10-24-1893

Amending section 5391, Revised Statutes.

53D CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 141.

AMENDING SECTION 5391, REVISED STATUTES.

OCTOBER 24, 1893.—Referred to the House Calendar and ordered to be printed.

Mr. LAYTON, from the Committee on the Judiciary, submitted the following

REPORT:

[To accompany H. R. 3981.]

The Committee on the Judiciary, to whom was referred the bill (H. R. 3981) to amend section 5391 of the United States Revised Statutes, submit the following report:

This bill is, substantially, a reënactment of the existing law, viz, section 5391 of the Revised Statutes of the United States, passed April 5, 1866, with slight changes in the phraseology.

It provides, in substance, that the laws of the respective States in which reservation or places under exclusive jurisdiction of the United States are located, relative to certain minor offenses, shall be applicable to such reservation or places, and offenses therein may be proceeded against under such laws in the United States court having jurisdiction.

It has been judicially determined that the present law is operative to put in force only the laws of such States as existed at the time of the last enactment of said section 5391, viz, April 5, 1866; hence the necessity of this reënactment, so as to apply to all such reservations and places in States admitted into the Union since the last-mentioned date.

Your committee report the bill favorably, with a recommendation that it do pass with the following amendments:

Insert after the word "States," in the title of the bill, the following words, "relating to the punishment of certain minor offenses in reservations or places over which the United States has exclusive jurisdiction."

Strike out the words "such offense," in the eleventh line, and insert in lieu thereof "any person so committing the same."

Strike out the word "existing," in the fourteenth line, and insert the words "now in force," at the end of said fourteenth line. Said section, as amended, will then read as follows:

A BILL to amend section fifty-three hundred and ninety-one of the Revised Statutes of the United States, relating to the punishment of certain minor offenses in reservations or places over which the United States has exclusive jurisdiction.

SEC. 5391. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That if any offense be committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dock yard, or other needful building, the punishment for which offense is not provided for by any law of the United States, any person so committing the same shall, upon conviction in a circuit or district court of the United States for the district in which it was committed, be liable to and receive the same punishment

as the laws of the State in which such place is situated now in force provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any such prosecution.

This legislation is approved and recommended by the Secretary of War and the Attorney-General also, as shown by copy of Executive Document No. 14, this Congress, hereto attached, marked Exhibit A, and by letter of the Attorney-General, dated October 20, 1893, hereto attached, marked Exhibit B, and both made part of this report.

EXHIBIT A.

[House Ex. Doc. No. 14, Fifty-third Congress, first session.]

WAR DEPARTMENT,
Washington, D. C., October 6, 1893.

SIR: I have the honor to transmit herewith a copy of a letter dated January 20, 1893, from the commanding officer at Fort Logan, Colo., reporting the result of a prosecution instituted against W. E. Curran *et als.* for an offense committed on that military reservation on July 8, 1890, the offense being an aggravated assault on three laundrymen, employed at the post, by a party of citizens who entered upon the reservation, seized the men, and treated them in a brutal manner for the ostensible purpose of extorting a confession of theft. Copies of papers accompanying the letter of the post commander are also transmitted. It appears from the papers that the offending citizens were arrested with a view to being brought to trial for a violation of section 5391 of the Revised Statutes, which is as follows:

"SEC. 5391. If any offense be committed in any place which has been or may hereafter be ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States."

But, as will be seen from the copy of the decision rendered by Mr. Justice Hallett in the district court of the United States for the district of Colorado on December 23, 1892, the motion to quash the indictment against them was sustained, for the reason that at the time of the enactment of section 5391 Colorado was not then a State in the Union, and that none of its laws were adopted or put in force by this section, and that consequently the section will never be operative in Colorado to put in force the laws of the State in respect to crimes committed on Government reservations unless reënacted.

Concurring in the views of the Acting Judge-Advocate-General and the Major-General Commanding the Army, as shown in the accompanying copies, I have the honor to submit, with a recommendation for favorable legislation by Congress, a draft of an act reënacting section 5391, so as to make it applicable alike to all military reservations, whether in new or old States, or whether in Territories, and which will also be applicable to States hereafter admitted into the Union.

Very respectfully,

DANIEL S. LAMONT,
Secretary of War.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

OFFICE OF THE POST COMMANDER,
Fort Logan, Colo., January 20, 1893.

SIR: I have the honor to inclose herewith a communication received from United States Attorney John D. Fleming, district of Colorado, reporting the result of a prosecution instituted against W. E. Curran *et al.* for an offense committed on this military reservation July 8, 1890.

The offense was a peculiarly aggravated assault on three Chinese laundrymen, employed at this post, by a party of citizens under the lead of one W. E. Curran, who entered the reservation at night, seized upon the Chinamen, took them in a

wagon about a mile from the post to the place of residence of said Curran, where the Chinamen were repeatedly hanged up by their necks in a most brutal and cruel manner, the rope marks being plainly visible for weeks afterwards.

The ostensible purpose and motive on the part of the assailants was to extort a confession of theft of certain articles of jewelry alleged to have been sent to the laundry, accidentally, with clothing by Mrs. Curran.

It appears to me the defenseless condition of this reservation, and apparently many others, against crimes of this nature, as appears from the decision of the court set forth, demands the early attention of Congress, and I request that proper action may be taken to that end.

Very respectfully, your obedient servant,

H. C. MERRIAM,
Colonel Seventh Infantry, Commanding Post.

The ADJUTANT-GENERAL, U. S. ARMY,
Washington, D. C.
(Through Headquarters Department of the Platte.)

[Third indorsement.]

WAR DEPARTMENT,
JUDGE-ADVOCATE-GENERAL'S OFFICE,
Washington, D. C., February 4, 1893.

Respectfully returned to the Adjutant-General for the Major-General Commanding the Army.

That a brutal, aggravated assault and battery, such as is here described, can, under existing law, be committed with impunity on a military reservation, exclusive jurisdiction over which has—as in the case of Fort Logan, Colo.—been ceded to the United States, certainly indicates a gross failure of justice which calls for prompt discontinuance.

This end may be attained on all reservations within States now in existence by reënacting section 5391, Revised Statutes. By that means the laws now in force in the various States would be adopted by the United States and made United States laws for the reservations in their respective States, just the same as if they were taken up one by one and passed in the usual way by Congress and approved by the President. It would not only supply the reservations in new States—such as Fort Logan Reservation in Colorado—with such laws as are needed of the character under consideration, but it would bring the laws on reservations in old States down to date, as it were.

By the enactment of section 5391 the State laws that were in force at the time of the enactment were made United States laws on the reservations. But since that time the States have, in many instances, changed their laws, so that now the laws of the States are in many respects different from the laws in force on the reservations in those States. The States could not change the laws on the reservations, of course, because they have no jurisdiction over them, and therefore the laws on the reservations adopted by the enactment of section 5391 have stood as they were, while the laws of the States in which they are located have been undergoing a change to keep up with the progress of the times. And it is now desirable to abandon and repeal the laws adopted by the enactment of section 5391 and adopt in lieu of them the laws of the respective States now in force. As indicated above, this may all be done by putting the substance of that section into the form of a bill and enacting it into law at this time.

The only other adequate remedy for the evils under consideration would be the enactment by Congress of a full penal code of the United States for the reservations, etc., over which the United States has jurisdiction.

One objection to the latter course would be the almost certain failure to foresee, and provide for, all offenses that the code ought to cover; and another—which, by the way, may or may not be well founded—would be that the laws of the reservations would in many instances be different on given subjects from those of the Territory or the State that immediately surrounded the reservations. But, on the other hand, it might be said in favor of such a code that it would secure a uniformity of laws on the reservations. We would then have the same law on a reservation in Virginia that we would have on a reservation in North Dakota.

It is recommended that the Secretary of War cause the subject to be brought to the attention of Congress, with a view to adequate legislation.

In its absence our military reservations in the new States—too extended to be effectually patrolled by the military force—will remain open to the incursions of ruffians, etc., and those in the old States will only have the advantage of the laws in force in the various States at the time of the enactment of the said section 5391.

G. NORMAN LIEBER,
Acting Judge-Advocate-General.

HEADQUARTERS OF THE ARMY,
Washington, February 11, 1893.

Respectfully submitted to the Secretary of War, concurring in the recommendation of the Acting Judge-Advocate-General, with the suggestion that in the reënactment of section 5391 the penalty imposed for the offense should be that provided for the like offense when committed within the jurisdiction of the State by the laws in force at the time the offense is committed, instead of by the laws "now in force."

J. M. SCHOFIELD,
Major-General Commanding.

WAR DEPARTMENT, *February 21, 1893.*

Respectfully returned to the Acting Judge-Advocate-General, to prepare a bill for presentation to Congress which shall meet the case.

If practicable, and if it can be accomplished by a short bill, it would be better to have a law which would be applicable alike to all military reservations, whether in new or old States, or whether in Territories, and which will also be applicable to States hereafter admitted.

As it is not likely that the present Congress will act upon a new bill, there will be time for a thorough examination and preparation.

L. A. GRANT,
Assistant Secretary of War.

[Seventh indorsement.]

WAR DEPARTMENT,
JUDGE-ADVOCATE-GENERAL'S OFFICE,
Washington, D. C., September 29, 1893.

Respectfully returned to the Secretary of War.

Attention is invited to the accompanying report and draft of proposed legislation, prepared in accordance with the directions of the Assistant Secretary of War, contained in the foregoing indorsement.

G. NORMAN LIEBER,
Acting Judge-Advocate-General.

UNITED STATES ATTORNEY'S OFFICE,
DISTRICT OF COLORADO,
Denver, Col., January 18, 1893.

SIR: On Friday December 23, ultimo, in the United States district court at Denver, Judge Hallett granted a motion to quash the indictment in the case of the men charged with the assault upon the Chinamen upon the reservation at Fort Logan. As I have before had some correspondence with you in this matter, and knowing your interests in the case, I have had a copy of the opinion of Judge Hallett made, dismissing the charge, which opinion I send you herewith. It is very brief, but I think correctly states the law upon the question, as further investigation, subsequent to the indictment, convinces me.

First, it should be remembered that *there is no law in the United States statutes* directly providing punishment for minor offenses when committed by one private person against another in places under the exclusive jurisdiction of the General Government. Recourse, therefore, was had in the indictment in question to that general provision of the Revised Statutes of the United States found in section 5391, which in effect provides that in such cases we may proceed under the laws of the State against such offenders.

Accordingly I had Curran and others indicted under the State statute by the Federal grand jury for (1) riot, (2) assault (aggravated by beating and wounding the Chinamen, etc.), (3) false imprisonment, etc.

Now comes the court and says that section 5391, Revised Statutes, United States, is operative to put in force only the laws of such States as existed at that time of the enactment of said section 5391. The effect is, you plainly see from the decision, to make that law in some of the older States (Massachusetts, say) which is not law in Colorado, or Montana, or any of the newer States.

It is this peculiarity which leads me to address you at this length; to the end, if you think it necessary, as I certainly do, that appeal may be made to Congress, through your own or the proper Department, for the reënactment of section 5391 of the Revised Statutes of the United States, whereby the existing laws of the State of Colorado may be made available for the punishment of offenses committed on your reservation. As the law now is, only murder, and perhaps a few of the more serious

crimes, can be punished in the civil courts when the offense is committed there. I send you inclosed a copy of a recent Montana decision (United States *v.* Barnaby), in which substantially the same question as ours arose, and was similarly disposed of.

I write this note hurriedly, and would be glad that it be shown, if convenient, to Capt. Quentin, of your post, who also took an interest in the case of the unfortunate Chinamen.

The decision, I may add, of Judge Hallett finally disposed of the present offenders. It is to be hoped that in the future the state of the law may be such as to fitly punish all who imitate Curran and his crowd.

Very respectfully,

JOHN D. FLEMING,
United States Attorney for Colorado.

Col. H. C. MERRIAM,
Fort Logan, Colo.

In the district court of the United States for the district of Colorado, December 23, 1892.

HALLETT, J. (orally): The United States against William E. Curran and others is a prosecution for inciting a riot and committing an assault upon certain Chinamen on the reservation at Fort Logan.

This is alleged to be in violation of a law of the State, which is put in force by section 5391 of the Revised Statutes of the United States. This section was enacted first in 1825 and again in 1866, and it refers to the laws of States then existing. The act was so construed in Paul's Case, 6 Peters, 141 (U. S. Supreme Court).

As Colorado was not then a State in the Union, none of its laws were adopted or put in force by this act. This section will never be operative in Colorado to put in force the laws of the State in respect to crimes committed on Government reservations unless reënacted.

The motion to quash will be sustained.

UNITED STATES *v.* BARNABY.

[Circuit court, D. Montana. June 7, 1892.]

KNOWLES, *District Judge.* The defendant was charged in the indictment in this case with an assault with the intent to commit murder. He was tried and by the jury found guilty of this offense. Counsel for defendant now come into this court and move the court that the judgment herein be arrested. Among the grounds for this motion are that the indictment alleges no offense known to the laws of the United States; that for the crime alleged in the indictment and proven at the trial there is no punishment provided by the United States laws. Upon an examination of the statutes of the United States, I find no such crime named as an assault with the intent to commit murder. There is a punishment provided in the 5342d section of Revised Statutes of United States for the crime of an attempt to commit murder or manslaughter by any means not constituting an assault with a dangerous weapon. I suppose the meaning of this latter clause, not constituting an assault with a dangerous weapon, means nothing more than that the attempt to commit murder must amount to something more or different from that of an assault with a dangerous weapon, because such an assault is made a crime of itself. In the crime of an attempt to commit murder, or an assault with the intent to commit murder, there is the ingredient of malice aforethought, express or presumed. When this ingredient in a crime exists, although the assault may be accompanied with the use of a deadly weapon, I should think there would be no difficulty in maintaining a proper charge of an attempt to commit murder. The facts stated would constitute something more than an assault with a deadly weapon, and not that alone. The indictment in this case charges that the defendant made an assault with a knife upon one Alexander Ashley with the intent him to kill willfully, feloniously, and of his malice aforethought. There is no charge that the defendant struck Ashley with this knife or inflicted upon him any wounds or battery which would have had the tendency to produce death. There are no allegations as to the character of the knife used. The question is then presented as to whether the indictment shows sufficient to warrant the court in saying that it appears that the crime of an attempt to commit murder is presented. "The word 'attempt' signifies both the act and the intent with which the act is done." (2 Bish. Crim. Proc., sections 88, 89.) In speaking of an

indictment for an attempt, the same author says (section 92): "The attempt may be a crime or may not be, and the indictment should state such facts as will enable the court to say whether the particular attempt constitutes a crime or not." An "assault" is generally defined to be an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another. When a simple assault is alleged, a court can not judicially see whether or not it is of such a nature, if consummated, death would ensue. From the very nature of the definition it will be seen that a court can not see from such a charge that it involves an act which would effectuate the purpose alleged. 1 Whart. Crim. Law, section 190, says: "In indictments for attempts the laxity in assaults will not be maintained." That author gives as a reason for this that the term "assault" is one "which describes an act easily defined, and asserts a consummated offense;" while "'attempt' is a term peculiarly indefinite." "It has no prescribed legal meaning; it relates, from its nature, to an unconsummated offense." Again, he says, in section 192: "On the same reasoning, in an indictment for an attempt to commit a crime, it is essential to aver that the defendant did some act which, directed by a particular intent to be averred, would apparently result, in the ordinary and likely course of things, in a particular crime." The same rule is expressed, in effect, in section 749 *et seq.*, 2 Bish. Crim. Law. It will be seen from these authorities that there were not sufficient facts set forth in the indictment in this case to warrant the court in holding that the attempt to commit murder or manslaughter was charged. Generally the crime of assault with the intent to commit murder is defined by statute law. When so defined, if the indictment follows substantially the language of the statute in charging the offense, it will generally be sufficient, but when not so defined facts must be alleged which will make the crime judicially appear.

The question arises as to whether or not the crime of an assault does not appear sufficiently in the indictment. It is charged that the defendant made an assault upon Ashley. There is, however, no punishment provided for a simple assault committed in a place within the exclusive jurisdiction of the United States except in specified cases, of which the one under consideration is not classed. There is a punishment provided for an assault committed by one belonging to the Navy, which is to be decreed by a court-martial; there is a punishment provided for an assault committed upon a public minister; an assault upon the high seas is punished; one committed by a person in the Army, in time of war, or upon a superior officer in the Army, or upon a letter carrier, or on officers by seamen, or upon an officer authorized to execute process, or upon a custom-house officer when in the execution of duty, is each punished by provisions of statute. It will be seen that the special instances here named do not include an assault of one person upon another in any such place as an Indian reservation. It is a settled rule in Federal jurisprudence that there are no common-law offenses against the United States, and that no punishment can be inflicted for any common-law offenses unless the punishment therefor is specially provided for by Congress. It is claimed, however, that there are two statutes of the United States which provide for the punishment of the crime in question. The first of these is found in 23 Statutes at Large, p. 385, section 9, and is as follows:

"That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases. And all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

Montana has ceased to be a Territory, and hence the first part of the above section does not apply. As I have shown, the punishment for the crime of an assault with intent to commit murder or manslaughter, nor the crime of assault, except in enumerated cases, is not established by a United States statute, although committed within a place within the exclusive jurisdiction of the United States. An assault with intent to kill is not the same offense as an assault with the intent to commit murder. There may not exist in the former the element of malice aforethought; there may be an unlawful and intentional killing, which does not amount to murder. (State *v.* Hill, 4 Dev. and B., 491, Hor. and T. Cas., 199; Com. *v.* Drum, *Id.*, 190.) If an assault with the intent to kill was the same crime as an assault with the intent to commit murder, no punishment is provided for either.

The second of the statutes before alluded to is as follows:

"If any offense be committed in any place which has been or may hereafter be ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to and receive the same punishment as the laws of the State in which such place is situated, now in force, provided for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States." (Section 5391, Rev. Stat. U. S.)

This statute has been construed by the Supreme Court in the case of United States *v.* Paul, 6 Pet., 141, and held to apply to State statutes punishing crimes which existed at the time of the passage of this statute. This decision has at no time been reversed or doubted by that court, and was a contemporaneous judicial construction of the same, and should be adhered to. Considering the language of the statute (and I do not see how any other conclusion could be reached), Congress might be willing to adopt the laws of a State which existed at the time of the passage of a statute by it, but would hardly be willing beforehand to adopt all the criminal statutes a State might in future enact. A statute to this effect might be classed as delegating legislative authority, which is not proper. This statute was passed in 1825. But the construction contended for, namely, that it applied to any laws which might exist in any State, at any time when a place might be ceded by it to the United States, brings us to no different conclusion. In the case of the United States *v.* Kagama (118 U. S., 375; 6 Sup. Ct. Rep., 1109) the Supreme Court, in speaking of Indian tribes, said:

"They were and always have been regarded as having a semiindependent position when they preserved their tribal relations, not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

This view was largely supported by the cases of Cherokee Nation *v.* Georgia, 5 Pet., 1; Worcester *v.* Georgia, 6 Pet., 515. The evidence in this case showed that the defendant and the witness, Ashley, upon whom the offense was committed, were both members of the Flathead tribe of Indians, under the charge of an Indian agent. It is safe, therefore, to assert that Montana could pass no criminal statute affecting the members of this Indian tribe in their relations with each other, and that it has not done so. In the case of United States *v.* Kagama, *supra*, the Supreme Court said of Indians occupying such relations as these Indians: "They owe no allegiance to the State, and receive from them no protection." I do not say that when an Indian commits a crime against a white man within the State and off of a reservation he can not be punished by the laws of the State where the offense was committed, but the State can not regulate in any manner the social relations of the members of an organized Indian tribe among themselves. There was then no law of Montana touching this crime at the time the Flathead Indian Reservation was ceded, if ever, to the United States. I hardly think that the agreement by which the United States retained jurisdiction over the Flathead Indian Reservation can be called a ceding to the United States of the same. For these reasons I find that the defendant committed no crime for which this court can enter a judgment punishing him. As the Government of the United States has undertaken to control Indians by laws, and has left them no longer to be controlled by their tribal rules and regulations, it is to be regretted that an adequate and proper code of laws to this end has not been enacted by Congress. This attempt to adopt Territorial and State laws may be classed as indolent legislation, not well adapted to producing order upon Indian reservations, or in those places under the exclusive jurisdiction of the General Government, and allowing men guilty of crimes, demanding in all civilized governments punishment, as in this case, to escape their just deserts. The motion in arrest of judgment is sustained, and the defendant discharged from custody.

WAR DEPARTMENT, JUDGE-ADVOCATE-GENERAL'S OFFICE,
Washington, September 29, 1893.

SIR: Section 5391 of the Revised Statutes of the United States is as follows:

"If any offense be committed in any place which has been or may hereafter be ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to and receive the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States."

This is taken from an enactment of April 5, 1866. In 1832 the Supreme Court (in United States *v.* Paul, 6 Peters, 141), passing upon a similar act of March 3, 1825, said that it was to be limited to the laws of the States in force at the time of its enactment.

In 1892 the circuit court for the district of Montana in the case of United States *v.* Barnaby (51 F. R., 20) followed the decision of the Supreme Court in United States *v.* Paul, and the district court for the district of Colorado held similarly in the United States *v.* Curran and others indicted in 1892 for riot and assault.

That is to say, as the law is held to be the only criminal law in force on a place under such jurisdiction of the United States is such criminal law of the United States as may be applicable, and if it is a place jurisdiction over which has been ceded to the United States by a State existing in 1866, the laws of the State in force at that time. So that, as in the Montana and Colorado cases referred to, the criminal laws of the State can not be enforced over the ceded territory because the States were not in existence at the time of said enactment. And in State which were in existence at that time the criminal laws adopted in such States since then can not, under the legislation as interpreted by the courts, be extended over such territory. In the Montana and Colorado cases riot and assault were thus held not punishable.

It is evident, therefore, that the law needs amendment. It is regarded as impracticable for Congress to enact a full penal code to apply to such territory, but appears to be very much better to supplement (as was done in 1825 and 1866) the laws of the United States with the existing laws of the States. What seems to be most desirable now is to bring the legislation contained in section 5391 of the Revised Statutes to date. If, however, that should be done by a separate piece of legislation, it is evident that it would from year to year fall behind the State legislation, so that in time there would arise a difficulty similar to that now existing. This can not be provided for by adopting beforehand all the criminal laws of a State which shall be in force at the time of the commission of the criminal act, because that would be a delegation by Congress of its legislative power to the States. In order to overcome this difficulty it is suggested that a provision somewhat like section 5391 should be annually enacted that would incorporate the State legislation from year to year.

I submit herewith the draft of such legislation and recommend that steps be taken to have it placed in the next sundry civil expenses act under the head of "Judicial, United States courts," to be every year reënacted therein.

Very respectfully, your obedient servant,

G. NORMAN LIEBER,
Acting Judge-Advocate-General.

The SECRETARY OF WAR.

If any offense be committed in any place, jurisdiction over which has been retained by the United States, or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dock yard, or other needful building, the punishment for which offense is not provided for by any law of the United States, such offense shall, upon conviction in a circuit or district court of the United States for the district in which it was committed, be liable to and receive the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any such prosecution.

EXHIBIT B.

DEPARTMENT OF JUSTICE,
Washington, D. C., October 20, 1893.

SIR: I have the honor to acknowledge the receipt of your letter of the 18th instant, inclosing House bill amendatory of section 5391 of the Revised Statutes of the United States, copy of letter from the Secretary of War of date October 6, 1892, to the Speaker of the House of Representatives, and copy of letter of January 20, 1893, from Col. H. C. Merriam, Seventh Infantry, commanding at Fort Logan, Colo., to the Adjutant-General, U. S. Army, together with various indorsements thereon, upon which you ask my opinion as to the necessity of the proposed amendment.

In reply I beg leave to state that I have considered with care your letter and inclosures, and find that the question presented is one to which the attention of this Department has been heretofore directed—the inadequacy of existing statutes of

the United States to secure the punishment of persons committing certain offenses in places where the General Government possesses jurisdiction, and am of the opinion that legislation is urgently required to remedy this defect in the law. The practical result of this want of effective legislation is so clearly shown by the occurrence referred to in the communications from the Secretary of War and Col. Merriam that further demonstration of the necessity of Congressional action would seem to be uncalled for.

Whether it is your wish that I advise only as to the need of *some* action to be taken, or whether you desire my views concerning the form of the inclosed bill, I am somewhat at a loss to determine from your letter. Rather, however, than fail to respond fully to your inquiry, I beg to offer the following suggestions:

(1) It seems to me that the insertion of the words contained in the pencil memorandum which I find at the foot of the first page of the bill submitted, evidently designed to be introduced in the eleventh and twelfth lines, so that thus corrected those lines and the thirteenth shall read (subsequent to the first word of the eleventh line) "the person so committing the same shall, upon conviction in a circuit or district court of the United States for the district in which such an offense was committed," would be desirable.

(2) It occurs to me that the following words, contained in the thirteenth, fourteenth, and fifteenth lines of the bill, may be less definite than might be found desirable, viz, "be liable to and receive the same punishment as *the existing laws* of the State in which such place is situated provide for the like offense," etc. The question might arise as to whether the laws existing at the time of the enactment of this bill or those existing at the time of the commission of the offense were thus referred to.

(3) I concur in the opinion expressed by Acting Judge-Advocate-General G. Norman Lieber, that a law adopting, *in advance*, whatever statutes should thereafter be enacted by the several States would amount to an attempted delegation of the Congressional legislative power, which would probably be inoperative; and, further, that, if operative, such a law would be of much embarrassment to the Government, inasmuch as it would place in the power of the various State legislatures in large measure the molding in the future of the national legislation and policy pertaining to the punishment of crimes; which view, it seems, was entertained by the circuit court of the United States for the district of Montana, cited by Mr. John D. Fleming, United States attorney for Colorado, in his communication to Col. Merriam, and which opinion appears at length in the papers transmitted to me.

With the submission of these suggestions, I beg to state that I regard as desirable the enactment of the bill under consideration.

Respectfully,

RICHARD OLNEY,
Attorney-General.

Hon. F. C. LAYTON, M. C.,
Chairman subcommittee of the Committee on the Judiciary,
House of Representatives.

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