

214 U. S.

Appendix.

APPENDIX TO UNITED STATES *v.* SHIPP.

On May 28, 1906, the Attorney General moved for leave to file an information for contempt and on the same day the following order was made.

UNITED STATES OF AMERICA,	}	October Term, 1905.
COMPLAINANT,		
<i>v.</i>		
JOHN F. SHIPP <i>et al.</i>		

On motion of *Mr. Attorney General Moody*, of counsel for complainants, leave is hereby granted to file an information for contempt herein.

The information referred to on the motion of the Attorney General and in the order is as follows:

In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA,	}	October Term, 1905. No. 26. ¹
complainants,		
<i>v.</i>		
JOHN F. SHIPP, FRANK JONES, Mat-	}	Original
thew Galloway, C. A. Baker, T.		
B. Taylor, Fred Frauley, George		
Brown, Jeremiah Gibson, Marion		
Perkins, Joseph Clark, "Nick"		
Nolan, "Sheenie" Warner, Luther		
Williams, Paul Pool, William		
Marquette, William Beeler, Claude		
Powell, Charles J. Powell, "Bart"		
Justice, John Jones, A. J. Cart-		
wright, R. F. Cartwright, Henry		
Padgett, William May, Frank		
Ward, John Varnell, and Alfred		
Hammond, defendants.		

Information.

To the honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come the United States of America by William H. Moody, their Attorney-General, and in their behalf inform the court as follows:

¹ October Term, 1906, No. 12, original; October Term, 1907, No. 5, original; October Term, 1908, No. 5, original.

1. That on the 11th day of February, 1906, one Ed Johnson, a citizen of the United States and a resident and citizen of the State of Tennessee, and a colored person of African descent, was convicted of the crime of rape in the criminal court of Hamilton County, held at the city of Chattanooga, in the State of Tennessee, and said court thereupon sentenced the said Ed Johnson to suffer the penalty of death.

2. That thereafter, to wit, on the 3d day of March, 1906, and before the date set for the execution of the said Ed Johnson, a petition for a writ of habeas corpus, signed by the said Ed Johnson, as petitioner, was duly presented to the United States Circuit Court for the Northern Division of the Eastern District of Tennessee, in which it was alleged, among other things, that upon the trial of the said Ed Johnson in the criminal court of Hamilton County in the State of Tennessee for the crime of rape, for which he had been convicted, said petitioner had been denied a trial by a fair and impartial jury, and had been denied the aid of counsel in violation of the fifth and sixth amendments to the Federal Constitution, and that said petitioner was also denied rights secured to him under the fourteenth amendment to the Federal Constitution; that thereafter, to wit, on the 10th day of March, 1906, the application of the said Ed Johnson for a writ of habeas corpus came on for hearing before the said United States Court for the Eastern District of Tennessee upon the petition, return, answer, and replication, and upon the testimony of witnesses given orally in open court, and after argument of counsel, the said Circuit Court ordered that said petition be dismissed, and that the writ of habeas corpus prayed for in said petition be denied. It was further ordered by the said Circuit Court of the United States that said petitioner be remanded to the custody of the sheriff of said Hamilton County in the said State of Tennessee, to be detained by said sheriff in his custody for the period of ten days in which to enable said petitioner to prosecute an appeal from said order, should he be so advised and should an appeal lie from said order, and in default of the prosecution of an appeal within said time to be then further proceeded with by the court of the State of Tennessee under its sentence; that thereafter, to wit, on the 17th day of March, 1906, an application was duly presented by the said Ed Johnson to the Hon. John M. Harlan, an associate justice of the Supreme Court of the United States, assigned to the Sixth Circuit, asking that an appeal be allowed to the Supreme Court of the United States from the judgment rendered in the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee on March 10, 1906, denying his, the said Ed Johnson's, application for a writ of habeas corpus, as aforesaid, which said appeal was on the same

214 U. S.

Appendix.

day duly allowed by Mr. Justice Harlan; that thereafter, to wit, on the 19th day of March, 1906, a motion was duly made in the Supreme Court of the United States by Mr. E. M. Hewlett, counsel for and representing the said Ed Johnson, for an order allowing an appeal to the Supreme Court of the United States from the judgment of the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, rendered on the 10th day of March, 1906, denying his, the said Ed Johnson's, application for a writ of habeas corpus, which motion was thereupon granted by the Supreme Court of the United States and an order duly made and entered by the Chief Justice in the words and figures following, to wit:

"Ed Johnson, Appellant, *v.* The State of Tennessee.

"On motion of Mr. E. M. Hewlett, of counsel for the appellant, it is ordered by the court that an appeal from the Circuit Court of the United States for the Eastern District of Tennessee be, and the same is hereby, allowed, and that all proceedings against the appellant be stayed, and the custody of the said appellant be retained pending this appeal.

"Per Mr. Chief Justice Fuller."

All of which more fully appears from the record in the case entitled "Ed Johnson, Appellant, *v.* The State of Tennessee," on file in the office of the clerk of this court.

3. This honorable court is further informed of the following facts, which are alleged and stated by the Attorney-General solely upon information and belief:

That on the same day, to wit, the said 19th day of March, 1906, and after the making and entering of said order, as aforesaid, the clerk of the Supreme Court of the United States duly notified by telegraph John F. Shipp, the sheriff of said Hamilton County, in the State of Tennessee, of the making and entering said order, as aforesaid, and of the contents thereof, to wit, that all proceedings against the said Ed Johnson were ordered stayed by the said Supreme Court and that the custody of the said Ed Johnson by the said John F. Shipp, as sheriff of said Hamilton County, should be retained by him, the said John F. Shipp, pending the determination of said appeal in the Supreme Court; that said telegram informing the said John F. Shipp of the action of this honorable court was received by said sheriff before 6 o'clock on the evening of the said 19th day of March, 1906; that in addition to the notification by telegraph of the action of this court in allowing said appeal and staying proceedings against the said Ed Johnson, as aforesaid, there was published and circulated in the said city of Chattanooga

in the evening papers on the said 19th day of March, 1906, a full account of the action of the Supreme Court of the United States in allowing an appeal and granting a stay of further proceedings on the part of the state courts against the said Ed Johnson until the determination of said appeal before the Supreme Court of the United States.

4. That during all the times herein mentioned the above-named defendant, John F. Shipp, was the duly elected, qualified, and acting sheriff of Hamilton County, in the State of Tennessee, and as such sheriff had and exercised full charge and control of the county jail, located in the city of Chattanooga, in said county, and was the legal custodian under the laws of Tennessee of all persons duly committed in said county under the laws of said State to confinement and imprisonment within said jail; that the above-named defendants, Frank Jones, Matthew Galloway, C. A. Baker, T. B. Taylor, Fred Frauley, George Brown, Jeremiah Gibson, Marion Perkins, and Joseph Clark, and each of them, were, during all the times herein mentioned, the duly appointed, qualified, and acting deputy sheriffs of said county and State; that said sheriff and said deputy sheriffs and each of them before the hour of 6 o'clock on the evening of the said 19th day of March, 1906, were fully advised and informed of the action taken by the Supreme Court of the United States with respect to the appeal of the said Ed Johnson, as hereinbefore set forth; that the said Ed Johnson was then and there a prisoner confined and restrained of his liberty in the said county jail and in the lawful custody and control of said sheriff and said deputy sheriffs under a commitment duly issued out of the criminal court of said Hamilton County, and under and pursuant to the orders of the said United States Circuit Court for the Northern Division of the Eastern District of Tennessee and the Supreme Court of the United States made and entered as aforesaid; that said sheriff and said deputy sheriffs on the said 19th day of March, 1906, after having been advised of the action of the Supreme Court of the United States, as aforesaid, were informed, and had every reason to believe, from current reports and rumors conveyed to them and each of them, that an attempt would be made on the evening of said day or early in the morning of the following day, by a mob composed of a large number of armed men, to force an entrance into the said county jail for the purpose of taking therefrom by violence and unlawful means the said Ed Johnson and putting him to death; that notwithstanding said rumors and said reports which were conveyed to said sheriff and his said deputies, as aforesaid, the said sheriff withdrew from said jail early in the evening of said day the usual and customary guard and left in charge thereof only the night jailor, to wit, Deputy Sheriff

214 U. S.

Appendix.

Jeremiah Gibson, and committed other acts and did other things, evincing a purpose and disposition on the part of said sheriff to render it less difficult and less dangerous for said mob to prosecute and carry into effect its unlawful design and purpose, to wit, the lynching of the said Ed Johnson, designed and planned as aforesaid.

5. That thereafter, to wit, at about the hour of 9 o'clock on the evening of the said 19th day of March, 1906, at the city of Chattanooga in the said county and State, the above-named defendants, John F. Shipp, Frank Jones, Matthew Galloway, C. A. Baker, T. B. Taylor, Fred Frauley, George Brown, Jeremiah Gibson, Marion Perkins, Joseph Clark, "Nick" Nolan (whose true first name is to complainants unknown), "Sheenie" Warner (whose true first name is to complainants unknown), Luther Williams, Paul Pool, William Marquette, William Beeler, Claude Powell, Charles J. Powell, "Bart" Justice (whose true first name is to complainants unknown), John Jones, A. J. Cartwright, R. F. Cartwright, Henry Padgett, William May, Frank Ward, John Varnell, and Alfred Hammond, and each of them, and a large number of other persons whose names are to complainants unknown, did then and there willfully, unlawfully, and wrongfully combine, conspire, confederate, and agree to break and enter the said county jail of Hamilton County for the purpose of taking therefrom the person of the said Ed Johnson to lynch and murder him, the said Ed Johnson, with the intent then and there had and entertained by the said defendants, and each of them, to show their contempt and disregard for the order of this honorable court made, entered, issued, and published, as aforesaid, and for the purpose of preventing this honorable court from hearing the appeal of the said Ed Johnson, allowed by this court, as aforesaid, and for the purpose of preventing the said Ed Johnson from exercising and enjoying a right secured to him by the Constitution and laws of the United States; that in the prosecution and furtherance of said unlawful conspiracy, made and entered into as aforesaid, and in order to show their contempt and disregard for the said order of this honorable court, and in order to prevent this court from hearing said appeal, said defendants and each of them did then and there do the things and commit the acts more particularly described, as follows, to wit:

That between the hours of 9 and 12 o'clock on the evening of the said 19th day of March, 1906, at the city of Chattanooga, in the county and State aforesaid, a large number of persons, including the above-named defendants, with the exception of the said John F. Shipp, the sheriff of said county, and the said Jeremiah Gibson, deputy sheriff of said county, assembled in the vicinity of said county jail, and thereupon

said mob unlawfully and wrongfully entered said jail and with force and arms broke open the cell in which the said Ed Johnson was then and there confined as a prisoner, and with force and violence and against the will of him, the said Ed Johnson, took him, the said Ed Johnson, from said jail to a point a short distance therefrom and hanged him, the said Ed Johnson, by the neck until he was dead; that at the time said mob entered said jail, as aforesaid, the only person in charge thereof was the said deputy sheriff, Jeremiah Gibson; that while the mob was in possession of said jail the said sheriff, John F. Shipp, arrived at said jail, but made no effort to prevent said mob or any of the members thereof from taking the said Ed Johnson from said jail; that the said John F. Shipp and the said Jeremiah Gibson were in truth and in fact in sympathy with said mob and, while pretending to perform their duty as officials of said county and State in affording protection to the said Ed Johnson, who was then and there in their lawful custody and control, the said John F. Shipp and the said Jeremiah Gibson and each of them did in truth and in fact aid and abet said mob and the members thereof in the prosecution and performance of their unlawful act in lynching and murdering the said Ed Johnson, as aforesaid; that during all this time the above-named defendants and each of them, and the said John F. Shipp and the said Jeremiah Gibson and each of them then and there well knew that the Supreme Court of the United States had made, entered, issued and published the order in the manner hereinbefore set forth; that all of said acts were then and there committed by said defendants and each of them, and the other members of said mob whose names are to complainants unknown, with the intent then and there had and entertained by them and by each of them to show their contempt and utter disregard for the order of this honorable court made and entered as aforesaid, and in order to prevent this honorable court from hearing the appeal of the said Ed Johnson, which appeal had been perfected and allowed, as aforesaid.

6. Wherefore, the United States of America, the complainants herein, through their Attorney-General, respectfully request this honorable court that in consideration of the acts committed by the above-named defendants and each of them, as hereinbefore set forth, it will issue and direct the marshal of this court to serve upon said defendants and each of them a rule to show cause, if any there be, on a day certain why said defendants and each of them should not be punished as and for a contempt of this honorable court.

WILLIAM H. MOODY,

The Attorney-General of the United States.

WASHINGTON, D. C., May 25th, 1906.

214 U. S.

Appendix.

On May 28, 1906, rule to show cause was entered as follows:

Supreme Court of the United States.

THE UNITED STATES OF AMERICA,	}	October Term, 1905. No. 26. Original.
COMPLAINANTS,		
v.		
JOHN F. SHIPP AND OTHERS.		

On consideration of the information filed herein,

It is now here ordered by the court that cause be shown by the above-named defendants and each of them before this court, at the city of Washington, on Monday, October 15th, 1906, at twelve o'clock noon of that day, or as soon thereafter as counsel can be heard, why they and each of them should not be punished as and for a contempt of this court.

And October 15, 1906, the marshal of the Supreme Court of the United States made the following return:

Came to hand at my office the 4th day of June, A. D. 1906, and for the purpose of serving the same, I, J. M. Wright, marshal of the Supreme Court of the United States, do hereby authorize and deputize William A. Dunlap, United States marshal for the Eastern District of Tennessee, or any of his deputies, to serve the within rule to show cause on the parties named therein, and make due return thereof.

In testimony whereof I hereunto subscribe my name, at the city of Washington, this 4th day of June, A. D. 1906.

J. M. WRIGHT,

Marshal of the Supreme Court of the United States.

Came to hand at my office in Knoxville, Tenn., this the 7th day of June, 1906, and executed on the following named defendants, at time and place set opposite their names, by summoning them to appear before the United States Supreme Court in the city of Washington, D. C., on Monday, the 15th day of October, 1906, at 12 o'clock noon, and by leaving a copy of this writ with each of the said named defendants, to wit:

Joseph F. Shipp (sheriff), Chattanooga, June 8th, 1906. Dunlap, marshal.

Frank Jones (deputy sheriff), Chattanooga, June 8th, 1906. Dunlap, marshal.

Appendix.

214 U. S.

Mathew Gallaway (deputy sheriff), Chattanooga, June 9th, 1906.
Welch, D. M.

C. A. Baker (deputy sheriff), Chattanooga, June 9th, 1906.

T. B. Taylor (dept. sheriff), Chattanooga, June 8th. Dunlap,
U. S. M., at Chattanooga.

Fred Frauley (dept. sheriff), June 8th. Dunlap, U. S. M., at Chattanooga.

Geo. Brown (dept. sheriff), June 9th. Gresham, D. M., at Chattanooga.

Jeremiah Gibson (dept. sheriff), June 9th. Gresham, D. M., at Chattanooga.

Marion Perkins (dept. sheriff), June 8th. Dunlap, U. S. M., at Chattanooga.

Jas. Clark (dept. sheriff), June 9th. Gresham, D. M., at Chattanooga.

Nick Nolan, June 8th. Welch, D. M., at Chattanooga.

"Cheeney" Warner, June 8th. Dunlap, U. S. M., at Chattanooga.

Luther Williams, June 8th. Dunlap, U. S. M., at Chattanooga.

Wm. Marquet, June 8th. Dunlap, U. S. M., at Chattanooga.

Wm. Beeler, June 8th. Dunlap, U. S. M., at Chattanooga.

Claud Powell, June 9th. Welch, D. M., at Chattanooga.

Chas. H. Powell, June 9th. Welch, D. M., at Chattanooga.

Bart Justice, June 8th. Dunlap U. S. M., at Chattanooga.

Johnnie Jones, June 9th. Welch, D. M., at Chattanooga.

A. J. Cartwright, June 8th. Welch, D. M., at Chattanooga.

R. T. Cartwright, June 8th. Welch, D. M., at Chattanooga.

Henry Padgett, June 8th. Welch, D. M., at Chattanooga.

Wm. May, June 9th. Welch, D. M., at Chattanooga.

Frank Ward, June 8th. Welch, D. M., at Chattanooga.

John Varnell, June 8th. Dunlap, U. S. M., at Chattanooga.

Alford Handman, June 9th. Gresham, D. M., at Chattanooga.

The defendant Paul Pool not to be found in my district; said to be
in Mobile, Ala.

This July 26th, 1906.

(Signed) W. A. DUNLAP,
U. S. Marshal, E. Dist. of Tennessee.

[Similar authorizations for service of defendant Paul Pool by the
United States marshals for the Southern District of Alabama, Western
District of Texas, Southern District of California and returns by them
of "not found."]

Came to my hand, as aforesaid and returned executed by service on

214 U. S.

Appendix.

all defendants except Paul Pool, who, after diligent search, as shown by certificates herewith could not be found.

Witness my hand and seal this 15th day of October, A. D. 1906.

J. M. WRIGHT,

Marshal Supreme Court of the United States.

On October 15, 1906, leave was granted on application of counsel to file answers of the defendants.

Certain of the answers are as follows:

Joint answer of Joseph F. Shipp, sheriff, and the deputy sheriffs, Frank Jones,¹ Matt. L. Galloway,¹ C. A. Baker,¹ Thomas B. Taylor,¹ George W. Brown,¹ Jeremiah Gibson, Fred Frauley,¹ Marion Perkins¹ and Joseph C. Clark.¹

Judson Harmon,
Clift and Cooke,
Robert Pritchard, } Attorneys.

To the honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come Joseph F. Shipp, Frank Jones, Matthew Galloway, C. A. Baker, T. D. Taylor, Fred Frauley, George Brown, Jeremiah Gibson, Marion Perkins, and Joseph Clark, defendants, and, admitting their official characters as alleged in the information herein, but protesting that they have each and all never nor in anywise been lacking in obedience to the authority and respect for the dignity of this honorable court, for cause why the prayer of said information should not be granted as against them respectfully show:

I.

They first respectfully submit whether they or any of them ought to be interrupted in the discharge of their duties under the laws of Tennessee and put to trouble and expense by being required to answer before this honorable court the charges made against them in the information, because they are advised and believe, and so aver, that said charges, even if true, would be, and ought to be treated as, crimes under the laws of Tennessee and contempt of the judicial authority thereof only, and not offenses against the authority or dignity of this

¹ The rule to show cause was subsequently discharged as to these defendants.

honorable court, by reason of the following acts which are each and all established by the record herein:

The petition filed in the Circuit Court of the United States by Ed. Johnson for a writ of habeas corpus, mentioned in the information and, with the complete record of the proceedings thereon, made part of said information by reference, did not in any way or in any respect whatever allege a lack of jurisdiction in the court of the State of Tennessee in which said Johnson was convicted, either to try him on said charge or to adjudge the sentence imposed on him under which he was in custody of said Shipp, as sheriff, as stated in the information.

It is not averred in said petition that the alleged denials of rights secured to said Johnson by the Constitution of the United States, or any one of such denials, were made by virtue or under color of the constitution, laws, or rules of judicial practice of the State of Tennessee. On the contrary it appears from said petition that each and every of such alleged denials of right was and is charged as being due to the individual action of officials and other citizens of said State in violation of their duties under the constitution and laws thereof.

And these defendants are advised and believe, and so aver, that according to the repeated and uniform decisions of this honorable court the Circuit Court of the United States, in which said petition for habeas corpus was filed, had no right or authority whatever to inquire into any of the matters alleged therein, but that the same were cognizable only by the Supreme Court of Tennessee, which, as shown by the record herein, had full power and authority under the constitution and laws of said State, properly to deal with and dispose of each and every complaint made in said petition with reference to the indictment, trial, and sentence of said Johnson. So that said petition for a writ of habeas corpus was, on the face thereof, merely an attempt on the part of said Johnson to obtain from the Circuit Court of the United States instead of from the Supreme Court of Tennessee a review of said proceedings for alleged errors therein.

Said record, which contains all the evidence offered by either party in said Circuit Court of the United States, shows that each and all the allegations of said petition for a writ of habeas corpus concerning the denial of rights to said Johnson by said criminal court of Tennessee, were both false and unfounded.

There was no proof whatever that he was denied the aid of counsel; on the contrary it appears that, as he was unable to employ counsel, said criminal court appointed three lawyers of high standing to conduct his defense, and that they did so, as he himself admits, with ability, fidelity, and zeal.

214 U. S.

Appendix.

There was no proof whatever that said Johnson ever made or had any ground for objection to the selection or character of the juries which indicted and tried him, or of either of them. On the contrary it appears that his counsel forbore to make such objection on learning the facts.

There was no proof whatever that his attorneys were denied the right to apply for a change of venue or a continuance. On the contrary, it appears that they forbore to make application therefor, and that the time for said trial, as originally fixed by the court, was postponed by the consent of counsel for both parties, and that the trial was had at the time so agreed on.

There was no evidence whatever that his trial was not public, or that any of his relatives or friends were prevented from attending the same. On the contrary the proof shows that precautions were merely taken, at the request of his own counsel, to prevent the attendance of disorderly persons only; that such precautions were withdrawn when the first day of the trial showed them to be needless, and that during each and all of the three days the trial lasted there was a large attendance of the public.

There was no proof whatever that he was compelled to give evidence against himself. On the contrary, it appears that he rose, without any objection by himself or his counsel, when requested by a juror, in order to afford the juror he was charged with assaulting a better view; and that the exclamation of a juror, which occurred after the testimony had all been given, was treated by all, including the prisoner and his counsel, as the effect of the proof on an emotional nature, not as evidence that the juror was not impartial when accepted and sworn, and consequently nothing was said or done by the prisoner's counsel with reference to such occurrence, although they had full opportunity.

There was no proof whatever that when new counsel took up his case after his conviction they were denied the right to file a motion for a new trial, or to present a bill of exceptions, or to appeal to the Supreme Court of Tennessee. On the contrary, it appears that no motion for a new trial was presented until after the time allowed for such motions by the reasonable and long-established rules and practice of the court had expired, although said counsel had ample time to prepare and file the same before such expiration; and that said counsel took no steps whatever towards preparing or presenting a bill of exceptions or taking an appeal, although the court remained in session for an entire week after the conviction of said Johnson and for five consecutive days after said counsel first appeared.

By reason of the foregoing facts appearing undisputed on the

record herein, these defendants are advised and believe, and so aver, that said petition for a writ of habeas corpus was not an appeal in good faith to the power and authority vested by the Constitution and laws of the United States in said Circuit Court; that said Circuit Court of the United States had no right or authority to entertain said petition and thereby interfere with the proceedings had and taken by the judicial authority of the State of Tennessee; and that consequently the order of said Circuit Court dismissing said petition was not appealable to this honorable court under the decisions and rules of practice thereof and the Constitution and laws of the United States.

They, therefore, humbly pray the consideration and judgment of the court in the premises and that said information be dismissed as against them.

II.

If and in case the court shall find and decide the foregoing cause shown to be insufficient, then these defendants, as further cause why they and each of them should not be punished as for contempt of this honorable court, as prayed in said information, severally and collectively plead and say, that the charges made against them and each of them respectively in said information are not true, and to each and every of said charges, that they are not guilty.

Wherefore these defendants each and all most humbly pray that the rule herein issued against them be discharged.

The separate answer of defendant Nick Nolan by *Lewis Shepherd, Fleming & Shepherd*, attorneys, contained averments as follows:

He denies that he had any connection with or had anything to do with the mob which attacked the jail of Hamilton County, Tennessee, on the evening and night of the 19th day of March, 1906, when Ed. Johnson was taken from jail and lynched. This defendant had no knowledge or information whatever by rumor or otherwise that a mob was to be formed or was forming to lynch and murder said Ed. Johnson.

He did not at any time combine, conspire, confederate, or agree with the persons named in said information or any or either of them, or with any other person or persons to break and enter the jail of Hamilton County for the purpose of taking therefrom the person of Ed. Johnson to lynch and murder him. He did not participate with

214 U. S.

Appendix.

the mob that broke the jail or with the mob which lynched and murdered said Ed. Johnson. He did not know beforehand that a mob was to be formed to lynch said Ed. Johnson, and he did not in anyway aid, abet, counsel, or advise the lynching of said Ed. Johnson, and did not know anything about the formation of the mob or its work until after the affair was over, and did not approve the action of the mob in lynching and murdering the said Ed. Johnson.

Defendant was informed after Johnson was hanged that the mob attacked the jail at or about the hour of nine o'clock p. m., March 19, 1906.

At that time the defendant was at his place of business on Whiteside street, in South Chattanooga, about two miles from the Hamilton County jail. About 9.30 o'clock p. m. of said date he left his place of business and went to the saloon of John Nolan, in South Chattanooga, on Whiteside street. He remained at this saloon until 10 o'clock p. m., at which time the saloon was closed in pursuance of an ordinance of the city of Chattanooga requiring all saloons to close at 10 o'clock p. m. After the said saloon closed, defendant remained there or thereabouts with the proprietor, John Nolan, discussing a question of politics until about 10.30 o'clock p. m., at which time he went to his home on Aiken street, in South Chattanooga, where he remained until next morning.

This defendant denies that he ever at any time did any act to show contempt and disregard for the order of this honorable court or to prevent this court from hearing the appeal of the said Ed Johnson. He has always entertained the very highest respect for this honorable court.

The answers of the defendants Henry Padgett and William Mayse, against whom the rule was made absolute, and of defendants Claude Powell, Charles J. Powell, Bart Justice, John Jones, John Varnell and Alfred Handman, as to whom the rule was discharged, by the same attorneys, were similar in form *mutatis mutandi* as to the allegations as to the whereabouts of each defendant respectively.

The answer of the defendant Paul Werner, *W. H. Cummings* and *G. W. Chamlee*, attorneys, as to whom the rule was subsequently discharged, denied participation and alleged absence from the place where Ed Johnson was lynched.

The answer of defendant Luther Williams, *W. H. Cummings* and *G. W. Chamlee*, attorneys.

1st. That he is advised that the Supreme Court of the United States of America had no jurisdiction of the cause of *Ed Johnson, Complainant, v. The State of Tennessee*, and that all proceedings had by the United States Supreme Court in the matter of *Ed Johnson, Complainant, v. The State of Tennessee* were null and void and illegal.

2d. That the original petition for a writ of habeas corpus that was sued out by the said Ed Johnson, complainant, against the State of Tennessee was, as this respondent is advised, addressed to the United States District Court at Chattanooga, Tennessee, and that the original proceedings were presented and tried before the Hon. C. D. Clark, judge of the United States court, not at Chattanooga, Tennessee, but at Knoxville, Tennessee, at chambers, and he is advised that from the dismissal of said petition for the writ of habeas corpus held at chambers that there is no appeal and that the appeal that the said Ed Johnson undertook to perfect was, in law, ineffective and that this honorable court did not acquire jurisdiction of the case, because a transcript was presented and filed in this honorable court.

3d. He is advised that Ed Johnson was not a United States prisoner, but that he was a state prisoner, and under the charge of state officials, and that in order to make him a United States prisoner a different proceeding than that which was had in this cause would be required to make said proceedings valid under the law.

4th. That if Ed Johnson was, as a matter of law, a United States prisoner at the time that he was lynched, that no notice of that fact had ever been conveyed to this respondent by any person whomsoever.

5th. That under the law of the United States and the facts of this case he is advised that this honorable court had no jurisdiction to proceed with said cause of *Ed Johnson, Appellant, v. The State of Tennessee*, under the facts as alleged in Johnson's petition, and that the case would, upon motion or demurrer, had to have been dismissed or stricken from the docket according to the rule laid down in the case of *Caleb Powers v. The Commonwealth of Kentucky*.

6th. Not waiving any of his rights as stated in the foregoing pleas for want of jurisdiction by this honorable court in this case, but pleading and relying upon the same as a full and complete defense to this case, this defendant, Luther Williams, now comes and for further answer to the rule in this cause, and answering so much and such parts of said information as he is informed is material and proper for him to answer, says:

214 U. S.

Appendix.

That he was not an officer and that he did not have Ed Johnson in his charge, care, or custody at any time or place whatsoever.

He says that he is a business man and runs a saloon at No. 630 Market street, in the city of Chattanooga, Tennessee, and that his place of business is on the east side of Market street, between Sixth street and Seventh street; and that the county jail of Hamilton County, Tennessee, is on the west side of Walnut street, between Sixth and Seventh streets, and that between the county jail and his place of business there is one cross street.

He further says that the first notice that he had of a mob intending to assemble at the jail or were assembling at the jail in Chattanooga on the night of March 19, 1906, was that about 9.30 to 10 o'clock p. m., some one came in his saloon and called attention of those present there that a mob had assembled at the county jail for the purpose of lynching a negro. Inquiry being made, it developed that it was Ed Johnson.

Under a law of the city of Chattanooga, all saloons were required to close at ten o'clock p. m. every night except Saturday night, and then at 11 o'clock on Saturday night. March 19, 1906, was on Monday night, as affiant now remembers, and it was nearly closing time when he received his first information about a mob at the county jail. He knew that if trouble was about to occur in that neighborhood that all saloons ought to close in order to prevent members of the mob becoming intoxicated and committing violence, and for this reason he immediately closed his saloon and in a few minutes went up to the county jail, which was a distance of about 200 yards, and when he got there a mob was in control of the jail. A large crowd of men had their faces covered and were disguised so that no one could tell who they were and were proceeding to break down the doors of the jail, and in a very short time after his arrival Johnson was taken out and carried to the county bridge and lynched.

This respondent saw the lynching; was on the bridge where he could witness the entire trouble as a spectator with hundreds of other people who were on the bridge at the time.

He is well known to a number of people who were at his saloon on the night that Johnson was lynched and who were about the county jail as spectators at the time, and he was not disguised; made no effort to conceal his own identity; he had no part whatever in aiding or counseling the mob to lynch Ed Johnson and had nothing in the world to do with the entire trouble. Just like people go to see a great fire or anything else of excitement that is about to happen, he went up to the jail to see what the mob was doing and what was going to happen to Johnson.

He denies that he was a member of said mob or that he had anything to do either by word or action, aiding, or abetting in the alleged lynching, or that he counseled or conspired or confederated with any person or persons whomsoever to lynch the said Ed Johnson.

He denies that he endeavored or conspired or confederated or agreed together or formed a combination with any person to break or enter the county jail or to lynch the said Ed Johnson or to do any other act to prevent this honorable court from hearing and determining the appeal of the said Ed Johnson, or to show any contempt for this honorable court, and he denies each and every allegation made in the information against him in this cause, that by implication could be construed to mean that he had aided or consented to the lynching of the said Ed Johnson, or committed any other act or conspired, confederated, or agreed to commit any other act, or agreed for any other person to commit any act towards the lynching of the said Ed Johnson, or to break or enter the county jail of Hamilton County, Tennessee, or to prevent this honorable court from hearing the appeal of the said Ed Johnson, or to show his contempt for the orders of this honorable court, or to do any other act that would be disrespectful of this honorable court.

He says that he is not a lawyer, does not know what it takes to vest this honorable court with jurisdiction of this case, but makes the plea as to the jurisdiction upon the advice of his lawyers in this cause; but independent of his pleadings that he can prove that he had no part in the lynching of Ed Johnson, and that on the merits of his case he stands ready to show to this honorable court that he is entirely innocent of the charge made against him, and that if an opportunity is afforded him he will be pleased to present his evidence to sustain his contention as made in his answer.

He says that after Ed Johnson was lynched that the great crowd that had congregated at the bridge began to disperse and that he went to his home, where he spent the remainder of the night; that this was between ten and eleven o'clock, as he believes.

Wherefore this respondent says that he denies each and every allegation made against him in this cause.

And now having fully answered, he prays to be dismissed from the requirements of said rule to show cause why he should not be punished for a contempt of this honorable court.

The answer of defendants William Marquette, *Joe V. Williams*, attorney; James William Beeler, *Head & Ford*, attorneys; Frank Ward, *John A. Hood*, attorney, as to whom

214 U. S.

Appendix.

the rule was subsequently discharged, denied all participation in the lynching of Ed Johnson and asserted an alibi and was accompanied by numerous affidavits as to defendants' whereabouts at the time.

Defendants A. J. Cartwright and R. T. Cartwright, *Shumate & Maddox* and *John H. Early*, attorneys, as to whom the rule was subsequently discharged, answered denying all knowledge and participation in the lynching of Ed Johnson, and asserting that they were elsewhere at the time.

On November 12, 1906, on motion of *Mr. Solicitor-General Hoyt*, the court assigned the cause for hearing on the preliminary questions of law, without prejudice, on Monday, December 3.

Motion to set down for hearing on preliminary questions of law, without prejudice, etc.

The Attorney-General calls up this information in contempt and shows the court that the answers of all the defendants are now on file, excepting the answer of Paul Pool, who has not been located and was not served with process and seems to be a fugitive.

The answers in general set up an alibi or deny connection with the mob or knowledge of its formation, and plead not guilty. Certain of the answers also rely upon the contention that this court had no jurisdiction of the Johnson case. The answer of Shipp and his deputies prays that the information be dismissed as against them, because the Circuit Court of the United States had no right or authority to entertain Johnson's petition for habeas corpus, and that consequently the order of the Circuit Court dismissing the petition was not appealable to this court.

These averments and contentions raise the question of the jurisdiction to entertain Johnson's case in the Circuit Court and in this court, and consequently the question of the jurisdiction of this court in this proceeding and other related preliminary questions of law.

The Attorney-General therefore respectfully suggests that the court set the case down for hearing under the information and answers upon these preliminary questions of law, and further suggests that the court shall, if it sees fit, define the nature and scope of these ques-

tions for discussion in the briefs and at the oral argument. Further, the Attorney-General expressly states that this application to set the case down for hearing is made without prejudice to the right of the Government to proceed thereafter as it may be entitled to do and as it may be advised, upon the merits of the case, by taking testimony under the claims of alibi and the pleas of not guilty, thereafter presenting the case for final hearing and determination upon the issues of fact thus made.

The Attorney-General also suggests that the preliminary hearing on the questions of law, for which application is now made, be set for December 3 next at the head of the call for that day, and that in any order which the court may now see fit to make in the premises it will frame the order so as to operate without prejudice to the ulterior progress of the case on the merits.

WILLIAM H. MOODY,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

Argument was heard December 4 and 5, 1906.

For the United States *The Solicitor General (Henry M. Hoyt)* with whom the *Attorney General (William H. Moody)* was on the brief.

For the defendants *Mr. Judson Harmon, Mr. Lewis Shepherd, Mr. G. W. Chamlee and Mr. Robert B. Cooke*, with whom *Mr. Robert Pritchard, Mr. Martin A. Fleming and Mr. T. P. Shepherd* were on the brief.

[For abstracts of the arguments and briefs see 203 U. S. 563-570.]

On December 24, 1906, the preliminary questions of law were decided by the court.

The headnote (prepared by the Reporter) is as follows, 203 U. S. 563:

Even if the Circuit Court of the United States has no jurisdiction to entertain the petition for *habeas corpus* of one convicted in the

214 U. S.

Appendix.

state court, and this court has no jurisdiction of an appeal from the order of the Circuit Court denying the petition, this court, and this court alone, has jurisdiction to decide whether the case is properly before it, and, until its judgment declining jurisdiction is announced, it has authority to make orders to preserve existing conditions, and a willful disregard of those orders constitutes contempt.

Where the contempt consists of personal presence and overt acts those charged therewith cannot be purged by their mere disavowal of intent under oath.

In contempt proceedings the court is not a party; there is nothing that affects the judges in their own persons and their only concern is that the law should be obeyed and enforced.

After an appeal has been allowed by one of the justices of this court, and an order entered that all proceedings against appellant be stayed and his custody retained pending appeal, the acts of persons having knowledge of such order, in creating a mob and taking appellant from his place of confinement and hanging him, constitute contempt of this court, and it is immaterial whether appellant's custodian be regarded as a mere state officer or as bailee of the United States under the order.

MR. JUSTICE HOLMES delivered the following opinion, 203 U. S. 571-575.

This is an information charging a contempt of this court, and is to the following effect. On February 11, 1906, one Johnson, a colored man, was convicted of rape, upon a white woman, in a criminal court of Hamilton County, in the State of Tennessee, and was sentenced to death. On March 3 he presented a petition for a writ of *habeas corpus* to the United States Circuit Court, setting up, among other things, that all negroes had been excluded, illegally, from the grand and petit juries; that his counsel had been deterred from pleading that fact or challenging the array on that ground, and also from asking for a change of venue to secure an impartial trial, or for a continuance to allow the excitement to subside by the fear and danger of mob violence; and that a motion for a new trial and an appeal were prevented by the same fear. For these and other reasons it was alleged that he was deprived of various constitutional rights, and was about to be deprived of his life without due process of law.

On March 10, after a hearing upon evidence, the petition was denied, and it was ordered that the petitioner be remanded to the custody of the sheriff of Hamilton County, to be detained by him in his

custody for a period of ten days, in which to enable the petitioner to prosecute an appeal, and in default of the prosecution of the appeal within that time to be then further proceeded with by the state court under its sentence. On March 17 an appeal to this court was allowed by Mr. Justice Harlan. On the following Monday, March 19, a similar order was made by this court, and it was ordered further "that all proceedings against the appellant be stayed and the custody of said appellant be retained pending this appeal."

The sheriff of Hamilton County was notified by telegraph of the order, receiving the news before six o'clock on the same day. The evening papers of Chattanooga published a full account of what this court had done. And it is alleged that the sheriff and his deputies were informed, and had reason to believe, that an attempt would be made that night by a mob to murder the prisoner. Nevertheless, if the allegations be true, the sheriff early in the evening withdrew the customary guard from the jail and left only the night jailer in charge. Subsequently, it is alleged, the sheriff and the other defendants, with many others unknown, conspired to break into the jail for the purpose of lynching and murdering Johnson, with intent to show contempt for the order of this court and for the purpose of preventing it from hearing the appeal and Johnson from exercising his rights. In furtherance of this conspiracy a mob, including the defendants, except the sheriff, Shipp, and the night jailer, Gibson, broke into the jail, took Johnson out and hanged him, the sheriff and Gibson pretending to do their duty, but really sympathizing with and abetting the mob. The final acts, as well as the conspiracy, are alleged as a contempt.

The defendants have appeared and answered, and certain preliminary questions of law have been argued which it is convenient and just to have settled at the outset before any further steps are taken. The first question, naturally, is that of the jurisdiction of this court. The jurisdiction to punish for a contempt is not denied as a general abstract proposition, as, of course, it could not be with success. *Ex parte Robinson*, 19 Wall. 505, 510; *Ex parte Terry*, 128 U. S. 289, 302, 303. But it is argued that the Circuit Court had no jurisdiction in the *habeas corpus* case, unless Johnson was in custody in violation of the Constitution, Rev. Stat., § 753, and that the appellate jurisdiction of this court was dependent on the act of March 3, 1891, c. 517, § 5 (26 Stat. 827), *Ex parte Lennon*, 150 U. S. 393, and by that act did not exist unless the case involved "the construction or application of the Constitution of the United States." If the case did not involve the application of the Constitution, otherwise than by way of pretense; it is said that this court was without jurisdiction, and that its order

214 U. S.

Appendix.

might be condemned with impunity. And it is urged that an inspection of the evidence before the Circuit Court, if not the face of the petition, shows that the ground alleged for the writ was only a pretense.

We regard this argument as unsound. It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt. *Ex parte Sawyer*, 124 U. S. 200; *Ex parte Fisk*, 113 U. S. 713; *Ex parte Rowland*, 104 U. S. 604. But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. See *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U. S. 379, 387. Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time. Rev. Stat. § 766. Act of March 3, 1893, c. 226, 27 Stat. 751. The fact that the petitioner was entitled to argue his case shows what needs no proof, that the law contemplates the possibility of a decision either way, and therefore must provide for it. Of course the provision of Rev. Stat. § 766, that until final judgment on the appeal further proceedings in the state court against the prisoner shall be deemed void, applies to every case. There is no implied exception if the final judgment shall happen to be that the writ should not have issued or that the appeal should be dismissed.

It is proper that we should add that we are unable to agree with the premises upon which the conclusion just denied is based. We cannot regard the grounds upon which the petition for *habeas corpus* was presented as frivolous or a mere pretense. The murder of the petitioner has made it impossible to decide that case, and what we have said makes it unnecessary to pass upon it as a preliminary to deciding the question before us. Therefore we shall say no more than that it does not appear to us clear that the subject-matter of the petition was beyond the jurisdiction of the Circuit Court, and that, in our opinion, the facts that might have been found would have required the gravest and most anxious consideration before the petition could have been denied.

Another general question is to be answered at this time. The de-

defendants severally have denied under oath in their answer that they had anything to do with the murder. It is urged that the sworn answers are conclusive, that if they are false the parties may be prosecuted for perjury, but that in this proceeding they are to be tried, if they so elect, simply by their oaths. It has been suggested that the court is a party and therefore leaves the fact to be decided by the defendant. But this is a mere afterthought to explain something not understood. The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case. On this occasion we shall not go into the history of the notion. It may be that it was an intrusion or perversion of the canon law, as is suggested by the propounding of interrogatories and the very phrase, purgation by oath (*juramentum purgatorium*). If so, it is a fragment of a system of proof which does not prevail in theory or as a whole, and the reason why it has not disappeared perhaps may be found in the rarity with which contempts occur. It may be that even now, if the sole question were the intent of an ambiguous act, the proposition would apply. But in this case it is a question of personal presence and overt acts. If the presence and the acts should be proved there would be little room for the disavowal of intent. And when the acts alleged consist in taking part in a murder it cannot be admitted that a general denial and affidavit should dispose of the case. The outward facts are matters known to many and they will be ascertained by testimony in the usual way. The question was left open in *Ex parte Savin*, 131 U. S. 267, with a visible leaning toward the conclusion to which we come, and that conclusion has been adopted by state courts in decisions entitled to respect. *Huntington v. McMahon*, 48 Connecticut, 174, 200, 201. *State v. Matthews*, 37 N. H. 450, 455. *Bates's Case*, 55 N. H. 325, 527. *Matter of Snyder*, 103 N. Y. 178, 181. *Crow v. State*, 24 Texas, 12, 114. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864, 873. See *Wartman v. Wartman*, Taney, 362, 370. *Cartwright's Case*, 114 Massachusetts, 230. *Eilenbecker v. Plymouth County*, 134 U. S. 31. Whether or not Rev. Stat. § 725 applies to this court, it embodies the law so far as it goes. We see no reason for emasculating the power given by that section, and making it so nearly futile as it would be if it were construed to mean that all contemnors willing to run the slight risk of a conviction for perjury can escape.

The question was touched, in argument, whether the acts charged constitute a contempt. We are of opinion that they do, and that their character does not depend upon a nice inquiry, whether, after the order

214 U. S.

Appendix.

made by this court, the sheriff was to be regarded as bailee of the United States or still held the prisoner in the name of the State alone. Either way, the order suspended further proceedings by the State against the prisoner and required that he should be forthcoming to abide the further order of this court. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the trial of the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step. If that step is taken the contempt is proved.

These preliminaries being settled the trial of the case will proceed.

Mr. JUSTICE MOODY took no part in the decision.

And on December 24, 1906, the following entry appears of record:

The opinion of the court on the preliminary questions of law herein was delivered by Mr. JUSTICE HOLMES (Mr. JUSTICE MOODY took no part) and the cause was ordered to proceed.

On January 14, 1907, there was filed the following:

Motion to arrest defendants and require recognizances to abide the future orders of the court.

The court having decided the preliminary questions of law herein against the defendants and ordered the case to proceed, the Attorney-General moves the court to order writs of attachment to issue that the said defendants may be brought into court and required to enter into recognizances, in such sums, respectively, as to the court shall seem adequate and proper, conditioned for their appearance whenever required and to abide the future orders of the court herein, said recognizances to be given, with good and sufficient sureties, approved by this court, unless it shall seem to the court appropriate that the said defendants, or any of them, should be permitted to appear and furnish such recognizances before the judge of the Circuit Court of the United States for the Eastern District of Tennessee, in conformity with or by analogy to the provisions of section 1014 of the Revised Statutes of the United States, in which event it is further moved that the sureties be approved by the said judge and by the justice of this court assigned to the Sixth Circuit.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

The motion on behalf of the defendant Shipp and his deputies prayed that the witnesses named

Be ordered to be subpoenaed to attend at such time and place as the court may designate for hearing the testimony in this cause, and that it be ordered by the court that the costs incurred by the process of subpoena, including the fees and mileage of said witnesses, be paid by the United States, in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States, or in lieu of this that the court, if it deems the same expedient, direct that the testimony be taken in this cause by a commissioner duly appointed and to sit at Chattanooga or some other designated point in the Southern Division of the Eastern District of Tennessee.

The motions on behalf of several of the defendants also prayed that:

Affiant is not possessed with sufficient means and is actually unable to pay the fees of said witnesses, and he prays the court to order them to be subpoenaed, and to direct that the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States.

On January 14, 1907, there was filed the following:

Motion for the summoning of witnesses and to take testimony herein.

In order that the facts may be ascertained by the court as to the connection of the defendants herein with the matters which the court has held constituted contempt of its authority, the Attorney-General moves the court to take testimony herein as to the complicity of the defendants in such matters, and to examine, under oath, to be administered by the court, any witnesses ordered to be summoned in behalf of the United States or of the defendants, subpoenas therefor to be issued by the clerk of this court, with full rights of cross-examination and objection as to the admission of evidence and the competency of witnesses to counsel for both parties; such evidence to be taken in open court unless it shall appear to the court appropriate to appoint a commissioner or examiner to receive and record the same, and then to report such testimony, with any exceptions thereto made as aforesaid, forthwith to the court.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

214 U. S.

Appendix.

And also motions on behalf of certain of the defendants for the summoning of witnesses at the expense of the Government.

On January 14, 1907, *Mr. Attorney General Bonaparte*, of counsel for the complainant, submitted to the consideration of the court a motion to arrest the defendants herein and to require them to enter into recognizances to abide the future orders of the court and also a motion as to taking testimony herein, and leave was granted to counsel for defendants to file a brief in reply thereto.

And afterwards, to wit, on January 17, 1907, defendants Shipp and others filed the following brief:

MOTION FOR ARREST, ETC.

The only object of issuing attachments is to bring before the court the parties charged with contempt so that they may be heard, if defense they have. *Rapalje on Contempts*, § 100.

This course is discretionary with the court when there is any other mode of procedure open. The usual practice is by a rule to show cause. (*Rapalje on Contempts*, § 9, 103; *United States v. Anonymous*, 21 Fed. Rep. 761.)

The Government did not ask for attachments in the information, but very properly followed the usual practice, praying only for the issuance and service of "a rule to show cause, if any there be, on a day certain, why said defendants and each of them should not be punished as and for a contempt of this honorable court."

According to some authorities the personal appearance of the parties might have been required. (*Rapalje on Contempts*, § 109.) But the Government acquiesced in their appearance by counsel and by answers personally signed and verified.

The preliminary matters set up in those answers have been held insufficient cause, and the proceeding now stands as to each defendant on his denial, under positive oath, of the offense charged. This is surely sufficient cause as against an information verified only on information and belief until the Government produces proof. We submit that the production of that proof is now the only course open to it.

The Government has waived its right to an interlocutory attachment, if it had such right. It has waived the personal attendance of the defendants in answer to the rule. Now, as against their sworn denials, it asks, merely on its naked information, that the defendants

be arrested and committed in default of bail. There is no attempt to show any facts to justify a different course from that taken in the prayer of the information.

We submit that to grant this motion would subject the defendants to hardship and indignity which the state of the record does not justify and which would violate the presumption of innocence this court has so strongly upheld.

As to Joseph F. Shipp, sheriff, and his deputies, all this has peculiar force. They are officers of justice of the State of Tennessee. Their time is required in the service of the courts and the preservation of the peace in that State. Courtesy to the State and the tribunals they serve makes regard for the presumption of their innocence highly appropriate as well as just.

MOTION TO TAKE TESTIMONY.

We consent, of course, to the taking of testimony. We consent, too, for the convenience of the court, that the testimony be taken by some disinterested person to be appointed by the court for that purpose.

We pray, however, that the person so appointed be directed to take the testimony at Chattanooga, where all the witnesses on both sides reside. If it should be found that any reside elsewhere we consent to taking their testimony wherever desired.

I am informed and believe, and so state to the court, that the defendants are almost without exception unable to bear the expense of traveling to Washington and remaining there during the hearing, as they would have to do or submit to a practical denial of justice. To compel them to attend a hearing away from home would be in itself a severe punishment, and trial should precede punishment. The analogies of the Constitution and the laws, too, make the place where the offense is charged to have been committed the appropriate one for the taking of the proof. As the sheriff and all his deputies are parties, their absence from their homes would also work harm to the course of business in the courts and to the preservation of the peace of their county.

Respectfully submitted.

Mr. Judson Harmon, Clift & Cooke and Mr. Robert Pritchard,
attorneys for Joseph F. Shipp and others.

On January 21, 1907, the following entries appear of record,
viz.:

214 U. S.

Appendix.

October Term, 1906. No. 12. Original.

On consideration of the motion to require the defendants herein to enter into recognizances for their appearances hereafter,

It is now here ordered by the court that the defendants in this cause enter into their personal recognizances in the penal sum of \$1,000 each, conditioned to abide the further orders of the court before the judge of the District Court of the United States for the Eastern District of Tennessee.

On consideration of the motion as to the taking of testimony herein,

It is now here ordered by the court that a commissioner will be appointed to take the testimony of witnesses at Chattanooga, in the Eastern District of Tennessee, and counsel on both sides are given ten days in which to agree upon a fit person for such appointment and communicate the nomination to the court.

On January 25, 1907, the *Attorney General* filed the following:

Suggestion in reply to brief for certain defendants on motion to take testimony.

In the brief filed by certain of the defendants reasons are suggested why the testimony should be taken at Chattanooga, and the court's order directing that it shall be taken before a commissioner appears to designate Chattanooga as the place. The Attorney-General now respectfully requests the court to reconsider this designation and to designate the city of Washington, at least for the purpose of taking the testimony of witnesses for the United States, for the following reasons:

1. The defendants themselves need not attend the hearings in Washington unless, as is unlikely, they wish to be personally present, and their counsel will probably find it no serious hardship to come to Washington.

2. If the defendants are, in fact, inconvenienced and suffer some hardship through loss of time or money, or both, these are ordinary and necessary incidents of their situation. They rest under a charge which must be tried. A *prima facie* case has been made out, in the

sense that proofs against them are now to be offered and they are called upon to meet the charge. It may be fairly assumed that it is not wholly without their own fault that they are in this position. Defendants generally must attend the trial court at its usual place of session, either personally or by counsel. The official duties of some among them need not, and should not, change that rule in this case. The entire sheriff's force need not be withdrawn from Hamilton County merely to listen to the testimony for the United States; and it is right and customary, not harsh and arbitrary, to bring witnesses from any part of a district to the court. The court does not go to them. The entire country is the district in the present case, and the court only sits in Washington; the city of Washington, then, is the natural place for the taking of the testimony. This is none the less true because an officer of the court and not the court itself is to take the testimony, and because the defendants have the right to be present, if they are not compelled to be present.

3. It seems to us very important that the testimony should be taken under the eye and direct control of the court, to afford opportunities for immediate reference to the court by, and instructions from the court to, the commissioner in connection with unexpected incidents which may readily occur during the examination of witnesses in a case like this one, wholly without precedent.

4. Finally, it is submitted that the locality where this terrible occurrence took place, and where (as appears from the crime itself, from the record in Johnson's case, and from the oral argument herein on the preliminary questions of law) the feelings of certain portions of the community have been and are still greatly excited, is an unsuitable place for this examination, at least of the witnesses for the United States. In that locality the real facts can not be elicited in a calm and dispassionate atmosphere, free from the danger that local prejudice and a sense of personal insecurity may stifle or check the full and frank utterances of the witnesses for the prosecution; and the Attorney-General deems it his duty to advise the court that confidential information in the possession of the Department of Justice, of a character entitled to credit, indicates that witnesses for the United States may reasonably, and will in fact, entertain apprehensions of danger to themselves if they testify at Chattanooga.

On January 28, 1907, on motion of *Mr. Solicitor General Hoyt*, leave was granted counsel for the defendants to file briefs in opposition to the suggestions of the *Attorney General* as to taking testimony in this cause and on January 29, 1907,

214 U. S.

Appendix.

on behalf of certain defendants there was filed the following brief opposing the motion of the *Attorney General* to require witnesses to be examined at Washington, D. C., instead of Chattanooga, Tenn.

The court is familiar with the proceedings of this cause, and this brief is presented in opposition to a motion of the Attorney-General, which motion means, if granted, that all the witnesses for the Government in these cases must be examined at Washington, D. C., instead of at Chattanooga, Tennessee.

The reason why the defendants oppose this motion is that they are all poor men, except the sheriff, and not able to pay the expenses of going from Chattanooga to Washington and there remaining, with their attorneys, during the time that the Government will be taking its proof. It cannot be said that this proof can be heard in their absence, because the charges are serious, and the court has laid down the rule that in contempt cases the defendants are entitled to meet the witnesses face to face. If this hearing is to be had at Washington and the proof taken there, it will practically amount to a denial of justice, because the defendants do not know what the Government's proof will be, nor just which of the defendants are liable to be affected by any witness. It is necessary, therefore, for all of them to be present at this hearing. The defense of the officers and the alleged lynchers is not necessarily the same, and there is no one attorney in the case in a position to represent them all; so that it becomes necessary for most all the attorneys who have been actively engaged in these cases to attend these hearings. We say that there is no reason in the world why the witnesses for the Government should not tell the facts about this case at Chattanooga, Tennessee, just as freely as at any other place. And if after the hearing has commenced at Chattanooga any witness is intimidated, the court has power to change the place of the hearing and also to punish the offending party, if such a case were possible. Public opinion is in a mood now to hear freely, frankly, and unreservedly all the facts of this case at Chattanooga without intimidation towards anybody.

To take these witnesses away from Chattanooga and deprive these defendants of the right to meet them face to face, as must necessarily result, is a great hardship upon them, and particularly so if they are innocent, as they claim to be, and especially on account of their poverty.

Many of these defendants have heretofore filed their affidavits showing that they are unable to pay the expenses of their own wit-

nesses to the city of Washington, and they now appeal to your honors not to have this hearing at Washington, because it imposes hardships upon them that they cannot bear, and is as to some of them a denial of justice.

We most respectfully and earnestly insist that there is no sound reason or foundation for the argument that the witnesses for the Government will testify to facts in Washington, D. C., that they are unwilling to tell at the home of the witnesses and when surrounded by their own families and friends. Besides, the law is sufficient to protect the witnesses, and there ought not to be a precedent established by this court that its commissioner or examiner was unable to get the truth out of witnesses because of the sentiment at the place of the hearing being reported as favorable to the accused when the law presumes the accused innocent of the charges against him.

We most earnestly submit that this honorable court should not make an order in these cases that will prevent the defendants from having the fullest opportunity to show their innocence in this case, and for that reason the motion of the Attorney-General should be overruled.

Geo. W. Chamlee, Lewis Shepherd, attorneys.

On January 31, 1907, the following nomination to the court of a commissioner to take the testimony was filed.

The Attorney-General has the honor to report that counsel of record for the defendants unite with him in the nomination to the court of James D. Maher, Esq., of the District of Columbia, to take the testimony of the witnesses in this cause.

And on the same day *Mr. Solicitor General Hoyt*, of counsel for the complainant, submitted the nomination to the consideration of the court.

On February 2, 1907, there was filed the following answer of Joseph F. Shipp, sheriff, and his deputies, to suggestion of *Attorney General* as to taking testimony.

The Attorney-General asks this court to reconsider its order designating Chattanooga as the place of taking testimony in this case, and requests that the city of Washington be designated, at least for the purpose of taking testimony of witnesses for the United States.

214 U. S.

Appendix.

And now come the defendants, Joseph F. Shipp, Frank Jones, Matthew Galloway, C. A. Baker, T. V. Taylor, Fred Frawley, George Brown, Jeremiah Gibson, Marion Perkins, and Joseph Clark, defendants, being the said sheriff and his deputies, and respectfully show to the court that the granting of said request would work great hardship upon them and might result in actual injustice.

These defendants were, at the time of the happening of the matters and things complained of in the information of the Attorney-General, officers of Hamilton County, Tennessee, sworn to uphold the law, and occupying positions which the public welfare required should be filled by persons who respected the law, and who would obey it.

The information not only charges them with failure to uphold the law, but with having become parties to a conspiracy to dethrone the law and substitute in its place mob violence, the antithesis of law.

A conviction of these defendants under the charges of the information involves not only the crime and infamy of perjury, but the guilt of conspiracy to murder.

These defendants have heretofore, prior to the filing of the information in this case, enjoyed the respect and confidence of their fellow-citizens, and it is of the utmost importance to them that their good names be not destroyed unless they are convicted after a full, fair, and impartial trial.

It is not the purpose of the United States to inflict wrong upon any of its citizens, however humble. These defendants verily believe that the granting of the request of the Attorney-General would do them grievous wrong. Every one of these defendants is entitled to be confronted by the witnesses against him. It has been shown by affidavits that many of them are not able to attend the taking of the testimony at Washington. It would be impossible for all of the counsel for all of the defendants to be present all the time, and a false witness might escape proper cross-examination and might leave an impression of truth. The presence of the defendants, when witnesses for the prosecution are being examined, is an important right, one that should not be denied. The defendants are not only entitled to the aid of counsel, but counsel are entitled to the assistance of the defendants.

It is true that these defendants rest under a charge which must be tried, but they submit that they are entitled to a trial which will give them the right to be present, so that they may have the privilege accorded to the meanest criminal of being faced by their accusers. This right will be practically denied should the testimony be taken in Washington.

The Attorney-General suggests that it may be fairly assumed that

it is not wholly without their own fault that these defendants are placed in the position which they would be placed were his request granted, but these defendants are unable to reconcile this assumption with the presumption of innocence which the law accords to them.

Answering the further suggestion that Washington is the proper place for the hearing of testimony because the court sits at Washington for the whole United States, these defendants say that the court has already decided that it will not hear oral testimony and has allowed counsel for both parties to nominate a commissioner to take the testimony.

The suggestion contained in paragraph three (3) is equally without merit, because it is impossible to conceive of this tribunal allowing separate hearings on every "unexpected incident which may readily occur during the examination of witnesses," it being the duty of the commissioner to act upon exceptions to testimony, as well as "unexpected incidents."

Finally, these defendants solemnly deny the averments contained in the fourth paragraph of the suggestion of the Attorney-General. They deny that there is any foundation in fact for the serious and unusual charge, confessedly based upon secret information to which neither the defendants nor this honorable court have access, that Chattanooga is, for any reason, an unsuitable place to take the testimony of witnesses. They deny that the real facts cannot be elicited there in "a calm and dispassionate atmosphere." They deny that the testimony would be colored or suppressed by local prejudice or any sense of personal insecurity, or that full and frank utterance of the truth by witnesses for or against these defendants would be "stifled or checked." Whatever may be the character of the "confidential information" to which the Attorney-General refers, these defendants deny that any witness for the United States could reasonably or would, in fact, entertain any apprehension whatever of danger if he testified at Chattanooga.

Defendants respectfully submit that the charges contained in said paragraph 4 that the feelings of the community are excited, that the truth would be suppressed from prejudice or from a sense of personal insecurity, or from any other cause, are based upon information of an unreliable character or upon a mistaken conception of the facts.

The "confidential" character of the information referred to by the Attorney-General precludes an investigation of its reliability by these defendants; but in opposition thereto these defendants present herewith the affidavits of D. L. Snodgrass, J. W. Bachman, C. A. Lyerly, Wm. L. Frierson, J. T. Moseley, T. S. Wilcox, G. G. Fletcher and

214 U. S.

Appendix.

M. M. Allison, whose positions in the community indicate their character and standing. Wherefore these defendants pray, etc.

On February 4, 1907, the following order appointing commissioner to take testimony was entered:

This cause coming on to be heard in respect of the appointment of a special commissioner to take testimony herein, and the parties, duly appearing by their counsel, having agreed upon a fit person for such appointment and communicated their nomination to the court:

It is ordered that Mr. James D. Maher, a resident of the District of Columbia, be, and he is hereby, appointed a commission to take and return the testimony in this proceeding, with the powers of a master in chancery, as provided in the rules of this court; but said commissioner shall not make any findings of fact or state any conclusions of law.

It is further ordered that the taking of the testimony shall be commenced at the city of Chattanooga, in the Eastern District of Tennessee, as soon as possible, at such place as the commissioner shall designate, reasonable notice thereof to be given counsel on both sides, and be proceeded in with all convenient speed; and the commissioner is hereby authorized also to take testimony elsewhere if that shall be agreed on by counsel or appear to be necessary, with leave to him or to either of the parties to apply to the court for such orders in that regard as they may be advised.

Said commissioner shall promptly report to the court the testimony taken by him, without findings of fact or conclusion of law, and shall receive such compensation as may hereafter be determined, and his actual expenses, an itemized statement of which shall accompany his report.

On February 6, 1907, the oath of James D. Maher as commissioner herein was filed in the words and figures following, viz.:

I, James D. Maher, commissioner appointed by the Supreme Court of the United States to take and return the testimony in the cause of The United States of America, complainant, *vs.* John F. Shipp et al. (No. 12, Original, October term, 1906), do solemnly swear that I will faithfully and impartially discharge and perform all the duties de-

volved on me as such commissioner, according to the best of my ability and understanding. So help me God.

JAMES D. MAHER.

Subscribed and sworn to before me this 5th day of February, 1906.

[SEAL.]

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

The Commissioner proceeded to Chattanooga and executed the commission.

The following stipulations were entered into as to the taking of testimony and appear in the record:

In this cause it is stipulated and agreed that after the testimony is reduced to typewriting it shall be submitted to counsel for the several parties and promptly examined, and unless counsel find material errors in the same the testimony may be signed by the commissioner, with the same force and effect as if signed by each witness. In the event material errors are found, they shall be called to the attention of the commissioner and the usual course shall be taken in reference thereto.

In this cause, to save the time and expense of taking proof as to the matters hereinafter referred to, it is stipulated and agreed as follows:

That on the 11th day of February, 1906, one Ed Johnson, a citizen of the United States and a resident and citizen of the State of Tennessee, and a colored person of African descent, was convicted of the crime of rape in the criminal court of Hamilton County, held at the city of Chattanooga, in the State of Tennessee, and said court thereupon sentenced the said Ed Johnson to suffer the penalty of death.

That on the 3d day of March, 1906, and before the date set for the execution of the said Ed Johnson, a petition for a writ of *habeas corpus*, signed by the said Ed Johnson as petitioner, was duly presented to the United States Circuit Court for the Northern Division of the Eastern District of Tennessee in which it was alleged, among other things, that upon the trial of the said Ed Johnson in the criminal court of Hamilton County, in the State of Tennessee, for the crime of rape, for which he had been convicted, said petitioner had been denied a trial by a fair and impartial jury, and had been denied the aid of counsel in violation of the fifth and sixth amendments to the Federal Constitution, and that said petitioner was also denied rights secured to him under the fourteenth amendment to the Federal Constitution;

214 U. S.

Appendix.

that thereafter, to wit, on the 10th day of March, 1906, the application of the said Ed Johnson for a writ of *habeas corpus* came on for hearing before the said United States Court for the Eastern District of Tennessee upon the petition, return, answer, and replication, and upon the testimony of witnesses given orally in open court, and after argument of counsel the said Circuit Court ordered that said petition be dismissed and that the writ of *habeas corpus* prayed for in said petition be denied, and further ordered that said petitioner be remanded to the custody of the sheriff of said Hamilton County, in the State of Tennessee, to be detained by said sheriff in his custody for the period of ten days in which to enable said petitioner to prosecute an appeal from said order should he be so advised and should an appeal lie from said order, and in default of the prosecution of an appeal within said time to be then further proceeded with by the court of the State of Tennessee under its sentence.

That thereafter, on the 17th day of March, 1906, an application was duly presented by the said Ed Johnson to the Hon. John M. Harlan, an associate justice of the Supreme Court of the United States, assigned to the sixth circuit, asking that an appeal be allowed to the Supreme Court of the United States from the judgment rendered in the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee on March 10, 1906, denying his, the said Ed Johnson's, application for a writ of *habeas corpus*, as aforesaid, which said appeal was on the same day allowed by Mr. Justice Harlan.

That on the 19th day of March, 1906, a motion was duly made in the Supreme Court of the United States by counsel for and representing the said Ed Johnson for an order allowing an appeal to the Supreme Court of the United States from the judgment of the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, rendered on the 10th day of March, 1906, denying his, the said Ed Johnson's, application for a writ of *habeas corpus*, which motion was thereupon granted by the Supreme Court of the United States and an order duly made and entered by the Chief Justice in the words and figures following, to wit:

ED JOHNSON, APPELLANT,	}
vs.	
THE STATE OF TENNESSEE.	

On motion of *Mr. E. M. Hewlett*, of counsel for the appellant, it is ordered by the court that an appeal from the Circuit Court of the United States for the Eastern District of Tennessee be, and the same is hereby, allowed, and that all proceedings against the appellant be

stayed, and the custody of the said appellant be retained pending this appeal.

Per MR. CHIEF JUSTICE FULLER.

That there was also published and circulated in said city of Chattanooga in the evening paper on the said 19th day of March, 1906, before six o'clock p. m., an account of the action of the Supreme Court of the United States in allowing an appeal and granting a stay of further proceedings on the part of the state courts against the said Ed Johnson until the determination of said appeal before the Supreme Court of the United States.

That during all the times herein mentioned, and on and subsequent to March 19th, 1906, the above-named defendant, J. F. Shipp, was the duly elected, qualified, and acting sheriff of Hamilton County, in the State of Tennessee, and as such sheriff had and exercised full charge and control of the county jail, located in the city of Chattanooga, in said county, and was the legal custodian under the laws of Tennessee of all persons duly committed in said county under the laws of said State to confinement and imprisonment within said jail; and that the defendants, Frank Jones, Matthew Galloway, C. A. Baker, Fred Frauley, George Brown, Jeremiah Gibson, Marion Perkins, and each of them, were, during all the times herein mentioned, and on and subsequent to March 19, 1906, the duly appointed, qualified, and acting deputy sheriffs of said county and State under the said J. F. Shipp.

It is further agreed that this stipulation may be offered before the commissioner by either the complainant or defendant as evidence of any part or all of the matters hereinbefore stipulated. Provided, however, that no admission is made as to the competency or relevancy of any of the facts above stated, this stipulation being merely intended as proof of the facts above stipulated with the same force and effect as if duly proven by the testimony of witnesses and to be subject in all respects to the same exceptions as the testimony of witnesses would be; all parties expressly reserving the right to except to any portion of this stipulation when introduced in evidence upon any ground relating to the competency, relevancy, or admissibility of the subject-matter to which this stipulation relates.

The following took place before the Commissioner:

Mr. Assistant Attorney General Sanford: I thought that had been submitted to all of the counsel. It was so intended. That, I understand, is agreed to by all of the counsel and we will have it drawn up in proper form.

214 U. S.

Appendix.

In regard to the matter of the telegram sent by the clerk of the Supreme Court of the United States, it was agreed by counsel to whom the matter has been mentioned that the Commissioner's personal statement may be taken as evidence in the matter of when that telegram was sent and its contents.

The COMMISSIONER: This telegram was sent by myself, for the clerk, on the day it is dated, March 19th, in the neighborhood of one o'clock in the afternoon. I delivered it personally at the telegraph office in the corridor of the House of Representatives in the Capitol at Washington, and pre-paid it; and this copy was made under my direction before I left Washington.

The copy was put in the record.

On October 14, 1907, the United States moved the court to file the reports of James D. Maher, esquire, special commissioner herein, as to the taking of testimony and as to his expenses.

And on October 14, 1907, on motion of *Mr. Assistant Attorney General Sanford*, of counsel for the complainant, it was ordered that the testimony taken herein be opened, published, and filed; also on same day and on motion of *Mr. Assistant Attorney General Sanford*, of counsel for the complainant, leave was granted to file the reports of the Commissioner as to the taking of testimony and as to his expenses in connection therewith, and also stipulations of counsel as to facts, as to the taking of the testimony, and as to the misnomer of certain defendants.

On October 14, 1907, a motion was made for leave to file stipulations as to misnomer of certain defendants, as to taking of testimony, and as to certain agreed facts.

And on October 14, 1907, the reports of the Commissioner as to taking testimony and as to expenses were filed as follows:

To the honorable the Supreme Court of the United States:

The undersigned commissioner appointed by an order entered in this cause on the 4th day of February, 1907, to take and return such evidence as the parties to said cause should produce, respectfully reports

to the court that pursuant to the said order he opened the commission conferred on him in the United States court room in the city of Chattanooga, State of Tennessee, on Tuesday, February 12, 1907, at 10 o'clock a. m., and, the counsel for the respective parties being present, proceeded to execute the said commission on that day and on the 13th, 14th, and 15th days of the same month, when, on the suggestion of the counsel for the complainant, an adjournment was taken. Pursuant to notice given by the undersigned to counsel for the respective parties, the taking of testimony in the cause was resumed at the same place on Monday, June 10, 1907, and continued on the 11th, 12th, 13th, 14th, 15th, 17th, 18th, 19th, 20th, 21st, 24th, 25th, 26th, 27th, 28th, and 29th days of the same month, on which last-named day, the parties not offering any more testimony, the commission was closed.

The said commission was executed by receiving the testimony of the several witnesses named in the testimony, who were sworn to testify to the truth, the whole truth, and nothing but the truth before giving their evidence, and the testimony so given by them was taken down by a stenographer in the presence of the undersigned, and is herewith submitted, together with the exhibits offered in evidence.

Said testimony and exhibits, contained in 20 typewritten volumes containing 2,283 pages, have been deposited with the clerk of this honorable court.

Respectfully submitted.

JAMES D. MAHER,
Commissioner.

To the Honorable the Supreme Court of the United States:

Pursuant to the order of this honorable court entered on the 4th day of February, 1907, appointing the undersigned as commissioner to take and return the testimony in the above-entitled cause and directing a statement of actual expenses incurred in the taking of said testimony to be submitted, I beg leave to state that it became necessary to travel to the city of Chattanooga, Tennessee, on two separate occasions—in February and June, 1907—and the expenses of the commissioner were as follows:

In February:

Railroad fares.....	\$48 15	
Cabs and baggage.....	1 60	
Room at hotel.....	15 00	
Meals.....	16 15	
Telegrams.....	1 46	
	<hr/>	
	\$82 36	\$82 36

214 U. S.

Appendix.

Amount carried forward		\$82 36
In June:		
Railroad fares.....	\$43 00	
Cabs and baggage.....	2 50	
Hotel bill	83 75	
Meals on trains and at club.....	5 75	
Telegrams.....	1 69	
		<hr/>
	\$136 69	\$136 69
		<hr/>
Making a total of.....		\$219 05

Respectfully submitted.

JAMES D. MAHER,
Commissioner.

On November 4, 1907, the following order was made:

It is now here ordered by the court that Mr. James D. Maher, the commissioner appointed by this court to take and return the testimony in this cause, be, and he is hereby, allowed the sum of \$800.00 in full for his compensation and expenses, and that said sum be paid by the complainant herein.

And on April 22, 1908, the following motion for leave to take additional testimony was made:

The Solicitor-General appearing for and on behalf of the United States, moves the court to reopen the hearing of testimony in this case and to reappoint Mr. James D. Maher as commissioner for the purpose of taking and returning additional testimony to the court in this behalf.

In support of this motion the Solicitor-General shows and represents to the court that under the original order of reference to the said commissioner the Government and the defendants took their testimony in the city of Chattanooga, Tenn., in the year 1907, and closed their case in June of that year; that said commissioner subsequently made his report as to the taking of testimony, which was opened, published, and filed pursuant to an order of court; that while, since the taking of testimony was closed as aforesaid, the Government has made no further effort to find additional testimony, the Department of Justice recently and unexpectedly was informed that two persons who were not examined on the former hearing were eye-

witnesses of part of the incidents connected with the lynching of the prisoner, Ed Johnson, which is involved in this information, and could identify two of the defendants herein as connected therewith; that the department thereupon caused this matter to be inquired into through the office of the United States attorney for the Eastern District of Tennessee, and was advised by him that these two persons will so testify and will identify two of the defendants in question.

The Solicitor-General further represents and shows to the court that he is advised that these two parties did not previously make known their knowledge of these facts in reference to this matter on account of fear, and that there was no means by which the Government could have been previously advised as to the information which they possessed or could have obtained their testimony on the former hearing.

The Solicitor-General further represents and shows to the court that this application for leave to take additional testimony is not made for purposes of delay, but solely that justice may be done and all material evidence brought to the attention of the court.

He therefore prays that the taking of testimony may be reopened, and that the said James D. Maher may be reappointed as commissioner, with the same powers as under his original appointment, and may be directed to proceed at an early and convenient date to the city of Chattanooga, Tenn., there to take the testimony of the two witnesses in question, together with any rebuttal testimony which any of the defendants may desire to offer in that behalf, or further testimony which may be rendered necessary in behalf of the Government by reason of such rebuttal evidence, if any, and to report such additional testimony to the court.

Respectfully submitted.

HENRY M. HOYT,
Solicitor-General.

The defendants submitted the following answer to motion for leave to take additional testimony:

The defendants Joseph F. Shipp, Frank Jones, Matthew Galloway, C. A. Baker, Fred Frawley, and Marion Perkins, appearing by their attorneys, Judson Harmon, Robert Pritchard, James J. Lynch, M. H. Clift, and Robert B. Cooke; the defendants T. B. Taylor and George Brown, appearing by their attorney, T. W. Stanfield; the defendant Jeremiah Gibson, appearing by his attorneys, Clift & Cooke; the defendant Joseph Clark, appearing by his attorneys, Spears & Lynch; the defendants Claude Powell, Nick Nolen, Chas. J. Powell, Bart

214 U. S.

Appendix.

Justice, John Jones, Henry Padgett, William May, John Varnell, and Alfred Handman, appearing by their attorneys, Lewis Shepherd and Shepherd & Fleming; the defendants "Sheenie" Warner and Luther Williams, appearing by their attorney, G. W. Chamlee; the defendant William Beeler, appearing by his attorneys, Ford & Chamlee and G. W. Chamlee; the defendants W. J. Cartwright and R. F. Cartwright, appearing by their attorneys, S. P. Maddox and John H. Early; the defendant Frank Ward, appearing by his attorneys, G. W. Chamlee and John A. Hood; and the defendant William Marquette, appearing by his attorney, Joe V. Williams, answering the petition of the Solicitor-General for leave to take additional testimony in this case say:

1. It is true that much proof has been taken in this case both by the Government and the defendants, and the defendants closed their proof in June, 1907; the report of the commissioner has been made and the testimony opened, published, and filed. It is likewise probably true that the Government made no effort to find additional evidence after the closing of the testimony.

2. These defendants take it for granted that the statement that the Department of Justice has received the information set out in the motion is true. But they call the attention of the honorable court to the vague and meagre statements of the motion upon this subject. The names of the two persons who are supposed to have been eye-witnesses of "part of the incidents connected with the lynching of the prisoner, Ed Johnson," are not given. The nature of the "part of the incidents" they saw is not stated. The names of the "two defendants" whom it is supposed these witnesses "could identify as connected therewith" are not given.

3. While these defendants submit that they are entitled to be furnished with the names of the two witnesses, they do not insist upon this because the motion suggests that "these two parties did not previously make known their knowledge of these facts in reference to this matter on account of fear." Defendants aver that nothing whatever has occurred, so far as their knowledge or information extends to support the suggestion that any concealment of facts has been induced by fear of any sort.

4. But there are many defendants to the information in this case and many of them have separate defenses and the defendants are not all represented by the same counsel. The defense has been onerous and expensive. It is inferrible from the statements of the motion that only two defendants will be interested in the additional testimony sought to be taken. To save the expense of the attendance of all the defendants and the attorneys for all of them, these defendants

respectfully submit that they are entitled to be furnished with the names of the two defendants who will be affected by the proposed additional testimony. After the testimony of the two witnesses in question shall have been taken, the defendants affected thereby should have reasonable time within which to collect and adduce evidence in rebuttal.

Defendants therefore offer no resistance to the motion further than to insist that before it is allowed they should be furnished with the names of the two defendants whom it is proposed to identify by the witnesses, and that such additional time be allowed as may be necessary for collecting and adducing rebuttal evidence.

On May 4, 1908, *Mr. Solicitor General Hoyt* submitted a motion for leave to take additional testimony herein, and for the reappointment of James D. Maher as Commissioner to take and return said testimony, and the following order was made on May 18, 1908:

On consideration of the motion for leave to take additional testimony herein, and that James D. Maher be appointed commissioner to take the same, it is now here ordered by the court that said motion be, and the same is hereby, granted, due notice of the names of the particular defendants affected by the proposed evidence to be given and leave being granted to give evidence in rebuttal.

On October 13, 1908, *Mr. Solicitor General Hoyt* presented the reports of the commissioner appointed to take additional testimony herein, and submitted an oral motion as to the matter of his compensation, and on his motion it was ordered that the additional testimony taken herein be opened, published and filed.

On the same day, October 13, 1908, the following reports of the Commissioner were filed:

To the Honorable the Supreme Court of the United States:

The undersigned commissioner appointed by an order entered in this cause on the 18th day of May, 1908, to take and return such additional evidence as the parties to said cause should produce, respectfully reports to the court that pursuant to the said order he proceeded to the city of Chattanooga, Tennessee, on the 28th day of June, 1908, and opened the commission conferred on him in the

214 U. S.

Appendix.

United States court room in said city on the first day of July, 1908, at 10 o'clock a. m., and, the counsel for the respective parties being present, proceeded to execute the said commission on that day and the day following, on which last-named day the parties not offering any more testimony the commission was closed. The said commission was executed by receiving the testimony of the several witnesses named in the said testimony, who were sworn to testify to the truth, the whole truth, and nothing but the truth before giving their evidence, and the testimony so given by them was taken down by a stenographer in the presence of the undersigned and is herewith submitted.

Said testimony, comprising 175 typewritten pages, has been deposited with the clerk of this honorable court.

Respectfully submitted.

JAMES D. MAHER,
Commissioner.

To the Honorable the Supreme Court of the United States:

Pursuant to the order of this honorable court entered on the 18th day of May, 1908, appointing the undersigned as commissioner to take and return additional testimony in the above entitled cause, I beg leave to state that I proceeded to the city of Chattanooga, Tennessee, on June 28, 1908, and returned to the city of Washington on July 3, 1908, and that my expenses were as follows . . . \$64.35

Respectfully submitted, JAMES D. MAHER, *Commissioner.*

On October 14, 1908, the following order was made:

It is now here ordered by the court that Mr. James D. Maher, the commissioner appointed by order of this court, entered herein on May 18th, 1908, to take and return additional testimony in this cause, be, and he is hereby, allowed the sum of \$200.00 in full for his compensation and expenses, and that said sum be paid by the complainant herein.

On October 13, 1908, a motion was made by the *Attorney-General* to dismiss as to certain defendants.

The *Attorney-General*, on behalf of the United States, moves that the information herein be dismissed as to the defendants Paul Pool, T. B. Taylor, William Beeler, John Jones, Marion Perkins, C. A. Baker, Claude Powell, Charles J. Powell, A. J. Cartwright, R. F. Cartwright, John Varnell, Joseph Clark, Fred Frauley, Paul or "Sheenie" Warner, Alfred Hammond, William Marquette, and George Brown, and that they be discharged from their respective recognizances

entered into pursuant to an order of this honorable court made herein on the 21st day of January, 1907, without prejudice, however, to the right of the United States to prosecute this proceeding as to each and all of the other defendants herein with the same force and effect as if the proceeding against the above-named defendants were not dismissed.

Testimony has been taken and the cases of all parties closed. All of the testimony has been reported by the commissioner, printed, published, and filed pursuant to an order of the court.

Efforts to serve Paul Pool with process in this proceeding have been unsuccessful. He left Chattanooga soon after the lynching and has never since been located, according to our information.

The proof fails to disclose any evidence implicating defendants T. B. Taylor, William Beeler, John Jones, Marion Perkins, C. A. Baker, Claude Powell, Charles J. Powell, A. J. Cartwright, R. F. Cartwright, or John Varnell in the acts complained of in the information.

The defendant John Jones is not the John Jones which the Government witnesses testify to having seen in the lynching party. The witnesses stated positively that he was not the same party.

On October 13, 1908, on motion of *Mr. Solicitor General Hoyt*, of counsel for the complainant, it was ordered by the court that the information herein be, and the same is hereby, dismissed as to the defendants, Paul Pool, T. B. Taylor, William Beeler, John Jones, Marion Perkins, C. A. Baker, Claude Powell, Charles J. Powell, A. J. Cartwright, R. F. Cartwright, John Varnell, Joseph Clark, Fred Frauley, Paul or "Sheenie" Warner, Alfred Hammond, William Marquette and George Brown.

On March 2 and March 3, 1909, the case was duly argued and submitted to the Supreme Court of the United States and on May 25, 1909, that honorable court rendered its decision; the opinion of the court was delivered by Mr. Chief Justice Fuller,¹ and on that day the following order was duly entered.

¹ In which MR. JUSTICE HARLAN, MR. JUSTICE BREWER, MR. JUSTICE HOLMES and MR. JUSTICE DAY concurred. See p. 426, *ante*, for dissenting opinion of MR. JUSTICE PECKHAM, in which MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concurred; MR. JUSTICE MOODY did not sit.

214 U. S.

Appendix.

UNITED STATES OF AMERICA, ss:

The President of the United States, To
the Marshal of the Supreme Court
of the United States,
Greeting:

(SEAL)

Whereas it has been made to appear to the Supreme Court of the United States that Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett and William Mayse have been adjudged by the said court, now in session at the city of Washington, in the District of Columbia, to be in contempt of said court.

We, therefore, command you that you attach the said Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett and William Mayse, so as to have their bodies before the said Supreme Court of the United States at the city of Washington, in the District of Columbia, on the first day of June, 1909, at 12 o'clock noon of that day, to answer the said court of the said contempt, by them lately committed against it, as it is said, and further, to do and receive what our said court shall in that behalf consider.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 25th day of May, A. D. 1909.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

And thereafter and on June 1, 1909, the marshal produced the defendants named before this honorable court and a motion having been made for leave to file a petition for rehearing the following order was made:

The marshal of this court made return to the attachment heretofore issued herein by producing the bodies of the defendants, Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett and William Mayse, who appeared in open court in their proper persons, and thereupon the Solicitor General moved the court for sentence upon the said defendants above named, and counsel for the said defendants moved the court for leave to file a petition for rehearing—

Whereupon, upon consideration, It is now here ordered by the court that leave be, and the same is hereby, granted to file motions for leave to file petitions for rehearing herein within thirty days.

It is further ordered that the said above named defendants be re-

manded to the custody of the United States marshal for the Eastern District of Tennessee, he having been deputized by the marshal of this court to serve the attachment herein, to be released on entering into recognizances in the penal sum of one thousand dollars each, conditioned to abide the further order of the court, before the judge of the District Court of the United States for the Eastern District of Tennessee.

And thereafter the following proceedings took place, as appears by the following certificate:

Before me, the District Judge of the United States for the Eastern District of Tennessee, personally came, in open court, in the District Court of the United States for the Southern Division of the Eastern District of Tennessee, the marshal of said court, and produced the bodies of the defendants Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett and William Mayse, who appeared in open court in their proper persons; and there was at the same time exhibited to me a copy of an order entered in this cause by the Supreme Court of the United States on June 1, 1909, directing that said defendants be released from custody on entering into recognizances before me in the penal sum of one thousand dollars each, conditioned to abide the further order of the Supreme Court of the United States;

Whereupon each of said defendants, Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett and William Mayse, did, in open court, enter into his recognizance before me as required by said order of the Supreme Court, and did acknowledge himself to be indebted to the United States of America in the penal sum of one thousand dollars, such obligation to be void upon condition that he should abide the further order of said Supreme Court in the premises; otherwise to remain in full force and effect; and each of said defendants was thereupon released by the marshal from custody.

In witness whereof, I have hereunto set my hand this fourth day of June, 1909.

EDWARD T. SANFORD,
*Judge of the United States District Court
for the Eastern District of Tennessee.*

On June 28, 1909, a petition for rehearing was filed on behalf of defendant Williams.

On June 30, 1909, a petition for rehearing was filed on behalf of defendants Shipp and Gibson.

214 U. S.

Opinion of the Court.

On July 1, motions of defendants Padgett, Mayse and Nolan for leave to file petitions for rehearing were filed.

ED JOHNSON v. THE STATE OF TENNESSEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF TENNESSEE.

No. 2. Docketed March 19, 1906; Abatement announced May 24, 1909.

Case abated on account of death of appellant.

THIS is the appeal referred to in the statement of the case of *United States v. Shipp*, No. 5, original, *ante*, p. 386. The order allowing the appeal was granted and the case docketed March 19, 1906. On that day the appellant was killed under the circumstances set forth in the statement of the case in *United States v. Shipp*, *ante*, p. 386. No further proceedings were had in the case. On May 24, 1909, after announcing the decision in *United States v. Shipp*, holding that certain of the defendants in that case were guilty of contempt of this court for their conduct in connection with the killing of the appellant in this case, the Chief Justice announced that this case had abated owing to death of appellant.

Mr. E. M. Hewlett was attorney for appellant on motion for allowing the appeal.

THE CHIEF JUSTICE: Appeal abated by death of appellant, and case dismissed.