every, all, and singular the crimes punishable by imprisonment in the State prison."

Is it sufficient in an indictment to say that the parties unlawfully conspired to commit some crime? I think it will hardly be claimed that an indictment would be good under the statute which charged that the object of the conspiracy was to commit each and every, all and singular, the crimes that are punishable by imprisonment in the State prison. The court say further:

All crimes are not so punishable. Whether a particular crime be such a one or not is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer, or plea, and the court that it may determine whether the facts will sustain the indictment. (United States v. Cruikshank et al., 2 Otto, 558.)

There can be no general indictment of conspiracy to defraud the United States, but the indictment must be for conspiracy to defraud in some particular manner pointed out by statute, and the indictment or information must show the means to be used.

In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. (United States vs. Moins, 14 Pet., 435.)

I call attention again to the case of Lamb vs. The People (reported in the Legal News, Oct. 2, 1880, pages 18 and 19), where the court said:

So, where he has entered into a conspiracy with others to commit a felony or other crime, under such circumstances as will, when tested by experience, probably result in the unlawful taking of human life, he must be presumed to have understood the consequences which might reasonably be expected to flow from carrying into effect such unlawful combination, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. But further than this the law does not go.

It is for this reason I insist that the information must set out the whole scheme of the conspiracy; otherwise it is impossible for the court to say whether the act done was an act in furtherance of the conspiracy, and consequently to determine whether the other conspirators are bound by that act. Because if it is an act not calculated to further the conspiracy, the other conspirators are not bound, although they may have entered into the conspiracy.

"For if the accused in such case has not expressly assented to the commission of the crime, and the unlawful enterprise is not of such a character as will probably involve the necessity of taking life in carrying it into execution, there can be no implied assent, and consequently no criminal liability. The principle which underlies and controls cases of this character is the elementary and very familiar doctrine, applicable alike to crimes and mere civil injuries, that every person must be presumed to intend and is accordingly held responsible for the probable consequences of his own acts or conduct. When, therefore, one enters into an agreement with others to do an unlawful act he impliedly assents to the use of such means by his coconspirators as are necessary, ordinary, or usual in the accomplishment of an act of that character. But beyond this his implied liability cannot be extended."

We must understand the scope of the conspiracy. We must understand the scheme in all its parts. In an indictment for presenting a fraudulent pension claim, brought under Sec. 5438 R. S., it was held by Dyer, J.:

It will be observed that the gist of the offense, as we find it defined in the statutes, is the presentation for payment of a false or fraudulent claim. The indictment alleges no facts which constitute the fraud; it is not shown how the fraud was perpetrated, nor wherein the claim was false, except that the defendant presented a claim which he represented to be due to him by virtue of a pension certificate which had been theretofore procured upon false and fraudulent proofs, and by unlawful and fraudulent devices, and without authority of law. What the false and fraudulent proofs and unlawful and fraudulent devices were is not stated.

That is the trouble with this information. The "subtle devices" are not set out here. Perhaps they were too "subtle" to be put in writing. The court says further:

The question is: Are these allegations sufficiently certain, and do they contain statements of fact which will support a conviction?

THE PARTY IN THAT CASE

was indicted for obtaining a pension by false and fraudulent papers. In this case it is charged that certain false and fraudulent papers were used; that the accused resorted to unlawful and corrupt means and to certain false and fraudulent devices; but the gentlemen on the other side do not have the kindness to state what the means were, except to say" by means of unlawful, illegal, or fraudulent papers." They do not have the kindness to state wherein the illegality consisted. The court, after referring to the opinion in the case of United States vs. Watkins, 3 Cranch C. C. Rep, 441, 456-7-8-9, goes on to say:

But it is undoubtedly a sound principle that an indictment charging fraud of any sort ought to aver with requisite particularity wherein the fraud consisted, and the means by which it was effected, and I have been unable to find any cases which dispense with the application of this rule. * * * The fraud should have been by apt allegation more particularly identified; it should have been alleged what the proofs and devices were—

That is our case—

and wherein they were fraudulent; and it is, in my judgment, immaterial when the proofs were made or devices resorted to—whether at the time of presenting the claim, or a time anterior, and when made as the basis for obtaining the pension certificate. * * * It was necessary to show the alleged fraud, and the acts which constituted it on the trial, and it was therefore necessary that it should be alleged, at least with sufficient particularity to enable the defendant to plead any judgment which might follow as a bar to a subsequent prosecution for the same offense.

I refer also to United States vs. Goggin—Legal News, January 31, 1880, page 173.

The means proposed to be used to effect a criminal purpose are not, in all cases, to be set out, and are not, in all cases, required to be proved; nor are they, in all cases, a necessary element of the crime of conspiracy. To a certain extent, the rules upon the subject are uncontroverted. If the alleged conspiracy be an unlawful agreement of two or more persons to do a criminal act, which is a well-known and recognized offense at common law, so that by reference to it as such, and describing it by the terms by which it is familiarly known, the nature of the offense is clearly indicated, in such a case, a charge of conspiracy to commit the offense, describing it in general terms, will be proper. On the other hand, if the agreement or combination be to do an act which is not unlawful in itself, by the use of unlawful means, those must be particularly set forth, or the indictment will be bad.

Remember that the acts which Brady did were lawful. It was lawful for him to increase the number of trips or to expedite the service. The acts he did were absolutely lawful and within his discretion.

The question of doubt, and upon which there are conflicting authorities, is the case of a conspiracy to do a wrongful act in violation of the rights of another, including under the denomination of wrongful acts those which are unlawful because they are in violation of some statute provision, but which are not offenses at common law. The purpose of "cheating and defrauding," which is the case now before us, does not necessarily import the commission of any indictable offense either at common law or by statute. It may embrace only such civil frauds as are in violation of common honesty, and for which the party is amenable to justice, not by indictment, but by a civil action. The words "cheat and defraud" do not import any known common law offense. If punishable at all as a crime it is only when the cheat is effected by false tokens, false pretenses, or the like—to make such an object of conspiracy a criminal act the combination or agreement must be to cheat and defraud in some of the modes made criminal by statute; and the indictment must contain allegations which show that the cheat and fraud agreed upon are embraced in such statute provisions, and that, if perpetrated, they would be punishable as a criminal offense.

The thirtieth section of the act of March 2, 1867, now section 5440 Revised Statutes, requires some act to be done by one of the conspirators to complete the offense. Until some act be done by some one of the conspirators to effect the object of the unlawful agreement, all parties to the agreement may withdraw and thus escape the effect of the statute. After such an act all are liable to the penalty. * * * Some act by some one of the conspirators is required to show, not the unlawful agreement, but that the unlawful agreement, while subsisting, became operative. (United States v. Donau et al, 11 Blatch., 169.)

That, I understand, is the law. They must set forth not simply that the act charged is "unlawful," but why; not simply that it is "improper," but why; not simply that it was "extravagant," but why; not that this party resorted to papers designed to corrupt and mislead, but why, and must show the papers so calculated to corrupt and mislead. I have shown what they must do. Now let me call attention to the affidavits made in this case. I have shown that the information itself is contradictory and absurd, as far as it relates to my client, and as far, really, as it relates to McDonough. Now, what are the affidavits? I take up first the affidavit of Mr. James. The court has heard it read. There is one thing in this affidavit which Mr. James states of his own knowledge: "Personally appeared before me, &c., Thomas L. James, who, being duly sworn, &c., says that he is Postmaster-General of the United States." Good!

I ADMIT IT.

[Laughter]. "That he has read the foregoing information"—I admit that—"and knows that the contents thereof, and that the same are true, as he states upon information and belief;" that his knowledge, information, and belief are derived from an examination of the records of said Department, including the orders and papers relating to the various matters set forth in the said information, including the increases of service and of expedition, the reduction of service, the offer to sureties, and the change of route, the position and action of Brady, French, and Turner (nothing about Brown), and also from the reports and statements made to him by the inspectors and other agents and officers of the Post-Office Department, who have, by his direction, been engaged for many months in a careful examination and investigation of the transactions of the Post-Office Department, &c.

WHAT HE SAYS, THEN, IS THIS:

that he has read the information and that the contracts and papers referred to there are in his office. Good. Also, that he has employed persons to look into this matter and they have reported to him. I ask the gentlemen on the other side, is that evidence? Is it such evidence as Thomas L. James would be allowed to give before a petit jury? Is it such evidence as he could give before a grand jury? Let us be honest; would that sort of evidence be admissible anywhere? Certainly not. Why? Because it is not evidence. If the case were being tried and Mr. James as a witness stated that he had read this information and believed it, would that statement be allowed to go to the jury? No. If he stated that he had the contracts and papers referred to in the information on file in his office, would he not be asked to produce them? Yes. If he stated that he had employed persons to look up these matters and they had reported to him that these men were guilty, would not Your Honor order those persons who had so reported to be sent for? Are not they the men who should be the witnesses in this case? Is it possible to establish *probable cause* by hearsay? Can I come into court and make an affidavit that somebody told me that he believed that

A CERTAIN MAN HAD COMMITTED A CRIME,

and upon that affidavit a warrant issue and that man be deprived of his liberty and imprisoned like a common felon? That is the question in this case, and it makes no difference whether the man who swears to such an affidavit is Postmaster-General of the United States or not. I say here that I have nothing against Thomas L. James. I entertain for him the highest regard; but I do not think any more of his testimony because he happens to be Postmaster-General, especially when he takes pains to swear that he knows nothing about the matter in question! He was honest enough to say here that he knew nothing about it. He made his affidavit upon "information and belief," and the question is, is that sufficient? Is it sufficient to file an affidavit upon information and belief? Is that a compliance with the fourth article of the amendment? Let us see whether that constitutional provision is simply a shadow that can be evaded by sworn ignorance?—for that is what this amounts to. In the case *ex parte* Bollman and *ex parte* Swartout, 4 Cranch, 40, a case decided by Chief-Justice Marshall, who, I imagine, knew something upon this subject, an affidavit was filed which purported to be as near the substance of a letter from Colonel Burr to General Wilkinson as the person making the affidavit could give it.

THAT WAS A GOOD AFFIDAVIT!

The man swore to a "copy" of the letter based on information and belief! The judges, however, were of opinion that "as such testimony delivered in the presence of the prisoner on his trial would be decided inadmissible it could not be considered as a foundation for a commitment." Good! "Although in making a commitment the magistrate does not decide on the guilt or innocence of the prisoner, yet he does decide on the *probable cause*." Good! "And a long and painful imprisonment may be the consequence of his decision. Probable cause ought to be proved by testimony in itself legal, and which, though from the nature of the case must be *ex parte*, ought, in other respects to be such as a court and jury might hear." That is good law. Whatever evidence there is, however little of it there may be, *it must be evidence*. "Information and belief" is not a compliance with the Constitution. The man who seeks to take from another his liberty, the man who seeks to drag another from his home, roofed by that constitutional amendment, must have something more than "information and belief." For the purpose of depriving a man of his liberty there must be, as a foundation for the proceeding, *a fact sworn to by some responsible person*. The idea that an information can be filed on an affidavit made on "information and belief," and citizens branded and their reputation destroyed, simply because

IGNORANCE AND MALICE UNITE

and honest "information and belief" does the swearing! It won't do. It is a violation of the fundamental law of our country. I present to these gentlemen this opinion of Chief-Justice Marshall, and commend it to their attention.

The next case to which I shall refer is the one about which so much has been said, and about which I will say a little, is the Maxwell case, in which Judge Dillon gave an opinion. I wish to call attention to that opinion. A distinction has been made in this country (to which I will refer hereafter), between revenue cases and all other cases, and I now say to these gentlemen that this Government had been in existence at least two generations before the word "information" was ever used in our legal proceedings in respect of any except revenue cases and cases arising in admiralty and in the slave trade. There was a distinction made, and probably for this reason: revenue crimes are artificial crimes; they are not crimes in the nature of things; they are simply made crimes by law. It is not a natural crime for me to sell what I produce with my hands to any being in the world who wishes to purchase; it is not naturally a criminal act for me to buy where I can buy cheapest. But the law steps in

AND MAKES IT A CRIME

for me to sell certain articles, for instance, without having paid an export duty, or to buy certain articles without having paid an import duty. These, I say, are not natural crimes; they are artificial crimes, and the history of the world shows that men violate such laws who are not destitute of honor or honesty, and consequently the distinction has been made to which I have referred here, and of which I shall have more to say hereafter. In the Maxwell case Judge Dillon says: "We are of opinion that offenses not capital or infamous may, in the discretion of the Court, be prosecuted by information. We cannot recognize the right of the District Attorney to proceed on his own motion," as they do in New York. There probably is the most liberal practice in the world. And here let me call attention to one statement in the brief filed by Mr. Bliss yesterday. He says: "I state as a matter of fact within my knowledge that in the Southern District of New York informations are filed without oath." Now, I state my opinion as a lawyer, that if this is true the judge who allows such a proceeding ought not to be permitted to disgrace the bench upon which he sits. The ermine that he stains should be torn from his shoulders if this statement is true. He violates

THE CONSTITUTION OF THE UNITED STATES.

He is willing to rob citizens of their liberty on information, without any probable cause being shown, without even asking for an oath! If that judge does it he does an infamous act, but whether he does it or not it does not change the law. A strange idea of justice they must have in the State of New York, to allow a man to be arrested and imprisoned without anybody in the world having sworn that he is guilty of any offense, without anybody in the world having even affirmed that he has violated any law! A man can be imprisoned there, it appears, on the unsworn guess of a district attorney, or of the district attorney's deputy, or of the deputy's clerk! And I have no doubt that this information was the child of the New York practice, suggested by a gentleman who is in the habit of practicing in courts where men are deprived of liberty, without requiring their accusers to go through the formality of taking an oath, or without their accusers resorting to that formality. It may be that in New York the oath is so little regarded that it is understood to be a mere matter of form. [Laughter.]

THAT IS THE PRACTICE

in New York, but in the Maxwell case Judge Dillon says: "We cannot recognize the right of the district-attorney to proceed on his motion, and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed." So that in this case, so far as probable cause is concerned, it makes no difference whether the court has jurisdiction of this information or not, even admitting that the court has full and perfect jurisdiction the probable cause must have been established by oath before the warrant issue or it must be stricken from the files. Judge Dillon goes on to say: "But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear the abuse of the powers of the grand jury." I differ with Judge Dillon. I differ with him! If there is to be any irresponsible power it is a thousand times better to lodge it in the grand jury, whose members change every court, than to lodge it in the breast of a judge who holds that office during life. If there is to be any irresponsible power used let it be

USED BY TWENTY-THREE PERSONS

coming from the body of the community, rather than be used, year after year, by an irresponsible court, responsible only to the power that appoints. The history of England shows that the judiciary cannot be trusted absolutely with the liberties of the people. No department, unless it be a department springing constantly from the people, receiving fresh blood every election, can safely be trusted with human liberty. So that if there is to be any irresponsible power in this country, I want that power to be in the hands of a body of men coming, day after day and year after year, from the people themselves. I do not agree with Judge Dillon, although I have as much respect for the judiciary as any man living. I believe that it is the firmest pillar in the edifice of human liberty, where it is properly guarded by law. Judge Dillon says further: "Where the accusation is a grave one [this is a tolerably grave accusation], or where the charge seems to be doubtful [it seems to be somewhat doubtful in this case, where they cannot find a solitary man to swear to it except upon information and belief—tolerably doubtful] [laughter]—the court will refuse leave to file an information and compel the district attorney

TO LAY IT BEFORE A GRAND JURY."

That is good law, good sense, healthy healthy! In 3 Woods, 502, in the matter of a rule of court prescribing the duty of the Circuit Court commissioners in certain cases, Justice Bradley gives his idea upon this point. He says:

I am informed by His Honor, the district judge, that great inconvenience is caused in this district by the arrest of persons charged with offenses against the revenue laws, against whom no sufficient evidence can be produced, either before the grand jury to warrant an indictment, or before a traverse jury to justify a conviction, whereby much useless expense is caused to the Government, and the personal liberty of the people is unnecessarily interfered with. One cause of this evil seems to be the fact that warrants are issued upon the affidavit of some officer who, upon the relation of others whose names are not disclosed swears that, upon information, he has reason to believe, and does believe, the person charged has committed the offense charged.

That is this case exactly. Thomas L. James, who makes an affidavit in this case, is "an officer," and he swears upon the relation of other persons, whose names he does not disclose. What other persons did he employ to ferret out the star-route frauds? He does not even give their names. I presume they are the "persons unknown" mentioned in the counts of this information. Our case could not have been better described than it is described here by Judge Bradley. He proceeds:

The district judge, not being satisfied that this is a sufficient ground for issuing a warrant of arrest, has desired my advice in the matter. After examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the Constitution, which, by the fourth article of the amendments declares that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and that no warrants shall issue but upon probable cause supported by oath or affirmation, describing the place to be searched, and the persons to be seized.

Colonel Bliss quoting this provision dropped out the word "persons," by inadvertence, I suppose, and substituted the word "things," making it read, "The place to be searched and the *things* to be seized." Naturally, under the New York practice a man would confound persons with things. [Laughter.] Judge Bradley proceeds:

It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty.

So I say in this case Your Honor is the person to decide, and it was an insult to offer to this Court an affidavit founded simply on information and belief. The facts should have been given so that the Court might judge of the sufficiency of the grounds shown. Judge Bradley proceeds:

And this ground must amount to a probable cause of belief or suspicion of the party's guilt. [Good!] In other words, the magistrate ought to have before him the oath of the real accuser, either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded.

Who are the real accusers in a case? Why the men who know the facts; not the men they told the facts to. This case has taken such a curious turn that I have no doubt the Cabinet conceived that they were the accusers, but as a matter of fact the real accuser, the real prosecutor is the man who knows the facts; he is the prosecuting witness, and he cannot divide that responsibility. Judge Bradley says further:

The magistrate can then judge for himself and not trust to the judgment of another whether sufficient and probable cause exists for issuing a warrant. It is possible that by exercising this degree of caution some guilty persons may escape public prosecution, but it is better that some guilty ones should escape than that many innocent persons should be subjected to the expense and disgrace attendant upon being arrested upon a criminal charge, and this was undoubtedly the beneficent reason upon which the constitutional provision referred to was founded. In view of these considerations, and to correct the evil alluded to, we have prepared and now make the following general order for the guidance of the commissioners of this court in the manner of issuing warrants of arrest against persons charged with crime, to wit:

No warrant shall be issued by any commissioners of this court for the seizure or arrest of any person charged with a crime or offense against the laws of the United States upon mere belief or suspicion of the person making such charge, but only upon probable cause, supported by oath or affirmation of such person—

Not the oath of somebody else that he has talked with—

in which shall be stated the facts within his own knowledge constituting the grounds for such a belief or suspicion.

It will not be denied that the same certainty is required in an information as in an indictment. (See Bacon's Abridgement, 3d, page 640.) If this is so, it requires at least as much evidence to support the filing of an information as the presentment of an indictment. The affidavit upon which the application is made, or rather upon which the information is filed, must disclose all the material facts of the case. The court in a case of this kind takes the place of a grand jury. The facts must be disclosed in good faith, and when disclosed must amount to a probable cause. Probable cause—information and belief; they are not connected! All the "information and belief" in the world will not establish probable cause. If parties or persons applying for an information suppress any material fact, that fact can be brought to the notice of the Court, and the Court will then act precisely as he would have acted had that fact been presented at first. In this connection I call the attention of the Court to Rex vs. Woolmer et al., 12 Adolphus & Ellis, 422. The Attorney-General obtained a rule upon the defendants to show cause why a criminal information should not be exhibited against them for a newspaper libel. The affidavits referred to the newspaper, but the paper was not filed with the affidavits.

The Court—Denman, C. J.—held that—

We can look at the affidavits only. * * * The newspaper should be filed with the affidavits, and it is essential that the rules should be drawn upon reading it. No rule can be discussed on documents to which it does not refer.

Littledale, justice—

The newspaper has, indeed, been shown to the Court, but it has not been annexed to the affidavits, nor marked as an exhibit.

[In this case the papers referred to were not even shown to the Court. The Court has never seen these papers that were obtained for the purpose of "misleading" and "corrupting" the Second Assistant Postmaster-General—the letters and papers said to have been furnished by my client.]

The most correct way would be to annex it to the affidavits; but it would perhaps be enough that it should be made an exhibit and filed; but merely producing it to the court and taking it away is not giving it in evidence. We are at present in the same position as a grand jury, who must have before them the newspaper which is the foundation of the proceedings. * * * The defendant ought to be apprised of what he has to answer by seeing it on the files of the court.

Patterson, justice, held:

Evidence must be given which is good under the statute or good at common law.

And the rule was discharged.

In the case of Queen vs. Stranger, 6 Law Reports, Queen's Bench Court, p. 352, the motion for a rule to show cause why a criminal information for libel should not be filed was supported by an affidavit alleging on information and belief that the defendant was the publisher of the libel. The court held that the rule must be discharged, on the ground that the affidavits did not contain any evidence of the publication of the libel by the defendant; that an affidavit made on information or belief is not sufficient legal evidence. That is exactly our case. There is an affidavit here made upon information and belief, but it is "not sufficient legal evidence;" it is utterly and hopelessly inadequate. The gentlemen on the other side probably drifted into this position by following the New York custom of arresting people without requiring an oath or an affirmation. It was that practice that brought informations into universal

ABHORENCE AND CONTEMPT.

It was the practice in England to allow the attorney-general to come into court and proceed against any citizen without oath and without affirmation. That was the practice in the court known as the Star Chamber. That court had its jurisdiction extended, I believe, in the time of Henry VII., and it kept extending it. It had not the right to pass sentence of death, but it passed sentences of imprisonment. It put men in the pillory; it branded them; cut off their limbs; took from them their estate; made them infamous; and offenses were multiplied until it cost a man his liberty, his property, and his reputation simply to have made a disparaging remark about some royal robber. That was within the province of that court, and the reason it became so odious was that informations were filed without oath or affirmation. They did exactly as they now do in the State of New York. It is not necessary for me to give the history of that court. There is not a lawyer in the world who does not know it. There is not a lawyer in the world who does not know that the practice of

FILING INFORMATIONS WITHOUT OATH

was the club in the hands of the Tudors that struck down liberty in Great Britain. There is no lawyer who does not know that it was used by the Stuarts until finally the blood of a king reddened the scaffold. It is known by all that England had no real liberty until that court was abolished in the year 1641—the birthday, you may almost say, of English manhood and liberty. Stricken down—why? Because they branded the citizen without oath and without affirmation; because they put substantially the life, the liberty, the property, the happiness of every man in the kingdom at the beck, the will, the caprice, the malice of the King's Council and of the king's attorney. In this Government we have no officers of that kinds. We have servants. They are the servants of the people. The great sovereign is the people, and these officers are but their servants, and it is for the people to say upon what condition the liberty of the citizen shall be stricken down. And let me say here to-day, because

IT SEEMS TO ME ENTIRELY APPROPRIATE,

that the great, the sole, the only legitimate object, when followed to its last result, of any good and legal government is to preserve the liberty of the citizen. All other objects are but subsidiary to that. The preservation of the Nation is simply the preservation of the liberty of the individual. Everything that is done is for the individual. In my judgment, that idea is in accordance with the genius of our Government. Now, upon this same subject, let me call attention to another thing stated in the argument of my friend, Colonel Bliss. Allow me to say that I admit cheerfully that Colonel Bliss is a most excellent lawyer; that his intentions are perfectly honorable in this case. We simply differ upon modes and methods. I do not believe that he wishes to subvert this Government or our modes of procedure. I do not believe that he wishes to trample into the earth the liberty of the citizen. But I am going to state the effect of his position. I find upon page 26 of this remarkable document [Mr. Bliss' brief in the case] this remarkable statement, and I am sorry not to see Colonel Bliss here this morning. The only reason that I desire his presence is that I hate to speak of any man who is not present.

But if the Court should regard the question as doubtful—

That is, as to whether it is an infamous offense or not.

But if the Court should regard the question as doubtful, the safer and fairer way is to allow the case to proceed.

I hazard the declaration that that is an original remark [laughter] by a prosecutor in a criminal proceeding. I do not believe it can be found in any legal report or in the report of any speech or anything of the sort ever published, made, or filed in any criminal case. That is reported as having been made by the prosecution. You are told that if there is any doubt about your jurisdiction the fair way is to decide that you have got it. [Laughter.] You are told that if there is any doubt about this being an infamous crime, the safest way is to decide that it is. [Laughter.] Now, why?

All the rights of the accused will be protected, and those of the Government saved.

I recollect of a gentleman who was elected justice of the peace. A man was arrested by the police during the night and brought to the justice's office. The case was heard. Not a solitary thing was found against the man except that the police had arrested him. The justice remarked to him: "I will only fine you a dollar and costs." [Laughter.] A lawyer said to him: "Why, this is an outrage; there is nothing against this man." "Well," said the justice, "if you don't fine him you might just as well not have arrested him. [Laughter.] Somebody has got to pay the costs, or there is no use in having any cases." I was in a theatre one time to see a little play. One of the characters in this play never does anything without quoting some authority; he always has his authority on hand. I recollect one occasion, when he, being in company with several on the stage, and they having one by one gone away, looks on the floor and sees a $10 bill. He picks it up. The question with him is

WHAT TO DO WITH IT.

He says: "Maybe they lost it; maybe they didn't. If I should say I had found it, it might be the means of these men lying about having lost it. There is doubt in my mind as to what I ought to do." Then putting the bill in his pocket he said: "When in doubt take the trick." That is really the argument urged in this case. "If Your Honor has any doubt as to whether you have jurisdiction, the safer way is to decide that you have. If you have any doubt as to whether it is a proper proceeding, the safer way is to say that you have. If you have any doubt about the guilt, the safer way is to say 'guilty.'" But all the common law, all the statute law of every civilized nation says exactly the other way. There is not a law in the world upon the subject but says when the court has any doubt about the jurisdiction, stop! When the court has doubt about the guilt of the prisoner, stop! That has been the law for centuries, and will be until man returns to barbarism, except it may be in the Southern District of New York. I wish to call the attention of the Court to Justice Field's charge. I do not expect to add anything to the argument made by Mr. Wilson, and I take this occasion to say that the argument was exhaustive, candid, splendidly presented, and I do not flatter myself that I shall add anything to any subject that he treated; but I simply wish to read a little part of this, because it goes along so admirably with my thought. I read from Justice Field's charge to grand jury, 2 Sawyer, page 668:

The institution of the grand jury is of very ancient origin in the history of England; it goes back many centuries. For a long period its powers were not clearly defined; and it would seem, from the accounts of commentors on the laws of that country, that it was at first a body that not only accused, but which also tried public offenders.

I believe, as a matter of fact, that we get our idea of a grand jury from the civil law, and that at one time the jury, instead of not knowing anything about the case, was required to know all about the case, and that the twelve jurors were the men who investigated the facts, lived in the neighborhood, and when they came forward and reported that they understand the circumstances, and that, in their judgment, the man was not guilty, then he was acquitted. I believe that our particular jury system is derived from the Scandinavian law. The civil law was taught at Oxford in the thirteenth century, and it was from that that we

GOT THE IDEA OF THE GRAND JURY.

However may have been its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject it often stood as a barrier against persecution in his name, until at length it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the Crown. (Ib.)

And what more? The proceedings of the grand jury are to be absolutely secret. It would stain the reputation of any man, especially among his enemies, were it known that a solitary individual had wended his way to a court to file an information against him charging him with crime. It would stain the reputation of any man were it known that one single individual had gone before the grand jury and had made an effort to have him indicted. For that reason the proceedings of the grand jury are secret. So that when no bill is found there shall be laid no foundation for slander, for calumniation, for malignity. That is one reason. But if we allow informations to be filed, even without oath, it is in the power of every District Attorney to malign the reputation of any man with whom he may happen to be at enmity. So the grand jury stands as a wall between the citizen and any calumny, and any man who has anything

AGAINST ONE OF HIS NEIGHBORS

goes to the District Attorney and tells that District Attorney what he knows—what he can swear to; not his information, but what he knows; then the District Attorney can introduce him to the grand jury, and there he tells his story, and if the grand jury fail to believe him nobody is maligned; no character is stained; no face of woman is made white with shame and grief; no children hang their heads because their father has been maliciously assailed—no one knows it. But if we leave the grand jury out and allow the District Attorney to come into court with an information, it becomes a matter of record, and in that way men of excellent reputation can be substantially destroyed by the malice of one man. I do not say that there is any malice in this case; and I know that the District Attorney will not for a moment think that I am alluding to any action of his in this case or any other. I am simply saying what it is and what

IT GIVES THE POWER TO OTHERS TO DO.

I want always to stand between me and the malice of my enemies an institution that was tried as by fire, an institution that in the times of tyranny did as much as any other to save English liberty. I want that institution well preserved; I want men to be tried by their neighbors, their friends and acquaintances. I want also the evidence to be passed upon by men who know the witnesses, and who can then call for other witnesses. This Court has no time to discharge the functions of a grand jury. It is enough for this Court to try the case when it comes before the petit jury. It is enough for this Court to give the law to the traverse jury without sitting himself as a grand jury. This Court has no time to inquire into these matters; no time to send for other witnesses. The grand jury, in my judgment, ought not to be done away with in this country. If it was a mere question of dollars and cents,

A MERE VIOLATION OF REVENUE LAW,

then I might say, "File your information;" but if it involves the reputation or liberty of the citizen, I would say a grand jury must pass upon this evidence, because the Court has no time to do this thing.

In this country, from the popular character of our institutions, there has seldom been any contest between the Government and the citizen which required the existence of the grand jury as a protection against oppressive action of the Government. Yet the institution was adopted in this country, and is continued from considerations similar to those which gave to it its chief value in England, and is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds, *but also as a means of protecting the citizen against unfounded accusation*, whether it comes from Government or partisan passion or private enmity. (Ib.)

It is for that reason that I wish the institution to be preserved. The citizen always needs to be protected from power, no matter whether that power is what he calls his government or any department of it, or not. Every citizen needs to be protected from power, and the grand jury is an institution for that purpose. It protects the citizen in the first place, from fraud, from crime, and it also protects the innocent citizen from malignity, from malice, from slander.

No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes, unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is a good reason for his accusation and trial. (Ib.)

And yet in the State of New York they not only dispense with the grand jury, they not only dispense with probable cause, but they absolutely dispense with all oaths and with all affirmations. They have only to take one more step and dispense with the information, and arrest a man simply upon a verbal order.

Formerly it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable.—*Ib.*

That is to say that the juries can guess, may be, he was guilty; it looked more like he was guilty than that he was innocent.

To justify the finding of an indictment you must be convinced so far as the evidence goes that the accused is guilty. In other words, you ought not to find an indictment unless in your judgment the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury (Ib).

WHAT KIND OF A FIGURE

would this evidence cut? The affidavit of Messrs James and Woodward, "uncontradicted," would be no evidence at all; contradicted or uncontradicted—nothing—no more evidence in the case than blank paper. If Thomas L. James had simply said, "I am Postmaster-General," and signed and sworn to it, it would have been precisely as good evidence as it now is. If Mr. Woodward had simply said that he had been employed, and signed his name, it would have been just as good evidence as it now is—no more and no less. The next question to which I wish to call the attention of the court is as to whether this crime is infamous. What is an infamous crime? In this country we are all supposed to be sovereigns. In this country we have certain rights before the law; these rights make up the crown and sceptre of a sovereign. We must have the right to vote. Colonel Bliss says, "A man sixty-five years of age is not allowed to sit upon a jury."

IS HE THEREFORE INFAMOUS?

A man twenty years of age is not allowed to vote. Is he infamous? We have the right to vote; that is, to help make law; that is all that amounts to. Secondly, we have the right to help execute the law. We do both. In one capacity, simply as voters, we make, and as voters we execute the law. We are also entitled to certain honors, provided our fellow-citizens see fit to bestow them upon us. We are entitled to hold certain offices; we are entitled to help make the law, to help form it; we are entitled, if our fellow-citizens see proper to give us the chance, to help execute the law. We are entitled to sit upon juries, to pass upon the rights of others, as others are entitled to pass upon our rights; and we must have that right in order to be on an equality with other citizens. If one of those rights is taken from us—the right to vote, the right to testify in courts, the right to hold office, the right to sit upon juries—if either of these rights is taken from us we become infamous.

WE ARE UNCROWNED, UNSCEPTRED.

We are no longer sovereigns; we are outlaws; we have been degraded, and upon the forehead of our reputation is the brand of infamy. Now, the question is whether this is such an offense that it becomes an infamous crime. Let me say here that I agree heartily with what has been said upon one subject—that it is the offense and not the punishment that makes a man really infamous. In the history of this world the men who battled for the rights of mankind were made infamous. The Titans who erected the fabric of British and American liberty were in their day branded as infamous. The best men in England stood in the pillory; the best men in England were declared to be outlaws; the best men in England were regarded as criminal wretches, unfit to be believed in any court or to hold any office of trust, profit, or honor.

I UNDERSTAND THAT.

The men who said a few words in favor of the rights of the people, the men who said a few words against slavery—in favor of breaking the chains—were regarded as infamous. So that, of all men, I am one who believes that the punishment renders no man infamous. It must be the crime as a matter of fact. Yet the law, having that power, where the law does render a man infamous, for the purposes of this argument, he is. But we know, as well as we know anything, that it is impossible to make principles infamous by declaring the men infamous who propagate them. We know, as well as we know anything, that the cross, rack, or gallows never succeeded in making a principle infamous. The gallows did not make abolitionism a crime, but John Brown shed a glory even upon the gallows. And so it has been

DURING THE HISTORY OF THIS WORLD.

What then is an infamous crime? Whenever a man commits a crime that shows a lack of common honesty; that shows that the citadel of his manhood has surrendered; that shows that the flag of honor has been hauled down; that truth has abdicated the throne of the soul; that man is infamous, and he cannot be believed in any court of justice. What is this crime? Is it of that sort? Let us see. The charge in this case is that an officer of the Government who had solemnly sworn to carry out the law, who had solemnly sworn to use his discretion honestly—the charge is that that officer with other officers and my client conspired to rob this Government. How? By bribery, because the Second Assistant Postmaster-General had to be bribed to make a false decision; had to be bribed to corrupt his own discretion;

HAD TO COMMIT PERJURY

in order to succeed in this conspiracy. And this money, the result of conspiracy, bribery, perjury, and robbery, was to go into the hands of these officers. Does that show a lack of common honesty? About how much honesty did they have left after they got through with this transaction, provided it is true that they did what is charged in this information? Is conspiracy an infamous crime? That depends upon what they conspire to do? How are we to find what they conspired to do? Simply by the information, and that states that it was a conspiracy to defraud the Government by means of bribery and corruption. What else? Papers designed to mislead and defraud. What are such papers? They must be forgeries. They must come at least under the head of false tokens of some kind. Is that an famous crime? Let us see. In 2 Starkie on Evidence, 713, I read a word upon that subject

UNDER THE HEAD OF "INFORMATION:"

When a man is convicted of an offense which is inconsistent with the common principles of honesty (a broad definition) and humanity, the law considers his oath to be of no weight, and excludes his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to effect the property or liberty of others. Formerly the infamy of the punishment, as being characteristic of the crime and not the nature of the crime itself, was the test of incompetency, but in modern times immediate reference has been made to the offense itself, since it is the crime and not the punishment which renders the offender unworthy of belief. By the common law the punishment of the pillory indicated the *crimen falsi*, and consequently no one who had stood in the pillory could afterward be a witness; but now a person is competent, although he has undergone a punishment for a libel, trespass, or riot; and on the other hand, when convicted of an infamous crime, he is incompetent, although his punishment may have been a mere fine. The crimes which render a person incompetent are treason, felony, all offenses founded in fraud, and which come within the general notion of the *crimen falsi* of the Roman law, as perjury, subornation of perjury and forgery, piracy, swindling, cheating; so also barratry, conspiracy at the suit of the King.

WHAT IS "CONSPIRACY

at the suit of the King?" It is the very case which has been so often described here, when the attorney-general on behalf of the King filed an information against a man for conspiracy—conspiracy to stop or to hinder in some way the operations of the Government, to interfere with its revenues, to interfere with the just execution of the law; and whenever a man conspired in that regard, and the information was filed against him by the King, I take it that that is "conspiracy at the suit of the King," and that one convicted thereof became infamous and was not allowed to testify. Let me say right here that under the Roman law *crimen falsi* included every species of

[illegible]

Argument of Mr. Jeff. Chandler.

After recess Mr. Chandler addressed the Court as follows:

[illegible]

[Continued on Sixth Page.]