

UNITED STATES *v.* HAYNES.

*Circuit Court, D. Massachusetts.*      March 24, 1886.

## CRIMINAL LAW—REMITTING INDICTMENT TO DISTRICT COURT—Rev. St. § 1037.

After conviction in the district court, the indictment cannot be lawfully remitted to the circuit court, under Rev. St. § 1037.

Motion in Arrest of Judgment.

*C. Almy, Jr.*, Asst. U. S. Atty, for the United States.

*B. F. Butler* and *H. Dunham*, for defendant.

COLT, J. This indictment was remitted from the district to the circuit court, under section 1037, Rev. St., on motion of the district attorney, and after conviction in the district court. Upon the present motion in arrest of judgment the question is raised whether, after conviction in the district court, the indictment can be lawfully remitted to the circuit court under section 1037. There are serious objections to the allowance of a remission at this stage of the case. The defendant, if entitled to a new trial, has a right to a re-examination of the facts by the court where the issues were tried, and this court has no power to re-examine the facts. The seventh amendment to the constitution provides as follows: "And no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to common law." In the construction of this provision in *Parsons v. Bedford*, 3 Pet. 433, Mr. Justice STORY says:

"This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate

court, for some error of law which intervened in the proceedings.”

This language is cited with approval in *The Justices v. Murray*, 9 Wall. 274. We do not think section 1037 should be construed so broadly as to permit the remission of an indictment to another court after conviction, and so deprive the defendant of any right he may have to a new trial by the court where the issue was tried.

The motion in arrest of judgment is sustained.

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