an upper age limit above which sterilization cannot be performed and a provision that the operation be performed only when the defendant is discharged from the institution of which he has been an inmate—also indicates different legislative purposes in passing the two statutes and tends to corroborate the defendant's contention that the statute is penal. The statute, if penal, is not only inapplicable to the particular case as an ex post facto law, but should also be held unconstitutional on the ground that the obvious humiliation of a forced sterilization is cruel and unusual punishment.[19]

Contempt—Privilege—State Court Citation for Statements in Pleadings in Federal Court—[California].—A California superior court issued a temporary injunction restraining certain defendants, who owned a Mexican broadcasting company, from broadcasting racing results. The defendants' attorney, who also represented the alien broadcasting corporation, which had been named as defendant but had not been served, then filed suit in the federal district court to enjoin the attorney general of California and the judge of the superior court from molesting the broadcasting corporation or its agents by contempt proceedings. The grounds stated for federal jurisdiction were diversity of citizenship and the federal question raised by the allegation that the state court's temporary injunction interfered with foreign commerce subject to the jurisdiction of the Federal Communications Commission.[1] The temporary injunction would, the complaint stated, cause irreparable harm because of an alleged conspiracy between the attorney general and the superior court judge to delay trial until the broadcasting corporation would be ruined. The federal court dismissed the suit, upon the attorney general's and judge's motion, on the ground that the suit was against the state. Thereupon, the superior court cited the broadcasting corporation's attorney for contempt because of the allegation of conspiracy contained in the federal pleadings. On certiorari from the California Supreme Court, *held*, the superior court had jurisdiction and the allegation of conspiracy was not privileged. Judgment affirmed. *Hume v. Superior Court.*[2]

While the court in the instant case discussed petitioner's privilege to allege the conspiracy, it found that such charges were irrelevant to the issues before the federal court and, therefore, not privileged.[3] The allegations, it is true, were not pertinent to establishing the federal court's jurisdiction if that was based only on diversity of

[19] Okla. Const. art. 2, § 9. Similar provisions have been held to invalidate sterilization statutes as constituting cruel and unusual punishment. Davis v. Berry, 216 Fed. 413 (D.C. Iowa 1914); Mickle v. Henrichs, 262 Fed. 687 (D.C. Nev. 1918). Contra: State v. Feilen, 70 Wash. 65, 126 Pac. 75 (1912).

[1] 48 Stat. 1064, 1082 (1934), 47 U.S.C.A. §§ 152 (a), 303 (r) (Supp. 1940). But at the time of trial there was no controlling treaty or agreement with Mexico. Therefore, the exercise of state police power to abate a nuisance was probably proper, since federal jurisdiction over foreign radio was not then exclusive.

[2] 17 Cal. (2d) 506, 110 P. (2d) 669 (1941). Petitioner, a Texas attorney, was also disbarred from practicing before the superior court.

[3] Otherwise contemptuous statements made in pleadings are privileged only when relevant. Works v. Superior Court, 130 Cal. 304, 62 Pac. 507 (1900); In re Sherwood, 259 Pa. 254, 103 Atl. 42 (1918).

citizenship.[4] But that is not to say that the allegation was not relevant to the showing of irreparable harm as a ground for equitable relief in the federal court.[5] Nevertheless, the California court found the charge of conspiracy contemptuous because it was not supported by allegations of fact. Fact pleading, however, is not necessary to stating a cause of action under the new federal rules.[6]

Furthermore, it may be argued that the allegedly contemptuous pleadings should have been privileged not only because relevant but also because they were addressed to an official who could act thereon. This is the basis of the privilege of a citizen to write to a congressman about a federal judge,[7] of a labor leader to telegraph the United States Secretary of Labor about a labor case,[8] and of an attorney to charge bias and prejudice in applying for a change of venue or the disqualification of a judge when bias and prejudice are statutory grounds for such applications.[9] In the instant case, the worst that can be said was that petitioner was mistaken as to whether the federal court

[4] Rev. Stat. §§ 563, 629 (1875), 28 U.S.C.A. § 41 (1) (1927). Appellant argued that the allegation of conspiracy was privileged because relevant to the provision of the removal statute which permits removal for local prejudice. Petitioner's Brief for Certiorari, at 6–9; 18 Stat. 470 (1875), 28 U.S.C.A. § 71 (1927); In re Sherwood, 259 Pa. 254, 103 Atl. 42 (1918) (assertion made in removal proceedings before a federal court that five state judges were prejudiced held privileged). But the proceeding in the federal court in the instant case was not one for removal because the plaintiffs there were not parties to the California suit and, furthermore, were aliens, who cannot remove from the state court. Grand Trunk R. Co. v. Twitchell, 59 Fed. 727 (C.C.A. 1st 1894).

[5] The federal suit to enjoin the superior court judge and the attorney general from molesting the broadcasting corporation or its agents by contempt proceedings may be within the ban of § 265 of the Judicial Code, Rev. Stat. § 720 (1875), 28 U.S.C.A. § 379 (1928), which provides that a federal court shall not grant an injunction to stay proceedings in a state court. If the federal action was intended to prevent the enforcement of the state court's temporary injunction against the defendant owners of the broadcasting corporation, § 265 would have been a good defense. See Hill v. Martin, 296 U.S. 393, 403 (1935). Even if the federal action was aimed only at preventing extension of the state court's process to the broadcasting corporation, which had not been served, § 265 would be a bar if it could be said that the broadcasting company was merely an associate of the defendant owners attempting to aid them in performing the prohibited acts. See Chase Nat'l Bank v. Norwalk, 291 U.S. 431, 436, 437 (1934); In re Lennon, 166 U.S. 548, 554 (1897). But if the broadcasting corporation's California activities were considered independent of those actions of the defendants enjoined by the superior court, the latter's injunction would not bind the company. Alemite Mfg. Corp. v. Staff, 42 F. (2d) 832 (C.C.A. 2d 1930). Then the company's federal suit for injunction might be entertained because it would not be an action to stay state court proceedings. Chase Nat'l Bank v. Norwalk, 291 U.S. 431 (1934).

[6] Rule 8 (a)(2), 28 U.S.C.A. foll. § 723c (1941); 1 Moore and Friedman, Moore's Federal Practice 553 (1938); Hummel v. Wells Petroleum Co., 111 F. (2d) 883 (C.C.A. 7th 1940). The court in the instant case cites California authority on this point of pleading in the federal court, a point clearly subject to the federal rules.

[7] See Froelich v. United States, 33 F. (2d) 660, 664 (C.C.A. 8th 1929).

[8] See Bridges v. Superior Court, 14 Cal. (2d) 464, 493, 94 P. (2d) 983, 997 (1939).

[9] In re Cunha, 123 Cal. App. 625, 11 P. (2d) 902 (1932); Lapique v. Superior Court, 68 Cal. App. 407, 229 Pac. 1010 (1924); cf. In re Jones, 103 Cal. 397, 37 Pac. 385 (1894) (decided before California made bias a statutory ground for change of venue).

would grant an injunction. That the complaint in the federal court contained allegations sufficient to support federal jurisdiction and a claim for equitable relief is indicated by the fact that the federal court issued an order to show cause.[10]

Apart from questions of privilege, the instant case may be criticized because, contrary to the usual practice, the court about whom, rather than the court to whom, the statements were made, is citing for contempt. When contemptuous statements about a lower court are made in pleadings before an appellate court, it is the appellate court which punishes for contempt;[11] the lower court has no power to punish.[12] Perhaps these cases are inapplicable in the instant case because in the appellate-trial court situation no suit is pending in the lower court to which its ancillary contempt jurisdiction may attach. But where a party applies to a second judge for a change of venue on the ground that the judge before whom the suit is pending is biased, it is the judge to whom the statements are made who punishes for contempt, even though the other judge still has jurisdiction of the proceedings.[13]

Furthermore, the instant case raises the additional problem, not discussed by either the majority or the dissenting opinion, of the jurisdiction of the state court to punish for statements made in a federal court. The case is one of first impression on the point, but it would seem that, had the petitioner made timely application for a writ of habeas corpus in the federal court, he could have obtained it. It is true that ordinarily a federal court will not grant habeas corpus on the ground that the state commitment violates the Constitution or laws of the United States;[14] the prisoner must first resort to the state remedies.[15] But a federal court will discharge a prisoner

[10] A federal court should dismiss on its own motion when it does not have jurisdiction. See Byers v. McAuley, 149 U.S. 608, 618 (1893); Gaines v. Baltimore & Chesapeake S.S. Co., 234 Fed. 786, 789 (D.C. S.C. 1916). But the mere fact that the suit was dismissed should not affect the privilege question. Cf. Dada v. Piper, 41 Hun (N.Y.) 254 (S. Ct. 1886).

[11] In re Arnold, 204 Cal. 175, 267 Pac. 316 (1928); In re Glauberman, 107 N.J. Eq. 384, 152 Atl. 650 (1930); First Nat'l Bank of Auburn v. Superior Court, 12 Cal. App. 335, 107 Pac. 322 (1909); Sears v. Starbird, 75 Cal. 91, 16 Pac. 531 (1888); Friedlander v. Sumner Gold and Silver Mining Co., 61 Cal. 116 (1882); cf. Matter of Minnis, 56 S. Ct. 504 (1936); Ex parte Tillinghast, 4 Pet. (U.S.) 108 (1830).

[12] Johness v. Stoulig, 151 La. 618, 92 So. 137 (1922); In re Dalton, 46 Kan. 253, 26 Pac. 673 (1891); cf. Fitzsimmons v. Bd. of Canvassers, 119 Mich. 147, 77 N.W. 632 (1898).

[13] Hallinan v. Superior Court, 27 Cal. App. (2d) 433, 81 P. (2d) 254 (1938); Francis v. Superior Court, 3 Cal. (2d) 19, 43 P. (2d) 300 (1935); cf. Ex parte Ewell, 71 Cal. App. 744, 236 Pac. 205 (1925).

[14] Rev. Stat. § 753 (1875), 28 U.S.C.A. § 453 (1923)'

[15] Ex parte Royall, 117 U.S. 241, 251–53 (1886); United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 17 (1926); Craig v. Hecht, 263 U.S. 255 (1923). If petitioner had remained in jail he might possibly have obtained a writ of habeas corpus from the federal court without first resorting to the state appellate courts since California provides no appeal as of right from a contempt conviction. Calif. Code Civ. Proc. (Deering, 1937) § 1222. Petitioner had satisfied one requirement of the exhaustion of state remedies doctrine by applying for writs of habeas corpus and prohibition from the California appellate court, which had been denied. Where the remaining state remedy is the discretionary one of certiorari, there is division of opinion as to whether a federal court will entertain a petition for a writ of habeas corpus. Hale v. Crawford, 65 F. (2d) 739 (C.C.A. 1st 1933) (petition entertained); Downer v. Dunaway, 53 F. (2d) 586 (C.C.A. 5th 1931) (refusal to entertain petition).

from state custody where a state court has convicted him for perjury as a witness before a federal tribunal,[16] because "it is essential to the . . . . efficient administration of justice that witnesses . . . . be able to testify freely . . . . unrestrained . . . . by fear of punishment in the state courts."[17] It may be argued that an attorney presenting his client's case to a federal court should also be free from the fear of state court prosecution.[18] The fact that the proceeding in the federal court was dismissed for lack of jurisdiction in the instant case should make little difference;[19] mistake as to the jurisdiction of a federal court should be of no more importance than mistake as to the merits of one's claim in a federal court.

But even if the petitioner may no longer seek a writ of habeas corpus,[20] it seems that, except for procedural considerations,[21] the instant case would present a federal question which is ground for certiorari from the Supreme Court of the United States. A federal question is raised when statements of a witness in a federal tribunal are made the grounds for prosecution for perjury in a state court,[22] and also when an action for malicious prosecution in a federal court is brought in a state court.[23] In each case the federal court will not permit state court actions based on occurrences in the federal courts.

It is also possible that there would be a federal question involved in the instant case under the Fourteenth Amendment. State court convictions for contempts not com-

[16] In re Loney, 134 U.S. 372 (1890); Ex parte Bridges, Fed. Cas. No. 1862 (C.C. Ga. 1875).

[17] In re Loney, 134 U.S. 372, 375 (1890). The federal court's exclusive jurisdiction to try prosecutions for perjuries committed before federal tribunals is judge-made. Neither the perjury statute, Rev. Stat. § 5392 (1875), 18 U.S.C.A. § 231 (1927), nor the statute authorizing federal courts to commit for contempt, Rev. Stat. § 725 (1875), 28 U.S.C.A. § 385 (1928), specifically confers exclusive jurisdiction on the federal courts.

[18] Indeed, the attorney might lament with Alice's pigeon: "As if it wasn't trouble enough hatching the eggs, but I must be on the lookout for serpents, night and day!" Carroll, Alice in Wonderland 49 (Jacket Library ed. 1932).

[19] Cf. Kirk v. Milwaukee Dust Collector Mfg. Co., 26 Fed. 501 (C.C. Wis. 1885) (contempt proceeding ancillary to principal cause in state court not removable to federal court with principal cause).

[20] A person who pays a fine and is released from custody cannot obtain such a writ from the federal courts. Cf. Stallings v. Splain, 253 U.S. 339 (1920); Johnson v. Hoy, 227 U.S. 245 (1913); Ex parte Simon, 208 U.S. 144 (1908).

[21] A federal question raised for the first time in a petition for rehearing will not be reviewed by the Supreme Court unless 1) the state court raises the issue for the first time in its decision, or 2) the state court in passing on the petition for rehearing gives an opinion on the federal question. Neither element is present in the instant case. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932); St. Louis & San Francisco R. Co. v. Shepherd, 240 U.S. 240 (1916); Waters-Pierce Oil Co. v. Texas (no. 2), 212 U.S. 112 (1909).

[22] Note 16 supra.

[23] Rury v. Gandy, 12 F. (2d) 620 (D.C. Wash. 1926); 1 Hughes, Federal Practice § 580 (1931); cf. Eighmy v. Poucher, 83 Fed. 855 (C.C. N.Y. 1898). But a state court action for libel based on pleadings in a federal court is not so removable because no federal question is raised in the complaint. Thompson v. Standard Oil of New Jersey, 67 F. (2d) 644 (C.C.A. 4th 1933). However, the court stated that the federal question, if any, was a matter of defense possibly reviewable by the Supreme Court on certiorari. Ibid., at 647–48.

mitted in the presence of the court have been held to violate the due process clause where there was neither notice nor hearing.[24] But there was a judicial proceeding in the instant case. It is therefore necessary to argue that this contempt citation conflicts with the guarantee of freedom of speech, which has not yet been incorporated into the Fourteenth Amendment for review of state court contempt proceedings, but has been so incorporated in other types of cases.[25]

The argument against applying the First Amendment to state contempt proceedings is that the state courts have held that they have inherent power to determine when a contempt has been committed against them, unrestricted by the requirement of freedom of speech.[26] The United States Supreme Court, however, has recently indicated that federal courts, at least, have no such inherent power.[27] If the Court would also be willing to deny that state courts have such inherent powers, it might apply the First Amendment to state court contempt proceedings where the contempt was not committed in the presence of the court.[28]

Were the First Amendment to be so applied, the court might use the "clear and present danger" test used in other civil liberties cases[29] to determine whether the state court's citation violated the contemnor's right of free speech.[30] In terms of the rationale of contempt process that standard might read: no person shall be punished by contempt process for out-of-court action unless such action actually obstructed the

[24] Ex parte Stricker, 109 Fed. 145 (C.C. Ky. 1901); cf. Cooke v. United States, 267 U.S. 517 (1925); Ex parte Hudgings, 249 U.S. 378 (1919); see Patterson v. Colorado, 205 U.S. 454, 461 (1907); Tinsley v. Anderson, 171 U.S. 101, 105 (1898).

[25] Cantwell v. Connecticut, 310 U.S. 296 (1940) (statute regulating solicitation of funds for religious purposes); Thornhill v. Alabama, 310 U.S. 88 (1940) (peaceful picketing); Schneider v. New Jersey, 308 U.S. 147 (1939) (municipal handbill ordinance); see Summary Contempt Proceedings v. The Fourteenth Amendment, 27 Va. L. Rev. 665, 669 n. 28 (1941).

[26] Bridges v. Superior Court, 14 Cal. (2d) 464, 94 P. (2d) 983 (1939); State v. Morrill, 16 Ark. 384 (1855); consult Nelles and King, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 525, 533–43 (1928).

[27] Nye v. United States, 313 U.S. 33 (1941). By holding that an 1831 statute, Rev. Stat. § 725 (1875), 28 U.S.C.A. § 385 (1928), limits a federal court's power to punish for contempts to those acts committed in the geographical vicinity of the court, the Supreme Court implicitly denied the inherent power doctrine. Ex parte Robinson, 19 Wall. (U.S.) 505 (1873). Commentators have long been insisting that there are neither historical nor legal grounds supporting the inherent power doctrine. Fox, The History of Contempt of Court (1927); Nelles and King, op. cit. supra note 26; Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts, 37 Harv. L. Rev. 1010 (1924).

[28] The question is now before the Supreme Court. Bridges v. Superior Court, cert. granted 8 U.S. L. Week 605 (1940); Times-Mirror Co. v. Superior Court, cert. granted 8 U.S. L. Week 966 (1940).

[29] E.g., Herndon v. Lowry, 301 U.S. 242, 258 (1937); Whitney v. California, 274 U.S. 357, 373 (1927); Schenk v. United States, 249 U.S. 47, 52 (1919).

[30] Freedom of Expression v. Contempt of Court, 9 U.S. L. Week 3110, 3111 (1940); Summary Contempt Proceedings v. The Fourteenth Amendment, 27 Va. L. Rev. 665 (1941); Nelles and King, op. cit. supra note 26, at 403 n. 13; 1 Bill of Rights Rev. 303, 307 (1941).

court's administration of justice.[31] It seems clear that, under this standard, the petitioner's statements in the pleadings in the federal suit were not in contempt of the California court.[32]

Contracts—Formation—Promissory Estoppel in Business Transaction—[Federal].—At the request of the plaintiff, the defendant, a manufacturer of refrigeration equipment, supplied price and other data concerning machines which would be required by the plaintiff in bidding on an air-conditioning contract with the state. Although the defendant's letter said, "the tabulation includes two machines as listed," data were given for one machine only. At the bottom of the first page of the defendant's stationery was a statement in small red print to the effect that all contracts were subject to approval by an officer of the defendant and that quotations were subject to change without notice.

The plaintiff submitted a bid accompanied by a bond, basing his figures upon the price given by the defendant, which the plaintiff understood to cover two machines. After the award of the contract to the plaintiff, he learned from a competing contractor that the price quoted was intended as a per unit price only. The competitor, who had received a copy of the same quotation sent to the plaintiff, had questioned the defendant before the opening of the bids and had warned the defendant of the possible ambiguity.[1] Thereupon the plaintiff mailed a formal acceptance to the defendant. After the defendant's refusal to supply two machines at the price understood by the plaintiff, the plaintiff obtained machines elsewhere. The plaintiff sued in an Illinois court, alleging that the defendant's letter was an offer to supply two machines at the price indicated and that either the plaintiff's written acceptance was effective or the defendant was bound by promissory estoppel from the time the plaintiff, by entering into a contract with the state specifying the defendant's equipment, had changed its position in reliance on the statement.

The federal district court, to which the case was removed, decided for the plaintiff

[31] See Holmes, J., dissenting in Toledo Newspaper Co. v. United States, 247 U.S. 402, 423 (1918). See also Freedom of Expression v. Contempt of Court, 9 U.S. L. Week 3110, 3111 (1940) where petitioner's counsel in his Supreme Court briefs in Bridges v. Superior Court suggests that it must be demonstrated that: 1) the judge knew of the publication while suit was pending, 2) there was intent to influence him, and 3) the acts were such as would influence a judge of "ordinary firmness and fortitude."

[32] An actual obstruction to the state court proceedings may possibly be found by asserting that the false charges supported the federal suit which itself delayed the state court action. Brief for Respondent, at 38–39. But that argument concedes the relevance of the allegations to the issues before the federal court and, therefore, their privileged character. Note 3 supra; cf. In re Riggsbee, 151 Fed. 701 (D.C.N.C. 1907) (federal court will not cite for contempt one who used its proceedings to obstruct the state court).

[1] The competing contractor warned the defendant over the telephone as soon as the quotation was received, which was Saturday, December 24. The defendant would have been able to clarify the letter by phoning the other three contractors to whom copies had been sent. But since December 25 and 26 were holidays, the defendant could not have been absolutely certain that another letter would have reached the plaintiff before it mailed its bid on December 27, for opening at 2:00 P.M. on December 28.