are simply with a view of securing a tribunal competent to receive and weigh the evidence, and render a verdict accordingly, unimpaired by prejudice or preconceived opinions. If there is a reasonable doubt of whether the juror comes up to the standard, that doubt should be resolved in favor of the accused."

In Holt v. People, 13 Mich. 224, Judge Cooley said that in criminal cases, wherein, after full examination, the testimony given upon a challenge leaves a reasonable doubt of the impartiality of the juror, the defendant should be given the benefit of the doubt.

In People v. McQuade, 110 N. Y. 300, 18 N. E. 162, the court of appeals of that state, speaking of the statutory modification of the common-law rule, said:

"There has been no change of the fundamental rule that an accused person is to be tried by a fair and impartial jury. Formerly the fact that a juror had formed and expressed an opinion touching the guilt or innocence of a person accused of crime was in law a disqualification; and, although he expressed an opinion that he could hear and decide the case upon the evidence produced, this did not render him competent. * * * Now, as formerly, an existing opinion, by a person called as a juror, of the guilt or innocence of a defendant charged with crime, is prima facie a disqualification; but it is not now, as before, a conclusive objection, provided the juror makes the declaration specified (that he believes that such opinion or impression will not influence his verdict, and he can render an impartial verdict according to the evidence), and the court, as judge of the fact, is satisfied that such opinion will not influence his action. But the declaration must be unequivocal. It does not satisfy the requirement, if the declaration is qualified or conditional. It is not enough to be able to point to detached language, which, alone construed, would seem to meet the statutory requirement, if, on construing the whole declaration together, it is apparent the juror is not able to express an absolute belief that his opinion will not influence his verdict."

In State v. McClear, 11 Nev. 39, 67, Hawley, C. J., in concluding a well-considered opinion, said:

"When not regulated by statutory provisions, we think that whenever the opinion of the juror has been formed upon hearing the evidence at a former trial, or at the preliminary examination before a committing magistrate, or from any cause has been so deliberately entertained that it has become a fixed and settled belief of the prisoner's guilt or innocence, it would be wrong to receive him. In either event, in deciding these questions, courts should ever remember that the infirmities of human nature are such that opinions once deliberately formed and expressed cannot easily be erased, and that prejudices openly avowed cannot readily be eradicated from the mind. Hence, whenever it appears to the satisfaction of the court that the bias of the juror, actual or implied, is so strong that it cannot easily be shaken off, neither the prisoner nor the state ought to be subjected to the chance of conviction or acquittal it necessarily begets. But whenever the court is satisfied that the opinions of the juror were founded on newspaper reports and casual conversations, which the juror feels conscious he can readily dismiss, and where he has no deliberate and fixed opinion, or personal prejudice or bias, in favor of or against the defendant, he ought not to be excluded. The sum and substance of this whole question is that a juror must come to the trial with a mind uncommitted, and be prepared to weigh the evidence in impartial scales, and a true verdict render according to the law and the evidence."

See, also, People v. Wells, 100 Cal. 227, 34 Pac. 718; People v. Casey, 96 N. Y. 122; Stephens v. People, 38 Mich. 739; Smith v. Eames, 36 Am. Dec. 515, and cases cited in note thereto.

One other point made on behalf of the appellant it is necessary to decide, as, if it should be sustained, it would, in view of the evidence

in the case, be useless to direct a new trial. That point is that there is a fatal variance between the proof on the part of the prosecution and the allegations of the indictment. It is contended in support of this point that the proof shows that the money was extorted by the defendant, if at all, not from Wong Sam, as alleged, but from one Chin Deock; and this, upon the ground that the money really came from Chin Deock, although the defendant dealt in the unlawful and criminal transaction with Wong Sam, and received the money from him. Both Wong Sam and Chin Deock were witnesses on the trial, and, according to their testimony, it was at the request of the latter that Wong Sam agreed to pay the defendant $100 for securing the landing of Wong Lin Choy, and that, when the defendant came to Wong Sam for the $100, the latter sent for Chin Deock, who brought the money, and, in the presence of the defendant, handed it to Wong Sam, who, in turn, handed it to the defendant, after trying to induce him, without avail, to accept $90. We do not think the circumstance that Wong Sam got the money that he paid the defendant from Chin Deock of any importance. The transaction constituting the crime, according to the evidence, was between the defendant and Wong Sam. The defendant, so far as appears, did not know Chin Deock, in the matter, at all, and had nothing to do with him. It was from Wong Sam that he demanded $100 for procuring the landing of Wong Lin Choy, and from Wong Sam that he received the money. This is in accordance with the averments of the indictment, and there was no variance.

It is not necessary to consider any other assignment of error, as they all relate to the rulings of the court below, which, if in any respect erroneous, can be readily corrected on the new trial which must follow for the reason first stated herein. Judgment reversed and cause remanded for a new trial.

GILBERT, Circuit Judge (dissenting). The examination of the juror on his voir dire, as set forth in the bill of exceptions, is chiefly presented in narrative form. We have not before us the questions which he answered; nor have we the benefit, which the trial court had, of noting his demeanor, his appearance, or the tones of his voice. Nor does the bill of exceptions state that all of his examination is embodied therein. The certificate is that it contains all the evidence necessary to explain the exceptions. But, assuming that the record contains substantially all that the juror testified, is the decision of the trial court, overruling the challenge to the juror, ground for now reversing the judgment?

By section 819 of the Revised Statutes it is provided that all challenges for cause or favor shall be tried by the court. In construing this provision, the United States courts, upon writ of error, have uniformly deferred to the decision of the trial court, and have exercised their power to set aside its decision with hesitancy. In Reynolds v. U. S., 98 U. S. 156, Chief Justice Waite said:

"The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set

aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court."

In Hopt v. Utah, 120 U. S. 435, 7 Sup. Ct. 616, where a juror had formed an opinion, but stated under oath that notwithstanding such opinion he could and would act impartially and freely, the court said:

"The judgment of the court upon the competency of the juror in such cases is conclusive."

In Spies v. Illinois, 123 U. S. 179, 8 Sup. Ct. 30, the language from Reynolds' Case, above quoted, was repeated, with the approval of the court.

In Publishing Co. v. McDonald, 19 C. C. A. 517, 73 Fed. 442, the circuit court of appeals for the Second circuit said:

"But it must be remembered that the question before the trial judge, although one of mixed law and fact, is, in the main, a question of fact, and that, while he may be sometimes wrongly influenced by a desire to expedite the trial or by impatience of delays, yet, if his mind is undisturbed, the impression which the juror makes, of his intelligence, fairness, and evenness of mind, from a personal inspection of him, and the belief, in regard to his probable character, which is created by his appearance under examination, his bearing, and willingness to disclose the nature and extent of his preconceived opinions, are valuable, and have deserved weight before an appellate court; and therefore the finding of fact by the trial court will not be set aside, except for manifest error."

Turning to the decisions of the supreme court of California, we find that a similar view of the conclusiveness of the ruling of the trial court has been entertained by that court. In Trenor v. Railroad Co., 50 Cal. 230, Rhodes, J., said:

"And we are inclined to the opinion, though we do not expressly so hold, that the decision is final, and not subject to review either on motion for a new trial or on appeal. But, however that may be, if the decision is subject to review, it is only on the ground that the evidence is insufficient to sustain it. This court would not, except in the clearest case, interfere with the decision, for the determination of the court below is based more largely than in ordinary questions in litigation upon the bearing, manner, appearance, etc., of the juror while giving his testimony."

In People v. Wells, 100 Cal. 229, 34 Pac. 719, referring to section 1073 of the Penal Code which defines actual bias to be "the existence of a state of mind on the part of the juror in reference to the case or to either of the parties, which will prevent him from acting with entire impartiality, and without prejudice to the substantial rights of either party," the court said:

"Whether the state of mind of the juror is such as to constitute actual bias, within the above definition, is a question of fact, to be determined by the court. * * * The court's decision upon these points, when the evidence disclosed upon the examination of the juror is susceptible of different constructions, is to be regarded on appeal like its determination of any other question of fact resting upon the weight or construction of evidence."

In People v. Fredericks, 106 Cal. 559, 39 Pac. 945, the court said:

"This court is only allowed to review an order denying a challenge to a juror upon the ground of actual bias when the evidence upon the examination

of the juror is so opposed to the decision of the trial court that the question becomes one of law, for it is only upon questions of law that this court has appellate jurisdiction. * * * The evidence of each juror was contradictory in itself. It was subject to more than one construction. A finding by the court either way upon the challenge would have support in the evidence, and under such circumstances the trial court is the final arbiter of the question; for under such conditions the question presented to this court by the appeal is one of fact, and our power to hear and determine is limited to appeals upon questions of law alone."

Guided by the principles announced in the foregoing decisions, both of the courts of the United States and of California, I think the finding of the trial court in this case upon the question of the competency of the juror is conclusive. Conceding that the juror's evidence appears contradictory, and that there are portions of it which would lead to a contrary conclusion, it must be borne in mind that it is not our province to weigh the evidence, and to say whether or not the trial court should have found differently upon the facts. The only question for us to consider is whether there was evidence to support the finding. The record shows that there was. When asked if he would sit as a juror, and render a verdict based solely upon the evidence, he answered: "I think I would. I feel that I might." The force of these words would, it is true, largely depend upon the manner and tones in which they were uttered. They might be said in a hesitating, doubting manner, such as to convey the impression that the speaker himself distrusted his ability to divest himself of his bias; and, upon the other hand, they might be expressed with such earnestness and sincerity as to carry to the court the conviction that notwithstanding his bias the juror could and would act impartially. The trial court had a better opportunity than have we to judge of the effect and the credibility of that testimony, and he had the right to trust and act upon it. In so doing, he exercised a discretion which was vested in him by the statute; and his finding upon the facts is not, I think, subject to our review.

UNITED STATES, to Use of SICA, v. KIMPLAND et al.

(Circuit Court, E. D. New York. April 18, 1899.)

1. PRINCIPAL AND SURETY—BOND OF CONTRACTOR FOR PUBLIC WORK—FURNISHING LABOR OR MATERIALS.

   The condition in a bond of a contractor with the United States for public work, prescribed by 28 Stat. 278, which requires that the contractor shall make prompt payments to all persons supplying him labor and materials in the prosecution of the work, is intended to cover payments only for the visible material furnished for direct use and incorporation in the work, and of wages to the men whose services are directly employed in doing the work; and an action against the sureties on such a bond can only be maintained, under the statute, by one who has title to a claim for labor or materials so supplied. A person furnishing board and lodging to laborers employed on the work does not supply either labor or materials, within the statute.

2. SAME—ACTION ON BOND.

   Plaintiff brought action, under 28 Stat. 278, on the bond of a contractor for public work, conditioned, as therein required, for the payment by the contractor of all persons supplying him labor and materials in the prose-