defendant did not wilfully disobey the sequestration order, and the defendant was not at fault, it is reversible error not to permit such witness to testify.[42]

Judge Learned Hand has held that just as exclusion of witnesses from the courtroom who have not testified is discretionary, so is the giving of an instruction to them not to discuss the evidence while out of the courtroom.[43] The latter question had not previously arisen in the federal courts. It is better practice to instruct the jury, as otherwise the benefit of exclusion may be largely destroyed.[44]

Presence of Defendant

Admission of testimony on an essential element of the offense in the absence of the defendant is a direct violation of the defendant's right to confront the witness against him.[45] Rule 43 of the *Federal Rules of Criminal Procedure* provides in part: "The defendant shall be present . . . at every stage of the trial." A court has stated on a motion to vacate under 28 U.S.C. § 2255: "The record should affirmatively show the presence of the defendant at all stages of trial in

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[37] Spaulding v. United States, 279 F.2d 65, 66 (9th Cir. 1960). The court cited 6 WIGMORE §§ 1841, 1869.

[38] Holder v. United States, 150 U.S. 91 (1893). See also Easley v. United States, 261 F.2d 276 (5th Cir. 1958).

[39] United States v. Woods, 28 Fed. Cas. 762, 763 (No. 16760) (C.C.D.C. 1834).

[40] United States v. Mooney, 269 Fed. 853 (E.D.N.Y. 1920). See also Reigo v. United States, 285 Fed. 740 (5th Cir. 1923).

[41] Laney v. United States, 294 Fed. 412, 416 (D.C. Cir. 1923).

[42] United States v. Schaefer, 299 F.2d 625, 631 (7th Cir. 1962).

[43] United States v. Chierella, 184 F.2d 903, 906 (2d Cir. 1950).

[44] Milanovich v. United States, 275 F.2d 716, 720 (4th Cir. 1960).

[45] United States v. Hamrick, 293 F.2d 468, 469 (4th Cir. 1961).

a felony case."[46]

Seating of Defendant

When the defendants were placed within the bar in the place reserved for counsellors at law, and within a reasonable distance from their counsel, who could constantly have free access to them, it was held that it was not also necessary to place the defendant in the very front benches of the bar by the side of their counsel.[47] In fact the usual place for defendants in capital cases is in the dock or prisoner's bar.

Free Narrative Versus Specific Questions

While ordinarily direct examination is by specific questions, the trial judge may in his discretion permit the free narrative method.[48]

Leading Questions

A leading question is one which suggests or leads to the answer, and which embodies a material fact, and can be directly answered by *yes* or *no*.[49] Such a question cannot be put on the main examination even to contradict another witness. This applies to questions put by the defendant as well as the Government.

One court of appeals was inclined not to reverse because of leading questions unless properly objected to and shown to be prejudicial. "Again we are met by objections in gross to certain questions put by the prosecuting attorney, to the effect that they were leading questions, which, of course is of no consequence in the court of appeals except in very extreme cases."[50] The appellate court will not reverse "unless there was a gross abuse of discretion to the prejudice

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[46] United States v. Brest, 23 F.R.D. 103, 106 (W.D. Pa. 1958). See ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 413-17 (1947); UNDERHILL 833-37.

[47] United States v. Gibert, 25 Fed. Cas. 1287, 1313 (No. 15024) (C.C.D. Mass. 1834).

[48] Tolbert v. United States, 11 F.2d 78, 79 (4th Cir. 1926). For a leading civil case to the same effect see Northern Pac. R.R. v. Charles, 51 Fed. 562, 570 (9th Cir. 1892), *rev'd. on other grounds*, 162 U.S. 359 (1896). See MCCORMICK, EVIDENCE 8-9 (1954) [hereinafter cited as MCCORMICK]; UNDERHILL 742; 3 WIGMORE § 767.

[49] United States v. Angell, 11 Fed. 34, 39 (C.C.D.N.H. 1881). See the full and helpful statement in United States v. Dickinson, 25 Fed. Cas. 850, 852 (No. 14958) (C.C.D. Ohio 1840). On leading questions, see MCCORMICK 9-11; UNDERHILL 742-58; 3 WHARTON 219-23; 3 WIGMORE §§ 769-79.

[50] Jacobs v. United States, 161 Fed. 694, 701 (1st Cir. 1908). See also Williams v. United States, 216 F.2d 529, 531 (8th Cir. 1954).

of the defendant."[51] Some cases have denied appellate review.[52]

Leading questions may be asked on cross-examination.[53] The fact that a witness is favorable to the side of the examiner is not a ground for excluding leading questions on cross-examination.[54]

Allowing the United States Attorney to ask questions of his own witnesses who are not unwilling or unfriendly, which are leading and in a form to suggest the answer desired and call for a mere conclusion of the witness is prejudicial error.[55]

Where a witness called by the Government gives answers which surprise the Government, the United States Attorney may put leading questions to him.[56] The trial judge in his discretion may allow leading questions. When the Government witness is evasive, the Government may ask leading questions.[57] The rule against asking leading questions does not have any necessary relation to the rule against impeaching one's own witness.[58]

It is not reversible error to allow the government to put a leading question where in the subsequent examination of the witness the same fact is elicited as that in answer to the alleged objectionable question.[59]

Where questions put by the Government are "merely preliminary in character, or assumed uncontroverted facts, or elicited answers not unfavorable to the defendant," there is no error.[60] A court has pointed out that many courts permit counsel to ask the witness leading questions on direct examination to lay the foundation for his testimony.[61]

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[51] Hart v. United States, 183 Fed. 368, 372 (6th Cir. 1910). See also Mitchell v. United States, 213 F.2d 951, 956 (9th Cir. 1954), *cert. denied,* 348 U.S. 912 (1955); Stahl v. United States, 144 F.2d 909, 912 (8th Cir. 1944); Arnold v. United States, 7 F.2d 867, 869 (7th Cir. 1925); Wagman v. United States, 269 Fed. 568, 573 (6th Cir. 1920), *cert. denied,* 255 U.S. 572 (1921); Linn v. United States, 251 Fed. 476, 482 (2d Cir. 1918), citing 3 WIGMORE § 770. See Azcona v. United States, 257 F.2d 462, 466 (5th Cir. 1958).

[52] Dysart v. United States, 270 Fed. 77, 79 (5th Cir.), *cert. denied,* 256 U.S. 694 (1921).

[53] Gantz v. United States, 127 F.2d 498, 503 (8th Cir. 1942); United States v. Dickinson, 25 Fed. Cas. 850, 852 (No. 14958) (C.C.D. Ohio 1840).

[54] Arnette v. United States, 158 F.2d 11 (4th Cir. 1946).

[55] Nurnberger v. United States, 156 Fed. 721, 732, 734 (8th Cir. 1907). *But see* Gantz v. United States, 127 F.2d 498, 504 (8th Cir. 1942).

[56] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233 (1940); Putnam v. United States, 162 U.S. 687, 694 (1896); St. Clair v. United States, 151 U.S. 134, 150 (1894).

[57] Gill v. United States, 285 F.2d 711, 712 (5th Cir. 1960).

[58] Gill v. United States, *supra* note 57. The court cited 3 WIGMORE § 915(2). See also *id.* § 773, at 131.

[59] Schaffer v. United States, 24 App. D.C. 417, 426 (1904).

[60] Schoppel v. United States, 270 F.2d 413, 418 (4th Cir. 1959).

[61] Williams v. United States, 216 F.2d 529, 531 (8th Cir. 1954).

Even if technically improper it is not necessarily prejudicial.

The trial judge may permit the Government to ask leading questions to refresh the recollection of a witness.[62] Permitting the Government "to suggest circumstances which refreshed the memory of witnesses after each had stated positively that his memory on the subject was exhausted" was upheld on appeal.[63]

Leading questions may be used where the witness is not understanding. In a prosecution for statutory rape the court stated: "The prosecuting witness here was a young, timid Indian girl. . . . The questions, of necessity, were embarrassing to her. She testified in a timid, halting manner. Under these circumstances, it was necessary to ask some leading questions to elicit from her the material facts."[64]

Leading questions may be used to prove a self-contradiction. Where the government's witness was called in rebuttal to refute specific testimony by the defendant, it was essential that the questions be framed in language cognate to the defendant's contradictory testimony, and leading questions were proper.[65]

Calling of Witnesses by the Judge

The trial judge may call his own expert witnesses in a hearing on present insanity, although he need not do so, though requested.[66]

In some cases the Government expects that a possible witness will be hostile and wishes to escape the necessity of calling him and being cumbered by the rule against impeaching one's own witness.[67] The court, at the request of the Government, may call the witness, in which event either party may cross-examine and impeach him.[68] The Government may after a brief preliminary examination of its own witness withdraw him, and have him called as the court's witness.[69] The trial judge may in his discretion refuse on request, to call a witness.[70] Some showing should be made to the court to justify the

[62] Gill v. United States, 285 F.2d 711, 713 (5th Cir. 1960); Roberson v. United States, 249 F.2d 737, 742 (5th Cir. 1957), 72 A.L.R.2d 434 (1960).

[63] Thomas v. United States. 227 F.2d 667, 671 (9th Cir. 1955). The court cited 3 WIGMORE §§ 772 & 777.

[64] Antelope v. United States, 185 F.2d 174, 175 (10th Cir. 1950).

[65] United States v. Montgomery, 126 F.2d 151, 153 (3d Cir. 1940). The court cited 3 WIGMORE § 779.

[66] United States v. Harriman, 4 F. Supp. 186, 187 (S.D.N.Y. 1933). On calling of witnesses by the judge see MCCORMICK 14; 9 WIGMORE § 2484 n.1; Notes, 51 NW. U.L. REV. 761 (1957), 58 YALE L.J. 183 (1948). On calling of expert witnesses by the judge see Orfield, *Expert Witnesses in Federal Criminal Procedure*, 20 F.R.D. 317, 326 (1958); Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness*, 29 So. CAL. L. REV. 195 (1956).

[67] MCCORMICK 14.

[68] United States v. Lutwak, 195 F.2d 748, 754 (7th Cir. 1952); United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945); Litsinger v. United States, 44 F.2d 45, 47 (7th Cir. 1930).

[69] Litsinger v. United States, *supra* note 68.

[70] United States v. Lester, 248 F.2d 329, 331 (2d Cir. 1957); Hirschfeld v. United States, 54 F.2d 62 (7th Cir. 1931).

court in calling a witness as its own, and this should be done out of the presence of the jury.[71] In one case the judge on suggestion of the Government called the sole surviving eye-witness of a homicide who had made inconsistent statements to the Government.[72] In a Selective Service prosecution the trial judge directed the Government to call the defendant's sister.[73]

The action of the trial judge in a narcotics prosecution in calling as witnesses, after the Government and the defendant indicated that they would not, two co-defendants who had pleaded guilty and were awaiting sentence and upon their refusal to implicate the defendant, in reminding them that the judge was going to sentence them and then asking them whether they desired to change their testimony was reversible error.[74] In fact while it is permissible to call a witness whom the parties do not wish to call, it is seldom desirable to do so.

Some American cases have suggested that in some cases the judge in the interest of justice, may have a duty as well as the power to call witnesses, and may be reversed if he fails to do so.[75] But the federal appellate courts have been unwilling to reverse on this ground.[76]

Examination of Witnesses by the Trial Judge

The trial judge has the authority to interrogate witnesses.[77] He may examine any witness to bring out needed facts which the parties have not elicited.[78]

There is some authority that a judge owes a duty to secure complete presentation of the case where the party-presentation is not complete. Judge Charles E. Clark has stated: "He enjoys the prerogative, rising often to the standard of a duty, of eliciting those facts he deems necessary to the clear presentation of the issues."[79]

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[71] Fournier v. United States, 58 F.2d 3, 6 (7th Cir.), *cert. denied*, 286 U.S. 565 (1932).

[72] Young v. United States, 107 F.2d 490, 493 (5th Cir. 1939), 18 TEXAS L. REV. 530 (1940).

[73] United States v. Guertler, 147 F.2d 796 (2d Cir. 1945).

[74] United States v. Marzano, 149 F.2d 923, 924 (2d Cir. 1945).

[75] Frankfurter, J., dissenting in Johnson v. United States, 333 U.S. 46, 54 (1948). See Notes 51 NW. U.L. REV. 761, 771 (1957), and 58 YALE L.J. 183 (1948).

[76] United States v. Kabot, 295 F.2d 848, 853 (2d Cir. 1961); United States v. Lester, 248 F.2d 329, 331 (2d Cir. 1957); Zammar v. United States, 217 F.2d 223, 226 (8th Cir. 1954); Fielding v. United States, 164 F.2d 1022 (6th Cir. 1947); Steinberg v. United States, 162 F.2d 120, 124 (5th Cir. 1947); United States v. Pape, 144 F.2d 778, 782 (2d Cir. 1944), citing WIGMORE §§ 784 & 2484; Miller v. United States, 53 F.2d 316, 317 (7th Cir. 1931).

[77] Glasser v. United States, 315 U.S. 60, 82 (1942); Griffin v. United States, 164 F.2d 903, 904 (D.C. Cir. 1947), *cert. denied*, 333 U.S. 857 (1948); Lewis v. United States, 11 F.2d 745, 747 (6th Cir. 1926); Kettenbach v. United States, 202 Fed. 377, 385 (9th Cir.), *cert. denied*, 229 U.S. 613 (1913).

[78] Simon v. United States, 123 F.2d 80, 83 (4th Cir.), *cert. denied*, 314 U.S. 694 (1941). On interrogation by the judge see MCCORMICK 12-13; UNDERHILL 758-64; 3 WHARTON 211-17; WIGMORE §§ 784 & 2484.

[79] United States v. Brandt, 196 F.2d 653, 655 (2d Cir. 1952). *But see* cases cited *supra* note 76.

With respect to comment and interruption by the trial judge, Judge Learned Hand has stated that "the disposition of courts to reverse judgments because of minor excesses in the exercise of the judge's authority at the trial has much abated."[80]

Where in a robbery prosecution a witness had testified positively in support of the defendant's alibi, it was improper for the trial judge to catechize the witness at length.[81] Where a witness for the defendant has testified as to the good character of the defendant, and on cross-examination by the United States Attorney he stated that the defendant had the reputation of being a gambler, and the trial judge then asked the witness whether he would believe on oath a man who has no reputation other than as a professional gambler, and the witness answered in the affirmative, there is no reversible error where no effective objection was taken to the examination.[82] There was no reversible error where the judge examined a witness for the defendant and the testimony was not prejudicial to the defendant.[83]

Interrogation by the judge should not be in such a manner as to impress the jury with the idea that the judge has a fixed opinion that the accused is guilty and should be convicted.[84] This is particularly true where the evidence is in sharp conflict. Committing a witness for the defendant for contempt after interrogation by the court may under certain circumstances be reversible error.[85] Where the trial judge, in the absence of the jury but apparently in the presence of other witnesses later called, expressed disbelief in the good faith of a hesitating identity witness, pressed him for a more positive statement, recalled the jury and by the judge's own questioning elicited a fairly definite identification and finally in the absence of the jury, directed the marshal to detain the witness, the conviction was reversed.[86] Where the trial judge cross-examined the defendant to compel either admission of the truth of testimony given against him, or assertion that the adverse witnesses were perjurers activated by spite, the Court of Appeals did not reverse, yet criticized such procedure.[87]

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[80] United States v. Warren, 120 F.2d 211, 212 (2d Cir. 1941).
[81] Glover v. United States, 147 Fed. 426, 429 (8th Cir. 1904), 8 Am. & Eng. Ann. Cas. 1184 (1908).
[82] Sylvia v. United States, 264 Fed. 593, 595 (6th Cir. 1920).
[83] Lusco v. United States, 287 Fed. 69 (2d Cir. 1923).
[84] Adler v. United States, 182 Fed. 464, 469 (5th Cir. 1910).
[85] Rutherford v. United States, 258 Fed. 855 (2d Cir. 1919) (one judge dissenting).
[86] Connley v. United States, 46 F.2d 53, 54 (9th Cir. 1931).
[87] Garber v. United States, 145 F.2d 966, 971 (6th Cir. 1944). The court reviewed

A trial judge's excessive interjection into the examination of witnesses and his numerous comments to defense counsel sometimes indicating hostility, though under provocation, may indicate such bias and lack of impartiality as to warrant a new trial.[88] Counsel are not held to strict accountability for failure to object or except when the questions are asked by the court.[89] The judge must not assume the role of an advocate or of a prosecutor.[90] But merely numerous questions without more is not necessarily reversible error.[91] Where the questions put by the judge are mainly to defense witnesses and tend to be on the side of the Government there may be reversible error.[92]

Where the judge asked more than 900 questions during an eight-day trial and cross-examined the defendant and his witnesses with the seeming purpose of emphasizing inconsistencies and discrediting the defense, the Court of Appeals reversed.[93] Excessive interrogation is not excused despite provocation.[94] The mere asking of 920 questions by the trial judge is not reversible error where the questions were designed to clarify testimony and point out its relation to prior testimony, and he allowed ample time to explain any resulting inconsistencies, and he avoided personalities, and did not address himself to the credibility of any witness nor remark on the weight to be given to any particular piece of evidence.[95] In a close case excessive questioning of the defendant and other witnesses may be reversible error.[96]

The trial judge may ask questions disclosing the witness' absence of knowledge. [97] Neutral questions about knowledge or interest might be needed and desirable not only in state courts but also in the federal courts where the authority of the judge is greater.[98] They are not necessarily discrediting.

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the prior decisions.

[88] Peckham v. United States, 210 F.2d 693, 702 (D.C. Cir. 1953); Williams v. United States, 93 F.2d 685, 687 (9th Cir. 1937). See Killilea v. United States, 287 F.2d 212, 216 (1st Cir. 1961); United States v. Kennedy, 291 F.2d 457, 459 (2d Cir. 1961).

[89] Stevens v. United States, 306 F.2d 834, 838 (5th Cir. 1962); Gomila v. United States, 146 F.2d 372, 376 (5th Cir. 1944); Williams v. United States, 93 F.2d 685, 690 (9th Cir. 1937).

[90] United States v. Lee, 107 F.2d 522, 525 (7th Cir. 1939).

[91] United States v. Aaron, 190 F.2d 144, 146 (2d Cir. 1951).

[92] Blunt v. United States, 244 F.2d 355, 365 (D.C. Cir. 1957); Blumberg v. United States, 222 F.2d 496, 501 (5th Cir. 1955).

[93] United States v. Brandt, 196 F.2d 653, 656 (2d Cir. 1952). Where the judge asked 1210 questions there was a reversal. United States v. Fry, 304 F.2d 296, 298 (7th Cir. 1962) (one judge dissenting).

[94] Peckham v. United States, 210 F.2d 693, 702 (D.C. Cir. 1953).

[95] United States v. Switzer, 252 F.2d 139, 144 (2d Cir.), *cert. denied*, 357 U.S. 922 (1958).

[96] United States v. Carmel, 267 F.2d 345, 347 (7th Cir. 1959).

[97] Cusmano v. United States, 13 F.2d 451 (6th Cir. 1926).

[98] MCCORMICK 13 n.10.

In a murder prosecution where the defendant claimed insanity and a psychiatrist was appointed to examine the defendant before trial, the trial judge's examination of the psychiatrist to eliminate any obscurities resulting from his testimony, and concerning the applicability of psychiatric tests to persons of various races and education, the defendant being a Mexican, was not prejudicial error.[99] In a murder trial where the defendant testified, and there was some discrepancy in his testimony on direct and cross-examination, the trial judge could interrogate him.[100]

At a trial of several defendants it is not good practice for the trial judge to question defendant's counsel during the opening statement as to the defendant's position regarding the Government's evidence.[101] Repeated interruptions may be reversible error.[102]

It is prejudicial error for the federal trial judge improperly to reprimand the defendant's counsel, a lawyer of high standing, and make an unfair reflection on his preparation of the case.[103]

The trial judge on his own initiative may advise a witness that he need not answer incriminating questions, even though this may deprive the defendant of cross-examination as to relevant matters.[104]

After the government has impeached a witness for the defendant by showing conviction of a felony, it was bad procedure for the trial judge to inform the jury that the witness had been convicted in the same courtroom on the indictment in which she is named with the defendant now on trial.[105] If the case had been close, the Court of Appeals would have reversed.

The mere fact that the trial judge denies a motion for a judgment of acquittal without calling on the Government to reply does not establish that the court "acted as advocate for the prosecution."[106]

If the trial judge conducts the trial not as a serious criminal proceeding, but like a town meeting or neighborhood caucus so that defense counsel cannot try the case to his best advantage, there is reversible error.[107] There is reversible error where the trial judge displays a hostile attitude towards the defendants and their counsel.[108]

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[99] Ochoa v. United States, 167 F.2d 341, 343 (9th Cir. 1948). See also Burgman v. United States, 188 F.2d 637, 641 (D.C. Cir. 1951).

[100] Griffin v. United States, 164 F.2d 903 (D.C. Cir. 1947), 34 VA. L. REV. 219 (1948).

[101] Lewis v. United States, 11 F.2d 745, 747 (6th Cir. 1926).

[102] Sunderland v. United States, 19 F.2d 202, 210 (8th Cir. 1927).

[103] Kraft v. United States, 238 F.2d 794, 800 (8th Cir. 1956).

[104] Hamer v. United States, 259 F.2d 274, 281 (9th Cir. 1958), *cert. denied*, 359 U.S. 916 (1959).

[105] United States v. Senior, 274 F.2d 613, 616 (7th Cir. 1960).

[106] United States v. Borisuk, 206 F.2d 338, 343 (3d Cir. 1953).

[107] Everett v. United States, 281 F.2d 429, 434 (5th Cir. 1960).

[108] United States v. Koenig, 300 F.2d 377, 378 (6th Cir. 1962).

It is not a part of the judge's duty to caution or advise the Government attorney in order to supply some deficiency in proof of testimony favorable to the Government.[109] But the error may be harmless if the case is not close. It is not good practice for the trial judge to suggest, without prior objection by the Government, that testimony offered by the defendant is not material.[110] It is improper practice, though not necessarily reversible error, for the trial judge to volunteer in the presence of the jury that an objection which the Government finally made was one that he was waiting for.[111]

In some cases the trial judge has charged the jury with respect to the effect of his interrogation of the witness.[112]

Few cases have been discovered of interrogation of witnesses by the jury.[113] In one case it was held that where during the trial a juror addressed an inquiry to the court, the court could properly admonish the jurors to withhold their questions until completion of the trial.[114] But in another case Judge Learned Hand stated: "When a party uses an earlier statement of his own witness to refresh the witness' memory . . . the party may not put the statement in evidence, although the other side may do so, and apparently the jury may call for it, sua sponte."[115] In a prosecution for conspiracy to defraud the United States, questioning of witnesses by jurors was held within the discretion of the trial judge.[116]

It is quite common for a jury deliberating on a case to request the court to have the reporter read to them the testimony of a witness. The trial court may permit such reading.[117] In some situations a defendant has an absolute right to have the testimony furnished to the jury.[118] Where the testimony is permitted to be read, the defendant has no right to cross-examine the witness again.[119]

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[109] United States v. Carengella, 198 F.2d 3, 8 (7th Cir.), *cert. denied*, 344 U.S. 881 (1952).

[110] United States v. Dunn, 299 F.2d 548, 556 (6th Cir. 1962).

[111] United States v. Wheeler, 219 F.2d 773, 777 (7th Cir. 1955).

[112] United States v. Amorosa, 167 F.2d 596, 600 (3d Cir. 1948).

[113] See MCCORMICK 13; UNDERHILL 763; 3 WHARTON 210-11; 3 WIGMORE § 784a; Annot., 159 A.L.R. 347 (1945).

[114] Dobbins v. United States, 157 F.2d 257, 260 (D.C. Cir.), *cert. denied*, 329 U.S. 734 (1946).

[115] United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946), *cert. denied*, 329 U.S. 806 (1947). The court cited 3 WIGMORE § 763.

[116] United States v. Witt, 215 F.2d 580, 584 (2d Cir. 1954). But jurors should not be allowed repeatedly to ask irrelevant questions. Pacific Improvement Co. v. Weichfield, 277 Fed. 224, 227 (2d Cir. 1921).

[117] United States v. Rosenberg, 195 F.2d 583, 588 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); United States v. Campbell, 138 F. Supp. 344, 345 (M.D. Iowa 1956).

[118] United States v. Jackson, 257 F.2d 41, 43 (3d Cir. 1958). The court cited Annot., 50 A.L.R.2d 176, 180, 185 (1956).

[119] Easley v. United States, 261 F.2d 276 (5th Cir. 1958).

Refreshing Recollection

Refreshing recollection should be distinguished from records of past recollection, in the latter case there being stronger reasons for safeguards.[120] As one court stated: "It is one thing to awaken a slumbering recollection of an event, but quite another to use a memorandum of recollection, fresh when it was correctly recorded, but presently beyond the power of a witness so to restore that it will exist apart from the record. In the former case it is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character."[121] Where it is a matter of records of past recollection, a witness may use a memorandum of the transaction made at the time, but not a copy thereof; he must, if possible, produce the original, which opposing counsel may inspect.

A witness may refresh his memory by referring to writings not made by himself.[122] The Supreme Court quoted favorably the view of Greenleaf: "Though a witness can testify only as to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory by use of a written instrument, memorandum, or entry in a book, and may be compelled to do so if the writing be presented in court. It does not seem necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided that, after inspecting it, he can speak to the facts from his own recollection."[123] That a letter upon which an alienist based his questions in examining a defendant alleged to be insane was not written by him does not prevent its use to refresh his memory at the trial, with respect to questions asked by him at the examination.[124]

Even though a document could not be admitted as a business record made in the ordinary course of business, it could be used as a memorandum, to refresh the defendant's memory if proper foundation was laid showing that the data was obtained from the records of the company.[125]

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[120] McCORMICK 15-16. On refreshing recollection in general see McCORMICK 14-18; UNDERHILL 769-79; 3 WHARTON 224-32; 3 WIGMORE §§ 758-65; Notes, 18 ORE. L. REV. 136 (1939), 3 U.C.L.A.L. REV. 616 (1956), and 15 WASH. L. REV. 257 (1940).

[121] Jewett v. United States, 15 F.2d 955, 956 (9th Cir. 1926). The court cited 2 WIGMORE § 349.

[122] Olmstead v. United States, 19 F.2d 842, 846 (9th Cir. 1927) citing 3 WIGMORE § 759; Breese v. United States, 106 Fed. 680, 683 (4th Cir. 1901).

[123] Putnam v. United States, 162 U.S. 687, 694 (1896). See also Goodfriend v. United States, 294 Fed. 148, 153 (9th Cir. 1923).

[124] McHenry v. United States, 276 Fed. 761 (D.C. Cir. 1921), 34 A.L.R. 1109, 1114 (1925).

[125] United States v. Indiana Trailer Corp., 226 F.2d 595, 600 (7th Cir. 1955).

Courts have stated broadly that anything can be used to refresh a witness' memory, even, for example, a false statement.[126] A tape recording even though not authenticated may be used.[127] A federal agent may use a memorandum prepared on the same day he conducted an interview.[128] The use of grand jury minutes to refresh a witness' recollection is in the discretion of the trial judge.[129]

A witness cannot be refreshed by having his oral testimony given at a previous trial repeated to him.[130] The error, if any, in permitting the Government to refresh a witness by use of a previously signed statement of the witness as to a fact which the Government claimed surprise, is harmless where there was corrobation by another Government witness.[131] The defendant is not prejudiced by the Government's use of a witness' former statement to refresh his recollection, where it is ineffective for that purpose, even though the statement was not given to the jury.[132]

Cross-examination to refresh a witness' recollection on the basis of prior statements is permitted, but the contents of the statements are not to be put in evidence before the jury.[133] The trial judge may permit the Government to put leading questions to a witness to refresh his recollection.[134]

A decision of the Supreme Court seemed to require the memorandum to have been made contemporaneously with the facts reported even when used to refresh present recollection. The court held it reversible error to allow a witness for the government to use in testifying as to certain conversations, a transcript of his testimony before a grand jury concerning these conversations, given four months after they had occurred. "It is elementary that the memory of a witness may be refreshed by calling his attention to a proper writing or memorandum. . . . The very essence, however, of the right to thus refresh the memory of the witness is, that the matter used for the purpose be contemporaneous with the occurrence as to which the witness is called

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[126] United States v. Rappy, 157 F.2d 964, 967 (2d Cir.), *cert. denied*, 329 U.S. 806 (1947).

[127] United States v. McKeever, 169 F. Supp. 426, 428 (S.D.N.Y. 1958).

[128] United States v. Koritan, 182 F. Supp. 143, 144 (E.D. Pa. 1960).

[129] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233 (1940); Cox v. United States, 284 F.2d 704, 706 (8th Cir. 1960).

[130] United States v. Cross, 20 D.C. (9 Mackney) 365, 377, *writ of error dismissed*, 145 U.S. 571 (1892).

[131] Lake v. United States, 302 F.2d 452, 456 (8th Cir. 1962).

[132] Foster v. United States, 178 Fed. 165, 177 (6th Cir. 1910).

[133] Young v. United States, 214 F.2d 232, 237 (D.C. Cir. 1954). The court cited 3 WIGMORE § 764. See also United States v. McKeever, 271 F.2d 669, 675 (2d Cir. 1959).

[134] Roberson v. United States, 249 F.2d 737, 742 (5th Cir. 1957), 72 A.L.R.2d 434 (1960).

upon to testify."[135] But in 1940 the Supreme Court found no reversible error in the use of transcripts of grand jury testimony given more than a year after the events to which that testimony related.[136]

Ledger entries in the books of a large mercantile partnership, showing the gross amounts of invoices of goods sold to a customer, and payments received thereon, posted at the close of the calendar month in which the sale was made, are sufficiently contemporaneous that they may be referred to by a partner, to refresh his memory as to such facts, where they are examined by him at or near the time of their entry and then known by him to be correct.[137] Grand jury testimony given by a witness contemporaneously with the matters testified about may be used to refresh the recollection of the witness now testifying at the trial.[138]

It is a preliminary question for the trial judge whether the memorandum actually does refresh. In a leading case the upper court upheld the finding of the trial judge that the memory of witnesses who testified while consulting a long list of articles was in fact refreshed.[139] The testimony of a Government witness would have to be disregarded if he had no present recollection and merely acknowledged that he had given certain testimony before a grand jury.[140]

The trial judge may decline to permit the use of the aid to memory, where he regards the danger of undue suggestion as outweighing the probable value, in the exercise of his discretion to control the manner of the examination.[141]

Another safeguard is the rule which entitles the adverse party, where the witness seeks to resort to the memorandum, to inspect the memorandum so that he may object to its use if ground appears.[142] Otherwise there is a violation of the right of confrontation when

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[135] Putnam v. United States, 162 U.S. 687, 694-95 (1896) (three justices dissenting).

[136] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). The court cited 3 WIGMORE § 761. This case was said to greatly limit the earlier doctrine in Dowling Bros. Distilling Co. v. United States, 153 F.2d 353, 360 (6th Cir. 1946), *cert. denied*, 328 U.S. 848 (1946); Fanelli v. United States Gypsum Co., 141 F.2d 216, 218 (2d Cir. 1944). See also Cox v. United States, 284 F.2d 704, 707 (8th Cir. 1960); Young v. United States, 214 F.2d 232, 237 n.4 (D.C. Cir. 1954).

[137] Greenberg v. United States, 145 Fed. 81, 95 (1st Cir. 1906).

[138] Felder v. United States. 9 F.2d 872, 874 (2d Cir. 1925), *cert. denied*, 270 U.S. 648 (1926); Bosselman v. United States, 239 Fed. 82, 85 (2d Cir. 1917).

[139] United States v. Riccardi, 174 F.2d 883, 889 (3d Cir. 1949), *cert. denied*, 337 U.S. 941 (1949), 1950 WASH. U.L.Q. 146. See also How. L.J. 1 (1957); 3 U.C.L.A.L. REV. 616 (1956).

[140] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Goldberg, 290 F.2d 729, 732 (2d Cir. 1961), *cert. denied*, 82 Sup. Ct. 176 (1962), citing 5 WIGMORE § 1415.

[141] United States v. Lenardo, 67 F.2d 883, 884 (2d Cir. 1933) (L. Hand, J.).

[142] Montgomery v. United States, 203 F.2d 887, 893 (5th Cir. 1953); Morris v. United States, 149 Fed. 123, 126 (5th Cir. 1906), 9 Am. & Eng. Ann. Cas. 558 (1908).

the witness is a Government witness. The rule should be enforced more vigorously in criminal than in civil cases. There should be a demand for inspection. With respect to the time of inspection, opposing counsel should be allowed to inspect memoranda to be used by a witness as soon as they have been identified. The adverse party is entitled only to the particular memorandum and not to the whole book containing it.[143] In some cases a denial of inspection while erroneous may not be reversible error.[144]

It has also been held that the defendant has a right to have the memorandum available for his reference in cross-examining the witness.[145] But in 1940 the Supreme Court held that where a transcript of prior testimony was not shown to the witness, but the judge read from it to refresh the witness, the opposing counsel was not entitled as of right to inspect it, but under these conditions the matter was in the discretion of the trial judge.[146] The Court of Appeals which had held otherwise,[147] was reversed.

The right to demand inspection has been limited in some cases[148] to writings used by the witness on the stand. On principle the reasons for inspection are equally applicable to writings used before the witness testifies.[149] The Supreme Court stated by Mr. Justice Roberts: "We think it the better rule that where a witness does not use the notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also part of the Government's files, a large discretion must be allowed the trial judge. We are unwilling to hold the discretion was abused in this case."[150]

While the adversary may inspect the memoranda and submit them to the jury for their examination,[151] the party offering the witness may

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[143] Brownlow v. United States, 8 F.2d 711 (9th Cir. 1925).

[144] United States v. Easterday, 57 F.2d 165, 167 (2d Cir. 1932); Taylor v. United States, 19 F.2d 813, 817, 818 (8th Cir. 1927).

[145] Little v. United States, 93 F.2d 401, 406 (8th Cir. 1937).

[146] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 333 (1940).

[147] 105 F.2d 809 (7th Cir.), noted approvingly 38 MICH. L. REV. 100 (1939).

[148] Little v. United States, 93 F.2d 401, 407 (8th Cir. 1937); Mullaney v. United States, 82 F.2d 638, 643 (9th Cir. 1936); Lennon v. United States, 20 F.2d 490, 493 (8th Cir. 1927); United States v. Toner, 77 F. Supp. 908, 917 (E.D. Pa. 1948).

[149] MCCORMICK 17. See 45 COLUMB. L. REV. 461, 464 n.22 (1945).

[150] Goldman v. United States, 316 U.S. 129 (1942), *affirming* 118 F.2d 310, 314 (2d Cir. 1941). See also Tillman v. United States, 268 F.2d 422, 424 (5th Cir. 1959); United States v. Roviaro, 229 F.2d 812, 815 (7th Cir. 1956); Kaufman v. United States, 163 F.2d 404, 409 (6th Cir. 1947). But in an admiralty case inspection was allowed. The Alpha, 44 F. Supp. 809, 815 (E.D. Pa. 1942), citing 3 WIGMORE § 762.

[151] United States v. Caserta, 199 F.2d 905, 909 (3d Cir. 1952), citing 3 WIGMORE §§ 762-65.

not do so.[152] They are not evidence, but merely aid in giving evidence. As a consequence it would seem that a copy may be used without accounting for the original.[153] But in a federal case the court concluded that the witness who testified from copied memoranda was not in fact refreshed, and that it was therefore error to allow use of a copy.[154]

Cross-Examination

An early case held that counsel for defendant may not cross-examine witnesses for the Government at the preliminary examination.[155] But cases in 1851[156] and 1868[157] permitted cross-examination. A defendant who testifies at his preliminary examination may be fully cross-examined at the preliminary examination concerning his testimony.[158]

In 1918 a court stated: "The trial judge is in the best position to determine how far cross-examination should proceed, and when convinced that the facts are all presented and fairly before the jury, the examination of a witness, either on direct or cross-examination, should cease."[159] This is particularly true where there are several defendants represented by several attorneys.[160]

In 1919 a court stated: "A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary."[161] The party need not make the witness his own to prove what he is entitled to prove by cross-examination.

The Supreme Court has held that cross-examination is a right and not merely a privilege. Mr. Justice Stone stated: "Cross-examination

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[152] Luse v. United States, 49 F.2d 241, 243 (9th Cir. 1931). The jury may call for it, sua sponte. United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946), *cert. denied*, 329 U.S. 806 (1947). The court cited 3 WIGMORE § 763. See also Eisenberg v. United States, 273 F.2d 127, 132 (5th Cir. 1959).

[153] McCORMICK 18.

[154] Jewett v. United States, 15 F.2d 955 (9th Cir. 1926). The court cited 2 WIGMORE § 349.

[155] United States v. White, 28 Fed. Cas. 888 (No. 16685) (C.C.D. Pa. 1807). On cross-examination see McCORMICK 40-60; MORGAN, BASIC PROBLEMS OF EVIDENCE 60-62 (1954); UNDERHILL 201-13, 779-812; 3 WHARTON 235-307; WIGMORE §§ 684, 730, 753, 761, 762, 764, 773, 780, 781, 782, 783, 785, 915, 1367-94, 1808, 1867, 1871, 1884-89.

[156] United States v. Macomb, 26 Fed. Cas. 1132 (No. 15702) (C.C.D. Ill. 1851).

[157] *In re* Van Campen, 28 Fed. Cas. 954, 955 (No. 16835) (S.D.N.Y. 1868).

[158] Powers v. United States, 223 U.S. 303, 314 (1912).

[159] Jelke v. United States, 255 Fed. 264, 288 (7th Cir. 1918).

[160] Harvey v. United States, 23 F.2d 561, 567 (2d Cir. 1928).

[161] Heard v. United States, 255 Fed. 829, 832 (8th Cir. 1919). See also Gallaghan v. United States, 299 Fed. 172, 175 (8th Cir. 1924).

of a witness is a matter of right."[162]

The denial of cross-examination altogether, or its arbitrary curtailment, upon a proper subject of cross-examination, is reversible error if substantial harm results. The Supreme Court held that a refusal to permit cross-examination of a Governmental witness as to his present residence was erroneous.[163] The trial court may refuse cross-examination as to the witness' address when the witness fears intimidation and there is no showing of materiality of the address.[164] A trial judge may sustain an objection to a question as to the hotel at which an F.B.I. agent was staying where it would not identify the agent as to environment for determination of character, veracity or bias.[165]

A court has stated: "Generally it is undesirable for more than one attorney of a single litigant either to examine or cross-examine the same witness, and especially was it objectionable here, where there were so many defendants, each asserting the right to cross-examine."[166] Where five attorneys represented the defendants and the trial judge suggested on several occasions that cross-examination was drawn out and repetitious, this is not reversible error.[167]

In general it is bad practice for any witness, particularly a government witness, to receive secret advice while he is on the stand, although it is not always reversible error.[168]

When a non-party witness refuses to be cross-examined or to answer proper questions of the cross-examiner, his direct examination may be excluded,[169] or it may be left to the trial judge's discretion. When the refusal is after the cross-examination is partly completed, and is not with the proponent's connivance, it is in the judge's discretion whether the direct shall stand. It was so held on a prosecution for treason in harboring an escaped German officer, where after testifying for the Government on direct, the witness answered some questions on cross-examination, but then refused to answer others as involving military secrets.[170]

Where a government witness testifies on direct examination and is then temporarily excused and the government fails to call such

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[162] Alford v. United States, 282 U.S. 687, 691 (1931). See MCCORMICK 40. Following this case there was a reversal in J. E. Hanger, Inc. v. United States, 160 F.2d 8, 10 (D.C. Cir. 1947).

[163] Alford v. United States, 282 U.S. 687, 692 (1931).

[164] United States v. Rich, 262 F.2d 415, 418 (2d Cir. 1959).

[165] United States v. Davis, 262 F.2d 871, 876 (7th Cir. 1959).

[166] Madden v. United States, 20 F.2d 289, 292 (9th Cir.), *cert. denied*, 275 U.S. 554 (1927).

[167] United States v. Sorcey, 151 F.2d 899, 902 (7th Cir. 1945).

[168] Duke v. United States, 255 F.2d 721, 728 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958).

[169] United States v. Toner, 173 F.2d 140, 144 (3d Cir. 1949).

[170] Stephan v. United States, 133 F.2d 87, 96 (6th Cir.), *cert. denied*, 318 U.S. 781 (1943). The court cited 5 WIGMORE § 1391, at 112.

witness later, the trial judge may on the defendant's motion instruct the jury to disregard the witness' testimony.[171] The defendant cannot complain after conviction that he had no chance to cross-examine. If the defendant had objected at the time, the witness could have been recalled for cross-examination.

The form of questions on cross-examination is usually leading.[172]

It is the general rule in the federal courts that a party, including the defendant, has no right to cross-examine a witness, without leave of court, as to any facts or circumstances not connected with matters stated in direct examination.[173] The rule in civil cases[174] was followed. The rule was subject to two necessary exceptions: He may ask questions to show bias or prejudice in the witness, or to lay the foundation to admit evidence of prior contradictory statements. "The scope of the proper cross-examination is determined by the subject matter of the direct examination, and not by the precise questions or answers relative to such matters in the direct examination."[175]

Suppose the government has already injected issue A into its presentation of its case by direct examination of W1, but has avoided issue A when directly examining W2. On principle it would seem that the defendant should be able to interrogate W2 about issue A. The scope of cross-examination should be determined by the posture of the whole case rather than by the extent of direct examination of W2 alone.[176] Yet a court held against the right of the defendant.[177] In another case a court allowed the defendant such a full examination but did not discuss this reason.[178] On a prosecution for pretending to be a federal officer, a refusal to permit cross-examination of a Government witness concerning a conversation between the defendant and the witness had at the time of the alleged offense was reversible error even though the Government had not asked the witness about such conversation.

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[171] United States v. Piampiano, 271 F.2d 273, 275 (2d Cir. 1959).

[172] Ewing v. United States, 135 F.2d 633, 639 (D.C. Cir. 1943).

[173] Rea v. Missouri, 84 U.S. (17 Wall.) 532, 542 (1873); McKnight v. United States, 122 Fed. 926, 928 (6th Cir. 1903); United States v. Davidson, 25 Fed. Cas. 850, 851 (No. 14958) (C.C.D. Ohio 1840). See also United States v. Lawinski, 195 F.2d 7 (7th Cir. 1952); Aplin v. United States, 41 F.2d 495 (9th Cir. 1930); Heard v. United States, 255 Fed. 829, 833 (8th Cir. 1919); Hendrey v. United States, 233 Fed. 5, 15 (6th Cir. 1916); Foster v. United States, 178 Fed. 165, 177 (6th Cir. 1910).

[174] Wills v. Russell, 100 U.S. 621, 625 (1879); Philadelphia & T.R. Co. v. Stimpson, 39 U.S. (14 Pet.) 448, 461 (1840).

[175] Heard v. United States, 255 Fed. 829, 834 (8th Cir. 1919).

[176] MORGAN, MAGUIRE & WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 258 (4th ed. 1957). See *Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 97 (1962).

[177] Aplin v. United States, 41 F.2d 495 (9th Cir. 1930).

[178] Dickson v. United States, 182 F.2d 131, 134 (10th Cir. 1950) (one judge dissenting).

Ordinarily where a witness has been passed subject to cross-examination on a specified point, the court is not bound on his recall to permit additional examination on other points, but the matter is within the court's discretion.[179]

In 1950 the Court of Appeals for the Fourth Circuit stated by Judge Soper that:

> [I]n the federal courts for over a hundred years the rule has been that the scope of cross-examination is limited to the subject matter referred to during the examination in chief; and if a party wishes to examine a witness regarding other matters, he must do so by making the witness his own and by calling him as such in the subsequent progress of the trial. . . . Nothing to the contrary appears in the Federal Rules of Criminal Procedure.[180]

Judge Goodrich has stated: "We do not stop to comment upon the desirability of the alleged restriction in the federal rule except to note that it has been criticized by writers of eminence in the field."[181]

Where a witness implies that the defendant and his counsel had suggested to her what her testimony should be, the defendant is entitled to a searching cross-examination, and defendant's counsel may ask: "In my presence what did the defendant tell you he wanted you to say that was not true?"[182]

Cross-examination of private police or detectives, bearing directly on substantial issues, should not be seriously curtailed as their testimony is open to the suspicion of bias, especially when uncorroborated.[183] The criminal defendant must have full scope to cross-examine Government witnesses.

In a prosecution of a former county attorney for conspiracy to violate the National Prohibition Act in which the federal official's testimony tended to show that the defendant attempted to bribe him, it was reversible error not to allow cross-examination as to other official dealings between the parties.[184]

Where a Government witness advised the trial judge, during the jury's absence, that he had been advised and threatened by representatives of the Government and that almost all his prior testimony was false, and the trial judge informed the jury thereof and all

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[179] Madden v. United States, 20 F.2d 289, 292 (9th Cir.), *cert. denied*, 275 U.S. 554 (1927).

[180] Bell v. United States, 185 F.2d 302, 310 (4th Cir.), *cert. denied*, 340 U.S. 930 (1950). The court cited 6 WIGMORE §§ 1885-88.

[181] United States v. Lowe, 234 F.2d 919, 921 (3d Cir.), *cert. denied*, 352 U.S. 838 (1956). The court cited MCCORMICK § 27; 1 MORGAN, *op. cit. supra* note 155, at 60; 6 WIGMORE § 1888, at 543.

[182] Arline v. United States, 10 F.2d 778, 780 (9th Cir. 1926).

[183] District of Columbia v. Clawans, 300 U.S. 617, 630 (1937).

[184] Minner v. United States, 57 F.2d 506, 511 (10th Cir. 1932).

the testimony was stricken, the refusal of the court to allow the defendant further cross-examination was prejudicial error.[185] It was not enough to allow the defendant to call the witness as his own witness. The defendant is entitled to seek on cross-examination a full disclosure of the interest and motives underlying the previous testimony of the witness. The action of the trial judge "relieved the government of the onerous responsibility for the testimony of a confessed perjurer for whose credibility it had vouched."

Where a Government witness in an income tax evasion prosecution testifies that the deceased person to whom the defendant claimed to have paid $236,000 in 1942 as a business expense, had been very poor, it was reversible error to disallow questions on cross-examination endeavoring to show conduct by the deceased indicating that he was not poor.[186] In a prosecution for attempt to evade income taxes for 1945, 1946, and 1947 in which the Government used the cash receipts and expenditure method of proving unreported income, a refusal to permit cross-examination designed to elicit evidence that the witness had not paid the full tax due in prior years, and thus had additional funds available for expenditure in 1945 is reversible error.[187] In a prosecution for filing false non-communist affidavits in which an F.B.I. informant, who had infiltrated the Communist Party, testified that he had seen the defendant at Party meetings in prior years, it was reversible error to refuse to let the defendant cross-examine the informant for the purpose of showing his prior false identification of Communists in Security Board hearings.[188] In a conspiracy prosecution it is reversible error to shut off cross-examination of a co-conspirator on a question of promised or expected immunity and on why he and his son had not been included as defendants in the indictment.[189] If the defendant is permitted no cross-examination at all of whether a witness who had pleaded guilty but was not yet sentenced, expected any preferential treatment as a result of his testimony, this is reversible error.[190] But where a witness had been twice previously cross-examined as to whether he would lie to save himself a substantial jail sentence, there need be no further cross-examination.[191] The trial judge may deny a defendant a right to cross-examine a co-defendant who does not testify against the defendant, where he is willing to let the defendant make the co-defend-

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[185] United States v. Bourjaidy, 167 F.2d 993, 994 (7th Cir. 1948).
[186] United States v. Augustine, 189 F.2d 587, 590 (3d Cir. 1951).
[187] Ford v. United States, 210 F.2d 313, 317 (5th Cir. 1954).
[188] Fisher v. United States, 231 F.2d 99, 105 (9th Cir. 1956).
[189] Sandroff v. United States, 158 F.2d 623, 629 (6th Cir. 1946).
[190] United States v. Hogan, 232 F.2d 905 (3rd Cir. 1956).
[191] United States v. Migliorino, 238 F.2d 7, 10 (3d Cir. 1956).

ant his own witness to examine him.[192]

A court has stated: "Even defendants in criminal cases are not entitled to conduct unlimited cross-examination of adverse witnesses."[193] Hence where the witness had already admitted three convictions, and living by stealing and lying during a period of drug addiction, the trial judge could refuse cross-examination as to a recent burglary.

After a witness for the government has testified on cross-examination that he had at his own expense employed another attorney to assist the United States Attorney, the question how much the witness paid such attorney may be excluded as immaterial.[194] Where on direct examination of a Government witness a question of little relevancy or importance was asked, the trial court in its discretion may limit the scope of cross-examination.[195] On a prosecution of the defendant for violation of the Mann Act, although it was improper for the Government to examine the defendant about his wife's arrest for prostitution, it was not reversible error.[196] One judge dissented. The question had not been raised in the direct examination.

If a witness is cross-examined on a collateral matter, evidence will not be admitted to disprove that matter in order to discredit the witness.[197] Other witnesses may not be brought in on such issue. The inquiring party is concluded by the witness' answer, and he may not later rebut it for purposes of impeachment.[198] The extent to which cross-examination on collateral matters shall go is a matter peculiarly within the discretion of the trial judge. His action will not be interfered with unless there has been plain abuse of discretion.[199] The cross-examination may be prolonged and searching.

A defendant has a right to cross-examine an expert witness for the Government as to his competency. Prohibition agents may be cross-examined as to their ability to distinguish different kinds of liquor.[200]

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[192] Siglar v. United States, 208 F.2d 865, 868 (5th Cir. 1954).
[193] United States v. Owens, 263 F.2d 720, 722 (2d Cir. 1959).
[194] United States v. Ball, 163 U.S. 662, 673 (1896).
[195] Chinn v. United States, 228 F.2d 151, 154 (4th Cir. 1955).
[196] Davis v. United States, 229 F.2d 181, 185 (8th Cir.), *cert. denied*, 351 U.S. 904 (1956). Cross-examination of the defendant's wife concerning her alleged statement to officers, although she said nothing of those matters on direct examination, and her direct testimony was not directly challenged, was not proper on any ground and required reversal, despite the sufficiency of other evidence and lack of objection, and was not cured by an instruction that the testimony could be considered only on the question of the wife's credibility. Dixon v. United States, 303 F.2d 226, 227 (D.C. Cir. 1962).
[197] United States v .White, 28 Fed. Cas. 550, 551 (No. 16675) (C.C.D.C. 1836).
[198] Arpan v. United States, 260 F.2d 649, 658 (8th Cir. 1958); United States v. Klass, 166 F.2d 373, 376 (3d Cir. 1948); Ewing v. United States, 135 F.2d 633, 639 (D.C. Cir. 1943).
[199] United States v. Manton, 107 F.2d 834, 845 (2d Cir. 1938), *cert. denied*, 309 U.S. 664 (1940).
[200] Gaughan v. United States, 19 F.2d 897, 899 (8th Cir. 1927).

The trial judge may restrict cross-examination even by the defendant within proper bounds particularly where the cross-examination is designed for impeachment of general credibility rather than prior development of a contradiction on a point in issue.[201] The cross-examiner is entitled to ask appropriate questions for the purpose of impeaching the credibility of the witness or of laying the foundation for such impeachment. A court of appeals reversed where the witness' prior statements were permitted to be read to the jury by the cross-examiner but he was denied the right to question the witness about them.[202]

The rule allowing a party including the defendant to place the witness in his setting[203] on cross-examination does not apply where the other party had not called the witness.[204] The defense may not call a witness who has not testified merely to discredit him in the course of eliciting adverse testimony. If the information as to residence is later brought out, there is no reversible error for failure to allow the defendant to examine as to the witness' residence.[205]

The defendant's scope of cross-examination may in fact be reduced where the witness refuses to answer incriminating questions.[206]

In 1895 the Supreme Court stated: "It is unnecessary to consider whether, when offering himself as a witness to one matter, he may either, at the will of the government or under the discretion of the court, be called upon to testify as to other matters."[207] The Supreme Court has held that where the defendant takes the stand and makes his own statement "it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime."[208] The defendant must answer questions even though this may result in evidence of other offenses, where evidence of other offenses is admissible.[209]

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[201] Collazo v. United States, 196 F.2d 578, 584 (D.C. Cir.), *cert. denied*, 343 U.S. 988 (1952).

[202] United States v. Fontana, 231 F.2d 807, 809 (3d Cir. 1956).

[203] Alford v. United States, 282 U.S. 687 (1931).

[204] Beasley v. United States, 218 F.2d 366, 368 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 907 (1955).

[205] United States v. Stromberg, 268 F.2d 256, 273 (3d Cir), *cert. denied*, 361 U.S. 863, 868 (1959); United States v. Carminati, 247 F.2d 640, 645 (2d Cir.), *cert. denied*, 355 U.S. 883 (1957).

[206] Hamer v. United States, 259 F.2d 274, 282 n.8 (9th Cir. 1958), *cert. denied*, 359 U.S. 916 (1959).

[207] Ragan v. United States, 157 U.S. 301, 305 (1895).

[208] Fitzpatrick v. United States, 178 U.S. 304, 315 (1900). See Brown v. United States, 356 U.S. 148, 154 (1958), 72 A.L.R.2d 818 (1960).

[209] Carpenter v. United States, 264 F.2d 565, 569 (4th Cir.), *cert. denied*, 360 U.S. 936 (1959).

Where a defendant charged with one offense is asked on cross-examination questions which he alleges would incriminate him as to another distinct offense, but his answers show that he did not commit such other offenses, no reversible error is committed.[210] The Supreme Court has held that where the cross-examination was outside the scope of the direct examination but the defendant answered the charge as to wrongful conduct on a previous voyage and on a different vessel in the negative, there is no prejudicial error.[211] But reversal lies where there is injury to the defendant.[212] In general the federal courts have held that the cross-examination of the defendant must be limited to the matters testified on direct examination.[213] The constitutional privilege against self-incrimination and the statute of 1878 permitting the defendant to testify have been construed as requiring a restrictive cross-examination.[214]

A defendant who testifies in his own behalf can be required to supply the full detail of matters within the scope of the direct examination but stated there only in part. Where a defendant charged with horsestealing and larceny relied in part on the defense that he was a victim of persecution by the police, and stated on direct examination that he had told his mother about different accusations that were being made against him, inquiry on cross-examination whether police officers had charged him with entering people's apartments late at night, was proper as tending to develop fully a material subject to which the defendant had testified partially.[215] The chief defense was alibi. The Government's summation in chief was devoted to the subject of alibi. In its rebuttal the Government commented briefly on the charge of persecution, but the trial judge at once told the jury that "we are trying only this one charge."

Where motive is involved in other testimony there may be cross-examination of the defendant as to motive, even though it relates to matters collateral to the issue.[216] In a case involving cross-examination of the defendant by the government, Judge Pickett stated: "While cross-examination should be limited to matters brought out on direct examination and to subjects which are relevant to the issues, the purpose of cross-examination is to elicit the truth. For this purpose the examination of collateral matters rests largely within the discretion

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[210] Willmering v. United States, 4 F.2d 209, 211 (5th Cir.), *cert. denied*, 267 U.S. 605 (1925).
[211] Sawyer v. United States, 202 U.S. 150, 165, 167 (1906).
[212] Wilson v. United States, 4 F.2d 888 (8th Cir. 1925).
[213] MCCORMICK 49.
[214] Madden v. United States, 20 F.2d 289, 292 (9th Cir.), *cert. denied*, 275 U.S. 554 (1927); Tucker v. United States, 5 F.2d 818, 822 (8th Cir. 1925).
[215] Branch v. United States, 171 F.2d 337 (D.C. Cir. 1948). The court cited 5 WIGMORE § 1368, at 34.
[216] Thompson v. United States, 144 Fed. 14, 20 (1st Cir. 1906).

of the trial court, and its ruling will not be disputed unless it appears that there has been a clear abuse of this discretion and an injustice done."[217]

Where the defendant is tried jointly with two others, evidence inadmissible as to the defendant is not a proper subject of cross-examination of the defendant.[218] However the answer given by the defendant may reveal that there was no prejudicial error.

Repetitious propounding of questions to the defendant despite a ruling on each question that its subject matter is not material may be prejudicial error.[219]

The scope of direct examination poses no limitation as to cross-examination even of the defendant as to credibility of the witness.[220] It is not reversible error to permit the Government to ask the defendant whether he would like to reconsider a specific answer in the light of the testimony of other witnesses.[221]

On cross-examination the Government may ask the defendant whether or not he had been confined in a state prison.[222] The defendant should not be asked as to prior arrests and indictments.[223] Permitting the defendant to be cross-examined as to arrests for vagrancy is not reversible error, where no ground of objection to the question was stated.[224] Where a defendant on direct examination testifies as to the commission of a crime in a foreign country, he may be properly cross-examined as to other convictions in such country.[225]

It is reversible error to allow a defendant, who had testified on direct examination only as to whether he had known a certain defendant, to be cross-examined as to his acquaintance with other defendants.[226] The Government had argued that there may be cross-examination to show bias or prejudice; or to lay a foundation for other

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[217] Marteney v. United States, 218 F.2d 258, 265 (10th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955). See also Rizzo v. United States, 295 F.2d 638, 640 (8th Cir. 1961); Wiley v. United States, 257 F.2d 900, 910 (8th Cir. 1958); Lovely v. United States, 175 F.2d 312, 314 (4th Cir. 1949); United States v. Manton, 107 F.2d 834, 845 (2d Cir. 1938).

[218] Anderson v. United States, 270 F.2d 124, 127 (6th Cir. 1959).

[219] United States v. Dunn, 299 F.2d 548, 556 (6th Cir. 1962).

[220] United States v. Lowe, 234 F.2d 919, 922 (3d Cir.), *cert. denied*, 352 U.S. 838 (1956). The court cited McCORMICK § 22; 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 62 (1954); 6 WIGMORE § 1891. See also Segal v. United States, 246 F.2d 814, 818 (8th Cir.), *cert. denied*, 355 U.S. 894 (1957).

[221] Carpenter v. United States, 264 F.2d 565, 572 (4th Cir.), *cert. denied*, 360 U.S. 936 (1959).

[222] Lang v. United States, 133 Fed. 201, 202 (7th Cir. 1904).

[223] Shea v. United States, 251 Fed. 433, 436 (6th Cir.), *cert. denied*, 248 U.S. 581 (1918).

[224] Tuckerman v. United States, 291 Fed. 958, 963 (8th Cir.), *cert. denied*, 263 U.S. 716 (1923).

[225] United States v. Rossi, 219 F.2d 612, 616 (2d Cir.), *cert. denied*, 349 U.S. 938 (1955).

[226] Enriquez v. United States, 293 F.2d 788, 793 (9th Cir. 1961).

evidence, including prior contradictory statements; or to identify the witness with his community; or to test the truth of the statements made on direct, so as to affect the credibility of a witness, or to show intent. But these were found not applicable to the case. The Government failed to show or to offer to show how such a question came within the scope of a proper cross-examination.

If a defendant declines to answer a proper question on cross-examination he may be punished for contempt of court.[227]

Recently a court has intimated that there is "a possible distinction between the permissible extent of the cross-examination of a defendant and that of other witnesses."[228]

Some federal decisions have emphasized the power of the trial judge to allow deviations in his discretion.[229] Referring to the normal rule of being bound by the scope of the direct examination Judge Swan stated: "Although the strict application of this rule is not always to be commended, this is a matter within the trial court's discretion."[230] In the particular case the trial court had applied the normal rule of narrow scope.

One main function of cross-examination is to shed light on the credibility of the direct testimony.[231] The test of relevancy is not elucidation of the main issues, but usefulness in appraising credibility. Thus the defendant may ask questions as to residence and occupation, so as to place the witness in his setting.[232] The defendant suspected that the witness was detained in custody of federal authorities. Explanatory questions may be asked, and the rule that the examiner must indicate his purpose does not, in general, apply.[233] The criteria of relevancy are vague and the cross-examiner must have some leeway. But time should not be wasted, and the witness should have some protection. Here the trial judge has a sound discretion to control.[234] But the discretion becomes operative only after the party has

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[227] Carpenter v. United States, 264 F.2d 565, 570 (4th Cir.), *cert. denied*, 360 U.S. 936 (1959).

[228] United States v. Owens, 263 F.2d 720, 722 (2d Cir. 1959). The court cited 3 WIGMORE 556-617. See also United States v. Provoo, 215 F.2d 531, 535 (2d Cir. 1954) which held that specific acts of misconduct by the defendant, not resulting in his conviction of felony or a crime of moral turpitude, are not proper subjects of cross-examination to impeach the credibility of the defendant.

[229] See Leathers v. United States, 250 F.2d 159, 165 (9th Cir. 1957), citing MCCORMICK 47.

[230] United States v. Minuse, 142 F.2d 388, 389 (2d Cir. 1944). *Accord*, United States v. Quinn, 124 F.2d 378 (2d Cir. 1941); Harvey v. United States, 23 F.2d 561, 567 (2d Cir. 1928) (several defendants).

[231] MCCORMICK 54.

[232] Alford v. United States, 282 U.S. 687, 691 (1931). There is no reversible error in rejecting the question where counsel fails to answer the judge's question as to materiality. United States v. Easterday, 57 F.2d 165, 166 (2d Cir. 1932).

[233] Alford v. United States, *supra* note 232, at 692.

[234] *Id.* at 694; Blitz v. United States, 153 U.S. 308, 312 (1894); United States v. Stromberg, 268 F.2d 256, 273 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959).

had an opportunity substantially to exercise his right of cross-examination. For example, curtailment of the defendant's cross-examination of alienists for the Government was held improper.[235]

Where cross-examination of the defendant is improper, objection should be made, and the defendant should ask for an instruction to disregard the matters brought out. An appellate court will not reverse where the defendant fails to do this, especially where it is not clear that the jury was influenced thereby and in view of the 1919 statute on the technical errors.[236] An exception must be preserved where the ruling is unfavorable.[237]

Error in permitting improper cross-examination is generally cured by striking out the answer and instructing the jury to disregard it.[238] Sometimes there is no prejudice because of the nature of the answer made.[239] Sometimes the party may have invited the cross-examination by his own examination.[240]

It is not ground for new trial that the court excluded a question by defendant's counsel to a Government witness on cross-examination, whether he had not testified to a specific fact on a former trial, where the defendant was not prejudiced.[241] If the appellant fails to follow the correct appellate procedure to raise the issue as to scope of cross-examination, the appellate court will not consider the issue.[242]

Redirect Examination

The scope of redirect examination, like that of direct, is a matter within the sound discretion of the trial judge.[243] Where the defendant on cross-examination brought out the matter of other offenses, the Government may pursue the subject in redirect.[244] In an antitrust prosecution an inquiry, relevant and otherwise competent, may not be excluded because of its tendency to discredit the witness by showing his relations with undesirable persons.[245]

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[235] Lindsey v. United States, 133 F.2d 368, 369 (D.C. Cir. 1942) (one judge dissenting).

[236] Wild v. United States, 291 Fed. 334, 337 (8th Cir. 1923) (one judge dissenting).

[237] Conner v. United States, 7 F.2d 313 (9th Cir. 1925). But as to the present law dispensing with exceptions, see FED. R. CRIM. P. 51.

[238] Kinser v. United States, 231 Fed. 856, 859 (8th Cir. 1916).

[239] Shea v. United States, 251 Fed. 433, 436 (6th Cir.), *cert. denied,* 248 U.S. 581 (1918).

[240] Slick v. United States, 1 F.2d 897, 898 (7th Cir. 1924).

[241] United States v. Hudson, 26 Fed. Cas. 406, 407 (No. 15412) (D. Me. 1874).

[242] Kinser v. United States, 231 Fed. 856, 860 (8th Cir. 1916).

[243] United States v. McCartney, 264 F.2d 628, 633 (7th Cir.), *cert. denied,* 361 U.S. 845 (1959). On redirect examination see MCCORMICK 60-61; MORGAN, *op. cit. supra* note 220, at 62; UNDERHILL 812-17; 3 WHARTON 307-11; 6 WIGMORE § 1896.

[244] Casmano v. United States, 13 F.2d 451 (6th Cir. 1926).

[245] United States v. Trenton Potteries, 273 U.S. 392, 405, 50 A.L.R. 989 (1927).

On redirect examination, a mere reiteration of assertions made on the direct or cross-examination is not usually allowed.[246] However where the witness on cross-examination was confronted with her written statement contradicting testimony on direct examination, it was held proper to ask her on redirect whether her testimony on direct was true.[247]

After a witness has once been examined in chief, it is in the discretion of the court to permit him to be examined again on new matters not brought out by cross-examination.[248] A defendant is not entitled to take his chances on the answer to a given question on direct examination, and then on redirect examination except thereto, merely because he was not permitted to go further into the subject.[249]

On redirect examination of a witness it is proper to permit questions tending to clarify or modify statements brought out on cross-examination.[250] In a prosecution for using the mails to defraud, where the defense on re-cross-examination had asked the government witness to distinguish between statements he testified to and the theories he had in mind in reference to the matter, there was no error in permitting him to state in redirect examination what the theories were.[251]

Where it was shown on cross-examination of a witness testifying for the Government that he was then undergoing imprisonment for larceny, it is not error on redirect to permit him to explain his conviction and assert his innocence.[252] Where a Government witness stated on cross-examination that he had called the defendant by a name not his own, it was proper to permit him on redirect to explain how he came to do so.[253] The evidence was not offered to show that the defendant was another person. Where on cross-examination of a secret service agent, counsel sought to make it appear that the witness was unfair to the defendant in his testimony, it is proper to let the witness testify on redirect that in making his investigation he was performing his duty.[254]

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[246] McCORMICK 61.
[247] Grayson v. United States, 107 F.2d 367, 369 (8th Cir. 1939).
[248] Kuhn v. United States, 24 F.2d 910, 914 (9th Cir. 1928); Jacobs v. United States, 161 Fed. 694, 695 (1st Cir. 1908); United States v. Wilson, 28 Fed. Cas. 699, 705 (No. 16729) (C.C.E.D. Pa. 1830).
[249] Sylvia v. United States, 264 Fed. 593, 595 (6th Cir. 1920).
[250] Wardell v. United States, 6 F.2d 188, 190 (2d Cir. 1925); Goldberg v. United States, 295 Fed. 447, 450 (1st Cir. 1924).
[251] Tank v. United States, 8 F.2d 697, 699 (7th Cir. 1925).
[252] Wagman v. United States, 269 Fed. 568, 572 (6th Cir. 1920), *cert. denied*, 255 U.S. 572 (1921).
[253] Shipley v. United States, 281 Fed. 134, 135 (5th Cir.), *cert. denied*, 260 U.S. 726 (1922).
[254] Hamil v. United States, 299 Fed. 369, 372 (5th Cir. 1924).

On a prosecution for carnally knowing and abusing a child under twelve years of age, redirect examination of the defendant's child with respect to her dislike for defendant was admitted for the purpose of negativing the impression that the dislike of the child was induced by a conspiracy to reap vengeance on the child.[255] In a narcotics prosecution in which the defendant had elicited on cross-examination of Government agents that no effort was made to preserve fingerprints on the package of narcotics allegedly handled by the defendant, it was permissible on redirect examination of the agent to show a motive for failure to preserve the fingerprints.[256]

It may be reversible error for a question to assume a controverted fact. In one case the court stated: "On redirect examination, appellant's counsel propounded to appellant Sherwin: 'Mr. Sherwin, in regard to this personal correspondence that you had in your possession, what was the purpose of that correspondence that you brought to California in the fall of '33?' There was no evidence that Sherwin brought any correspondence to California in the fall of '33. The objection was properly sustained."[257]

Where the defendants had used portions of extrajudicial statements of a co-defendant in cross-examining him, the court may permit the Government on redirect examination to use portions of such statements to round out and complete quotations on which the defendants had based their questions on cross-examination.[258] The right to show the whole transaction on redirect examination does not make a written statement by one not a witness admissible, as it is hearsay.[259]

Prior consistent statements are ordinarily not admissible on redirect to rehabilitate the credit of a witness.[260]

The principle of curative admissibility, under which evidence that is irrelevant or otherwise incompetent may sometimes be allowed to be answered by the adversary, may be resorted to by the examiner on redirect. Where a witness for the Government who guarded the defendant charged with murder while at a hospital was cross-examined as to a conversation in which the witness allegedly offered to aid the defendant to commit suicide, redirect examination as to such

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[255] Bracey v. United States, 142 F.2d 85, 90 (D.C. Cir. 1944).
[256] United States v. Davis, 262 F.2d 871, 876 (7th Cir. 1959).
[257] Sheridan v. United States, 112 F.2d 503, 504 (9th Cir. 1940).
[258] United States v. Lev, 276 F.2d 605, 608 (2d Cir.), *cert. denied*, 363 U.S. 812 (1960). The court cited 7 WIGMORE § 2113, at 526-27. See also Cook v. United States, 28 F.2d 730, 732 (8th Cir. 1928); Powers v. United States, 294 Fed. 512, 514 (5th Cir. 1923).
[259] Wright v. United States, 288 Fed. 428, 430 (D.C. Cir. 1923) (one judge dissenting).
[260] United States v. Lev, 276 F.2d 605, 608 (2d Cir.), *cert. denied*, 363 U.S. 812 (1960). The court cited United States v. Toner, 173 F.2d 140, 143 (3d Cir. 1949), and 4 WIGMORE § 1125.

conversation was admissible although irrelevant to the main issue.[261] Where a witness in response to a question by the Government testified that he had been attacked and robbed by one of the defendants and another person, although the robbery was irrelevant and the answers nonresponsive, and the trial court instructed the jury to disregard, but counsel for the defendant cross-examined as to the robbery, the Government could re-examine.[262]

Re-Cross-Examination

When the defendant on redirect examination opens up the question whether he had been arrested on other charges, the Government may re-cross-examine him about the matter.[263] A redirect examination may make relevant certain new evidence for which there was no prior need or opportunity, and a re-cross-examination becomes proper for this purpose, and may be a matter of right.[264] Where new evidence is opened up on redirect examination, the opposing party must be given the right to cross-examine as to the new matter. But the privilege of re-cross-examination as to matters not covered on redirect lies within the court's discretion.[265]

Where a witness for the Government was cross-examined for parts of six days, and then questioned on redirect examination for a short time, a refusal to allow re-cross-examination was not prejudicial error where the defendant did not state why re-cross-examinattion was desired nor show on appeal what was lost by the denial.[266] Where the defendant has cross-examined a Government witness for four hours, the trial judge has discretion not to permit recall of the witness for re-cross-examination on the morning of the last day of the trial.[267]

Rebuttal Evidence

The federal statute requiring a list of the witnesses to be furnished two entire days before trial of capital cases does not apply to witnesses called in rebuttal.[268]

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[261] Barrett v. United States, 82 F.2d 528, 532 (7th Cir. 1936).

[262] United States v. Maggio, 126 F.2d 155, 160 (3d Cir. 1942).

[263] Thayer v. United States, 168 F.2d 247, 249 (10th Cir. 1948). On re-cross-examination see MCCORMICK 61; 3 WHARTON 313; 6 WIGMORE § 1897.

[264] Cossack v. United States, 63 F.2d 511, 514 (9th Cir. 1933).

[265] United States v. Stoehr, 196 F.2d 276, 280 (3d Cir.), *cert. denied*, 344 U.S. 826 (1952), 33 A.L.R.2d 836 (1954). The court cited 6 WIGMORE § 1897. See also Hartzell v. United States, 72 F.2d 569, 585 (8th Cir. 1934).

[266] United States v. Dillard, 101 F.2d 829, 836 (2d Cir. 1938), *cert. denied*, 306 U.S. 635 (1939).

[267] United States v. Rosenberg, 157 F. Supp. 654, 660 (E.D. Pa. 1958), *aff'd*, 257 F.2d 760 (3d Cir. 1958).

[268] Goldsby v. United States, 160 U.S. 70, 75 (1895); United States v. Rosenberg, 195 F.2d 583, 599 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952). On rebuttal evidence see UNDERHILL 484; 6 WIGMORE §§ 1869, 1873-75.

After both sides have introduced their evidenece in chief, the party may then offer rebutting testimony only. But the court in its discretion may permit them to offer evidence upon their original case.[269] A defendant seeking reversal on the ground that the trial judge admitted testimony in rebuttal which could have been introduced by the government in its case in chief must show prejudice.[270] It is clear that in some cases evidence which could have been offered in chief may be offered in rebuttal.[271] In some cases permitting rebuttal testimony as to matters raised on cross-examination may be harmless error.[272]

A court has indicated that there are limits on the rule that evidence proper in chief may be admitted on rebuttal. Prosecution was for using the mails to defraud insurance companies by obtaining insurance on automobiles and collecting on faked collisions. The trial judge ruled on direct exiamination that evidence of accidents not charged in the indictment was inadmissible. But in cross-examination of the defendants he allowed the Government to inquire as to other accidents. Prejudicial error occurred because even if evidence of other accidents were admissible, the defendants in taking the stand knew their offer of testimony was a waiver of self-incrimination, but the waiver was restricted to relevant facts and each defendant has a right to believe that evidence as to other accidents was not relevant.[273]

Circuit Justice Clifford thus defined rebutting evidence: "Rebutting evidence is that which is given by a party in a cause to explain, repel, contradict, or disprove the facts given in evidence by the other side."[274] Rebutting evidence of the Government "is evidence in denial of some affirmative case or fact which defendant has attempted to prove."[275] A court has stated: "The function of rebuttal

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[269] Goldsby v. United States, *supra* note 268, at 74; Cornes v. United States, 119 F.2d 127, 130 (9th Cir. 1941); Osborne v. United States, 17 F.2d 246, 250 (9th Cir. 1926), *cert. denied*, 274 U.S. 751 (1927); Marron v. United States, 8 F.2d 251, 257 (9th Cir. 1925); Seeback v. United States, 262 Fed. 885, 887 (8th Cir. 1919); United States v. Heitler, 274 Fed. 401, 406 (E.D. Ill. 1921), *error dismissed*, 260 U.S. 703 (1922); Crawford v. United States, 30 App. D.C. 1, 27 (1907).

[270] United States v. Montgomery, 126 F.2d 151, 153 (3d Cir. 1942). There would be prejudice if the opponent was given no right to controvert. Rodella v. United States, 286 F.2d 306, 309 (9th Cir. 1960).

[271] United States v. Alaimo, 297 F.2d 604, 607 (3d Cir. 1961), citing 6 WIGMORE §§ 1869, 1873; Duke v. United States, 255 F.2d 721, 729 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958); Samish v. United States, 223 F.2d 358, 365 (9th Cir.), *cert. denied*, 350 U.S. 848 (1955).

[272] Robertson v. United States, 263 F.2d 872, 874 (5th Cir. 1959).

[273] Belvin v. United States, 273 F.2d 583, 585 (5th Cir. 1960) (one judge dissenting).

[274] United States v. Holmes, 26 Fed. Cas. 349, 356 (No. 15382) (C.C.D. Maine 1858).

[275] Carver v. United States, 160 U.S. 553, 555 (1896).

is to explain, repel, counteract or disprove adversary's evidence."[276] Another court has stated: "Questions of rebuttal testimony are generally subject to the sound discretion of the trial court."[277] Admission of rebuttal evidence on a collateral matter is ordinarily within the discretion of the trial judge according to a federal civil case.[278]

Dean Wigmore has concluded as to the proponent's case in rebuttal that the usual rule will exclude all evidence which has not been made necessary by the opponent's case in reply.[279] Evidence in rebuttal offered by the Government must bear directly or indirectly upon the subject matter of defense, and should not consist of new matter unconnected with the defense.[280] Where the defendant, an army officer, charged with stealing and selling government property, as a witness in his own behalf admitted receiving the money as charged, but claimed it was in payment for other property rightfully sold, questions asked on cross-examination, and testimony offered in rebuttal, tending to contradict such claims was not incompetent as impeaching the defendant as to collateral matters.[281] In a liquor prosecution where defendant's counsel on cross-examination of a Government witness adduced evidence that the defendant's place was a house of prostitution, and defendant thereafter introduced testimony to disprove such evidence, the government may offer rebuttal testimony to contradict the evidence offered by the defense.[282] Where the defendant introduced evidence that their co-defendant had informed them on the day of arraignment that he had made a written statement implicating them because they did not visit him in jail, the court could admit the written statement to show that it was made shortly after the co-defendant's arrest and before the defendants had a chance to visit in order to show no resentment involved.[283] On a prosecution for making false representations to the Internal Revenue Service where the defendant's wife testified that certain assets came from her, a Government witness could testify in rebuttal that the assets

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[276] United States v. Crowe, 180 F.2d 209, 213 (7th Cir. 1951). See also Shepard v. United States, 64 F.2d 641, 642 (10th Cir. 1933).

[277] Lelles v. United States, 241 F.2d 21, 25 (9th Cir.), *cert. denied*, 353 U.S. 974 (1957). The court cited many cases. See also Luke v. United States, 302 F.2d 452, 454 (8th Cir. 1962); United States v. Lieblich, 246 F.2d 890, 895 (2d Cir.), *cert. denied*, 355 U.S. 896 (1957).

[278] Robinson v. James, 262 F.2d 645, 647 (9th Cir. 1959).

[279] 6 WIGMORE § 1873, at 511. See Goldsby v. United States, 160 U.S. 70, 74 (1895); Leche v. United States, 118 F.2d 246, 247 (5th Cir. 1941); United States v. Hirsch, 74 F.2d 215, 219 (2d Cir. 1934).

[280] United States v. Gardiner, 25 Fed. Cas. 1245, 1253 (No. 15186a) (C.C.D.C. 1853).

[281] Black v. United States, 294 Fed. 828 (5th Cir. 1923), *cert. denied*, 264 U.S. 580 (1924).

[282] Gray v. United States, 9 F.2d 337, 340 (9th Cir. 1925).

[283] United States v. Crowe, 188 F.2d 209, 213 (7th Cir. 1951).

came from bookmaking.[284] Where the defendant testified that he had never engaged in the narcotic business and alleged entrapment, rebuttal testimony that he had been engaged in narcotic business in 1949 and 1950 was admissible to impeach the defendant's testimony and to negative entrapment.[285] Evidence of the Government in rebuttal with respect to the effect of a light from the flash of a revolver was held competent where the defendant put in a calendar apparently for the purpose of showing the time the moon rose that night.[286]

It is reversible error to admit a rebuttal testimony of a Government witness that the defendant had used narcotics two or three times at the home of such witness, after the defendant had testified on cross-examinatiton that he had not obtained drugs for the Government witness on other occasions and that he had no source from which he could buy narcotics.[287] When a witness is cross-examined to destroy his credibility by proof of specific acts of misconduct not the subject of a conviction, the examiner must be content with his answer. A number of cases have held that when the defendant is cross-examined as to other offenses, the government is so far bound by his answer that it cannot rebut such testimony.[288]

That the defendant was taken by surprise by testimony introduced in rebuttal is not a ground for new trial, where it was not objected to, and no attempt was made to contradict it.[289] A defendant cannot raise for the first time in the appellate court the objection that improper testimony was introduced in rebuttal.[290]

Recall of Witness and Reopening Case

In an early case in denying a motion for new trial Circuit Justice Story found no error where, after the evidence was closed and the United States Attorney had finished his argument to the jury, the court, after adjourning over Sunday, permitted the Government to introduce the records of the town to show a conveyance of the locus of the crime, as affecting the jurisdiction of a federal court, together

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[284] United States v. Brott, 264 F.2d 33 (2d Cir.), *cert. denied,* 359 U.S. 985 (1959).

[285] United States v. Johnson, 208 F.2d 404, 406 (2d Cir. 1953), *cert. denied,* 347 U.S. 928 (1954).

[286] Fitzpatrick v. United States, 178 U.S. 304, 316 (1900).

[287] United States v. Masino, 275 F.2d 129, 133 (2d Cir. 1960).

[288] Crocklin v. United States, 252 F.2d 561, 563 (5th Cir. 1958); Coulston v. United States, 51 F.2d 178, 182 (10th Cir. 1931); Smith v. United States, 10 F.2d 787, 788 (9th Cir. 1926); Fisk v. United States, 279 Fed. 12, 17 (6th Cir. 1922); Bullard v. United States, 245 Fed. 837, 840 (4th Cir. 1917).

[289] Bates v. United States, 269 Fed. 563, 566 (6th Cir. 1920).

[290] Wagman v. United States, 269 Fed. 568 (6th Cir.), *cert. denied,* 255 U.S. 572 (1920).

with explanations thereof by the town clerk.[291] The defendant could not ask additional questions as to other matters already covered.

In affirming a conviction the Supreme Court stated by Mr. Justice Shiras: "The fourth assignment complains of the refusal of the trial court to permit a witness who had been examined and cross-examined to be recalled in order to make some changes in the statements made by him on cross-examination. This was plainly a matter within the discretion of the court below."[292] Whether or not one mailing a letter giving information as to where an abortion would be performed had a physician's sign in his office is immaterial, hence it is not error to refuse to permit a witness to be recalled for cross-examination on that question.[293] The trial judge in his discretion may permit the Government to recall a witness for further direct examination.[294]

In a bribery prosecution, refusal of the court to allow a Government witness to be recalled by the defendant to lay a predicate for impeaching him by a statement claimed to have been made contrary to his sworn testimony is a matter for the discretion of the trial judge.[295] It has been held proper to decline to require witnesses for the Government to remain in court, subject to recall after the defendant had fully cross-examined.[296]

Witnesses may sometimes be recalled by the trial judge acting on his own motion.[297] When the trial judge is convinced that a witness is "conveniently forgetful" of matters to which he testified before the grand jury, the trial judge may have the previous testimony read to the witness, not in the presence of the jury, and then place the witness on the stand.

It is in the discretion of the trial court to permit the case to be reopened after the Government had closed its testimony, in order to permit the Government to prove the existence of the lottery, concerning which the papers in question were made.[298] The defendant had moved for an acquittal on the ground that no lottery had been shown. In a prosecution for violation of the National Prohibition Act

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[291] United States v. Cornell, 25 Fed. Cas. 650, 656 (No. 14868) (C.C.D.R.I. 1820). See also United States v. Wilson, 28 Fed. Cas. 699, 705 (No. 16730) (C.C.E.D. Pa. 1830). See on recall of witnesses and reopening the case, UNDERHILL 817-21; 3 WHARTON 311-13; 6 WIGMORE §§ 1876-81, 1898-1900.

[292] Faust v. United States, 163 U.S. 452, 455 (1896).

[293] Kemp v. United States, 41 App. D.C. 539, 547 (D.C. Cir.), 51 L.R.A.N.S. 825, 833 (1914).

[294] Kuhn v. United States, 24 F.2d 910, 914 (9th Cir.), *cert. denied*, 278 U.S. 605 (1928).

[295] Ybor v. United States, 31 F.2d 42 (5th Cir. 1929). The court cited 40 CYC. 2571.

[296] Levinson v. United States, 5 F.2d 567, 569 (6th Cir.), *cert. denied*, 269 U.S. 564 (1925).

[297] Jelke v. United States, 255 Fed. 264, 288 (7th Cir. 1918).

[298] United States v. Noelke, 1 Fed. 426, 437 (C.C.S.D.N.Y. 1880).

after the defendant moved for a directed verdict because the liquor in question had not been introduced in evidence, the Government was permitted to reopen the case for additional testimony.[299] After the Government has presented its case in a narcotics prosecution and the defendant then moves for a directed verdict because of entrapment, the Government may reopen its case to introduce evidence showing no entrapment.[300]

Where the government had rested its case and a motion for a directed verdict had been denied, the trial judge could permit the Government to offer testimony of another witness who had only then become available.[301] Where defense counsel who had received a prior statement made by a Government witness after the witness left the stand but before the Government rested its case on the following day, but defense counsel did not move to recall the witness for further cross-examination before the Government rested, the trial judge could deny the defendant's motion after the Government rested for leave to put in the prior statement or to call the witness for further cross-examination about such statement.[302]

The refusal of the trial judge, after the evidence on both sides has been closed, to permit the defendant to examine another witness, is a matter of discretion.[303] The discretion of the trial court in permitting the United States Attorney to recall a defendant for further cross-examination after defendant had closed the case is not reversible.[304] In a murder prosecution it was held that the trial judge did not abuse his discretion in admitting after the defendant had rested the testimony of a medical witness that the wound was inflicted by a steel-jacketed bullet, where a witness for the defendant had expressed his opinion that such wound was made by a soft bullet, even though such testimony was not strictly rebuttal.[305] The trial judge may permit a perjuring witness, even after the defendant has rested, to resume the witness stand, correct his previous false testimony, and

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[299] McGrew v. United States, 281 Fed. 809, 811 (9th Cir. 1922). See also United States v. Zeid, 281 F.2d 825, 829 (3d Cir. 1960); Gormley v. United States, 167 F.2d 454, 459 (4th Cir. 1948); Horowitz v. United States, 12 F.2d 590 (5th Cir. 1926).

[300] United States v. Siegel, 16 F.2d 134, 135 (D. Minn. 1926).

[301] United States v. Maggio, 126 F.2d 155, 158 (3d Cir. 1942).

[302] United States v. Miller, 248 F.2d 163, 165 (2d Cir. 1957).

[303] Wolcher v. United States, 218 F.2d 505, 509 (9th Cir. 1954), *cert. denied*, 350 U.S. 822 (1955); Alexis v. United States, 129 Fed. 60, 63 (5th Cir. 1904); Hart v. United States, 84 Fed. 799, 804 (3d Cir. 1898).

[304] Kalen v. United States, 196 Fed. 888, 889 (9th Cir. 1912). See also United States v. Klass, 166 F.2d 373, 376 (3d Cir. 1948); Russell v. United States, 119 F.2d 686, 688 (8th Cir. 1941).

[305] Conner v. United States, 7 F.2d 313 (9th Cir. 1925).

testify as to what he then asserts to be true.[306] The trial court may permit the Government to recall the defendant for further examination after the defense has rested.[307] Permitting a co-defendant to reopen his case and take the witness stand after both sides had answered that all the evidence is in is discretionary even though such evidence was harmful to the defendant.[308] A case may be reopened before argument.[309]

The trial judge in his discretion may deny the defendant's application after conclusion of the Government's summing up, to explain an exhibit or offer evidence as to it.[310] In a prosecution for possession of numbers slips, the trial judge did not abuse his discretion in permitting the introduction in evidence of the numbers slips after the close of the Government's case and after the argument had begun, and after having once rejected them.[311]

The trial judge may recall the jury even after it has retired to consider its verdict for the introduction of further evidence.[312] This is true where it is simply to complete evidence already offered. But where the jury reported its inability to agree on a verdict, it was reversible error for the trial court to permit the playing of a mechanical record of the testimony of one of the witnesses, who was strongly castigated by the trial court.[313] The Supreme Court has held that it is not reversible error to refuse to admit in evidence an unsworn unverified long distance call slip from the telephone company records four hours after the case has been submitted to the jury, even if its exclusion would have been prejudicial error if the offer had been timely and properly verified.[314]

Where a defendant offers no excuse for the untimeliness of his offer of testimony, there is no reversible error in denying a reopening of the case.[315] A defendant cannot complain of a reopening allowed

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[306] Hamer v. United States, 186 F.2d 875, 878 (10th Cir. 1951).

[307] Johnson v. United States, 207 F.2d 314, 321 (5th Cir. 1953), *cert. denied*, 347 U.S. 938 (1954).

[308] Maupin v. United States, 225 F.2d 680, 682 (10th Cir. 1955).

[309] Reining v. United States, 167 F.2d 362, 364 (5th Cir. 1948).

[310] Safford v. United States, 252 Fed. 471, 474 (2d Cir. 1918). See also United States v. Sheba Bracelets, Inc., 248 F.2d 134, 144 (2d Cir.), *cert. denied*, 355 U.S. 904 (1957); United States v. Cornell, 25 Fed. Cas. 650, 656 (No. 14868) (C.C.D.R.I. 1820).

[311] Smith v. United States, 105 F.2d 778, 790 (D.C. Cir. 1939). See Powell v. United States, 307 F.2d 396 (D.C. Cir. 1962); Eyer v. Brady, 128 F.2d 1012, 1014 (4th Cir. 1942).

[312] Jianole v. United States, 299 Fed. 496, 500 (8th Cir. 1924). See also Blakeslee v. United States, 32 F.2d 15, 18 (1st Cir. 1929).

[313] Henry v. United States, 204 F.2d 817, 820 (6th Cir. 1953).

[314] United States v. Bayer, 331 U.S. 532, 537 (1947). See also Colt v. United States, 160 F.2d 650 (5th Cir. 1947).

[315] Eason v. United States, 281 F.2d 818, 821 (9th Cir. 1960). See also United States v. Bayer, *supra* note 314, at 538; Means v. United States, 55 F.2d 745, 746 (D.C. Cir. 1932).

the Government when he is given additional time to argue the new matter to the jury.[316]

Where a case is tried without a jury and the court has not yet made a finding of not guilty, the trial court may in his discretion reopen the case and permit submission of additional evidence even after a delay of five days.[317]

[316] Morgan v. United States, 29 F.2d 911, 913 (D.C. Cir. 1961).
[317] Haugen v. United States, 153 F.2d 850, 851 (9th Cir. 1946).