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THE INDIANAPOLIS NEWS

Panama Libel Case

United States District Court

District of Indiana

HON. ALBERT B. ANDERSON, Judge

Removal of the defendants to the District of Columbia for trial denied October 13, 1909

THE INDIANAPOLIS NEWS PANAMA LIBEL CASE

Circumstances preceding the Return of the Indictments and Proceedings for the Removal to the District of Columbia for Trial of

DELAVAN SMITH and CHARLES R. WILLIAMS

Publishers of The Indianapolis News

Order for Removal Denied October 13, 1909, by the United States District Court for the District of Indiana

HON. ALBERT B. ANDERSON, Judge

Stenographic Report by Miss Margaret Wells

Reported by

Louis B. Ewbank, of the Indianapolis Bar

INDIANAPOLIS, IND.

1909.

THE FULMER-CORNELIUS PRESS
INDIANAPOLIS, IND.

THE PANAMA LIBEL CASE.

BRIEF STATEMENT OF THE WHOLE MATTER.

ACQUISITION OF THE PANAMA CANAL PROPERTY AND OTHER CIRCUMSTANCES PRECEDING THE RETURN OF THE INDICTMENTS, HEARING BEFORE THE COURT, AND OPINION OF THE COURT.

In November, 1899, a syndicate agreement was prepared in the law office of William Nelson Cromwell, in New York (p. 286, *post*), for a subscription of $5,000,000 for the Americanization of the Panama Canal. In December, 1899, the Panama Canal Company was incorporated under the laws of New Jersey, with an authorized capital of $30,000,000, the incorporators being clerks in Mr. Cromwell's office (p. 279, *post*). In March, 1900, the Interoceanic Canal Company was also organized under the laws of New Jersey, with an authorized capital of 1,000,000 shares of $100 each, six of Mr. Cromwell's associates subscribing for ten shares each, as incorporators (p. 283, *post*).

All of these acts had direct reference to the acquisition of the Panama Canal property.

Afterward the French Panama Canal Company gave Mr. Cromwell a power of attorney under which he negotiated for the sale of the canal property to the United States.

In November, 1901, the "Walker Commission," appointed under an act of Congress to visit the proposed routes for an interoceanic canal and report as to the most practicable and feasible route, reported in favor of the Nicaragua canal route; but at the same time reported that the Panama Canal would be the better route, if it could be purchased for not more than $40,000,000, the price demanded being several times that sum (pp. 29, 122, *post*).

In January, 1902, the New Panama Canal Company of France, which had become the successor to all rights of the old De Lesseps Panama Company, by cablegram, offered to sell its properties to the United States for $40,000,000, and after some negotiations the offer

was accepted (see indictment, p. 30, *post*). Authority to make the purchase for that amount was given to President Roosevelt by act of Congress, June 28, 1902. After a delay of nearly two years, the province of Panama suddenly declared its independence. November 3, 1903, troops were landed from United States battleships to preserve order, and a few days later the independence of Panama was acknowledged, followed closely by the grant of a concession for the "canal strip" ten miles wide to be occupied by the United States, the payment of the $40,000,000 of purchase money, and the transfer to the United States of title to the Panama Canal property.

Nearly two years after this sale was consummated, in response to a message from President Roosevelt, the United States Senate directed the committee on interoceanic canals to conduct an invstigation. Mr. William Nelson Cromwell, the attorney for the New Panama Canal Company in all its negotiations for the sale of its property to the United States, who had organized the above mentioned New Jersey corporations to take over the canal, and who also acted as attorney for the new country of Panama, was called as a witness before that committee.

He refused to answer a number of questions asked by Senator Morgan on behalf of the Senate committee, relating to his connection with the different Panama Canal companies and the transaction of business for them, giving as a reason that they related to matters of professional confidence and were privileged, although some of the matters inquired about had occurred ten years before the investigation (p. 329, *post*). But he stated, in answer to some later questions, that both the New Jersey companies proved abortive and were dead, and that he received nothing from the canal deal but compensation for legal services (p. 349, *post*). July 8, 1908, after the nomination of Mr. Taft for president, Mr. George R. Sheldon was selected as treasurer of the Republican national committee, and the Associated Press dispatches of that day stated that his selection had followed a conference between Mr. Taft and Mr. Cromwell, although "it had been the program" to choose a different treasurer.

Several weeks later, August 29, the Democratic national committee gave out advance sheets of a chapter of their "campaign text-book," which was printed in many newspapers of that date, and afterward published in the text-book, which contained an attack on William Nelson Cromwell as a representative of trust interests, and the associate of trust magnates, and upon the Republican party, through him (p. 289, *post*).

On September 26 the correspondent of *The Indianapolis News*

at Chicago sent that paper a dispatch in which he stated that there was a firm conviction at both Republican and Democratic national headquarters that there was to be a bitter personal campaign, and that "William Nelson Cromwell is to be dragged again into the spot light" (p. 291, *post*).

October 3 the *New York World* published a report that an American syndicate had acquired the greater part of the stock of the Panama Canal Company before the canal was sold to the United States, and had made a large profit out of the sale. An early edition of the *World* containing this story was received at the office of *The Indianapolis News*. A later edition of the same date, in which the *World* published a denial of the story by Mr. Cromwell, did not reach subscribers outside of New York City, and the denial was not seen by the publishers and editors of *The Indianapolis News* (pp. 15, 113, *post*).

October 6 the *Chicago News,* which was supporting Mr. Taft for president, printed a cable dispatch from its correspondent at Paris, stating that certain Americans had been concerned in buying up a majority of the old Panama shares and selling the canal property to the United States, and that "Panama Canal officials" named Charles P. Taft, William Nelson Cromwell and J. Pierpont Morgan as concerned in the alleged purchase of shares. This article was torn out by the correspondent of *The Indianapolis News* and mailed to that paper, which printed it the next day (p. 292, *post*).

October 7 other newspapers printed comments on the matter, notably the *Louisville Courier-Journal* (p. 292, *post*) and the *Daily States,* of New Orleans. The *Daily States* on that day printed an editorial (p. 293, *post*) and also printed a "news article," on which its editorial was based (p. 294, *post*). The same day the dispatch which had appeared in the *Chicago Daily News* was printed in the *Louisville Courier-Journal,* entitled "Millions Made in Canal Deal."

Next day, October 8, the *Chicago Journal* published an editorial entitled "C. P. Taft and the Big Canal" (p. 295, *post*).

October 8 *The Indianapolis News* printed the first article mentioned in the indictment, on which it was sought to take its publishers, Delavan Smith and Charles R. Williams, to Washington, for trial. It was a dispatch written by *The News's* correspondent at Chicago (p. 296, *post*) and referred to "The Cromwell-Morgan-C. P. Taft Panama Canal Deal" as a big campaign issue. It stated that "some ugly charges are likely to be made concerning the purchase of the Panama Canal route for $40,000,000," and asserted that a great deal of comment among politicians had been caused by "the

publication of the Paris cablegrams * * * in which the French bankers tell of this deal, and say that Cromwell, Morgan and C. P. Taft bought up the property and then loaded it on this country." (Indictment, count No. 1, p. 33, *post*).

October 9 appeared the second article mentioned in the indictment. Mr. Howland, of *The News's* editorial staff, wrote an editorial (p. 296, *post*), which was approved by Mr. Williams, the editor-in-chief, one of the defendants, stating in substance that a syndicate of American capitalists had got hold of the Panama Canal, and had sold it to the United States, and that some of said capitalists involved in the deal were J. Pierpont Morgan, Charles P. Taft and William Nelson Cromwell. (Indict. No. 1, p. 33, *post*).

October 10 appeared in *The Indianapolis News* the cartoon embodied in the indictment. This cartoon, published by order of its city editor (p. 87, *post*), suggested that "unpleasant" evidence concerning the Panama Canal was being discovered, affecting Cromwell, Morgan and Charlie Taft. (Indict. No. 1, p. 34, *post*).

October 11 the Sunday edition of the *Daily States,* of New Orleans, published an article entitled "The Panama Canal Deal" (p. 297, *post*).

October 14 the Associated Press dispatches carried an article from the *New York World,* asserting that "every source of official information as to the identity of those who got the $40,000,000 is obliterated as the result of an agreement between the United States Government and the Panama Canal Company" (p. 298, *post*).

October 14 the *Chicago Inter Ocean,* which supported Mr. Taft's candidacy, published a copyrighted special cable asserting that the "identity of those who got the $40,000,000 for the canal was hidden," and that all "traces were obliterated on the eve of the Chicago convention" (p. 298, *post*).

October 16 the *Chicago Journal* published an editorial entitled "Open the Canal Records" p. 299, *post*). On the same day the *Rocky Mountain News* published what purported to be a dispatch from Paris, entitled "$40,000,000 Grab of Charley Taft is Confirmed" (p. 299, *post*).

October 17 the Associated Press dispatches carried a cable dispatch from Paris to the *World* stating that "very little of the $40,000,000 went to Frenchmen"; and that "full information of the identity of those who got the $40,000,000 is in possession of the Roosevelt administration at Washington," and commenting on a public corporation of such vast importance "having so completely disap-

peared and removed all traces of its existence" (p. 300, *post*), and the *Chicago Inter Ocean* published a similar dispatch (p. 302, *post*).

October 19 the *Chicago Journal* printed a news article entitled "Roosevelt Hit in Canal Deal" (p. 303, *post*), and an editorial entitled "Mr. Roosevelt Should Act" (p. 305, *post*). And the same day the *Chicago Inter Ocean* printed a news article entitled "Canal Records Fail to Show Recipients" (p. 305, *post*). And the *Daily States,* of New Orleans, printed an editorial entitled "Covering the Panama Canal Steal" (p. 303, *post*).

October 20 *The Indianapolis News* published an editorial, written by Mr. Howland and approved by Mr. Williams, the editor-in-chief, on which the second count of the indictment was based, entitled "Panama Secrets," referring to a "gang of speculators," and asserting that no denial, "no matter how vehemently it may be made, ought to be accepted as conclusive" (p. 306, *post*). The second count of the indictment is based on this article.

October 21 the *New York World* published an article, and it was telegraphed to the members of the Associated Press, with reference to the dismissal of Gen. George W. Davis as governor of the canal zone, asserting that he was dismissed "because in his official capacity he discovered evidence of transactions on the part of William Nelson Cromwell which he believed unjustly deprived this Government of large sums of money, and made a report of his discoveries to his superiors at Washington," and reiterating the other charges of a "huge profit" made by "a syndicate of Americans" out of the sale of the Panama Canal (p. 307, *post*).

October 23 the press bureau of the Democratic national headquarters gave out a statement, which was telegraphed over the country by the Associated Press, asserting that Representative Rainey, of Illinois, would demand a congressional investigation of the Panama Canal matter as soon as Congress met (p. 310, *post*).

The same day (23d) the editorial forming the basis of the third count of the indictment was written by Mr. Howland, approved by Mr. Williams, and published in *The Indianapolis News.* It was entitled "Sooner or Later," and referred to "select manipulators" being able "to perpetrate a great international transaction that for all that is known of it reeks with deceit, sharp practice and graft," and that "the supposed servants of the people may be wrought upon by expert swindlers to stultify the public reports of committees of experts," with references to the uncovering of the "Credit Mobilier, the Whisky Ring thefts and the Star Route frauds" (p. 309, *post*).

October 24 the *Rocky Mountain News,* of Denver, Colo., printed an editorial entitled "Noisome Panama Scandal" (p. 311, *post*), and the *World-Herald,* of Omaha, printed a dispatch from New York entitled "Sheldon in the Deal? A Surprising Report. Republican Campaign Treasurer Mixed Up with the Panama Canal Purchase" (p. 310, *post*).

October 26 *The Indianapolis News* printed an editorial which was offered in evidence by the Government as showing express malice. It was written by Mr. Howland and approved by Mr. Williams, entitled "The Canal Deal," and referred repeatedly to "the brother-in-law of the President" (Mr. Douglas Robinson), with the expression of a wish to know all about the matter "before the election" (p. 312, *post*).

October 27 the *Chicago Journal* said editorially that "all the secrets of the canal deal are in Washington. The people of the United States own the Panama Canal; they have a right to full information. And unless Mr. Roosevelt furnishes it forthwith, they cannot be blamed if they draw conclusions accordingly and vote for publicity" (p. 312, *post*).

October 28 the *World-Herald,* of Omaha, printed an editorial entitled "The New York World Charges," which reviewed the several assertions of the *World* concerning the purchase of the Panama Canal, as given in articles above referred to, and stated that "these are, in brief, the charges made by the *World,* perhaps the greatest newspaper in the United States, and backed by the evidence which the *World* presents" (p. 312, *post*).

October 29 *The Indianapolis News* editorial on which the fourth count of the indictment is based was printed (p. 313, *post*). It was written by Mr. Howland and approved by Mr. Williams, and asserted that silence was tantamount to a confession; and that while Mr. Charles P. Taft "has denied the charge, he brings no evidence to support his denial, though the evidence is wholly in the control of his personal and political friends," that Mr. Robinson and Mr. Morgan have made no denial, and Mr. Cromwell "does not deign to give us any information."

November 2 (the day before the presidential election) the editorial appeared in *The Indianapolis News* which was the basis of the fifth count of the indictment (p. 314, *post*). Mr. Howland wrote this also and Mr. Williams approved it. It was entitled "The Panama Matter," and consisted of a brief statement of the charge that American citizens had bought the Canal for $12,000,000 and sold it to the United States for $40,000,000; that "the President's

brother-in-law" and "the candidate's brother" had been charged with complicity, and concluded: "The records are in Washington, and they are public records. But the people are not to see them—till after the election, if then."

November 17 *The Indianapolis News* printed another editorial (also written by Mr. Howland and approved by Mr. Williams) (p. 314, *post*), on which the sixth count of the indictment was based. It was entitled "Departmental Secrecy," and asserted that by reason of the election, as President, of "a member of the present administration," the country would not "get the truth as to the $28,000,000 canal deal, unless perchance Congress is able to drag the facts to light." It again referred to Messrs. Taft, Robinson and Cromwell by name as having either "maintained a strict silence," or, in denying the story, "refrained from appealing to the records, all of which are in the departments at Washington."

December 7 there was given out from Hot Springs, Va., through the Associated Press dispatches, a letter of Mr. William Dudley Foulke to President Roosevelt, calling his attention to the articles published in *The Indianapolis News,* and Mr. Roosevelt's reply, asserting that the articles were false, and that "Delavan Smith is a conspicuous offender against the laws of honesty and truthfulness," which were printed in *The Indianapolis News* and in other papers generally throughout the country (p. 317, *post*).

The same day the Associated Press dispatches carried a statement by Mr. Delavan Smith (one of the defendants) disclaiming any personal motive or knowledge (p. 321, *post*); and that afternoon, in the same issue of the paper which printed these dispatches, *The Indianapolis News* printed a column editorial (p. 322, *post*) disclaiming all personal motive, and asserting that it was only one of many papers "that ventured to suggest that the silence of all concerned only served to strengthen the suspicion, which was very generally held, that all was not right." It also asserted that it was not responsible for the charges, but that they were publicly made many times during the campaign "by a responsible paper" (the *New Work World*), and "no attention paid to them by the president or the men (except Charles P. Taft) said to be involved." And upon these facts it declared that "*The News* took the only course that could have been taken by a paper whose policy it is to print the news and to tell the truth about it."

December 7 (the same day the President's letter was given out), Representative Rainey, of Illinois, introduced a resolution in Congress

calling for a full investigation into the details of the purchase of the Panama Canal property from the French Government (p. 316, *post*).

December 8 the *New York World* printed a reply to President Roosevelt's letter to Mr. Foulke, the reprinting of which by *The Indianapolis News* is the basis of the seventh count of the indictment. It was reprinted the same day in *The News*, under the headlines, "New York World Stands by Charge. Says Roosevelt's Denial of Panama Canal Loot Story is Untrue" (p. 323, *post*). On the same page and immediately following this article *The Indianapolis News* printed "Josiah Quincy's Statement. Why the Democratic National Committee Did Not Use the Story" (p. 326, *post*), and "Charles P. Taft's View. Says Panama Article was Printed Solely for Political Reasons" (p. 327, *post*).

December 10 *The Indianapolis News* printed a dispatch from its correspondent at Washington giving extracts from the testimony of William Nelson Cromwell, before the Investigating Committee appointed by the United States Senate, wherein he refused to answer questions asked by Senator Morgan, on the ground of professional privilege (p. 329, *post*).

In the same issue (December 10) *The News* printed an editorial (also written by Mr. Howland and approved by Mr. Williams), entitled "Who Got the Money" (p. 328, *post*). This editorial asserted that President Roosevelt confessed his inability to answer that question, referred to Mr. Cromwell's power of attorney "to effect with an American syndicate the Americanization of the Panama Canal Company on the following basis," which was introduced in evidence upon the investigation by the Senate Committee, and concluded: "So the question is, 'What Americans got the money?' That some of them did get some of it we take as proved."

This editorial was introduced in evidence by counsel for the United States as tending to prove express malice. Much discussion and newspaper comment followed in the next two months.

INDICTMENTS RETURNED.

On February 17, 1909, four months and one week after the first alleged libelous publication (the cartoon) and two months and one week after the last one (the *New York World's* reply), following an investigation which included the examination of a number of employes of *The Indianapolis News*, subpœnaed from Indianapolis to Washington for that purpose, an indictment for the malicious publication of alleged criminal libels was returned by the grand jury of

the District of Columbia. The indictment was in seven counts, each of which charged the defendants, Delavan Smith and Charles R. Williams, with publishing, in the District of Columbia, one or more of the matters which had appeared at different times in *The Indianapolis News,* and after reciting many antecedent facts, alleged that the defendants "unlawfully and maliciously contriving and intending to vilify and defame" Messrs. Taft, Morgan and Cromwell (and in some of the counts, W. H. Taft, President Roosevelt, Mr. Root and Robinson also), "of their great hatred and ill-will toward said" gentlemen, "did unlawfully and maliciously publish" said articles "at the District (of Columbia) aforesaid" (p. 34, *post*). At and immediately after this time several indictments were also returned against different officers and employes of the company which publishes the *New York World,* including Mr. Joseph Pulitzer, the president of the company, who was and for several months had been cruising in his yacht, and denied having any knowledge of the articles until after they were published.

A warrant for the arrest of the defendants was issued, and was returned three days later indorsed "Not to be found."

At that time both of the defendants were in Indianapolis (where Mr. Williams lives and where Mr. Smith spends much time, though his home is at Lake Forest, Ill.), and their attorney (Mr. Ferdinand Winter) told the United States District Attorney and the marshal that they were ready to be arrested at any time that might suit the convenience of the Government, and asked them to telephone him when the warrant came. Mr. Winter, also, through Mr. John W. Yerkes, associate counsel at Washington, and through Mr. John Maynard Harlan, of Chicago, Mr. Smith's personal counsel, urged the Government to proceed without delay.

SERVICE DELAYED.

But it was not until May 1, 1909, that the warrant for their arrest was served (in Indianapolis).

By agreement of the parties the defendants were taken before Judge Albert B. Anderson, of the United States Court for the District of Indiana at Indianapolis, instead of a commissioner, so that the evidence at a single hearing could be acted on by him as an examining magistrate, and also as a district judge in passing upon the application for the removal of defendants to the District of Columbia for trial, if he should find, as examining magistrate, that there was probable cause.

Judge Anderson was not ready to hear the case at that time, and with the consent of all parties the hearing was set for Tuesday, June 1, and the defendants were released on bail, each becoming security for the appearance of the other.

THE FIRST HEARING.

At the hearing on June 1 the attorneys for the Government introduced in evidence the indictment with an admission by defendants of their identity, thus making a *prima facie* case, and rested.

The defendants then introduced evidence that the first publication with regard to the Panama Canal matter in *The Indianapolis News* was made after the matters published had been a subject of discussion for several days in Chicago, and after inquiry at the national headquarters of the Republican and Democratic parties; also that neither of the defendants had any personal ill-will toward any of the gentlemen alleged to have been libeled, and that neither of them had been in the District of Columbia at the time the alleged libels were published; that they did not have an agency for the circulation or distribution of *The News* in that District, and that all of the copies of *The News* containing the alleged libelous articles which were sent by defendants to the District of Columbia were sent through the mails, by depositing them in the postoffice at Indianapolis, addressed to subscribers or to news dealers who ordered and paid for them on their own account.

Counsel for the United States (Mr. Stuart McNamara) then asked for a continuance in order to produce certain witnesses. "Four or five of them," he said, "reside in New York City, as many more in Washington, one in Buffalo, and one in Nebraska."

Mr. Charles W. Miller (District Attorney) stated that at the Republican headquarters Mr. Hitchcock told the newspaper reporters that there was absolutely nothing in these Panama reports, and at the Democratic headquarters Mr. Mack informed them that he had investigated these matters and that there was no truth in them.

Mr. McNamara stated that they should want as witnesses Norman E. Mack and at least one Cabinet officer, and officers of the Department; that they would show that many other papers at the time "published the other side of the story," and that "the article which appeared in the *World* was the first of a series of articles published in that paper, and dovetailed into the article was an emphatic and full denial by Mr. Cromwell of every one of these charges * * * and that this came under the eyes of the defendants." He

also stated that he hoped and expected to prove that defendants had knowledge, prior to the publication of the first article in *The Indianapolis News,* that there was published in the *New York World* a statement by Norman E. Mack denying the truth of the story.

The hearing was thereupon continued until October 11, 1909.

GOVERNMENT ASKS FOR CONTINUANCE.

On September 29, 1909, Mr. Miller (District Attorney) presented a motion for a continuance of this case until after the trial of the *New York World* Panama libel case which, it was asserted by the Government, had been set for October 20. This application was resisted by Mr. Ferdinand Winter, counsel for defendants, who urged that it was unjust to the defendants to be held under arrest indefinitely to await the convenience of the Government (p. 119, *post*), and the court denied the motion.

HEARING RESUMED.

On October 11, 1909, the hearing was resumed before Judge Anderson. Counsel for the Government failed to produce the Cabinet officers, Chairman Hitchcock or Chairman Mack, or any other witness connected with the national headquarters of either the Republican or Democratic party (all of whom had been referred to at the June hearing). It was admitted by the Government that the denial by Mr. Cromwell of the *New York World* story was printed only in an edition of the *World* later than the edition mailed to subscribers out of New York City, which was sent to *The Indianapolis News.* The Government introduced evidence that in January, 1909, a copy of *The News,* several days old, had been purchased from some unidentified person at the office of the Washington correspondent of *The News* in the Wyatt building, and that during that month copies of current issues of *The News* (not containing the articles in question) were purchased from news stands in different parts of the city of Washington. It also proved that a file of papers which included the papers containing some of the articles in question was in the Congressional Library. Also that Mr. Hornaday, *The News's* correspondent at Washington, had a file of papers in his office, and that in obedience to a subpœna *duces tecum* he furnished copies of the paper, containing the articles in question, to the grand jury which found these indictments.

The testimony of Mr. Cromwell before the investigating committee appointed by the United States Senate, in answer to many

questions propounded by Senator Morgan, was also introduced in support of the assertion that he had not refused to answer proper questions that were asked by this committee. The report of the Isthmian Canal Commission was also introduced to support an assertion that it only reported in favor of the Nicaragua route because of the exorbitant price demanded for the Panama Canal. And two articles which appeared in *The News* that were not mentioned in the indictment were offered in evidence as proof of malice.

This was followed by an extended argument. The attorneys for the Government insisted that the articles libeled Messrs. Cromwell, Morgan, Robinson and Charles P. Taft, and also President Roosevelt, Secretary (now President) William H. Taft, and Secretary Elihu Root, and that the evidence proved they were published in the District of Columbia and in every other place to which copies of the paper were sent.

The attorneys representing the defendants contended that the offense of criminal libel had not been made out because there was an absence of malice, and the articles were within the privilege accorded to newspapers of a fair discussion of public questions. And they also insisted that if the offense of libel had been committed, it was committed only at Indianapolis, in the State of Indiana, where *The Indianapolis News* was published, and the defendants could not be taken to another district for trial.

After an extended argument, Judge Anderson ordered the prisoners discharged, saying: "If the history of liberty means anything—if constitutional guaranties are worth anything—this proceeding must fail. If the prosecuting authorities have power to select the tribunal, if there be more than one tribunal to select from; if the Government has the power and can drag citizens from distant states to the capital of the nation, there to be tried, then, as Judge Cooley says, this is a strange result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial. The defendants will be discharged."

SYLLABUS

OF

QUESTIONS DISCUSSED AND DECIDED.

POINTS DECIDED BY THE COURT.

1. CONTINUANCE, CAUSE.—The Court will not indefinitely postpone the hearing of a proceeding against persons under arrest and released on bail to accommodate the mere convenience of counsel for the Government. p. 119.

2. NEWSPAPER LIBEL, EVIDENCE, INTENT.—A newspaper owner charged with criminal libel has the right to offer, for the purpose of rebutting the charge of malice, evidence concerning the instructions which he gave to the editors and correspondents employed on such paper, by whom the alleged libel was written. p. 72.

3. NEWSPAPER LIBEL, PRIVILEGE.—The conception of privilege in the law of defamation is that an individual may with impunity commit an act which is a legal wrong if he shall act honestly in the discharge of some duty which the law recognizes and shall not be prompted by a desire to injure the person who is affected by his act; although such act, but for his privilege, would afford a good cause of action against him. p. 272.

4. NEWSPAPER LIBEL, PRIVILEGE, COMMENT AND INFERENCES, GOOD FAITH.—Where newspaper comment on a matter of general public interest with relation to the affairs of the Government and the inferences suggested from such facts were not too strongly drawn, the question of criminal liability depends upon whether the defendants, under the circumstances, acted honestly in the discharge of that duty which the law recognizes, or were prompted by a desire to injure the persons affected by their acts. p. 274.

5. NEWSPAPER LIBEL, PRIVILEGE, DUTY.—It is the duty of a newspaper to print the news of public concern and tell the truth about it; to tell its readers the facts it may find out about public questions, or matters of public interest, and honestly to draw inferences from the facts known. p. 272.

6. NEWSPAPER LIBEL, PUBLICATION, MAILING PAPER.—Where defendants printed a newspaper in Indianapolis, and deposited it in the postoffice at Indianapolis for circulation throughout other States, Territories, counties and districts, there was only one publication within the law of criminal libel, which was at Indianapolis, and there was no publication at other places to which the mails carried copies of the paper. p. 275.

7. NEWSPAPER LIBEL, PUBLICATION, EVIDENCE.—Proof that *The Indianapolis News* has a correspondent with an office in Washington, where news dispatches are prepared for transmission to Indianapolis, and that copies of *The Indianapolis News* are there received by mail and kept on file, with testimony expressly denying that any agency or office for the circulation of said paper in Washington is maintained by the owners of *The Indianapolis News*, does not prove that said owners circulate any papers in the District of Columbia. p. 274.

8. REMOVAL OF ACCUSED, EVIDENCE.—The defendants in a proceeding to remove them to the District of Columbia for trial had the right to introduce evidence as to any ingredients of the offense charged, including intent, malice, or whatever it might be, to rebut probable cause. (Tinsley vs. Treat, 205 U. S. 20; United States vs. Black, 160 Fed. 43.) p. 92.

9. REMOVAL OF ACCUSED, EVIDENCE, MALICIOUS INTENT, INSTRUCTIONS TO CORRESPONDENTS.—Upon the hearing before a district judge sitting as an examining magistrate, of an application to remove to another district for trial the publishers of a newspaper charged with criminal libel, evidence is competent on behalf of the defendants as to whether defendants gave any instructions regarding said matter to the correspondent who wrote the alleged libel, and what those instructions were. p. 61.

10. REMOVAL OF ACCUSED, EVIDENCE, PROOF OF MOTIVES.—A defendant charged with criminal libel may prove, in resisting removal to the District of Columbia, that he did not act in the publication of the alleged libel with a criminal intent, but solely from lawful motives. p. 61.

11. REMOVAL OF ACCUSED, PLACE OF CRIME.—When the defendants printed and published in the city of Indianapolis fifty copies of *The Indianapolis News*, and deposited them in the United States postoffice at Indianapolis to be transmitted by mail to fifty subscribers in Washington, they did not thereby publish those fifty papers in Washington. p. 276.

12. REMOVAL OF ACCUSED, PRACTICE.—Where the district judge acts as examining magistrate in a proceeding to remove persons accused of crime to another district for trial, there is a single hearing, and the record is not kept separate any further than that an order is first made as committing magistrate, and if he shall find the existence of probable cause a motion is then made before him for an order to commit the prisoners. pp. 47, 48.

POINTS ASSERTED ARGUMENTATIVELY BY JUDGE ANDERSON.

13. CONTINUANCE, ADMISSION TO PREVENT.—Upon the statement as to who are the witnesses desired and what they will testify, made in support of an application for a continuance, counsel for the other side may admit the facts stated and prevent a continuance. p. 103.

14. CONTINUANCE, REBUTTAL, EVIDENCE.—Ordinarily the Court will not entertain a motion for a continuance to rebut testimony which the opposite party was reasonably bound to anticipate might be offered. pp. 103, 117.

15. REMOVAL OF ACCUSED, CONTINUANCE.—The Government cannot start into a hearing and then get a continuance upon the ground that some evidence has been introduced which counsel may wish to inquire into and see whether or how far they may want to rebut it. p. 103.

16. CONTINUANCE, REMOVAL OF ACCUSED.—As this hearing is somewhat anomalous, the ordinary rules in regard to a continuance do not strictly apply. pp. 103, 117.

17. CONTINUANCE, SHOWING CAUSE.—In order to obtain a continuance of a hearing in a criminal cause to produce witnesses, counsel for the Government should either put in writing or state so that it can be taken down in writing just what witnesses the Government wishes to produce and what it expects to prove by them. p. 103.

18. CONTINUANCE, SURPRISE, EVIDENCE.—Counsel who have had a month to prepare for a hearing are not justified in claiming to be surprised by any action of the defendant in introducing evidence expressly authorized by a former decision of the circuit court of appeals of a circuit embracing the district where the hearing is being conducted. p. 91.

19. CONTINUANCE, SURPRISE, EVIDENCE.—Prior decision of the United States Supreme Court and Court of Appeals afforded notice that defendants might offer evidence disputing any essential element of the crime charged. p. 91.

20. CONTINUANCE, SURPRISE EVIDENCE, NEWSPAPER LIBEL.—Counsel for the Government were bound to anticipate that defendants, who admitted that certain alleged libelous articles were published in their newspaper, would offer evidence that the articles were published in good faith as ordinary matter of news, without any malice whatever. p. 92.

21. EVIDENCE, INTRODUCTION.—The Court will not deny the right to introduce competent proof on the ground that it may cause the Court and opposing counsel extra worry. p. 69.

22. EVIDENCE, PRIVILEGED COMMUNICATIONS, PUBLIC POLICY.—The public policy which dictates that a person should tell the whole truth about a matter concerning which an investigation by the United States Senate was prompted by a suspicion and charge that property had been bought for $12,000,000 and sold to the United States for $40,000,000, is as strong as that which excuses a lawyer from testifying about the affairs of his client. p. 85.

23. JURISDICTION, PLACE OF CRIME, COMMON LAW.—In the absence of a statute, where a crime is committed by an act done in one jurisdiction which takes effect in another, the offender cannot be prosecuted in either. p. 156.

24. JURISDICTION, PLACE OF CRIME, REMOVAL OF ACCUSED.—If the defendants did not publish in the District of Columbia the paper containing the alleged libelous article, the courts of that district have neither jurisdiction of the offense nor of these defendants. p. 275.

25. JURISDICTION, PLACE OF CRIME, REMOVAL OF ACCUSED.—A United States

statute which should make a case triable in a district different from the district where the act was committed would be invalid under the Sixth Amendment of the United States Constitution. p. 275.

26. JURISDICTION, PLACE OF CRIME, NEWSPAPER LIBEL.—If the publication of a libelous article in a newspaper shall be deemed a separate offense in every jurisdiction into which a copy of the paper is sent, a prosecution for one such offense will not, in the absence of a statute, bar a subsequent prosecution in each of the other jurisdictions. p. 154.

27. JURISDICTION, PLACE OF CRIME, SECOND PROSECUTION.—If a separate and distinct offense is committed in each of two or more separate jurisdictions, although each offense consists of a mere repetition of the same act, the prosecution of the offender for one of such acts in one jurisdiction will not bar another prosecution in a different jurisdiction. p. 154.

28. JURY TRIALS, PURPOSE.—The purpose of requiring that a person charged with crime shall be tried by a jury of the district is to give such jury an opportunity to acquit persons whom the Government and its officers may seek to convict of crime. p. 163.

29. NEWSPAPER LIBEL, CHARGING CONSPIRACY.—The charge of a conspiracy to obtain money from the United States by means which would be disapproved by the moral sense of the community, but would violate no law, does not constitute the charge of a crime. p. 169.

30. NEWSPAPER LIBEL, COMMENT, PANAMA CANAL.—The circumstances under which the revolution in Panama and the purchase of the Panama Canal took place, together with the action of William Nelson Cromwell in the matter of answering and refusing to answer questions asked by the Senate investigating committee, gave just ground for suspicion, which justified newspaper report and comment. pp. 273, 274.

31. NEWSPAPER LIBEL, COMMENT, INFERENCES, PANAMA CANAL.—The Court is not able to say that the inferences suggested by the articles set out in the indictment, as based upon the facts in evidence before the Court, were too strongly drawn. p. 274.

32. NEWSPAPER LIBEL, CRIME, DEFINITION.—An act which does not violate any existing law is not a crime until and unless a law covering it is passed. p. 172.

33. NEWSPAPER LIBEL, IMPROPER SPECULATION.—The charge that citizens of this country bought property for $12,000,000 and sold it to the United States for $40,000,000, does not charge that they defrauded the United States (in the absence of any charge that its value was less than $40,000,000, or was misrepresented), nor that they committed any crime. p. 169.

34. NEWSPAPER LIBEL, SHARP PRACTICE.—A charge that certain citizens conspired to induce the President of the United States to pay a larger sum for the Panama Canal than the price for which it might have been bought from the original owners does not charge the commission of a crime. pp. 171, 172.

35. NEWSPAPER LIBEL, UNBECOMING CONDUCT.—A charge of conduct unbecoming a gentleman, in a public financial transaction, does not charge the commission of a crime. p. 170.

36. NEWSPAPER LIBEL, CONDITIONAL PRIVILEGE.—The circulation in good faith among the voters, of an article concerning the character or conduct of a candidate soliciting their votes during a political campaign, is privileged as against a criminal prosecution for libel, if the party states therein only what he honestly believes, although affording a cause of action for tort. p. 223.

37. NEWSPAPER LIBEL, DISTINGUISHED AGENCY.—The civil liability of the owner of a newspaper for the publication of a libel by his agents is entirely different from the criminal liability which grows out of his own act in maliciously publishing a libel with intent to injure. p. 67.

38. NEWSPAPER LIBEL, GOOD FAITH.—If the refusal to answer questions on the part of an attorney for the corporation which sold the Panama Canal to the United States reasonably aroused suspicions in the mind of a layman that important facts relating thereto were undisclosed, the subsequent denial by said attorney, two or four years later, of the facts suspected would not be relevant as bearing upon the good faith and want of malice of a newspaper

owner in subsequently printing a statement of the suspicion and insisting that evidence relating to those facts should be produced or the public would be justified in regarding its suspicions as confirmed. p. 93.

39. NEWSPAPER LIBEL, INDICTMENT, MALICE INTENT.—An indictment against the publishers of a newspaper for criminal libel must charge that the publications were made maliciously, with intent to injure and defame, and the Government cannot make a case unless it proves such allegations. p. 62.

40. NEWSPAPER LIBEL, INTENT.—In a criminal case the defendant may show by way of defense what his motive or intent was. In a civil case the defendant is conclusively presumed to have intended the damage which resulted from his intentional acts. pp. 269, 270.

41. NEWSPAPER LIBEL, INTENT.—In a civil action for damages, want of actual intent to vilify is no excuse for a libel, but in a criminal prosecution the intent must be shown to make out the offense. pp. 250, 251.

42. NEWSPAPER LIBEL, INTENT, INFERENCE.—Where an article is defamatory the Court or jury trying the publisher on a charge of criminal libel may be justified in drawing an inference that the resulting injury was intended, but no conclusive and irrefutable inference to that effect arises. p. 269.

43. NEWSPAPER LIBEL, INTENT, REMOVAL.—The owners of a newspaper cannot be punished for a criminal libel without proof of a guilty intent. Mere proof of such malice as would make out a civil action for damages is not sufficient. p. 167.

44. NEWSPAPER LIBEL, MALICE.—Although the jury may draw the inference of express malice from the circumstances attending the publication of an alleged criminal libel, it is actual malice which must be present and must be found by them in order to justify a conviction. p. 67.

45. NEWSPAPER LIBEL, NEGLIGENCE.—Neglect is no crime, and the owner of a newspaper cannot be convicted for criminal libel by reason of his negligent failure to prevent his agents from publishing a libel in his newspaper. p. 68.

46. NEWSPAPER LIBEL, OWNER IGNORANT.—A rule which would hold the owner or publisher of a paper criminally liable for a libel printed therein without his knowledge would be bad law and bad morals, too. p. 268.

47. NEWSPAPER LIBEL, PUBLISHER'S KNOWLEDGE.—To say that a man can be held criminally liable for a publication in his newspaper of which he was not conscious, or convicted of any crime consisting of an act of which he was unconscious, violates fundamental principles. p. 268.

48. NEWSPAPER LIBEL, FACTS STATED, INFERENCE SUGGESTED.—When articles charge people with swindling or with thieving, and in the articles is contained a statement of the facts upon which such charges are based, they are not necessarily libelous *per se* because the words "thieving" and "swindling" are used. p. 272.

49. NEWSPAPER LIBEL, GOOD FAITH.—A newspaper has a public duty to perform, which includes the discussion of political questions. It is not only the privilege, but the duty of the owners "to print the news and tell the truth about it." p. 165.

50. NEWSPAPER LIBEL, GOOD FAITH.—The political character and general public interest of a matter under discussion, such as the purchase of the Panama Canal in preference to undertaking to construct the Nicaragua Canal, is a matter for consideration in determining the question of good faith and privilege in the publication of newspaper articles relating thereto, which might otherwise be libelous. p. 165.

51. NEWSPAPER LIBEL, GOOD FAITH, EVIDENCE.—Where newspaper owners are charged with publishing a criminal libel and attempt to justify on the ground of good faith by reason of an attorney who had knowledge of all the facts having stood upon his privilege and refused to disclose them, the question before the Court is, what effect would such refusal of an attorney, under those circumstances, have upon the lay mind? pp. 96-102.

52. NEWSPAPER LIBEL, GOOD FAITH, PUBLIC AFFAIRS.—Severe comment and erroneous conclusions and inferences and suspicions and suggestions with regard to a great public and political question published in a newspaper are not necessarily libelous, if they are published in a good faith effort to perform the public duty which the paper owes to its readers. p. 165.

53. NEWSPAPER LIBEL, GOOD FAITH, PUBLIC DUTY.—It is the duty of the owners of a newspaper to tell the people what the facts are as far as they can find out, and to suggest proper inferences therefrom, and if the indications point to the wrong doing of anybody in a public or political matter, it is their duty to speak out and talk about it. p. 165.

54. NEWSPAPER LIBEL, PUBLICATION.—There is a material distinction between depositing in the postoffice at Indianapolis, a newspaper already published containing a libelous article addressed to a person at Washington, and sending such a paper to an agent or representative in Washington and procuring him to publish it there. p. 162.

55. LIBEL, PUBLICATION, DISTRICT AGENCY.—If a person in Indianapolis writes a libel and sends it to another person in Washington with a request that the latter shall publish it there and he does so, the person in Indianapolis is guilty of publishing a libel in Washington. p. 162.

56. NEWSPAPER LIBEL, PUBLICATION, DISTANT AGENCY.—The Court does not decide whether, if these defendants had an agent in Washington to whom they sent for circulation copies of their paper, they might be amenable to prosecution in the District of Columbia. pp. 275, 276.

57. REASONABLE DOUBT, EFFECT.—The rule that when a question is one that reasonable men might differ about it is a question for the jury, which applies in civil cases, is overborne by the rule in criminal cases that guilt must be established beyond a reasonable doubt. p. 250.

58. REASONABLE DOUBT, INFERENCES.—An inference which arises from the intentional doing of an act is not necessarily as conclusive in a crimnal case as in a civil case. p. 251.

59. REMOVAL OF ACCUSED, CRIMINAL LIBEL, EVIDENCE.—In determining whether a defendant charged with criminal libel may be removed to the District of Columbia for trial the Court may enter into an investigation as to any and all essential ingredients of the crime to determine whether it was probably committed in that district, as charged. pp. 68-69.

60. REMOVAL OF ACCUSED, EVIDENCE, ISSUES.—The inconvenience to the Government of presenting its entire case at a hearing upon the question of the removal of a defendant to another district for trial is not ground for rejecting any competent evidence offered by defendants tending to show that the crime was not committed, as charged. p. 69.

61. REMOVAL OF ACCUSED, EVIDENCE, JURY QUESTIONS.—The judge sitting as a magistrate to hear an application for the removal to another district for trial of a person charged with criminal libel may hear evidence on any question tending to show that the crime charged was not committed in the other jurisdiction, such as alibi, self-defense, lack of criminal intent, etc., although they are questions which upon a trial would be submitted to the jury. p. 60.

62. REMOVAL OF ACCUSED, EVIDENCE, MITIGATION.—Evidence of good faith and qualified privilege by reason of proper motive, which might be admissible in mere litigation of damages in a civil action for damages on a charge of libel, may not be competent in a proceeding to remove to another jursdiction for trial a person charged with criminal libel. p. 60.

63. REMOVAL OF ACCUSED, NEWSPAPER LIBEL, ISSUES.—Upon an application to remove the owners of a newspaper charged with criminal libel to the District of Columbia for trial, the issue is presented whether, under probable cause, the crime was committed, and whether that degree of malice existed which was essential to the crime. p. 63.

64. REMOVAL OF ACCUSED, NEWSPAPER LIBEL, FAIR INFERENCES.—Upon an application to remove to another district for trial a person accused of libel, the Court sitting as an examining magistrate has to determine, in the first instance, whether the article complained of was limited to fair comment and reasonable criticism, and if it was, the accused should be discharged. p. 249.

65. REMOVAL OF ACCUSED, NEWSPAPER LIBEL, PLACE OF TRIAL.—It would be unbearable, and constitutional guarantees would be of little value, where there is more than one tribunal to select from in case of a charge of newspaper libel, if the Government should have the authority to drag citizens from distant States to the capital of the nation, there to be tried. p. 277.

66. REMOVAL OF ACCUSED, PROBABLE CAUSE, INFERENCES.—In determining

the question of probable guilt in a proceeding to remove an accused person to another district for trial, the court does not consider the question of inferences from the facts proved on the ground of a mere preponderance of the evidence, but upon its probable sufficiency to establish guilt beyond a reasonable doubt. pp. 250, 251.

67. RULINGS, BASIS.—The fact that a ruling which the Court is asked to make will not hurt the adverse party is no reason why the applicant should have a ruling in his favor. p. 118.

POINTS ASSERTED IN ARGUMENT BY MR McNAMARA, FOR PROSECUTION.

68. CRIME, AGENT.—One cannot commit a crime by an agent at common law. p. 156.

69. NEWSPAPER, PUBLICATION.—That a newspaper, by direct authority of the owner, is sold from a bureau or agency maintained and controlled by such owner in a distant city, State or district, constitutes a legal publication by the owner at that place. p. 148.

70. NEWSPAPER PUBLICATION.—A newspaper libel should be treated as published at each and every place in which the newspaper is circulated by the publisher. p. 148.

POINTS ASSERTED IN ARGUMENT BY MR. LINDSAY, FOR DEFENDANTS.

71. REMOVAL OF ACCUSED, DISCRETION.—An application to remove an accused person to another district for trial is addressed to the sound legal discretion of the Court. p. 182.

72. REMOVAL OF ACCUSED, JURISDICTION.—Any United States statute which undertakes to provide for the removal of a publisher to the District of Columbia or other place within Federal jurisdiction, for trial on the charge of publishing a libel which was actually published elsewhere, is unconstitutional. p. 201.

73. REMOVAL OF ACCUSED, JURISDICTION.—The Supreme Court of the District of Columbia does not have jurisdiction to try a defendant upon a charge of crime committed by acts done when the accused was not in that District. p. 183.

74. REMOVAL OF ACCUSED, JURISDICTION.—There is no statutory authority for the removal to the District of Columbia for trial of a person accused of a crime against the local laws of the District not actually, but only constructively, committed there. p. 186.

75. REMOVAL OF ACCUSED, JURISDICTION.—The fact that all the acts done by defendants constituting the alleged offenses were done within the jurisdiction of the State of Indiana, and are cognizable in its courts, is a sufficient reason for refusing a warrant of removal to the District of Columbia for trial. p. 181.

76. REMOVAL OF ACCUSED, PLACE OF CRIME.—A person cannot be removed from one State to another, for trial on a criminal charge, unless he was corporeally present in the State to which it is sought to remove him at the time he committed the act on which the charge is based. p. 176.

77. REMOVAL OF ACCUSED, PLACE OF CRIME.—No person can be removed from a State to the District of Columbia for trial on a criminal charge where he was not corporeally present in said District at the time he committed the act which forms the basis of the criminal charge. p. 176.

POINTS ASSERTED IN ARGUMENT BY MR. MILLER, FOR PROSECUTION.

78. LIBEL, INDICTMENT.—At common law, where a civil action for libel would lie, an indictment would also lie. p. 263.

79. NEWSPAPER LIBEL, CONDITIONAL PRIVILEGE.—Where a charge is made in good faith and without actual malice, in the honest belief that the facts stated are true and in the performance of a social or moral obligation owed to the persons to whom the statement is made, it is privileged. p. 262.

80. NEWSPAPER LIBEL, CONDITIONAL PRIVILEGE.—One who exceeds his privilege in circulating a false statement is not protected by the existence of a duty, a common interest, or a degree of confidential relationship, together with the fact that he acted in good faith. p. 262.

81. NEWSPAPER LIBEL, CONSTRUCTION OF LANGUAGE.—Even in a criminal prosecution the question whether or not the offense of libel was committed

should be determined from what is a fair and reasonable construction of the language used, and not merely what defendant intended to charge. p. 260.

82. NEWSPAPER LIBEL, DEFENSE.—At common law there is no defense to a prosecution for crimnal libel where the publication and the libelous character of the article are admitted; truth is an affirmative defense under the statute when the publication was made with good motives and for justifiable ends. pp. 264, 265.

83. NEWSPAPER LIBEL, INTENT, INFERENCE.—When a libelous article was knowingly published the inference of wicked intent follows, and defendant cannot show by way of defense that his motives were good and pure. p. 269.

84. NEWSPAPER LIBEL, INTENT, MISTAKE.—If a man deems that to be right in the matter of vilifying another which the law pronounces to be wrong, and does not intend to commit libel, his mistake as to what constitutes vilification and lack of an actual intent to vilify, do not free him from guilt. pp. 260-264.

85. NEWSPAPER LIBEL, MALICE, INFERENCE.—When the publication of words libelous *per se* is once proved, malice may be inferred from the nature of the charge. pp. 265, 266.

86. NEWSPAPER LIBEL, LIBERTY OF PRESS.—The liberty of the press is exactly the same as the liberty of an individual, so far as printing defamatory matter is concerned; the press has no greater right to prepare or publish a defamatory article or communication than the individual has. p. 248.

87. NEWSPAPER LIBEL, PUBLICATION, PLACE OF CRIME.—If the owner of a newspaper publishes his paper in two or more different States or jurisdictions, it constitutes a different offense in each jurisdiction. p. 242.

88. NEWSPAPER LIBEL, PUBLISHER'S LIABILITY.—The fact that a defamatory article which appeared in defendant's newspaper was published without his consent or knowledge will not defeat his liability for criminal libel if he negligently permitted another to be defamed thereby, although he may have entertained no special ill-will or malice toward such person. p. 267.

89. REMOVAL OF ACCUSED, DISTRICT OF COLUMBIA.—Section 1014, R. S. United States, authorizes the removal to the District of Columbia for trial of any person who has committed a crime therein, and is arrested in another State or Territory. p. 246.

90. REMOVAL FOR TRIAL, DISTRICT OF COLUMBIA, JURY.—A jury in the District of Columbia in a prosecution to which the United States is a party would not be made up of office-holders, but on the contrary, all office-holders would be excluded therefrom as incompetent. p. 241.

POINTS ASSERTED IN ARGUMENT BY MR. WINTER, FOR DEFENDANTS.

91. EVIDENCE, PRIVILEGED COMMUNICATIONS, PUBLIC AFFAIRS.—The public interest in the investigation of the alleged sale to the United States of the Panama Canal for $28,000,000 more than it cost the sellers was such that the refusal of an attorney to testify, where his client (a foreign corporation) could have no interest in the matter, reasonably prompted a suspicion that the facts would prejudice said attorney and his associates. p. 86.

92. JURISDICTION, CONSPIRACY, DISTRICT OF COLUMBIA.—A charge of conspiracy to commit misconduct in office on the part of a person who does not reside in the District of Columbia does not charge an offense against the United States under the law of the District of Columbia. p. 211.

93. JURISDICTION, PLACE OF CRIME.—No court of the District of Columbia has jurisdiction of an offense which was not committed in that District. p. 214.

94. JURISDICTION, PLACE OF CRIME, DEFENDANT'S ACT.—The jurisdiction of a court over an offense alleged to have been committed is to be determined by the consideration of where the active agency in the accomplishment of the crime was employed. p. 221.

95. JURISDICTION, PLACE OF CRIME, NEWSPAPER LIBEL.—The circulation in the District of Columbia of a newspaper containing a libelous article is merely a remote consequence of the act done by the publisher at Indianapolis in there publishing and mailing it. p. 221.

96. NEWSPAPER LIBEL, CONDITIONAL PRIVILEGE.—The circulation of an untrue and derogatory newspaper article concerning a candidate among the voters whose ballots he is asking, for the purpose of giving what the writer be-

lieves to be truthful information and only for the purpose of enabling such voters to cast their ballots more intelligently, if done in good faith, is privileged. p. 223.

97. NEWSPAPER LIBEL, CONDITIONAL PRIVILEGE.—It is the question of good faith and intent which controls as to criminal liability for circulating a libel; and not merely the truth of the charges or the extent of the investigation made to ascertain their truth. pp. 223, 224.

98. NEWSPAPER LIBEL, CONDITIONAL PRIVILEGE.—Comments on the fact that an attorney who procured permission from one client to reveal matters relating to his employment had not asked such permission from another client in relation to same matter, and absolutely refused to reveal the facts concerning the affairs of such other client in which a Government investigation had been ordered, on the ground of professional privilege, printed in a newspaper during a political campaign for the election of President, Congressmen and Legislative Officers to choose U. S. Senators, were conditionally privileged. p. 229.

99. NEWSPAPER LIBEL, CONDITIONAL PRIVILEGE, POLITICAL CAMPAIGN.—If the nature of the article and the occasion upon which it was published show that it was conditionally privileged, then unless express malice is shown it is absolutely privileged. p. 224.

100. NEWSPAPER LIBEL, CONSTRUCTION OF STATUTE.—The statute for the removal of United States prisoners to another district for trial should not be given a construction which makes Congress do what it could not be induced to do in express terms, opposed to the spirit of our institutions. p. 214.

101. NEWSPAPER LIBEL, EXCITING SCORN, INDICTMENT.—Mere general abuse, insinuation and suggestion, which does not amount to bringing any distinct charge of wrong-doing against the person referred to, will not support an indictment for libel. p. 234.

102. NEWSPAPER LIBEL, EXPLANATION.—Denouncing a person by epithets and the assertion of conclusions is not libelous under the criminal law, if all the facts are stated and they do not show the accused party to have done anything but what he had a legal right to do. p. 233.

103. NEWSPAPER LIBEL, FREEDOM OF PRESS.—The freedom of the press would be destroyed for all practical purposes if every newspaper writer had hanging over him the extreme penalties of the libel law of the District of Columbia in case his statements prove untrue, with the further liability to be carried to the District of Columbia for trial. p. 204.

104. NEWSPAPER LIBEL, INTENT, INDICTMENT.—A libel, if criminal at all, is criminal because there is a criminal intent leading to its perpetration; the essence of the offense of criminal libel is actual malice, or the intent or desire to do wrong. p. 221.

105. NEWSPAPER LIBEL, JURISDICTION.—The existence of the power asserted in this case would in practical effect destroy the freedom of the press as to the discussion of United States officers and their public acts. p. 204.

106. NEWSPAPER LIBEL, MALICE, BURDEN.—In a prosecution for criminal libel the burden of proof is upon the Government to show express malice. p. 229.

107. NEWSPAPER LIBEL, MALICE, FALSITY.—The fact that a written or printed statement circulated by defendant was untrue does not necessarily create an inference of malice. p. 224.

108. NEWSPAPER LIBEL, NATURE OF CHARGE.—An article merely accusing another of doing what he has a legal right to do is not criminally libelous, although it imputes to him a defect of the nicer moral virtues. p. 231.

109. NEWSPAPER LIBEL, PUBLICATION.—"Publication" within the meaning of the criminal law does not mean a technical, artificial, constructive publication by reason of the libel finally reaching a distant point, but it means the actual and substantive publication by putting the article in circulation where it may be seen and read. p. 219.

110. NEWSPAPER LIBEL, PUBLICATION, DEPOSITING IN POSTOFFICE.—When newspapers are deposited in the postoffice unsealed and open for inspection they are published at that moment in that place. And the final delivery by the postoffice in a distant city is not a publication within the meaning of a criminal statute of any libel therein contained at the latter place. p. 215.

111. NEWSPAPER LIBEL, REBUTTING MALICE.—Evidence that the defendants had no hostility toward the prosecuting witnesses and no intention to accuse them of crime is competent to rebut express malice. p. 225.

112. NEWSPAPER LIBEL, REBUTTING MALICE.—The defendant may prove that his paper copied from a reputable newspaper with superior facilities for learning the truth, to rebut the inference of express malice. p. 225.

113. NEWSPAPER LIBEL, STATING FACTS, EPITHETS.—It is not libelous in either a civil or criminal action to publish an article about a person denouncing him, by opprobious epithets, as being a thief, a hog, a swindler or a scoundrel, provided that in the article the facts upon which the accusation is made are stated, and the facts themselves show that the person is not accused of committing a crime, or of anything that has a legal tendency to expose him to public hatred, contempt or ridicule. p. 239.

114. NEWSPAPER LIBEL, SUCCESSIVE PROSECUTIONS.—If the publishers of a newspaper at Indianapolis, sent to the District of Columbia through the mails, were subject to prosecution in said District for a libel it contained, they would be liable to a like prosecution in each and all States, Territories and districts reached by any copies of the paper containing such libel. p. 217.

115. REMOVAL OF ACCUSED, CONSTRUCTION OF STATUTE.—The construction of section 1014 of the U. S. Revised Statutes, relating to the transfer of United States prisoners to other districts for trial, should be controlled by considerations of the practical effect upon the freedom of the press and other constitutional rights which would result from a proposed construction. p. 206.

116. REMOVAL OF ACCUSED, DEFENDANT'S EVIDENCE.—The examining magistrate in a proceeding to remove an accused person to another district for trial acts judicially; and the indictment is merely *prima facie* evidence of the existence of probable cause, which the defendant has the right to rebut. p. 51.

117. REMOVAL OF ACCUSED, DEFENDANTS EVIDENCE.—Before the examining magistrate, evidence is admissible, as tending to disprove express malice, that defendants gave their correspondents by whom the alleged libelous article was written no instructions or directions with relation thereto. p. 53.

118. REMOVAL OF ACCUSED, DEFENDANT'S EVIDENCE.—In a proceeding to remove prisoners to another district for trial, where the district judge sits as examining magistrate, the defendants have a right to introduce evidence on the question of malice and probable cause at such hearing. p. 53.

119. REMOVAL OF ACCUSED, DISTRICT OF COLUMBIA.—The debates upon the statute of June 22, 1874, show that it was not the intention of Congress that a person accused of newspaper libel should be subject to removal from his home to the District of Columbia for trial. p. 212.

120. REMOVAL OF ACCUSED, EVIDENCE, INSTRUCTIONS TO CORRESPONDENTS.—On the question of probable cause in a proceeding for criminal libel the good faith of the owners of the newspaper in which the alleged libel was published is an issue, and evidence relating thereto is competent. p. 54.

121. REMOVAL OF ACCUSED, NEWSPAPER LIBEL, EVIDENCE PRIMA FACIE.—A certified copy of the indictment is only *prima facie* evidence of the existence of probable cause that the crime was committed at all, or was committed within the jurisdiction, as charged, including the element of malice, where malice is a necessary element of such crime, as in criminal libel. p. 60.

122. REMOVAL OF ACCUSED, PLACE OF CRIME, CONSPIRACY.—Where a conspiracy to betray the Government was entered into in the District of Columbia and overt acts pursuant thereto were committed elsewhere, the jurisdiction of the courts of the District of Columbia rested upon the acts done therein. p. 245.

123. SPECULATION, PUBLIC CONTRACTS, SECRET INFORMATION.—In the absence of any confidential relation citizens of the United States had a right to buy the Panama securities without disclosing their superior information, and to make whatever profit they could out of their superior knowledge. p. 230.

124. SPECULATION, SUPERIOR KNOWLEDGE.—The Golden Rule commanding to do unto others as one would have them do unto him is not the law to the extent of requiring a disclosure of all knowledge of present and prospective values when buying from a stranger. p. 231.

125. STATUTES, CONSTRUCTION.—A statute should be interpreted in the light of all that might be done under it as so construed p. 206.

STATUTES, INDICTMENTS, EVIDENCE, ARGUMENT AND JUDGMENT.

STATUTES ON WHICH PROCEEDING WAS BASED.

Section 815 of the Code of Laws of the District of Columbia provides as follows:

Whoever publishes a libel shall be punished by a fine not exceeding one thousand dollars or imprisonment for a term not exceeding five years, or both.

Section 1014 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 716), providing for the removal of prisoners from one district to another for trial on the charge of violating laws of the United States, reads as follows:

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a Supreme or Superior Court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.

Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be held.

INDICTMENT.

The indictment was in seven counts and they were all alike as to the recitals by way of inducement and the allegations concerning the place where the crime was committed and the charges of malice, etc., but were based on the language of different news articles and editorials. The first count is given in full; the other counts are reduced to the language of the several articles relied on and the innuendoes inserted therein. They were as follows:

FIRST COUNT.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

HOLDING A CRIMINAL TERM.

District of Columbia, ss: January Term, A. D. 1909.

The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That at the time and times of the commission by Delavan Smith and Charles R. Williams of each of the offenses set forth in the several counts of this indictment, the said Delavan Smith and the said Charles R. Williams were the owners and proprietors of a certain newspaper called *The Indian-*

apolis News, and were engaged in the business of publishing the said newspaper called *The Indianapolis News* in the city of Indianapolis, State of Indiana, and in circulating and distributing the same in the said city and said State and in many other places, including the District of Columbia; and that the said Charles R. Williams was editor of the said newspaper and was engaged in the business and the duties of aiding in the composition and preparation of the said newspaper prior to its said publication as aforesaid; and that the said Delavan Smith and the said Charles R. Williams, in the carrying on of their said business of publishing, circulating and distributing the said newspaper called *The Indianapolis News* did maintain in the District of Columbia a Washington office at the time and times aforesaid, that is to say, an office and bureau located in the city of Washington, District of Columbia, and that at the time and times aforesaid there were circulated and distributed in the District of Columbia aforesaid a great many copies of said newspaper called *The Indianapolis News*.

And by way of a statement of facts and circumstances antecedent to the commission of the said offenses set forth in each of the several counts of this indictment, and bearing upon and necessary to the proper understanding thereof, and of the false, scandalous, malicious and defamatory libels involved therein, the grand jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, in the year of our Lord one thousand eight hundred and eighty-eight, the Compagnie Universelle du Canal Interoceanique de Panama (which, translated into the English language, is the "Universal Company of the Interoceanic Canal of Panama"), a body corporate existing by virtue of the laws of France, had acquired and owned certain valuable concessions from the Republic of Colombia to excavate and build through and across the territory of the said republic, to wit, through and across the Isthmus of Panama, a maritime canal connecting the waters of the Atlantic and the Pacific Oceans, and the said company had begun and proceeded with the work of building said canal, and had acquired valuable property and valuable machinery used in the work aforesaid, and had also had prepared for it, and owned, many valuable engineering plans, maps and archives relating to and illustrating said work, which it kept in the city of Paris, France. The said company had issued its capital stock to a large amount, to wit, to the amount of three hundred million francs, and in order to discharge its many obligations and expenses, the said company had also issued a series of bonds of large amount, to wit, to the amount or face value of one billion four hundred million francs; and thereafter the said company became insolvent and failed, and to wit, on the fourth day of February, in the year of our Lord, one thousand eight hundred and eighty-eight, its dissolution was decreed according to law by the proper judgment of the Civil Tribunal of the Seine at Paris, France, pronounced on the day aforesaid, and by the terms of which judgment an officer of the court called a liquidator was appointed, with plenary power to wind up the said company, and with full power in the premises, especially to grant and contribute to any new company all or any part of the property of the said Compagnie Universelle du Canal Interoceanique de Panama, and to enter into and ratify with the contractors for the Panama Canal all agreements having for their purposes the continuance of the work. And thereafter, to wit, upon the twenty-first day of July, in the year of our Lord one thousand eight hundred and ninety-three, by proper decree of the said Civil Tribunal of the Seine, one Jean Pierre Gautron was duly appointed liquidator of the said company, with all the powers granted in the premises as aforesaid, and the said Gautron thereafter duly qualified and was confirmed as the sole liquidator of the said company.

Thereafter, on, to wit, the twenty-second day of October, in the year of our Lord one thousand eight hundred and ninety-four, there was created under and by virtue of the laws of France, a "Societe Anonyme" (which, translated into the English language, is an "Anonymous Society"), a commercial joint-stock company, under the name of "Compagnie Nouvelle du Canal de Panama" (which, translated into the English language, is the New Company of the Canal of Panama), with its capital stock fixed at sixty-five million francs, divided into six hundred and fifty thousand shares of the par value of one

hundred francs each. Of this said capital stock, fifty thousand shares were set apart for the Republic of Colombia, in compensation and payment for the extension by the said Republic of Colombia of the concessions aforesaid, and in accordance with the existing law passed in that behalf. The said Republic of Colombia had demanded from time to time of the Compagnie Universelle du Canal Interoceanique de Panama large sums of money, in consideration of and payment of the concessions aforesaid, and in order to keep alive the said concessions and prevent their forfeiture, the liquidator of the said company, the aforesaid Gautron, made divers payments. The balance of six hundred thousand shares of the said capital stock of the said Compagnie Nouvelle du Canal de Panama was offered for subscription. The said liquidator of the Compagnie Universelle du Canal Interoceanique Panama, the said Gautron, subscribed to one hundred and fifty-eight thousand nine hundred and fifty shares, and the debtors and contractors of the said Compagnie Universelle du Canal Interoceanique de Panama subscribed for four hundred and six thousand two hundred and seven shares, leaving but thirty-four thousand eight hundred and forty-three shares of the said capital stock of the said Compagnie Nouvelle du Canal de Panama to be acquired by the public generally at large. The said Compagnie Nouvelle du Canal de Panama had its principal office in the city of Paris, France; it was duly organized and officered, and thereafter such proceedings were had that the aforesaid Jean Pierre Gautron, liquidator as aforesaid of the said Compagnie Universelle du Canal Interoceanique de Panama, contributed, ceded and transferred to the said Compagnie Nouvelle du Canal de Panama all its rights, franchises and concessions from the Republic of Colombia in the Isthmus of Panama, for the construction through and across the said Isthmus of the aforesaid maritime canal connecting the waters of the Atlantic and Pacific Oceans, together with its machineries, properties, plans, archives, documents, and contracts, and its right and interest, represented by shares of stock, in the Panama Railroad Company, a body corporate, created under and by virtue of the laws of the State of New York, and operating a railroad at Colon and across the said Isthmus in the said Republic of Colombia, which said contribution, cession and transfer was made by the said Gautron, liquidator as aforesaid, under the authority of a decree of the aforesaid Civil Tribunal of the Seine appointing him such liquidator as aforesaid. And thereafter, that is to say, on the twenty-ninth day of June, in the year of our Lord one thousand eight hundred and ninety-four, the said Civil Tribunal of the Seine approved the aforesaid contribution, cession and transfer by the said Gautron, liquidator of the said Compagnie Universelle du Canal Interoceanique de Panama, as aforesaid, to the Compagnie Nouvelle du Canal de Panama, as aforesaid, and in consideration of this contribution, cession and transfer, the said Compagnie Nouvelle du Canal de Panama undertook and agreed to pay to the said Gautron, liquidator as aforesaid of the said Compagnie Universelle du Canal Interoceanique de Panama, sixty per centum of the net profits, to be determined in a fixed way, arising from the operations of the said Compagnie Nouvelle du Canal de Panama. The said Gautron, liquidator as aforesaid of the said Compagnie Universelle du Canal Interoceanique de Panama, also subscribed for shares of stock in the Compagnie Nouvelle du Canal de Panama, to the amount aforesaid, but this relation to the Compagnie Nouvelle du Canal de Panama was an entirely separate transaction, and was in no wise connected with the consideration for the transfer, cession and contribution aforesaid.

And thereafter, the said Compagnie Nouvelle du Canal de Panama continued the work of constructing the said canal across the said Isthmus of Panama, and paid to the Republic of Colombia large sums of money in consideration of the concessions aforesaid, and placed and had large forces of men and equipment at work on the said Isthmus of Panama, and thereafter the said Compagnie Nouvelle du Canal de Panama continued to expend large sums of money in the construction of the said work.

Thereafter, and during the time that the said Compagnie Nouvelle du Canal de Panama was thus prosecuting the actual work of constructing the said canal, and while the said operations were in progress, the United States of America became interested in the project of having a maritime canal constructed to connect the waters of the Atlantic and the Pacific Oceans, and be-

came also interested in the project of owning such a canal and of considering where it could be most feasibly built. And thereafter, to wit, on the third day of March, in the year of our Lord one thousand eight hundred and ninety-nine, the Congress of the United States of America passed a law authorizing the appointment of a commission to investigate the subject aforesaid, which said Act of Congress, in substance provides:

That the President is authorized to make full investigation of the Isthmus of Panama with a view to the construction of a canal by the United States across the same to connect the Atlantic and Pacific Oceans, and is authorized to investigate all practicable routes across the Isthmus, particularly the two routes known as the Nicaraguan and Panama routes with a view to determining the most practicable route for such canal. And the President is also authorized to ascertain what rights and franchises may be held by any corporations or individuals and what work, if any, has been done by them in the construction of a canal on either of said routes, and likewise to ascertain the cost of purchasing all of the said rights and franchises, particularly in the Nicaraguan and the Panama routes; and generally to investigate fully so as to determine the most feasible and practicable route across the Isthmus for a canal, together with the cost of constructing the same and placing it under the management, control and ownership of the United States. The President is also authorized to employ in this service any of the engineers of the United States army and likewise engineers in civil life and any other persons necessary to make such investigation and to fix their compensation. And the President is then requested to report to Congress the result of his investigations with his recommendations.

And thereafter such proceedings were had by the said commission appointed under the authority of the said Act of Congress, whereby the said commission, known as the Walker Commission, from the name of its chairman, Admiral John G. Walker, visited the site of the Panama Canal of the said Compagnie Nouvelle du Canal de Panama, and also the site of the said Nicaraguan canal, and examined the proposed routes, and also any other routes which might be practicable, and the said commission visited the city of Paris, France, and examined the records and technical plans appertaining to the right and properties owned by the said Compagnie Nouvelle du Canal de Panama, and thereafter, on, to wit, the sixteenth day of November, in the year of our Lord one thousand nine hundred and one, the said commission published its report, setting forth in great detail their investigations in the premises, stating that the Panama route as aforesaid, that is to say, the route of the said Compagnie Nouvelle du Canal de Panama, for the construction of the maritime canal across the Isthmus of Panama in the territory of the Republic of Colombia, connecting the waters of the Atlantic and the Pacific Oceans, was the better route; that they adjudged the reasonable value of the holdings of the said Compagnie Nouvelle du Canal de Panama to the United States to be forty million dollars, having reached this estimate by the appraisement of the physical properties, maps and technical archives of the said Compagnie Nouvelle du Canal de Panama, owned in connection with the said Panama Canal, not having included in said appraisement the value of the concessions for which the said Compagnie Nouvelle du Canal de Panama had spent a large sum of money, to wit, the sum of four million dollars. The said commission, in the month of September, in the year of our Lord one thousand eight hundred and ninety-nine, and at different times thence on down to the month of November, in the year of our Lord one thousand nine hundred and one, requested the said Compagnie Nouvelle du Canal de Panama to name a price for the sale of its properties and rights aforesaid, but because the said commission found that the said Compagnie Nouvelle du Canal de Panama was unwilling to definitely name a reasonable price for which it would sell its properties, the said Commission, construing the directions of the said act as requiring a report of their judgment in favor of the most practicable and feasible canal route to be under the control, management and ownership of the said United States, thereupon reported in favor of the said Nicaraguan route.

And thereafter, that is to say, on the fourth day of January, in the year of our Lord one thousand nine hundred and two, the said Compagnie Nouvelle du Canal de Panama, through its council of administration, held an official

meeting at the office of the company, number seven, Rue Louis le Grand, city of Paris, and unanimously decided to make an offer of a fixed price for the cession to the Government of the United States of all the properties and rights which the said Compagnie Nouvelle du Canal de Panama possessed on the Isthmus of Panama, without any exception, for the sum of forty million dollars, and delegated to its president all power to transmit that offer and effect and sign the said cession.

And on the day aforesaid, the said company, through one Bo, the president of the board of the said company, sent a cablegram to the said commission, through one Jules Boeufve, who was then the Chancellor of the French Embassy, accredited to the United States at Washington, in the District aforesaid, of the substance following:

"Inform Admiral Walker immediately, and without awaiting Lampre's arrival, that the company declares itself ready to transfer to the Government of the United States, on payment of $40,000,000, its properties and concessions, estimated at that amount by the Isthmian Canal Commission in its last report, page 103, in conformity with the terms and conditions of the estimates of said report."

And on, to wit, the said ninth day of January, in the year of our Lord one thousand nine hundred and two, a cablegram was sent to Admiral John G. Walker, chairman of said commission, appointed under the authority of the said Act of Congress, of the substance following:

"The New Panama Canal Company declares that it is ready to accept for the whole of its property and rights on the Isthmus without exception the sum of forty million dollars. This offer good up to March fourth, 1903";

which said cablegram was sent by Bo, president of the council of administration of the said Compagnie Nouvelle du Canal de Panama. And thereafter, on, to wit, the eleventh day of January, in the year of our Lord one thousand nine hundred and two, another cablegram was sent by said Bo to the said Admiral John G. Walker, chairman of the said commission, as aforesaid, of the substance following:

"The offer of cession of all of our properties comprises also all plans and archives at Paris."

Upon this offer of sale by the said Compagnie Nouvelle du Canal de Panama at the exact figure and sum specified by the said commission appointed under the aforesaid Act of Congress, as the reasonable value of the properties of the said Compagnie Nouvelle du Canal de Panama on the Isthmus of Panama, as appraised by the said commission, thereafter, to wit, on the twenty-eighth day of June, in the year of our Lord one thousand nine hundred and two, the said Congress of the said United States passed an act providing as follows:

"That the President of the United States is hereby authorized to acquire, for and on behalf of the United States, at a cost not exceeding forty millions of dollars, the rights, privileges, franchises, concessions, grants of land, right of way, unfinished work, plants, and other property, real, personal, and mixed, of every name and nature, owned by the New Panama Canal Company, of France, on the Isthmus of Panama, and all its maps, plans, drawings, records on the Isthmus of Panama and in Paris, including all the capital stock, not less, however, than sixty-eight thousand eight hundred and sixty-three shares of the Panama Railroad Company, owned by or held for the use of said canal company, providing a satisfactory title to all of said property can be obtained."

Acting under the authority and in obedience to the direction of the aforesaid Act of Congress, the President of the United States directed the Attorney General of the United States to examine the title of the said Compagnie Nouvelle du Canal de Panama to the properties on the Isthmus of Panama which it proposed to sell as aforesaid. The said Attorney General searched and examined the records, proceedings, arbitrations and all other documents which would have relation to the title of the Compagnie Nouvelle du Canal de Panama to the property so proposed to be sold as aforesaid, and thereafter the said Attorney General rendered his opinion that a good and sufficient title could be delivered by the said Compagnie Nouvelle du Canal de Panama, and that the said properties could be purchased by the United States, under the

authority of the Act of Congress last aforesaid, approved the twenty-eighth day of June, in the year of our Lord one thousand nine hundred and two.

And thereafter, to wit, on the sixteenth and twenty-third days of April, and on, to wit, the seventh and tenth days of May, in the year of our Lord one thousand nine hundred and four, the proper deed and conveyance of the properties and rights aforesaid of the said Compagnie Nouvelle du Canal de Panama on the Isthmus of Panama, was made and delivered to the said United States of America, and thereby the said United States of America acquired full title to the said canal thus in the progress of construction by the said Compagnie Nouvelle du Canal de Panama through and across the Isthmus of Panama, and of all of its said properties, as mentioned in the aforesaid agreement of sale. And there then became due from the said United States of America, to the said Compagnie Nouvelle du Canal de Panama, the sum of forty million dollars, the purchase price agreed upon as the consideration for the sale aforesaid.

The said United States of America arranged, pursuant to convention and agreement, to deposit the said forty million dollars in the Bank of France, to the credit of the vendor of the said property. And to the end of establishing a convenient and safe medium for this payment, the said United States of America, on, to wit, the twenty-eighth day of April, in the year of our Lord one thousand nine hundred and four, appointed the firm of J. P. Morgan and Company, a copartnership carrying on a banking business in the city of New York, State of New York, and in the city of Paris, France, special disbursing agent of the United States of America for the Treasury Department, to transmit the said sum of forty million dollars, the purchase price aforesaid, to France, pursuant to the directions and the demands of the vendor, according to an agreement of apportionment and distribution of the said forty million dollars, had in the premises between the said Compagnie Nouvelle du Canal de Panama and the said Gautron, liquidator of the Compagnie Universelle du Canal Interoceanique de Panama, based upon the respective rights and interests of the two companies in the premises, determined by the award of the arbitrators appointed under an agreement between the said Compagnie Nouvelle du Canal de Panama and the said Gautron, liquidator as aforesaid of the Compagnie Universelle du Canal Interoceanique de Panama, approved by the said Civil Tribunal of the Seine. It was further agreed by the said firm of J. P. Morgan and Company and the said Compagnie Nouvelle du Canal de Panama, that the said Compagnie Nouvelle du Canal de Panama should bear the expense of the transmission of the aforesaid forty million dollars, and the said firm of J. P. Morgan and Company further guaranteed the said United States that it should be subjected to no expense for their services in this behalf, and the said United States was not subjected to and did not bear any expense on this account.

The said Compagnie Universelle du Canal Interoceanique de Panama had passed into the hands of a liquidator prior to the sale of the canal property, as aforesaid, and at the time of the said sale, to wit, on the sixteenth and twenty-third days of April, in the year of our Lord one thousand nine hundred and four, the said Compagnie Nouvelle du Canal de Panama, at a meeting of its stockholders in general assembly in the city of Paris, France, at the main office of the said company in the said city, simultaneously agreed and voted to dissolve, and the said Compagnie Nouvelle du Canal de Panama thereupon also passed into liquidation.

Carrying out the purpose of this appointment, thereafter the said firm of J. P. Morgan and Company paid into the Bank of France, for account of said Compagnie Nouvelle du Canal de Panama, the whole of the said sum of forty million dollars. By order of the said company, one hundred and twenty-eight million six hundred thousand francs were paid into the Bank of France to the credit of the aforesaid Gautron, liquidator of the aforesaid Compagnie Universelle du Canal Interoceanique de Panama, and seventy-seven million four hundred thousand francs, the equivalent of the balance of said forty million dollars, were paid into the said Bank of France to the credit of the said Compagnie Nouvelle du Canal de Panama, which said division was in accordance and in compliance with the award of the arbitrators hereinbefore mentioned. And thereafter, that is to say, on the sixteenth day of June, in the year of our Lord one thousand nine hundred and four, the aforesaid Jean Pierre Gautron,

liquidator of the Compagnie Universelle du Canal Interoceanique de Panama, executed and delivered to the said United States a separate receipt and acknowledgment of the aforesaid payment, through him, in full, for the interests and rights of the said Compagnie Universelle du Canal Interoceanique de Panama in the premises. And thereafter, on, to wit, the sixteenth day of June, in the year of our Lord one thousand nine hundred and four, the said Compagnie Nouvelle du Canal de Panama and the said Compagnie Nouvelle du Canal de Panama in liquidation, executed and delivered to the said United States a formal receipt of the aforesaid payment, and also declared and acknowledged that the said payments made to the credit of the said Jean Pierre Gautron, liquidator of the Compaigne Universelle du Canal Interoceanique de Panama, were so made with the consent and by the direction of the Compagnie Nouvelle du Canal de Panama.

And accordingly, by means of this agency and medium, the transfer of the said purchase price of forty million dollars, thus authorized to be paid by the said United States by the said Act of Congress approved on the twenty-eighth day of June, in the year of our Lord one thousand nine hundred and two, for the purchase of the said Panama Canal, was paid and delivered to the vendor of the said canal, its properties and possessions, according to the directions of the said vendor.

The respective sums of money paid as aforesaid by the United States, through its special disbursing agent, J. P. Morgan and Company, to the said Compagnie Nouvelle du Canal de Panama in liquidation, for and in behalf of the Compagnie Nouvelle du Canal de Panama, and to the account of the said Gautron, liquidator of the said Compagnie Universelle du Canal Interoceanique de Panama, were thereupon taken up, to be applied, alotted and distributed to the claimants in interest. The stockholders of the said Compagnie Universelle du Canal Interoceanique de Panama were paid nothing by the liquidator aforesaid, out of the said money received by him as aforesaid, but the same was distributed in partial payment to the holders of said bonds, the said holders being of a very large number, to wit, to the number of two hundred and twenty-six thousand.

The office of the liquidator of the said Compagnie Universelle du Canal Interoceanique de Panama is in the city of Paris, France, which said office contains the records of the different bondholders and the amounts paid to each according to his interest. The said Compagnie Nouvelle du Canal de Panama never issued any bonds, and the aforesaid money allotted to it is being distributed to the owners of its stock. The records of this said Compagnie Nouvelle du Canal de Panama are deposited with the Credit Lyonnais, a banking establishment having places of business and offices in the city of Paris, France, and the money so received as aforesaid by the said Compagnie Nouvelle du Canal de Panama in liquidation, for and in behalf of the said Compagnie Nouvelle du Canal de Panama, under the distribution and allotment aforesaid, has been paid to the stockholders in interest. In both cases the liquidation of the two companies was effected and carried on openly and publicly, and the records at the aforesaid offices show the individual distribution to the individual claimants, the amounts of said distributions, the dates thereof, and the residences of the persons to whom paid.

And the grand jurors aforesaid, upon their oath aforesaid, do therefore say:

That in the manner aforesaid and by the means aforesaid, the said United States of America acquired title and possession from the said Compagnie Nouvelle du Canal de Panama, of all of its property, rights, privileges and interests in and to the canal being constructed through and across the said Isthmus of Panama, which it offered to sell as aforesaid; and also acquired the said property, free and acquitted of all claims of the said Compagnie Universelle du Canal Interoceanique de Panama in the premises, and paid the purchase price of forty million dollars authorized by the said Act of Congress approved on the twenty-eighth day of June, in the year of our Lord one thousand nine hundred and two, to the vendor of the said canal and of the properties thereof, and procured the proper receipts for said payments and filed the said receipts among the records of the Treasury of the United States at Washington, in the District aforesaid, where the said receipts since have been and are now.

And by way of a further statement of facts antecedent to the commission of

each of the several offenses set out in the several counts of this indictment, and bearing upon and necessary to a proper understanding thereof, the grand jurors aforesaid, upon their oath, aforesaid, do further present:

That during the time and times set forth in each of the several counts of this indictment, one Charles P. Taft was a resident of the city of Cincinnati, State of Ohio, and was a half-brother of one William H. Taft hereinbefore mentioned, and the said Charles P. Taft did not own any of the stocks or bonds, or have any interest in any of the properties, of the aforesaid companies, and did not receive, either directly or indirectly, any money from the sale of the said Panama Canal to the said United States; that one Douglas Robinson was a resident of the city of New York, State of New York, and was a brother-in-law of one Theodore Roosevelt, who, during the time and times aforesaid, was the President of the United States, and the said Douglas Robinson did not own any of the stocks or bonds, or have any interest in any of the properties, of the aforesaid companies, and did not receive, either directly or indirectly, any money from the sale of the said Panama Canal to the said United States; that one William Nelson Cromwell was a lawyer, practicing in the city of New York, State of New York, and residing in the same place, and was general counsel in the United States of America for the aforesaid Compagnie Nouvelle du Canal de Panama, and had no interest in the sale of said Panama Canal except as counsel for said company; that one Elihu Root, during the time and times of the commission of each of the offenses set forth in each of the several counts of this indictment, was Secretary of State, and prior thereto, that is to say, from the first day of August, in the year of our Lord one thousand eight hundred and ninety-nine, continuously to the thirty-first day of January, in the year of our Lord one thousand nine hundred and four, was the Secretary of War of the said United States; that one J. Pierpont Morgan was a resident of the city of New York, State of New York, and was a member of the firm of J. P. Morgan and Company aforesaid, carrying on a banking business in the said city and elsewhere; that one William H. Taft, on the fourth day of July, in the year of our Lord one thousand nine hundred and one, became the civil Governor of the Philippine Islands, and continued as such until the first day of February, in the year of our Lord one thousand nine hundred and four, when he became the Secretary of War of the said United States, and continued to be and was the said Secretary of War until the thirtieth day of June, in the year of our Lord one thousand nine hundred and eight; that on, to wit, the fourteenth day of September, in the year of our Lord one thousand nine hundred and one, and continuously since, one Theodore Roosevelt became and has been the President of the said United States.

And by way of further facts and circumstances antecedent to the commission of the offense set out in this count, and bearing upon and necessary to the proper understanding thereof, the grand jurors aforesaid, upon their oath aforesaid, do further present:

That on the eighth day of October, in the year of our Lord one thousand nine hundred and eight, the said Delavan Smith and the said Charles R. Williams did publish in the said paper called *The Indianapolis News* an article, one part of which is as follows:

"THAT PANAMA CANAL DEAL."

"The Cromwell-Morgan-C. P. Taft-Panama Canal deal is going to be a big campaign issue before the fight is over, and some ugly charges are likely to be made concerning the purchase of the Panama Canal route for $40,000,000."

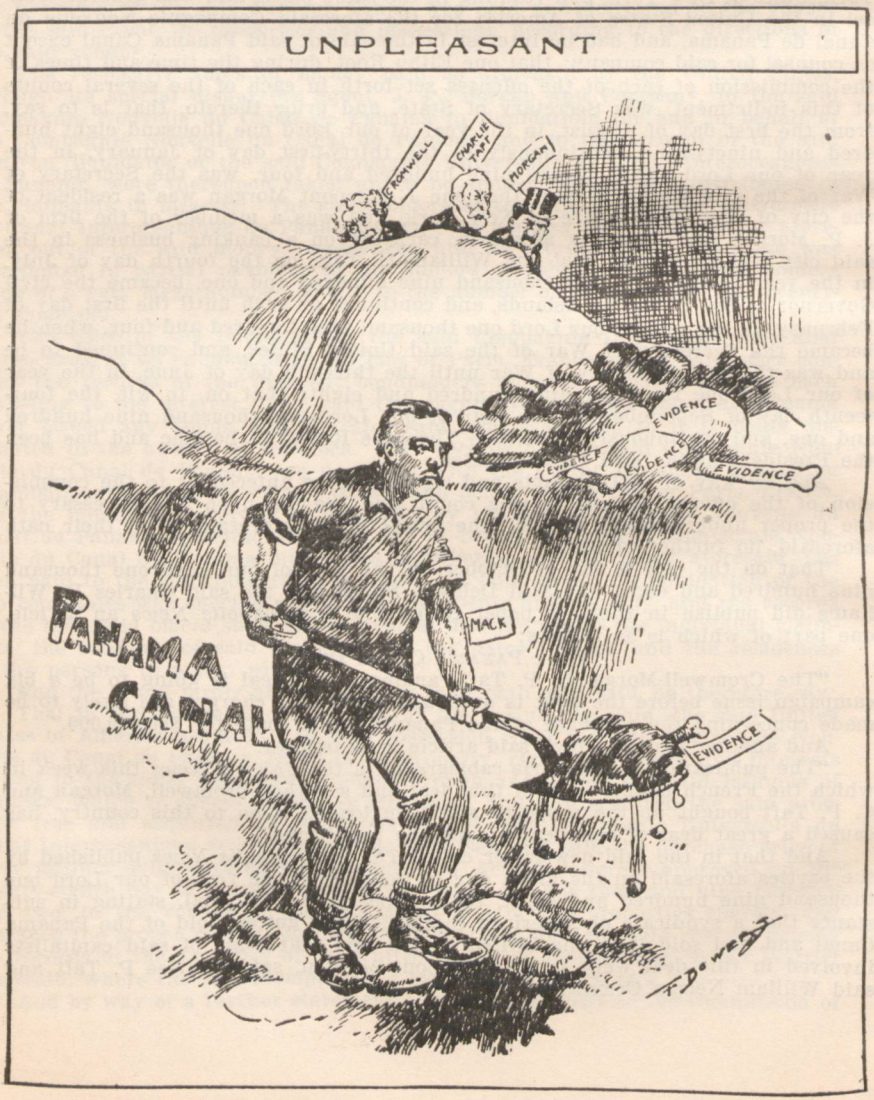
And another part of which said article is as follows:

"The publication of the Paris cablegrams in the *Chicago News* this week in which the French bankers tell of this deal and say that Cromwell, Morgan and C. P. Taft bought up the property and then loaded it on to this country, has caused a great deal of comment among the politicians."

And that in the said newspaper called *The Indianapolis News* published by the parties aforesaid on the ninth day of October, in the year of our Lord one thousand nine hundred and eight, there appeared an editorial, stating in substance that a syndicate of American capitalists had gotten hold of the Panama Canal and had sold it to the United States, and that some of said capitalists involved in this deal were said J. Pierpont Morgan, said Charles P. Taft and said William Nelson Cromwell.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That the said Delavan Smith and the said Charles R. Williams, unlawfully and maliciously contriving and intending to vilify and defame the said Charles P. Taft, the said J. Pierpont Morgan and the said William Nelson Cromwell, and to bring them and each of them into public scandal, contempt, ridicule, infamy and disgrace, on the tenth day of October, in the year of our Lord one thousand nine hundred and eight, at the District aforesaid, of their great hatred and ill-will towards the said Charles P. Taft, the said J. Pierpont Morgan and the said William Nelson Cromwell, did unlawfully and maliciously publish and cause to be published a certain false, scandalous, malicious and defamatory libel of and concerning the said Charles P. Taft, the said J. Pierpont Morgan and the said William Nelson Cromwell, which said false, malicious, scandalous and defamatory libel was in the form of a picture and delineation cartooning and caricaturing the said Charles P. Taft, the said J. Pierpont Morgan and the said William Nelson Cromwell, with the title word "UNPLEASANT" at the top of said picture, and of the tenor and likeness following, that is to say:



(the said picture meaning that one Norman E. Mack, chairman of the Democratic National Committee of 1908, and represented by the figure of a man digging, was investigating the facts concerning the purchase by the United States of the Panama Canal; that by so investigating the facts of the said purchase, the said Norman E. Mack was discovering evidence, and that he was bringing to light and public knowledge facts showing fraud and dishonesty practiced and committed by the said syndicate including among others the said Charles P. Taft, the said J. Pierpont Morgan and the said William Nelson Cromwell, in defrauding the United States of a large sum of money in connection with the purchase by the said United States of the said Panama Canal; that the said investigation would expose the said Charles P. Taft, the said J. Pierpont Morgan and the said William Nelson Cromwell, who are depicted in the said picture by three certain delineations with the names thereto affixed of "Cromwell," meaning thereby the said William Nelson Cromwell, of "Charlie Taft," meaning thereby the said Charles P. Taft, and of "Morgan," meaning thereby the said J. Pierpont Morgan, and by the appearances, attitudes and expressions of the said Charles P. Taft, the said J. Pierpont Morgan and the said William Nelson Cromwell, as represented in said picture, importing and signifying their complicity in the aforesaid fraud); to the great injury, scandal, ridicule and disgrace of them, the said Charles P. Taft, the said J. Pierpont Morgan and the said William Nelson Cromwell; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

SECOND COUNT.

The second count charged that, under the circumstances and conditions set forth in the first count, the defendants unlawfully and maliciously contriving and intending to vilify and defame the said Theodore Roosevelt, President of the United States, the said J. Pierpont Morgan, the said Charles P. Taft, the said Douglas Robinson and the said William Nelson Cromwell, and to bring them and each of them into public scandal, contempt, ridicule, infamy and disgrace, on the twentieth day of October, 1908, of their great hatred and ill-will towards the said persons, published the following editorial:

"PANAMA SECRETS" (meaning thereby facts concerning the purchase by the United States of the said Panama Canal, which had been withheld from public information). "The *Chicago Journal*" (meaning thereby a newspaper published in the city of Chicago, State of Illinois) "says that it is well known that 'somebody bought the stock of the defunct French Panama Canal Company for $12,000,000, or less and sold it to the United States Government for $40,000,000.' And the Chicago paper" (meaning thereby the *Chicago Journal* aforesaid) "declares further that it is 'not now known to anybody outside the gang of speculators that reaped a rich harvest by playing on the patriotism of the American people, how much of that $28,000,000 went into the pockets of President Roosevelt's intimate friends, who promoted the deal.'" (Meaning thereby that it is not now known to the public or to anybody outside the said alleged syndicate, including said Charles P. Taft, said William Nelson Cromwell, said J. Pierpont Morgan, and said Douglas Robinson, who were charged to be in a gang of speculators who tricked the American people into buying the Panama Canal, by appealing to their patriotism, how much of the sum of twenty-eight million dollars, was distributed to the intimate friends of the said Theodore Roosevelt, President of the United States, who encouraged and successfully put through the said unlawful and corrupt scheme.) "It has been said on what seems to be good authority that the Government's" (meaning thereby the said United States) "check for $40,000,000 was paid to J. Pierpont Morgan." (Meaning thereby the said J. Pierpont Morgan.) "But no one knows how the sum was divided. Charles P. Taft" (meaning thereby the said Charles P. Taft) "has denied that he got any of the money." (Meaning thereby the aforesaid forty million dollars.) "But he is the only person who has made a denial. We have seen no word from Douglas Robinson, a brother-in-law of the President." (Meaning thereby the said Douglas Robinson, brother-in-law of the said Theodore Roosevelt, President of the United States.) "Yet he" (meaning thereby the said Douglas Robinson) "has, at least through rumor, been connected with the transaction." (Meaning thereby the corrupt and dishonest scheme and deal aforesaid.)

"We do not think, however, that any denial, no matter how vehemently it may be made, ought to be accepted as conclusive. For all the records are in the possession and under the control of the Government." (Meaning thereby that the records showing the facts of the purchase of the said Panama Canal, and the payment of the forty million dollars aforesaid therefor, are in the possession and under the control of the said United States.) "The appeal is to them." (Meaning thereby that the said Charles P. Taft and the said Douglas Robinson were intimately acquainted with and related to the officers of the Government of the United States, including Theodore Roosevelt, President of the United States, and that the said records of the purchase of the said Panama Canal by the said United States, showing the fact of said purchase and the distribution of the said forty million dollars, were available and accessible to the said Charles P. Taft and the said Douglas Robinson, and that the failure of the said Charles P. Taft and the said Douglas Robinson to resort to the said records and exhibit and publish the same in their behalf, must be construed as an admission of their guilt.) "Mr. Cromwell" (meaning thereby the said William Nelson Cromwell), "no doubt, knows who got the money. Possibly Mr. Morgan" (meaning the said J. Pierpont Morgan) "is not wholly ignorant of the details of the negotiation. As long as the facts are thus suppressed, the people cannot be blamed for suspecting the worst. They remember the close relation of our Government to the inspired revolution in Panama, which resulted in our getting control of the canal strip. They remember the sudden turning from the Nicaragua to the Panama route, and this in spite of the fact that the experts had recommended the Nicaraguan route. These two events beyond question greatly increased the value of the stock of the Panama company. And now, when we hear that an American syndicate was the chief beneficiary of the change of plans, and of the made-to-order revolution, the people naturally feel that they are entitled to an explanation.

"When all the documents in a case are in the possession of men charged with or spspected of improper action, or in the possession of their friends, the duty of such men is of course perfectly clear. They must make the documents public. A failure or a refusal to do so is equivalent to something very like a confession. As we have said, mere denials will not serve when the men who make them refuse to produce the evidence which would support them, that evidence being in their possession. When men refuse to deny, the case is of course still stronger against them. All the papers and accounts of the French company passed to this Government when it purchased the property." (Meaning thereby the said Panama Canal.) "The facts can be had from the Government and the Government alone." (Meaning thereby the said United States.) "We think the people are entitled to them, and before the election, too. Men who have in their possession evidence which would prove or disprove a certain allegation, and who refuse to produce it, can not complain if their refusal is construed as proof of their unwillingness to have the truth known. That is both sound morals and sound law. We know that the American Government paid $40,000,000 for the property" (meaning thereby the said Panama Canal) "of the French company. To whom was that money paid? That is the question that must be answered. We think further that the American people, without distinction of party, ought to demand the facts in their completeness. They do not mean to accuse, or even to suspect any one unjustly—do not indeed want to think evil of any one. But what are they to do in a case like this? They know that there is in existence an abundance of evidence to disprove all charges, and that that evidence has so far been withheld from them. Why is it withheld?"

THIRD COUNT.

The third count charged, that under the same circumstances and conditions, the said defendants, on the twenty-third day of October, 1908, at the District aforesaid of their great hatred and ill-will towards the said Theodore Roosevelt, President of the United States, the said J. Pierpont Morgan, the said Charles P. Taft, the said Douglas Robinson and the said William Nelson Cromwell, did unlawfully and maliciously publish the following: "We do not mean here to argue the question. We advert to it for the purpose of repeating the sentence, 'Sooner or later there will inevitably be an investigation of this whole canal affair.' And it will come in some degree by keeping alive that idea; by

living with the notion that a clique of select manipulators can not—must not for the integrity of American government—be able to perpetrate a great international transaction that for all that is known of it reeks with deceit, sharp practice and graft." (Meaning thereby that the said J. Pierpont Morgan, the said Charles P. Taft, the said Douglas Robinson and the said William Nelson Cromwell, among others, who were favored by the officials of the United States, formed a syndicate, which carried out the unlawful and corrupt scheme of defrauding the United States in its purchase of the said Panama Canal, and that this transaction concerned not only the United States, but a foreign nation, and was full of fraud, deceit and imposition practiced upon the Congress and the people of the said United States.) "The idea that supposed servants of the people" (meaning thereby the officials of the Government of the United States) "may be wrought upon by expert swindlers" (meaning thereby the said J. Pierpont Morgan, the said Charles P. Taft, the said William Nelson Cromwell and the said Douglas Robinson) "to stultify the public reports of committees of experts, and with a sleight of hand utterly undo all that was proposed, and put through a forty-million-dollar transaction" (meaning thereby the purchase of the said Panama Canal) "in a dark corner" (meaning thereby that the transaction was negotiated and put through secretly because it was illegal and dishonest and could not be carried out publicly) "is one that we have faith to believe will not come to fruition.

"We discount in this, too, the fact that the people at large, busy with earning a livelihood, soon forget things. In that has consisted the prosperity of many a rogue. But this rascality was unusual" (meaning the said alleged unlawful scheme of the said alleged syndicate, composed, among others, of the persons aforesaid). "It involved a change of front on the part of the President" (meaning thereby the said Theodore Roosevelt, President of the United States) "and the Congress of the United States, which was followed by a revolution in a friendly state that looked as if it had been necessary in order to confirm title. And all this came to pass after the whirlwind order, and in the face of official program to the contrary.

"So, we say, sooner or later this thing will inevitably come to pass if for no other reason than that there will certainly be sometime a change in the public servants sent to take charge of the books. We know what happened here at home when a new man got into the county auditor's office, and had a chance to open the books. There will be new hands in charge of the national books sometime. Depend upon it, 'sooner or later there will inevitably be an investigation of the whole canal affair.' The Credit Mobilier affair" (meaning thereby a gigantic fraud in connection with the proposed building of a railroad whereby the United States was defrauded of many millions of dollars), "the Whisky Ring thefts" (meaning thereby a certain gigantic scheme to defraud the United States of large sums of money due to the said United States from internal revenue on whisky), "the Star Route frauds" (meaning thereby a gigantic scheme to defraud the United States out of large sums of money for the alleged transportation of mails) "were all denied and all apparently hidden away" (meaning thereby that the aforesaid frauds were all denied and secreted, just as the said fraud of the said alleged syndicate had been denied and secreted with the knowledge and aid of Government officials, including the said officials of the said United States). "But they came to light. We hope that the *New York World*" (meaning thereby the newspaper called the *World*, published by the Press Publishing Company, of which one Joseph Pulitzer was president) "which has been zealous and efficient in this canal deal, will persist" (meaning thereby that the said newspaper called the *World*, published by the Press Publishing Company, of which one Joseph Pulitzer was the president, had been active and efficient in publishing charges of fraud and corruption in the scheme of the said syndicate to defraud the said United States in the purchase of the said Panama Canal, and that the said Delavan Smith and the said Charles R. Williams hoped that the said newspaper called the *World* would continue to publish said charges). "It" (meaning thereby the said newspaper called the *World*) "may be short on evidence for a time" (meaning thereby that the said newspaper called the *World* was lacking in evidence of its charges, but would eventually obtain the same), "but it" (meaning thereby the said newspaper called the *World*) "can be long on presentation and not weary in well doing"

(meaning thereby that the said newspaper called the *World* could at least keep on publishing the said charges). "Some day we shall know who the thieves were that robbed their country" (meaning thereby that the said United States had been robbed when it purchased the said Panama Canal; that there would be an investigation sooner or later, and that some day all would know that the said J. Pierpont Morgan, the said Charles P. Taft, the said Douglas Robinson, and the said William Nelson Cromwell were the thieves).

FOURTH COUNT.

The fourth count alleged that, under the same circumstances and conditions, the defendants published the following in *The Indianapolis News*, October 24, 1908:

"THE PANAMA CANAL DEAL"

(meaning thereby the fraudulent and unlawful scheme to defraud the United States when it purchased the Panama Canal).

"In discussing the Panama Canal matter we said a few days ago that if it were shown that the records had been destroyed since they came into the possession of the Government" (meaning thereby the said United States), "that would be tantamount to confession" (meaning thereby that the said newspaper called *The Indianapolis News* had suggested that the records of the purchase by the United States of the Panama Canal might have been destroyed after they came into the possession of the said United States, and that if destroyed it would be a confession of the fraud of the said Theodore Roosevelt, President of the United States, the said J. Pierpont Morgan, the said Charles P. Taft, the said Douglas Robinson and the said William Nelson Cromwell in defrauding the said United States). "There is another thing that will be tantamount to confession—namely, silence. The election is now only four days off. The rumors of corruption in this matter have been afloat for weeks. The administration" (meaning thereby the said Theodore Roosevelt, President of the United States, and other officials of the Government of the said United States) "has been challenged over and over again to speak on the subject—to give the country the facts. It has wholly refused to do so thus far. The time is short, and there is need for prompt action. Why the issue should not frankly and bravely have been met when it was first presented we do not know, unless it was impossible to meet it satisfactorily" (meaning thereby that the said charges of fraud and corruption of the said syndicate had not been answered and the reason was that the said charges were true). "It has been charged that an American syndicate bought up the securities of the old French company" (meaning thereby the said Compagnie Universelle du Canal Interoceanique de Panama) "for a mere trifle, and sold them to the Government" (meaning thereby the said United States) "for $40,000,000, making a profit of at least $28,000,000. This has never been denied by any one, and we suppose no one now questions the truth of the charge. This of itself is a serious thing. If the property was worth only $12,000,000 there was no reason why the Government" (meaning thereby the said United States) "should have paid $40,000,000 for it. The administration" (meaning thereby the said Theodore Roosevelt, President of the United States, and such other officials of the said United States who were connected with the purchase of the said Panama Canal) "is responsible for this way of doing business.

"The question is as to the membership of the syndicate. Rumors have connected Charles P. Taft" (meaning thereby the said Charles P. Taft), "a brother of the candidate" (meaning thereby the said William H. Taft) "with it. He" (meaning thereby the said Charles P. Taft) "has denied the charge, but he brings no evidence to support his denial, though the evidence is wholly in the control of his personal and political friends. Mr. Douglas Robinson" (meaning thereby the said Douglas Robinson), "a brother-in-law of the President" (meaning thereby the said Theodore Roosevelt, President of the United States), "has also been mentioned as a member of the syndicate. He" (meaning thereby the said Douglas Robinson) "has not even denied the charge, and no one has denied it for him. It was made weeks ago, and is still, four days before the election, unanswered. Cromwell" (meaning thereby the said William Nelson Cromwell), "who was Taft's adviser when he was Secretary of

War" (meaning thereby the said William H. Taft), "does not deign to give us any information—Cromwell" (meaning thereby the said William Nelson Cromwell) "who got Sheldon" (meaning thereby one George R. Sheldon) "appointed treasurer of the Taft Committee" (meaning thereby the Republican National Committee). "J. Pierpont Morgan" (meaning thereby the said J. Pierpont Morgan) "has nothing to say, though the $40,000,000 check is said to have been made out to him. We do not suppose that the President" (meaning thereby the said Theodore Roosevelt, President of the United States) "is ignorant of what happened" (meaning thereby that the said Theodore Roosevelt, President of the United States, knew that corruption existed in connection with the purchase of the said Panama Canal by the United States Government), "but, though he has had a great deal to say on many subjects, he is silent on this subject. Indeed, the whole transaction is covered with a pall of silence. And yet the whole story is of record in Washington, and thus is absolutely at the disposal of the men with whose names rumor has been busy. We know how hard it is to have an investigation that would really investigate when the executive department is in the hands of those whose conduct is to be investigated" (meaning thereby that the officials of the said United States Government, including the said Theodore Roosevelt, President of the United States, would corruptly resist and thwart an investigation of the facts of the purchase by the United States of the said Panama Canal). "The people have not forgotten the persistent but futile efforts of the late Senator Morgan to get the truth out of this same man Cromwell" (meaning thereby the said William Nelson Cromwell) "in connection with other phases of this same question. We saw what a hard time Lilley had when he tried to prove, before a congressional committee, his charges of corruption against certain congressmen. And men cannot but wonder whether the President" (meaning thereby the said Theodore Roosevelt, President of the United States) "really wants to have this business cleared up. The people have a right to the facts. The good names of the men involved demand that they have the widest publicity. Why not tell the truth, and tell it now?"

FIFTH COUNT.

The fifth count charged that, under the same circumstances and conditions, the defendants published the following in *The Indianapolis News*, November 2, 1908:

"THE PANAMA MATTER"

(meaning thereby the charge of fraud and corruption in the purchase by the United States of the said Panama Canal).

"The campaign is over and the people will have to vote tomorrow without any official knowledge concerning the Panama Canal deal" (meaning thereby that no knowledge from the officials of the said United States had been made public concerning the alleged unlawful and corrupt scheme of the alleged syndicate to defraud the United States in connection with its purchase of the said Panama Canal). "It has been charged that the United States bought from American citizens for $40,000,000 property that cost those citizens only $12,000,000. Mr. Taft" (meaning thereby the said William H. Taft) "was Secretary of War at the time the negotiation was closed. There is no doubt that the Government" (meaning thereby the said United States) "paid $40,000,000 for the property" (meaning thereby the said Panama Canal). "But who got the money" (meaning thereby the forty million dollars aforesaid)? "We are not to know. The administration" (meaning thereby the officials of the said United States, including the said Theodore Roosevelt, President of the United States) "and Mr. Taft" (meaning thereby the said William H. Taft) "do not think it right that the people should know. The President's brother-in-law" (meaning thereby the said Douglas Robinson, brother-in-law of the said Theodore Roosevelt, President of the United States) "is involved in the scandal" (meaning thereby in the charges of the fraudulent, corrupt and dishonest scheme of the said alleged syndicate), "but he" (meaning thereby the said Douglas Robinson) "has nothing to say. The candidate's brother" (meaning thereby the said Charles P. Taft, half-brother of the said William H. Taft) "has been charged with being a member of the syndicate" (meaning thereby the said alleged fraudulent syndicate). "He" (mean-

ing thereby the said Charles P. Taft) "has, it is true, denied it. But he" (meaning thereby the said Charles P. Taft) "refuses to appeal to the evidence, all of which is in the possession of the administration, and wholly inaccessible to outsiders" (meaning thereby that the said Charles P. Taft refuses to procure the publication of official information contained in the records of the purchase of the said Panama Canal by the said United States and that persons not connected with the administration are not permitted to do so). "For weeks this scandal has been before the people. The records are in Washington, and they are public records. But the people are not to see them—till after election, if then."

SIXTH COUNT.

The sixth count charged the publication in *The Indianapolis News* of November 17, 1908, of the following:

"DEPARTMENTAL SECRECY."

(meaning thereby the refusal of the officials of the said United States, including the said Theodore Roosevelt, President of the United States, to make public the facts of the purchase by the said United States of the said Panama Canal and the distribution of the forty million dollars paid by it therefor).

"That we are to be subject to some inconveniences in electing to the presidency a member of the present administration" (meaning thereby the election of the said William H. Taft as President of the United States, and that he had been an official of the said United States under the said Theodore Roosevelt, President of the United States) "is already sufficiently clear. No one imagines, for instance, that the country will get the truth as to the $28,000,000 canal deal" (meaning thereby that the said United States had been defrauded of the sum of twenty-eight million dollars in its purchase of the said Panama Canal by an alleged syndicate, consisting, among others, of the said Charles P. Taft, the said Douglas Robinson, the said William Nelson Cromwell and the said J. Pierpont Morgan, and that the said William H. Taft knew of the existence of this syndicate and of its execution of the said unlawful scheme, and that as he had been elected President of the said United States he would prevent the country from ever getting the truth as to the said unlawful and corrupt deal). "It was charged openly during the campaign that $28,000,000 of the $40,000,000 given for the rights and property of the French company was paid to certain American citizens who bought up the old securties. The charge was never denied, except in so far as Charles P. Taft" (meaning thereby the said Charles P. Taft) "denied that he got any of the money" (meaning thereby the said twenty-eight million dollars). "But even he" (meaning thereby the said Charles P. Taft) "carefully refrained from appealing to the records, all of which are in the departments at Washington" (meaning thereby that the said Charles P. Taft was afraid to make public the records at Washington of the purchase by the United States of the said Panama Canal, and deliberately refused to do so). "Douglas Robinson, brother-in-law of the President" (meaning thereby the said Douglas Robinson, brother-in-law of the said Theodore Roosevelt, President of the United States), "whose name was mentioned in connection with the scandal, maintained a strict silence. No word was heard from William Nelson Cromwell" (meaning thereby the said William Nelson Cromwell), "who was intimately related both to the canal deal and also to Mr. Taft when he was Secretary of War" (meaning thereby that the said William Nelson Cromwell was intimately connected with the said unlawful, corrupt and dishonest scheme, and also with the said William H. Taft when he was Secretary of War of the said United States). "Mr. Cromwell" (meaning thereby the said William Nelson Cromwell) "has refused to throw any light on the subject. That some one got the money is practically certain" (meaning thereby that it is certain that said corrupt and fraudulent scheme existed, and that the said United States was defrauded of the sum of twenty-eight million dollars in connection with its purchase of the said Panama Canal). "Who got it the country is not likely to know, unless, perchance, Congress is able to drag the facts to light" (meaning thereby that the said William H. Taft, now elected to the presidency of the said United States, would prevent the information becoming

public of who got the twenty-eight million dollars of which the said United States was defrauded, and the public would never know about the same, unless Congress should be able by an investigation to force an exposure of the fraud).

SEVENTH COUNT.

The seventh count charged the publication of the following in *The Indianapolis News*, December 8, 1908:

"*New York World* Stands by Charge" (meaning thereby that the said newspaper called the *World*, published by the Press Publishing Company, of which Joseph Pulitzer was president, upholds the charge that in the purchase of the Panama Canal the United States was defrauded of a large sum of money by the unlawful and corrupt scheme of a syndicate consisting, among others, of the said Charles P. Taft, the said Douglas Robinson, the said William Nelson Cromwell and the said J. Pierpont Morgan). "Says Roosevelt's" (meaning thereby the said Theodore Roosevelt, President of the United States) "Denial of Panama Canal Loot Story is Untrue" (meaning thereby that the said newspaper called the *World*, published by the Press Publishing Company, of which Joseph Pulitzer is president, says that the story of the thievery and defrauding by the said syndicate in its great scheme to steal the moneys of the said United States in the purchase of the Panama Canal is true, notwithstanding the denial of the said Theodore Roosevelt, President of the United States). "Upholds *Indianapolis News*" (meaning thereby that the said newspaper called the *World*, published by the Press Publishing Company, of which Joseph Pulitzer is president, defends and supports the said Delavan Smith and the said Charles R. Williams in making the aforesaid charges). "Calls on Congress to Find Out Who Got the $40,000,000 Appropriated for the French Company."

And another part of which said false, scandalous, malicious and defamatory libel is of the tenor following, that is to say:

"Question put by *The News*" (meaning thereby the said newspaper called *The Indianapolis News*). "*The Indianapolis News*" (meaning thereby the said *Indianapolis News*) "said in the editorial for which Mr. Roosevelt" (meaning thereby the said Theodore Roosevelt, President of the United States) "assails Mr. Smith" (meaning thereby the said Delavan Smith):

"'It has been charged that the United States bought from American citizens for $40,000,00 property that cost those citizens only $12,000,000. There is no doubt that the Government paid $40,000,000 for the property' (meaning thereby the said Panama Canal). 'But who got the money?'

"President Roosevelt's" (meaning thereby the said Theodore Roosevelt, President of the United States) "reply to this most proper question" (meaning thereby the question contained in *The Indianapolis News* editorial asking who got the forty million dollars) "is, for the most part, a string of abusive and defamatory epithets. But he" (meaning thereby the said Theodore Roosevelt, President of the United States) "also makes the following statements as truthful information to the American people:

"'The United States did not pay a cent of the $40,000,000 to any American citizen. The Government'" (meaning thereby the said United States) "'paid the $40,000,000 direct to the French government, getting the receipt of the liquidator appointed by the French government to receive the same.

"'The United States Government has not the slightest knowledge as to the particular individuals among whom the French government distributed the same'" (meaning thereby the said forty million dollars paid by the said United States for the said Panama Canal).

"'So far as I" (meaning thereby the said Theodore Roosevelt, President of the United States) "'know there was no syndicate'" (meaning thereby that there was no syndicate such as described hereinbefore in this count and referred to in the preceding counts of this indictment); "'there certainly was no syndicate in the United States that, to my'" (meaning thereby the said Theodore Roosevelt, President of the United States) "'knowledge, had any dealings with the Government'" (meaning thereby the said United States) "'directly or indirectly.'

"Says President's Statement is Untrue."

"To the best of the *World's*" (meaning thereby the aforesaid newspaper called the *World*, published by the Press Publishing Company, of which Joseph Pulitzer is president) "knowledge and belief each and all of these statements made by Mr. Roosevelt" (meaning thereby the said Theodore Roosevelt, President of the United States) "and quoted above are untrue and Mr. Roosevelt" (meaning thereby the said Theodore Roosevelt, President of the United States) "must have known they were untrue when he made them" (meaning thereby that the United States did pay the sum of forty million dollars, or some part thereof, to American citizens; that the United States Government did not pay the forty million dollars, the purchase price of the said Panama Canal, direct to the French government, and that the United States Government did not get the receipt of the liquidator appointed by the French government to receive the forty million dollars; that the United States Government and the officials thereof, including the said Theodore Roosevelt, President of the United States, did know the particular individuals among whom were distributed the forty million dollars; that there was a syndicate such as described in this count and in the preceding counts of this indictment, and that the said Theodore Roosevelt, President of the United States, did know that there was such a syndicate; and that said syndicate did deal with the said United States and the officials thereof, including the said Theodore Roosevelt, President of the United States).

"As to the detailed distribution of the Panama loot only one man knows it all. And that man is William Nelson Cromwell" (meaning thereby that the said William Nelson Cromwell alone knows all about the thievery of the said syndicate including, among others, the said Charles P. Taft, the said Douglas Robinson, the said William Nelson Cromwell and the said J. Pierpont Morgan, and about the distribution to them and to said syndicate of the moneys fraudulently, corruptly and dishonestly obtained by them by defrauding the said United States in the purchase of the said Panama Canal). "The two men who were most in Mr. Cromwell's" (meaning thereby the said William Nelson Cromwell) "confidence are Theodore Roosevelt, President of the United States, and Elihu Root" (meaning thereby the said Elihu Root), "former Secretary of War and now Secretary of State" (meaning thereby that the said Theodore Roosevelt, President of the United States, and the said Elihu Root were entrusted by the said William Nelson Cromwell with knowledge of the existence of said syndicate and with knowledge of his participancy in the said syndicate and in the said unlawful scheme, and that the said Theodore Roosevelt, President of the United States, and said Elihu Root, former Secretary of War, and also Secretary of State, knavishly and corruptly accepted such information and confidence and connived at the purposes and scheme of said alleged syndicate).

PRECEEDINGS AT FIRST HEARING.

The defendants were arrested May 1, 1909, at which time the hearing was fixed for June 1, 1909, and the defendants were released on bail, each becoming surety for the other. At the hearing the United States Government was represented by Mr. Charles W. Miller, district attorney, and Mr. Stuart McNamara, special assistant representing the Attorney General.

Mr. Ferdinand Winter appeared for the defendants, and Mr. John D. Lindsay, of New York, an attorney representing the publishers of the *New York World*, was with him.

Mr. McNAMARA: If it please the Court, this is an application by the United States on section 1014 for the commitment of Messrs. Delavan Smith and Charles R. Williams and subsequent removal to

the District of Columbia from the District of Indiana, on the ground and charge of criminal libel. The complaint we have filed sets out the nature of the charge. It recites briefly that on the 17th day of February, 1909, there was returned into the Supreme Court of the District of Columbia an indictment against these two gentlemen charging criminal libel in the District of Columbia. The indictment is in seven counts, and it is certified to and authenticated in a proper manner, and a copy appended to the complaint. In a general way the libelous matter complained of consists of a series of charges of the existence of a syndicate composed of certain Americans, their names being Douglas Robinson, a brother-in-law of the former President, Charles P. Taft, a half-brother of the present President, William Nelson Cromwell, and J. Pierpont Morgan, both of New York, and some others, and that this syndicate bought up all of the securities of the old Panama Canal companies, and aided by the intimacy the members enjoyed with the different members of the United States Government, they managed to sell these securities and thereby secured the control of the Canal to the United States. The articles charged that they purchased these securities for the sum of about twelve million dollars and that thereafter they sold the property to the United States for forty millions of dollars. Now, around that bare skeleton these articles interweave a series of different charges, which I shall not now attempt to detail any further than is stated in the complaint. Now, the Government desires to proceed and offer its case, showing how these men committed this crime, and that they committed it in that particular district, and when that is done, we will ask your honor, sitting as a district judge, for their removal to the District of Columbia.

Mr. MILLER: I understand that the identity of the defendants in this case is admitted. Is that correct, Mr. Winter?

Mr. WINTER: That is correct.

Mr. MILLER: We now offer in evidence the authenticated copy of the indictment and bench warrant, the indictment returned by the Supreme Court of the District of Columbia, properly endorsed, No. 26446, Criminal Libel, United States against Delavan Smith and Charles R. Williams and the names of the witnesses; endorsed a true bill and signed by the foreman, the authentication being in due form; and attached to the authentication is a bench warrant.

Mr. WINTER: If the Court please, the defendants desire to object to the indictment being received in evidence in this case, not upon any technical ground as to insufficiency of its certification or

other ground of that character, but upon the general ground that the indictment itself is so defective in its charge of the facts alleged to constitute an offense, as not to be *prima facie* evidence of the commission of any such offense; and upon the further ground that the indictment does not show upon its face that the offense that was committed was in the District of Columbia, the place to which removal is sought; and upon the further ground that the offense charged in the indictment is not one for which a removal can be had to the District of Columbia under section 1014 of the Revised Statutes, or any other statutes of the United States; and upon the further ground that the facts stated in the indictment are not sufficient to show that any offense against the United States has been committed by these defendants.

Now, I do not care to discuss these questions at this stage. I am simply desiring to save the question in the record, and when the Court has heard all the evidence in the case, I shall want then to present the objections which appear upon the face of the indictment in addition to the other facts which will be in evidence in the case. I do not care to take up the time of the Court now, because the whole question will necessarily be discussed later, but I desire now to save the question in the record.

MR. MILLER: We will be content to meet these questions on the argument that arises.

The COURT: I suppose such questions as these more properly arise when the question comes up, if it does come up, on a motion for an order of removal. I am now sitting as an examining magistrate.

Mr. MILLER: Your honor, you are sitting now simply as a committing magistrate.

MR. WINTER: I understand that the questions which can be presented to the Court in opposition to an order to remove can also be presented to the Court sitting as an examining magistrate. In other words, your honor, all these questions arise at every stage of the hearing, either upon an application to commit or an application for an order to remove.

The COURT: Inasmuch as I agreed to sit here as an examining magistrate in order to save two hearings, of course we ought not to have two hearings. It does not make any difference to me. I suppose if you can keep the record straight, you might just as well go into the whole case.

Mr. WINTER: That was my idea, if the Court please, in asking the District Attorney to let the case be submitted to your honor in

the first instance. It was not necessary in this case and was simply a waste of time to have a hearing before a commissioner and then a hearing before your honor. Of course in both hearings the same questions would be involved. I understand that the whole matter is now before your honor and that the record will be made up in whatever form is proper.

The COURT: Yes, you can fix the record.

Mr. WINTER: In addition to the grounds I have stated here, I desire to add another. I have stated as one of the grounds that this indictment does not charge any offense against the United States. I will add to that, that if it states any offense, it states one against the laws of the District of Columbia, made so by Congress acting as the local legislature of the District of Columbia, which is not an offense, as I understand it, for which a person can be removed under section 1014 of the Revised Statutes of the United States, and on the further ground that the facts stated show the offense in this case to have been committed in the State of Indiana and to be a crime under the laws of the State of Indiana, and if cognizable at all in any of the Courts of the United States, it is so under the provisions of section 5391 of the Revised Statutes, being the Act of 1825 supplemented by the Act of 1898, which transplants into all places under the exclusive jurisdiction of the United States and within the boundaries of a State, the law of the State that creates any particular offense, and makes it an offense triable in the courts of the United States in the State where the offense is committed.

The COURT: What section do you refer to?

Mr. WINTER: Section 5391 of the Revised Statutes of the United States. If your honor remembers, it is a section based upon the Act of 1825, which provides that wherever there are by the laws of the State any acts that are made a crime which are not made a crime by any law of the United States, the State law shall be enforced for any of the acts which are made criminal by it that are committed in any place that is under the exclusive jurisdiction of the United States in the State; and there is a further statute of 1898, which is a substantial repetition of the Act of 1825 (p. 199, *post,* note).

Mr. MILLER: I take it there will be no misunderstanding as to our proceeding here. I certainly want it understood that we are proceeding now before your honor as a committing magistrate, and not that we are proceeding with the entire matter before you as committing magistrate and as district judge. Of course the entire matter will come before you as district judge by reason of coming before you

as committing magistrate, but it is absolutely necessary that the record should show the hearing before the committing magistrate, the proceedings had before the committing magistrate, and after the proceedings have concluded before the committing magistrate, that then the necessary hearing is had before the district judge. Of course the question of time will be affected by reason of the same person being the committing magistrate and the district judge, but we do want the record to distinctly show and we want to proceed along that line; that we are first proceeding without any reference to the district judge and without any reference to the powers of the district judge.

Mr. WINTER: If the Court please, I do not quite agree with the district attorney as to the necessity of the action taken before the judge as a committing magistrate and before him as the judge empowered to order removal, being moved separately. The statute gives the district judge the same authority to commit as it does the United States Commissioner, and then in addition it provides that the application to remove should be made to the district judge, but there is nothing whatever in the statute that requires the two hearings to be had at different times, or that the judge of the Court shall, upon the face of the record, or in any other way, make a distinction as to the capacities in which he is acting. On the contrary, the Supreme Court of the United States has had a case before it in which the proceedings were had precisely as they are being had before your honor. As I understand from that case, the Court simply made its order that the defendant should be committed for trial, in which, of course, it acted as an examining magistrate and then followed it up by the order that he should be removed to the District of Columbia for trial, and I do not think it is suggested by the Court at all that there was any necessity for any separate record or any distinction made whatever in the matter as indicating that the Court was hearing the matter or acting in different ways, but simply that it had the power to do all the things it did, first, by hearing the evidence as committing magistrate, and then to make the order to remove, or refuse to remove. One record was all that was necessary.

But I don't know that we have any particular objection as to the manner in which the record is to be made up. I would not like to say so definitely now without further reflection, because I do not want to prejudice any of the substantial rights of the defendants in this matter, but as I now see it, the manner in which the record is made up does not seem to me to be material.

I think it is perfectly competent that there should be one order made by the judge committing or refusing to commit the defendants

for trial, and the other order ordering or refusing to order them removed to the District of Columbia for trial.

Mr. MILLER: I remember very well a case decided by the Supreme Court of the United States, and the same Supreme Court of the United States says that where the district judge sits as a committing magistrate, he simply has the power of the committing magistrate. He sits first as a committing magistrate and hears the matter just exactly the same as a commissioner would hear it, and then of course it would not be necessary for the district judge when he sat as a committing magistrate to have the full hearing and go into the question of the evidence, because he knows what that is. But we want to say at this time that we do not want here in this record any question that might be raised if there was a committing magistrate and a district judge acting at the same time. It has been decided time and again that he has no more power than the commissioner before whom the matter would be heard. He sits in the same capacity, he hears the proceeding in exactly the same way.

The COURT: After the whole matter is heard, if a conclusion should be reached that there is probable cause, that part of the order, of course, will proceed, and then the district judge would take the matter up.

Mr. MILLER: Just so the record is kept in that way. We are insisting that the record be kept separate.

The COURT: It would not be kept separate.

Mr. MILLER: As committing magistrate and then as district judge.

The COURT: That is, the judge ceases to act as committing magistrate, and that is put in the record. I see no objection to that, do you, Mr. Winter?

Mr. WINTER: Certainly not. I am not objecting to anything. Suppose your honor proceeding as committing magistrate, holds that there is no probable cause. That is a matter that, as committing magistrate, your honor has a right to decide. On the other hand, if your honor, sitting as a committing magistrate, should hold that there was probable cause, then the next thing would be to have the record show that as removing magistrate, you make the order for removal.

The COURT: It occurs to me that I sit as judge, and that, as for the first inquiry, the scope is the same as would be the scope of an inquiry before a committing magistrate, and a further proceeding

would be before the same judge in the same capacity, with different questions and a different scope; is that correct?

Mr. WINTER: No, your honor.

The COURT: When you say I sit here as an examining magistrate, you mean that I have the same power as one of my commissioners, and the investigation would be over the same scope, over the same field exactly as if it were before a commissioner?

Mr. WINTER: Precisely, but that as committing magistrate the whole question is before you to decide as to whether or not there is a case entitling the Government to remove the defendants.

The COURT: Yes, and before me as judge of both questions.

Mr. MILLER: There is a distinction and a very clear one drawn by the authorities as to the scope and extent of the investigation that can be made before a committing magistrate and before a district judge. There is no doubt about that.

The COURT: When you say that I sit as a commissioner, that means that the investigation—the first part of the investigation—has the same scope exactly, over the same field, the same questions arising, as if it were before a commissioner. If the judge exercising that power and in that field comes to the conclusion that there is probable cause, then before the same judge, the same person who has sat in the investigation I have spoken of, a motion is made for an order to commit.

Mr. MILLER: That is right.

The COURT: Well, I guess we understand the proceedings.

Mr. MILLER: The Government rests, your honor.

EVIDENCE OFFERED BY THE DEFENSE.

At this hearing as above, the Government having introduced in evidence the indictment and an admission of the identity of the defendants and rested, the defense introduced evidence as follows:

Mr. WINTER: If the Court please, I will ask to have Mr. Lewis, Mr. Palmer, Mr. Delavan Smith, Mr. Williams and Mr. Howland sworn.

(These gentlemen were sworn.)

Mr. WINTER: Mr. Lewis, you may take the witness stand.

E. I. Lewis, on direct examination, testified that he is employed

by defendants, as the publishers of *The Indianapolis News,* in the capacity of reporter and correspondent, and was so employed in the fall of 1908, and stationed at Chicago.

Question: What instructions, if any, did you have from either of the defendants in reference to the discharge of your duties in collecting information and transmitting it for publication in *The News* at Indianapolis?

Mr. MILLER: If the Court please, we object to that question, for the reason that it is wholly immaterial and not relevant to any issue that is presented here. This is not the place of trial to determine either the guilt or innocence of the defendants. The question of good motives, the question of justifiable purposes, the question of truth, are all questions to be determined by a jury at the place of trial and this can not be the subject of investigation in a proceeding before the committing magistrate, who is simply to determine the identity and the question of probable cause when it appears that the Court to which removal is sought has jurisdiction and that a crime is charged in the indictment.

Mr. WINTER: If the Court please, the question that is mainly involved in this hearing is as to whether there is probable cause to believe that the defendants have committed the offense charged in the indictment, so that upon being removed into the trial court and put upon trial, it is probable that they would be convicted. If there is no probable cause to believe that the offense has been committed, the Court has no right to commit them for trial or order their removal for trial. There was for some time in the courts a doubt as to the scope of the inquiry that was open upon the proceedings before the committing magistrate. There were a number of cases in which it was decided by the lower courts in the line of Mr. Miller's suggestion that the only questions that were open at that time for investigation were the identity of the defendants, and, as suggested in some of the cases, rather qualifiedly, as to whether the indictment itself stated an offense, and a number of courts denied the right of the defendant to introduce any evidence at all as to the facts constituting the alleged offense and the defendant's connection with them, as tending to show that there was no probable cause to believe that an offense had been committed by him; but, as I say, some of the lower courts so held; others were to the contrary.

One of the cases in which, in the earlier considerations of this matter, the contrary was held was in the case of In re Richter, in 100 Fed. Rep. 295, where Judge Seaman, in his opinion, went into the question fully. He cited all the authorities practically that there were

at that time on either side of the question, and broadly decided that the defendant had the right to introduce evidence to show that there was no probable cause to believe that he had committed the offense. Not merely that he was not within the jurisdiction of the court to which his removal was sought, but that the acts done by him and his connection with the transaction were such as to indicate that there was no probable cause to believe that he was guilty.

Now, as I say, there were a number of cases in the Supreme Court of the United States where the question was simply suggested, but was not passed upon at all.

There is one, the case of Greene v. Henkel, 183 U. S. 249, and also Beavers v. Henkel, 194 U. S. 73, and Hyde v. Shine, 199 U. S. 62, and Benson v. Henkel, 198 U. S. 1. In all these cases there was no decision of the scope of the inquiry before the committing magistrate, as to whether it could go into the matters bearing upon the question as to whether or not it was probable that the defendant had committed an offense; but finally that question was squarely presented to the Supreme Court of the United States in the case of Tinsley v. Treat, which is reported in 205 U. S. 20, the case I alluded to in the beginning, where I said the proceeding was precisely the same that it is in this case. The district judge sat both as committing magistrate and the magistrate to remove, and there the defendants offered evidence, upon the indictment being put in evidence by the Government and upon their identity being admitted or proved, to show that they were not guilty of the offense, and the Court excluded it, holding that the only question open was as to their identity, and thereupon the case went to the Circuit Court upon a writ of *habeas corpus*. It went to the Supreme Court of the United States, and that court considered the question as an open question and stated in its opinion that it had not been decided before by the Supreme Court, and held squarely that the defendants had the right to introduce evidence as to the facts of the transaction, to show that there was no probable cause to make out a case.

It is not worth my while, if the Court please, to read from that decision to your honor. I have no doubt your honor is familiar with it. Since that decision was made there have been a number of cases before the courts.

One in 157 Federal 419, decided by, I think, Judge Sanborn, in which he considers the scope and effect of this decision in 205 U. S. 20, and holds that it opens up the whole question for investigation.

Then in this circuit, if the Court please, in the case of United States v. Black, reported in 160 Federal Reporter 431, in which the

opinion was delivered by Judge Seaman, the Court held, following the case of Tinsley v. Treat, that the questions were open.

Now, I have before me what is said in the case of Tinsley v. Treat. I can call your honor's attention to that without getting the book, and if your honor will indulge me a moment, I will read it.

In this case the district judge acted, as in the present case, as committing magistrate and as the judge to order removal. The district judge and the Circuit Court to which the case was taken by writ of *habeas corpus* both held that the indictment was conclusive evidence of probable cause and rejected evidence offered by the defendants to show want of probable cause. The Supreme Court held this to be error. The Court said at page 31:

"It was held in Beavers v. Henkel, 194 U. S. 73; Benson v. Henkel, 198 U. S. 1; Hyde v. Shine, 199 U. S. 62, as well as Greene v. Henkel, *supra,* that an indictment constituted *prima facie* evidence of probable cause, but not that it was conclusive. We regard that question as specifically presented in the present case and we hold that the indictment can not be treated as conclusive under section 1014. This being so, we are of the opinion that the evidence offered should have been admitted. It is contended that that evidence was immaterial, and, if admitted, could not have affected the decision of either the district or circuit judge. Of course, if the indictment were conclusive, any evidence might be said to be immaterial, but if the indictment were only *prima facie,* then evidence tending to show that no offense triable in the Middle District of Tennessee had been committed by defendant in that district could not be regarded as immaterial. The Constitution provides that 'The trial of all crimes except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed' (Article III, section 2); and that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed' (Amendment VI); and in order that any one accused shall not be deprived of this constitutional right, the judge applied to to remove him from his domicile to a district in another State must find that there is probable cause for believing him to have committed the alleged offense and in such other district. And in doing this his decision does not determine the question of guilt any more than his view that the indictment is enough for the purpose of removal definitely determines its validity."

It is settled by this case that the Court acts judicially; that the indictment is merely *prima facie* evidence of the existence of probable

cause and that the defendant has the right to rebut the *prima facie* case made out by the indictment by evidence tending to show that there is not probable cause to believe that any offense was committed, or, if committed, that it was committed by him.

The case also shows that it was not held in either Greene v. Henkel 183 U. S. 249; Beavers v. Henkel, 194 U. S. 1, or Hyde v. Shine, 199 U. S. 62, that the indictment was more than *prima facie* evidence or that evidence offered by the defendants to rebut probable cause should not be received. It has been followed and recognized as settling the law, as above stated, in Peerless v. Weil, 157 Fed. 419, and United States v. Black, 160 Fed. 431.

As I say, since that decision, the question has been presented to the Circuit Court of Appeals in this circuit in United States v. Black. There in the opinion of the Court, delivered by Judge Seaman, the law is thus stated:

"When the present appeals were taken, from the orders (1) denying the application for removal of the appellees to the District of Oregon for trial under the indictment there found, and (2) discharging them from custody under the *mittimus* of the commissioner, no decision of the Supreme Court, as the ultimate authority, appears to have settled, in express terms, the doctrine applicable to such removal proceedings. In the recent case, however, of Tinsley v. Treat, 205 U. S. 20, 27 Sup. Ct. 430, 51 L. Ed. 689, these propositions were directly involved and established: That the duty of the district judge, on an application for removal under section 1014, is judicial, not merely ministerial, in the inquiry which it involves of probable cause for the charge upon which removal is sought; that thereupon the accused is entitled 'to the judgment of the district judge as to the existence of (such) probable cause' under evidence tendered; that the indictment there presented 'cannot be treated as conclusive' of such cause, and *(if valid on its face)* is only *prima facie* evidence, which may be overcome by proof; and that evidence to that end is not only admissible upon the inquiry, but must receive just consideration, in so far as it tends to disprove either jurisdiction for trial or amenability under the charge."

Now, there are other cases, as I say, that have been decided since this decision of the Supreme Court of the United States. The case itself does not need any exposition by the other courts. It is broad in its holdings, but since it has been rendered, it has been treated by the lower courts in precisely the manner it has been treated by the Circuit Court of Appeals in this circuit in the case of United States v. Black, 160 Fed. 431.

That the defendants have a right to introduce evidence is an important question in the case, and it is to be considered by your honor sitting as a committing magistrate, because in the case in 205 U. S. it was offered before a committing magistrate as well as a removing magistrate.

That evidence may be addressed to the proposition that the offense was not committed in the District of Columbia, and also, as distinctly decided by the Supreme Court of the United States and decided in the case in 160 Federal, as to the question as to whether the offense has been committed by the defendants.

Now, the precise question presented by the one that is now pending is this: the instructions that were given to Mr. Lewis, their correspondent in Chicago. Now, as this case proceeds it will be developed that the starting point of the whole matter that is discussed in the articles published in *The Indianapolis News,* which are counted upon in this indictment, was a despatch that was sent from Chicago to *The Indianapolis News* by Mr. Lewis in the discharge of his duties as the correspondent of that paper at Chicago. Quotations are given from that despatch as a part of the inducement stated in the first count of the indictment in this case. Now, it is contended not merely, as I have already indicated, that the articles that were published were not libelous at all, that they were not published so as to make them the basis of a criminal charge in the District of Columbia, but that before even they could be considered to be libelous in the ordinary sense, they were published under such circumstances and in relation to such a subject matter as that they were what in the law is known as conditionally privileged publications; and that fact being established, the communications being of such a character as to entitle them *prima facie* to this privilege, then the question as to whether they are libelous depends upon all of the authorities, including the decision of the Supreme Court of the United States in the case of White v. Nichols, in 44 U. S. 266, upon the question of actual malice, and unless actual malice is shown, there is not any liability at all. That proposition has been decided by the courts everywhere, including the Supreme Court of the United States. It is so in a civil suit and by a much stronger reason in a case of criminal libel. The very essence in all charges of criminal libel is the existence of an evil intent; and where it is claimed that the article is conditionally privileged, even in a civil suit, and by a much stronger reason in a criminal suit, it is necessary that actual malice shall have been proved to have actuated the party who published the article. In order to rebut actual malice we will seek to show by this witness what his instructions were

in reference to furnishing news and other information for publication in this paper, and to follow that up by showing where he got his information, to show that this matter had been bruited about in hotel corridors and was a matter of common talk for weeks before he took notice of it in the paper, and he did not take notice of it until it was published in a paper of Chicago maintaining a correspondent in Paris, France, a cable from Paris, France, stating the facts as facts that had actually existed. As long as it was a mere matter of rumor he took no notice of it; under his instructions from the paper it was not proper for him to do so. Thereupon, he telegraphed to the paper here the article which had appeared in the Chicago paper and which was the start of this whole matter, the foundation of all that appeared afterwards in *The Indianapolis News*.

Now, the question of the good faith of the publishers of *The Indianapolis News* is at the very bottom of this matter. The burden of proving actual malice is upon the Government, but we have the right in the beginning to prove all the facts and circumstances attending the publication of that article in *The News*.

On this point, I have a number of authorities to which I desire to call your honor's attention.

Now, to the proposition that in criminal libel malice is of the essence of the offense, I cite 25 Cyc. Pleading and Practice, 571, State v. Shaffner, 2 Pennew. (Del.) 171, United States v. Cooper, Fed. Case No. 14865.

That last case was this: It was a prosecution under the sedition law passed during the administration of President Adams. The proceedings were had before Judge Chase, who was so stringent in his enforcement of the provisions of that law that it was attempted to impeach him afterwards on the ground that he had been guilty of misconduct in his office. This case of United States against Cooper was heard before him. It is very fully reported in the Federal Cases, the discussions and arguments of counsel and the comments of the judge being all given. But in that case, Judge Chase, rigorous as he was in enforcing the law, held as the law that there must be an actual intent to defame and malign—in other words, actual malice under the sedition law then in force; and of course a libel statute such as that in force in the District of Columbia simply makes a libel a criminal offense exactly as it is in common law, under which *scandalum magnatum,* any seditious utterance that fomented ill-will against the Government, as well as reflections upon individuals, was punishable as a libel.

An article conditionally privileged is not libelous unless actual malice is shown. (1 Bishop Criminal Law, Secs. 383-386.)

Now, upon the proposition of evidence to rebut express malice:

Express malice may be rebutted by evidence of facts and circumstances tending to show good faith on the part of the defendants. (Short v. Acton, 33 Ind. App. 361, 71 N. E. 505.)

Or by evidence that he had no hostility towards plaintiff and no intention to accuse him of crime. (Faxon v. Jones, 176 Mass. 206, 57 N. E. 359; Henn v. Horn, 56 O. St. 443, 47 N. E. 248; Bee Pub. Co. v. Shields, 68 Neb. 750, 99 N. W. 822.) These are all civil cases, where, as I say, there would be less ground for the admissibility of evidence of this kind than in criminal cases.

Or by giving in evidence the entire article in which the defamatory article was published. (Scullin v. Harper, C. C. A., 7 Circuit, 78 Fed. 460.)

In that case the opinion was written by Judge Woods and it is a broad discussion of this whole doctrine, and is as strong as any case to be found in the reports holding the right to introduce explanatory evidence bearing upon the question of good faith tending to show the absence of actual malice.

Or by showing the sources of his information. (Conner v. Standard, 183 Mass. 474, 67 N. E. 596; Hearne v. De Young, 132 Cal. 357, 64 Pac. 576.)

The case of Conner v. Standard Pub. Co., 183 Mass. 474, is a civil suit which was brought for libel, for saying in substance of a party that he had burned his own property in order to obtain the insurance. He sued for libel. On the trial of the case the defendant, the newspaper in which the articles were published, offered to prove and was permitted to prove, that it obtained its information from the insurance adjuster who adjusted the loss on one of these fires, and from another insurance agent, and all that evidence was objected to, just as the objection is being made here; but the Court held it was competent as bearing upon the question as to whether there was an evil intent, or actual malice, and that this and other evidence showing the circumstances under which these publications were made and how the basis upon which they were founded was obtained was competent.

It goes to show that as to one of the essential facts of this case there was an utter absence of actual malice, for the publications are of such character as to be conditionally privileged.

Mr. MILLER: Your honor, the question is not here before the committing magistrate as to good faith and as to whether these articles were published for justifiable purposes, or as to whether these articles are true. The question that is presented here is not the question that was involved in the Massachusetts decision, or in this other case for the mitigation of damages. The sole question here is a question of process—that is all this is, a mere question of process. It is not the question of having a trial here and then having a trial in the jurisdiction where the charge is brought. It is a question to determine here whether there is reason to believe that there ought to be a trial. It is not a case where a jury is to pass upon the question of good faith, where a jury is to pass upon the question of good motives, where a jury is to pass upon the question of the truth of the charge, where a jury is to pass upon the question of the existence of actual malice. Those are questions, and always have been questions to submit to a court that has a jury to pass upon the questions and determine those questions of fact in a criminal case.

Now, Mr. Winter says that the decision in 205 U. S. 20, cited by the Supreme Court of the United States, the case of Tinsley v. Treat, is contrary to the decisions of the Supreme Court of the United States in 198 U. S. 1, the Beavers case and the Benson case and the Hyde v. Shine case. As a matter of fact, your honor, there is no difference between the decisions of the Supreme Court of the United States in the case of Tinsley v. Treat and in the case in 198 U. S. and 199 U. S., and various other decisions.

Now, what was the question before the Court in the Tinsley v. Treat case? That is the test. What was the Court talking about? Why, the Court was talking about the Tinsley case (205 U. S. 20); the question of the district judge who sat in that case when application for the removal was made and who refused to permit any evidence to be offered in reference to the question of jurisdiction, and the 160 Federal Reporter case, Mr. Winter says, sustains the propositions that were announced in the Tinsley case. What are those propositions? Why, they are simply three: (1) that the district judge must look into the indictment to ascertain whether an offense against the United States is charged; (2) find whether there was probable cause, and (3) determine whether the court to which the accused is sought to be removed has jurisdiction of the matter. Those are the three questions determined. Those are the three questions considered that were approved by Judge Seaman in the 160 Federal 431.

This is the Tinsley v. Treat case: In May, 1906, the grand jury of the United States Circuit Court of the Middle District of

Tennessee returned an indictment against thirty corporations, etc. * * * Six counts. One, two, four and five charged violations of section 1, Act of Congress of July 2, 1890, "To protect trade and commerce." Three and six charged them under section 5440.

In July, 1906, the Government presented to the district judge of the Eastern District of Virginia a complaint by Treat, United States Marshal, alleging that Tinsley stood indicted, as aforesaid, and annexed a certified copy of the indictment as a part of the complaint, and praying that Tinsley might be arrested.

The case was taken directly before the district judge, who acted as committing magistrate as well as the judge to order removal.

In the proceedings before the district judge, Tinsley admitted that he was one of the defendants named in the indictment. The Government relied upon the certified copy of the indictment and offered no evidence except that and asked for an order for Tinsley's commitment and removal forthwith.

The record is then shown:

1. Tinsley offered himself as a witness; not permitted to testify.
2. Offered to prove no jurisdiction (residence before, etc.).

The Court refused the evidence and the district judge ordered the accused to give bail or to be held for removal.

Tinsley declined to give bond; a warrant directing removal to the Middle District of Tennessee was issued and he remained in custody pending its execution. No objections to indictment offered. Held:

"The district judge should not have allowed himself to be controlled by the statutes of Virginia. In Virginia formerly after indictment an examination should be had, but by subsequent legislation it was provided that where an indictment has been found a *capias* should be issued for the arrest of the defendant, and no inquiry was to be made. But when there was no indictment a person arrested for an indictable offense must be taken before a magistrate for preliminary examination, and it was the magistrate's duty to inquire whether or not there was sufficient cause for charging the accused with the offense."

But, as hereinafter seen, the district judge, on application to remove acts judicially and that part of section 1014 of the Revised Statutes of the United States which says that the proceedings are to be conducted "agreeably to the usual mode of process against offenders in such State" has no relation to the inquiry or application for removal.

Application then made to the Circuit Court for writs of *habeas corpus* and *certiorari;* granted and the returns made.

The court said:

"(Statutes set out—Sec. 1014.) Obviously the first part of this section provides for the arrest of any offender against the United States wherever found and without reference to whether he has been indicted, but when he has been indicted in a district in another State than the district of arrest, then, after the offender has been committed, it becomes the duty of the district judge, on inquiry, to issue a warrant of removal. And it has been repeatedly held that in such cases the judge exercises something more than a mere ministerial function, involving no judicial discretion.

"He must (1) look into the indictment to ascertain whether an offense against the United States is charged; (2) find whether there was probable cause; (3) determine whether the court to which the case is sought to be removed has jurisdiction of the same."

And then cites other cases. Then says: "No such removal should be summarily and arbitrarily made."

The Court held in that case that the indictment was conclusive and did not permit the defendants to go into the question of their motives in publishing the articles that were set forth in the indictment; accordingly the defendants in this case cannot call this witness and ask him what his instructions were in reference to his work.

An indictment which is presented here in court—an indictment which shows that there was a news item purporting to have been in the *Chicago News*. The first count of this indictment contains the antecedent facts leading up to the things that are charged. In this first count of the indictment is the caricature, Cromwell, Charlie Taft and Morgan pictured out before this mountain, or whatever it may be—this elevation—watching Norman E. Mack, the Chairman of the Democratic National Committee, digging up the evidence of corruption against these men, Cromwell, Taft and Morgan, not public officers, not public men, but private citizens.

Now, we cannot try this case here. I say it is simply—under all the decisions; not one can be found to the contrary—it is simply a question of process; the question of justification is not involved when we are determining the question of process.

The United States has enacted a statute which provides that whoever publishes a libel shall, upon conviction, be punished by a fine of not exceeding $1,000 and by imprisonment not exceeding five years, or both.

Now, the proof of publication of a libel at common law was no justification in connection with the enactment of this statute. The Congress of the United States enacted another statute, which provides what is justification, and under that statute justification means that

the article is true, and that the article was published for justifiable ends, and for good purposes, or from good motives—good motives, justifiable ends, truth.

The COURT: Where is that statute?

Mr. MILLER: I will read it. I have a copy here.

"Sec. 815. Whoever publishes a libel shall be punished by a fine not exceeding one thousand dollars or imprisonment for a term not exceeding five years, or both."

The COURT: You are speaking about an Act of Congress passed as the Legislature of the District of Columbia?

Mr. MILLER: I am. There is another statute on the subject of libel:

"Sec. 816. To knowingly send or deliver any libelous communication to the party libeled is a sufficient publication to subject the person sending or delivering the same to punishment as aforesaid."

Now, the question of whether it is true and whether it was published from good motives and for justifiable ends:

"Sec. 817. Any publication of a libel shall be justified if it appear that the matter charged as libelous was true and was published with good motives and for justifiable ends."

It is not necessary for me to bring any authorities to this court upon the proposition that each and every one of these are questions for the jury to determine whether it is from good motives, whether there is actual malice shown, and to determine whether it is true. That being the case, where the only thing the Government is seeking is process, where the only thing that is necessary here is for the indictment to show a charge against the defendants, the matter is not so technical as might be necessary if a demurrer was filed to the judgment, or a motion was made to quash the indictment in the jurisdiction where the indictment is returned, but such a charge as would show the Court that there is some charge of that character against the defendants, and that the court to which this indictment is returned has jurisdiction to try the case. Without that question involved, they have a right, of course, to introduce evidence upon that proposition. Of course they would have a right, your honor, to introduce evidence in a case where they would show that the defendants were not in the jurisdiction in a certain class of cases, which, of course, would show that the offense could not be committed; but it is not in this kind of a case, and, therefore, when the question is not the guilt or innocence the defendants, when the question is purely one of process, will the

committing magistrate hear all the evidence in the case, try the case here, determine the questions that would be determined by a jury in the jurisdiction where the indictment is pending? Certainly not.

The COURT: I do not want to be understood as subscribing to some of the suggestions made by counsel for the defendants. For example, I can very readily understand how certain evidence would be admissible upon a civil action for damages for libel, upon plain ground of mitigation. There motive, good purpose, and all that sort of thing, of course, would be relevant upon that theory, upon that ground. But there is a distinction in that respect between civil law and criminal law.

On the other hand, I cannot subscribe to the District Attorney's proposition that I cannot try the case on any question that is to be tried by a jury. I think I can demonstrate that in a second. Suppose that a man that had not been outside of Marion County for forty years were indicted by the Federal Grand Jury, say, sitting in the Western District of Pennsylvania, for example, for a crime in which it was absolutely essential that he be physically present in the Western District of Pennsylvania, in order to prove whether or not he was guilty. Now, what is his defense? His defense when he gets before the jury in Pittsburg would be an alibi, a question for the jury purely. Now, is it possible that this Court would not hear proof that this man never in his life, for forty years, had been outside of Marion County? Now, is that any less a question to be passed upon by a jury than the question of intent? Is it any less a question for the jury than the question of motive? I cannot see it. If this Court cannot hear the proposed evidence because it bears upon a question which the jury is to hear, then it might be very forcibly argued that the Court could not hear evidence as to the presence of the defendant who has not been out of Marion County for forty years, in the case I have supposed.

I do not know whether the defendant is right in his contention about actual malice. I do not want to pass on that until I hear more discussion. I do not think it is necessary to pass on that. I do not know anything that is more binding on this Court than a decision of the Supreme Court of the United States supplemented by a decision of this circuit, and I feel constrained to follow it. So it occurs to me—I have not read this case—that this evidence would certainly be competent under proposition No. 2 laid down by Judge Seaman in that decision.

Mr. MILLER: Probable cause?

The COURT: Yes. Suppose a justice of the peace is sitting in Marion County upon what we understand to be a preliminary hearing. A man is charged with murder and the defendant proposes to show that he had no malice whatever, that this man was a friend of his. Take a case that just occurred up in Tippecanoe County, when a landlord struck his tenant until he died. Suppose the examining magistrate was sitting to hear that charge to determine whether or not the man should be held to the grand jury. Is it possible that he should not go into the whole question and determine whether or not the man was guilty of the act charged, or did it in self-defense? Can it be argued that a justice of the peace ought not to hear such testimony, because, forsooth, the jury is to determine that question? I have threshed out a number of examples of that kind. I think I know what the practice ought to be. I will hear the testimony.

The question being read, Mr. Lewis testified that he had no instructions from either one of the defendants in reference to the discharge of his duties in collecting information and in transmitting it for publication in *The News* at Indianapolis. He forwarded a copy of an article that appeared in the *Chicago News,* October 6, 1908. He had previously heard discussion of the matters to which it referred at Chicago for ten days or more—especially for a week or more—at the Republican and Democratic national headquarters in Chicago, and around the lobby of the Auditorium Annex hotel.

Question: You may state whether or not that discussion of these matters was—or to what extent it had gone; how frequently did you hear the matter debated and discussed?

Mr. MILLER: That is wholly immaterial and does not tend to support any issue in this case, how frequently he heard it. It does not bear upon any question now before the committing magistrate, and we object to it.

Mr. WINTER: It bears upon the question of being matter of general interest and public discussion. That always enters into the question of whether or not it is privileged matter. The fact that it was under discussion in the headquarters of the two political organizations in Chicago all goes to show that it was a matter of public interest, and those questions enter into the proposition of whether the article is one that is conditionally privileged, and then also as to the care that was observed by these defendants, or by their representative, Mr. Lewis, before any publicity was given this matter in the Indianapolis paper. They did not take it up when it was just first mentioned in the hearing of Mr. Lewis, but it was heard and debated and dis-

cussed and circulated around in Chicago, as the witness has already stated and as I think he will further state, for at least ten days before any notice was taken of it in *The News*, and there was no notice taken of it in *The News* because the matters that were stated there were not supposed to come from any source that had definite information on the subject, and it was only taken up by *The News* when the article was published purporting to be from Paris, where the *Chicago News* had a correspondent.

It all bears upon the question of the circumstances under which this publication was made and the care that was observed by *The News* in reference to the matter.

The COURT: Does this indictment charge that these publications were made maliciously, and all that sort of thing?

Mr. WINTER: Certainly. It has to.

The COURT: And it would not be good if it did not contain those averments, and the Government can not make a case unless it proves them. Well, does not this testimony tend to rebut that charge?

Mr. MCNAMARA: If the Court please, I do not want to be misunderstood. The indictment, as your honor knows, does have that usual form of words. We have to have them. Now, our objection to this testimony is that it would be immaterial in that we have admitted that proof of the absence of malice. The gossip around the hotel lobby would not be competent.

The COURT: A man might invent a story, make up a lie and publish it and that fact would unquestionably bear on the question of malice. On the other hand, if a newspaper publishes what is going on, the circumstances under which it gets its information and publishes it, that would certainly be proper evidence.

Mr. MCNAMARA: If the Court please, what I wanted to add was this: that these articles in the indictment are not simply news items, they are cartoons and caricatures, which run beyond any privileged publications. Some of the articles consist of editorials, in which the very existence of the stories is admitted, and then the articles proceed further to argue as to the ramifications of the stories, and our objection is this: that it is immaterial as rebutting probable cause raised by the indictment. The indictment does not touch any question of ordinary privilege. It goes to the abuse of that privilege.

The COURT: If that is the question, almost anything—

Mr. MCNAMARA: We take it upon these two grounds. Now, we have another quarrel with the holdings of the Court as construed

by counsel: that in this hearing they may show such evidence as will tend to convince the Court that there is not probable cause that a crime has been committed, and in the district to which removal is sought. That is the holding of Tinsley v. Treat. In that case, the Court in the first instance refused to allow the defendant to testify that physically he had never been in the Middle District of Tennessee, and unless he had been, no crime had been committed by him. Of course that was radically necessary and competent evidence, and the Supreme Court so decided. That is the long and short of that case, and in the hearing in the Supreme Court it was argued, so that some way that question was submitted to the Court, and in its decision the Court said that while the committing magistrate may look over and scan the evidence, he does so, not for the purpose of determining the innocence or guilt of the party, but to determine in his own mind whether there is probable cause for believing that he committed the offense.

The COURT: The question is whether, under probable cause, the crime was committed. The question is that the thing that was committed probably was essential to the crime, and therefore the question of malice is to be investigated. Do you go that far?

Mr. MCNAMARA: I would go that far. As I put it—I don't know whether your honor has the same view of it that I have—what I wish to say is this: while the committing magistrate may receive all of this sort of evidence, he does so not for the purpose of determining definitely in his mind that the crime has not been committed there, but whether there is probable cause that it was.

It is a distinction of this kind: if he has to determine the probability of a possible act, if he finds that there is that necessary clash between the evidence of probable cause raised on one side and of rebuttal to the evidence offered on the part of the defendants, then he has a situation which calls for a trial, and then he has to remove the accused to the jurisdiction where the indictment was found. He has to do that for the very good reason that the Constitution provides that the trial must take place in the jurisdiction where the crime has been committed. When you sift these cases down, they harmonize one with the other and come out in a complete summary that is very simple.

It is said by the Supreme Court in the case of Beavers v. Henkel this is nothing but a form of arrest, but being a form of arrest, it involves deprivaion of somebody's liberty and, therefore, if the Government should attempt to deprive him of his liberty, it must show

some authority for it. What does the Constitution say about that in the Fourth Amendment, which says that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized"? We have to show probable cause. And the Constitution says that the trial shall be by jury and shall be in the State and district where the crime was committed, so that the Court has the right to inquire on behalf of the defendant whether there is probable cause for his apprehension, and second, was there a crime committed in the place to which we seek to take him?

Now, then, what is that probable cause? It is as the Court says raised *prima facie* by the indictment; but the defendants may go into the rebuttal, not in the sense of proving that he is not guilty, but to show there is no probability to expect that a crime was committed. I am not prepared to go so far as to say that it is a clear case. My brother (Mr. Miller) had a case of a man who was serving a term in the penitentiary and was indicted. We are not arguing any such principle as that, but if the Court say that the physical act has been committed in the district to which removal is sought and that it may be the defendants have a defense to that act, but the determination of whether that defense is good, whether the Government at the time of trial before the twelve men and the trial court may have other evidence it desires to meet and offset against that evidence. When the Court finds that situation, he finds that there is an issue between the parties. There is probable cause and he sends it on to be tried by the law.

The COURT: Then if he should make out a good case, the Court should send him on.

Mr. MCNAMARA: Then if he makes out a *prima facie* case he is not obliged to require the Government to try its case. It is unfair. Here is a case of the defendant who is not quite out of the jurisdiction. He has one hearing or one trial. Here is the defendant who does not reside in the jurisdiction. He compels the Government to try him first on the local proposition and then afterward in the district to which he is removed. Absolutely if the contention shown by the defense is so clear that it could not be judged in any wise other than that no crime was committed anywhere, the Court would not be obliged to order his removal. But if he see from the evidence that if a verdict were found he would be obliged to set it aside, he is justified in taking it from the jury. And if a court can see that no crime has taken place, I certainly am not here to argue to the Court that the Court would not be justified in saying "I shall not remove him."

The COURT: The question is the admissibility of the evidence.

Mr. MCNAMARA: I have gone into the other question to state our position.

The COURT: This is an objection.

Mr. MCNAMARA: I simply want to make this further objection, if the Court please, that, of course, malice is either express or implied, and where an article is published which is capable of only one meaning, then it is for the Court to determine that meaning; but if it is capable of more than one meaning, then it is a question for a jury to determine; and when we charge malice, the question is: Is the article published capable of being so held, containing malice, from the language used? Of course the rule is fundamental that words are to be considered in their ordinary and natural sense, and we are not required to show actual malice directly, but the malice is implied in law from the articles themselves, from the language that is used, and neither the defendant, nor any one in his behalf, can construe that language; the language speaks for itself. If it is so clear that it could not constitute an offense, why, of course that is for the Court. But if it is capable of two meanings, then, of course, it is for the jury.

Mr. WINTER: I would like to call attention, if the Court please, to one thing. Now, the proposition advanced, as I gather it, by the Government, is this: that, although it is conceded by Mr. Miller that the case in United States v. Treat, decided by the Supreme Court of the United States, states three propositions: first, that before removal can be had, the identity of the defendant must be established; second, that the court to which he is sought to be removed has jurisdiction of the matter; and third, the question of probable cause. Probable cause of what? That the defendant is guilty of the offense charged, or that offense has been committed in fact, and committed by him. That is what it means. It means nothing else, and in that very case the Supreme Court did not in any way, shape or form undertake to confine themselves, as suggested here, to merely saying that the party had a right to go into the evidence involving the jurisdiction of the Court; but they state in their opinion that the general question as to whether or not the defendant has the right to introduce evidence upon the question of probable cause to rebut the case made out by the introduction of evidence of the indictment, is now before them for the first time, and so before them as to require their decision, and then they proceed to decide it, and they point out what all the previous decisions were upon the question of the effect of the indictment introduced in evidence, the contention of the Government being in that case

that the indictment was not merely *prima facie* evidence, but conclusive evidence of—what? Of the existence of probable cause. They held, in the first place, that it was only *prima facie,* and that brought them up to the question then as to the ruling made in excluding the evidence the defendant had offered; and now in that particular case the question was whether the defendant was in the State of Virginia at the time this offense was committed, presenting just the proposition of an alibi that your honor suggested. The Court did not confine their decision to that particular question, but they decided the broad question, and they decided it taking into consideration the inconvenience and hardship that the defendant will be put to in being taken for trial to a distant point. They call attention to that in their opinion and cite what the Supreme Court has said on that subject in earlier decisions, quoting from those decisions the language upon that subject, and again reiterating the importance to the defendant of being allowed to go into the case in order that he may not be subjected to the hardship of being removed to a distant point for trial, and decide broadly that the whole question of probable cause is open. Now, your honor made the suggestion as to situations arising under our practice in this State. A man is indicted for murder, which is not a bailable offense. He has a right to go before a magistrate and be admitted to bail. Now, the law puts upon him the burden of showing that the proof is not evident or the presumption strong—of what? Why, of his guilt. And upon a hearing of that kind, as we all know, the evidence is competent, opened broadly and widely to all of the facts and circumstances entering into the defendant's connection with the act which is charged to have been committed by him; and if the magistrate says, after weighing the evidence, that there is not a strong presumption or evident proof that the offense has been committed by this defendant, he is required to be admitted to bail. The Constitution of the United States provides expressly the same thing. It says that no warrant shall be issued except upon probable cause.

They are asking for a warrant for the removal of these defendants a thousand miles from home, that they shall be at the expense of taking their witnesses to this distant point. All these things are circumstances that the Supreme Court has commented upon in 205 U. S., in Hyde v. Shine and in Beavers v. Henkel, as reasons why the defendant shall be heard to show that there is not probable cause, not probable cause that the Court has jurisdiction of the offense, not probable cause as to his being the party indicted, but, above all, not probable cause as to whether or not the offense has been committed by him. If the Court please, that is the broad proposition that is decided in

205 U. S., and it comes simply to the question as to whether or not this inquiry is to be confined in the evidence which is competent to be heard. But it should be open to every element of the offense, every ingredient of the offense that is material, upon the question of probable cause.

One of the ingredients, of course, is the purpose and animus of the defendants in publishing the articles complained of, whether there was malice. Mr. Miller has suggested here that malice is an inference of law from the character of the publication. That is true in a civil suit. If an article is libelous *per se,* malice is presumed from the mere publication of the article. But even in that kind of a case the party has a right in aggravation of damages to show actual malice; but in a criminal case the law is different. Malice is the essence of the offense. It is so stated in Bishop on Criminal Law and in the cases I called your honor's attention to. Some of these cases are criminal cases. They are not all civil cases. The probable cause, and then the object and the circumstances under which the publication is made are always competent to be inquired into upon the question of malice.

Now, there is one case decided by the Supreme Court which I should like to bring before your honor.

The COURT: Of course the Court here sitting would have a right to draw the same inferences that a jury would, but they would still be inferences of fact, so that, if there are not two kinds of malice—I am just thinking now—there may not be two kinds of malice in a criminal libel case, express and implied malice. The probabilities are that there must be express malice. It may very well be that the jury might be justified in and probably ought to draw the inference of actual malice, but nevertheless it is actual malice which must be present. I am just guessing at the law.

Mr. WINTER: I think your honor's guess is a pretty accurate one, as the law is so stated in Bishop on Criminal Law.

A communication that has been published or words spoken, in a criminal action, may of themselves be taken by the jury or Court as evidence of express malice. The character of the expressions and the violence of the language used, and other matters that appear on the face of the communication; but it is only evidence of malice that is open to be explained by other evidence.

The COURT: Of course there is back of all this the intent. The owner of a newspaper might be very well held to civil libel on anything that appears in his pages, because the men who put it there are

his agents. But when we come to a question of criminal libel for the publication of an article in a paper, it is a very different thing. As, for example, if the proprietor of one of the New York papers—of course I couldn't put this illustration as to the proprietor of a Western paper, because, rich as they are, they are not rich enough to own yachts—but, suppose that the owner of a New York paper was off for six months cruising in a yacht, and during his absence vicious libels might appear in his paper. Do you contend for an instant that he could be held for criminal libel? It does not occur to me that in a case like that a man could be held criminally liable.

Mr. MILLER: *Prima facie* criminally liable.

Mr. MCNAMARA: It is a matter of defense.

The COURT: I am not speaking now of the weight of the evidence. I am speaking about the facts. If it appears as a fact that the owner of the paper was not present, was in distant seas sailing on his yacht, it would not be possible for him to be held guilty of a crime.

Mr. MILLER: The theory of the liability is because the article could not appear without his consent or his neglect.

The COURT: He can't be convicted of a crime by reason of his neglect. Neglect is no crime, as the Circuit Court of Appeals held in the somewhat notorious Standard Oil Company case, and they have held it in one or two other cases which went up from the District Court of Illinois. They have utterly repudiated the idea that a man can be punished under the ordinary criminal statute for negligence. I can see that there can be crime made out of negligence. I am not sure but there ought to be some. I have in mind just now some men who ought to be punished for negligence.

But that is not the question here. There could be no crime made out of negligence.

Mr. MILLER: Oh, no, that is not the question here.

The COURT: Now, it seems to me that when we cross the stream on one ingredient of a crime, we cross the stream on all of them. It is just as much a part of the crime to show that this publication was done with malice and the motives which are ordinarily connected with the crime of libel, it is just as much a part of the Government's case, as to show any other ingredient of the crime upon the broad question of intent. The intent with which the deed is done is just as much an element of the crime as anything else.

Now, if it is the duty of the Court to enter into the field of inquiry as to whether a man in the case in 205 U. S. was actually in Tennessee,

or in the case I spoke of, in the Western District of Pennsylvania, the Court should enter into that just as much as any other essential ingredient of the crime.

Of course, it may be objected, as has been suggested, that the Court is not to be harassed with a trial such as would be held before a jury, the Government is not to be annoyed by two trials. That, of course, does not affect the question of the practice. I think I can trust myself not to allow the investigation to broaden out too much; and certainly I could not deny a man the right to introduce his proof on the ground that it might cause me and the Government's counsel extra worry.

Mr. MILLER: There is one other suggestion that occurs to me at this time: whether we have not proceeded to a point where the Court ought to know just what these several counts of the indictment are.

The COURT: I would think so. If you will read them, I will listen.

The indictment was then read.

The COURT: I don't think very much of the argument of that. It is a barbarian form of argument and belongs to a former age.

Mr. MILLER: It is brutal.

The COURT: That is enough for me. I will hear the testimony.

Mr. Lewis further testified that the discussion of "these matters" was one of those things that you hear around the hotels, just the same as you hear other politics of passing moment, and was also heard about the headquarters of the two national committees for a few days, and especially since the publication in the *New York World*. The names of Cromwell and Charles P. Taft had been mentioned as persons who were supposed to be connected with the transaction, or financially interested. Those were the principal ones. He does not recall that Douglas Robinson was named. He took no notice of these reports and rumors in any communication made to *The Indianapolis News*.

The *Chicago News* has been published at Chicago since about 1880, and witness believes it the most conservative and best afternoon paper in Chicago. In this political campaign it was on Mr. Taft's side, both before the convention and afterward. Witness identified a copy of the *Chicago Daily News* of October 6, 1908, and an article published therein, entitled "French Banker Tells of U. S. Panama Deal." It came to the notice of witness October 6, and he read it and made inquiry at the political headquarters of both parties as to whether there was any notice being taken by them of

the facts there stated, or any consideration was being given to them. Witness doesn't remember the persons he saw. He thinks at the Republican headquarters it was Chairman Hitchcock, but it might have been Mr. Charles Nagel, in the absence of Mr. Hitchcock; or it might have been Secretary Haywood. All the correspondents and Chicago reporters went up there at 11 o'clock that morning, and that matter came up. Witness also inquired at the Democratic headquarters about it, and saw Mr. Mack, the secretary, or Mr. Lamb, who was the ranking head in charge in the absence of Mr. Mack. The other correspondents were there as well as witness. After the publication in the *Chicago News,* either that day or the next morning, witness sent the article to *The Indianapolis News.* (It was read in evidence.) (See Appendix.) Witness didn't telegraph it, but just sent the clipping—simply tore it out of the *Chicago News* and folded it up and put it in a *News* envelope and mailed it.

(Mr. Winter here stated that the article in *The Indianapolis News* was identically the same as the one referred to.)

Mr. Lewis further testified that he sent to *The News* the article published October 8, which was read in evidence (see Appendix), Mr. Winter stating that there are extracts from this article in the first count of the indictment.

Mr. Lewis stated that the *Chicago Journal,* referred to in said article, is and was a Chicago newspaper of good standing and character which was supporting Mr. Bryan. He said that an editorial in that paper on October 8, 1908, headed "C. P. Taft and the Big Canal," attracted his attention in the earlier edition before his dispatch to *The News* was sent, and that the quotation in *The News* was from that editorial. The editorial was read in evidence. (See Appendix.)

Mr. Lewis further testified that he had been acting as correspondent of *The News* at Chicago from the 12th of September (about three weeks). He had been connected with *The News* for seven or eight years, and had been in the newspaper business twenty-five years. He had no particular instructions from either Mr. Delavan Smith or Mr. Charles R. Williams (the defendants) in reference to obtaining items of news respecting the Panama Canal, or in respect of telegraphing or communicating matters concerning that matter to the paper.

E. I. Lewis, on cross-examination, testified that he is a staff correspondent. He had a faint recollection of the publication, in different newspapers, two or three years ago, of stories about the Panama matter, and the Morgan investigation as one feature of it. He never was correspondent at Washington. He does not remember reading

the accounts of investigations in the Senate; he might have been away; he has been away for three or four years of that time; one period was away a year and two weeks; he was at Indianapolis in 1903; thinks he was on *The News* in 1902, beginning in the fall. Witness does not remember the time when the $40,000,000 was actually paid for the canal; he was in Spain about six months in the spring of 1904. He just tore the *Chicago News* article out and mailed it to *The Indianapolis News* in the regular printed envelope. He can't say who received it. In the usual course of business it would come to the telegraph editor, or the city editor, or the managing editor. Such an article would reach the telegraph editor or city editor, who would either use it or refer it to the managing editor.

When witness saw this article in the *Chicago News,* purporting to be a dispatch, he went to the political headquarters with all the correspondents and reporters; one would be the spokesman; they changed almost every day; in some instances witness was the spokesman; he can't recall that particular day. They all went in together to see whether it was true or not; all would go into the room and one would do the talking for all. Witness thinks they saw Chairman Hitchcock at the Republican headquarters; he is not certain it was Hitchcock; it might be one of the other two men, but his best recollection is it was Hitchcock. At the Democratic headquarters his best recollection is that it was John E. Lamb they saw (that day). If Norman Mack was in town they saw him, but witness is inclined to think he was not. A dispatch on the subject in *The Indianapolis News* might have been written by witness, or it might be Associated Press news. *The Indianapolis News* had nobody there but this witness. Witness cannot recall in this particular case what was said by Mr. Hitchcock, Mr. Nagel or Mr. Haywood. He does not know, as a matter of fact, whether the *Chicago News* had a correspondent in Paris. There were seven reputable papers in Chicago, and witness saw this matter in the two papers and he thinks possibly in the *Inter Ocean.* He made no inquiries by mail or telegraph in New York as to whether this story was credible. If it was in the *Inter Ocean* that was after the publication in the *Chicago News;* but it was not the same article.

TESTIMONY OF DELAVAN SMITH.

Delavan Smith (a defendant), on direct examination, testified that he lives at Lake Forest, in Illinois, near Chicago, and is a member of the partnership composed of himself and Charles R. Williams, engaged in the business of publishing *The News.* He maintains a

residence and spends a considerable part of his time at the city of Indianapolis.

Question: At the beginning of the presidential campaign I will ask you what instructions, if any, you gave to the persons in charge of the management of the paper as to the course to be pursued in reference to handling news and other matters that entered into or developed during the progress of the campaign?

Mr. MILLER: If the Court please, we object to that question for the reason that it simply calls for a self-serving declaration. It is not material or relevant to any issue now before the committing magistrate. The general instructions he gave would not be competent.

Mr. WINTER: This is prior to any of these transactions, of course.

The COURT: I do not propose to give reasons every time I rule, but it just occurs to me, now, that the same objection could be made when a man is on trial for a crime of any kind and is asked to state what his intention was, or what directions he gave in regard to certain transactions. I will overrule the objection.

Mr. Smith then testified that immediately following the Denver convention, "Mr. Hornaday, who is our political correspondent for the paper, and Mr. Richard Smith, the managing editor, came to my country home at Lake Forest to get their instructions for the campaign. I stated that *The News* had been active in the Republican national convention fight, and for that reason that during the campaign we would not have a candidate; that Mr. Smith and Mr. Hornaday should deal with the elements of the campaign absolutely on a news basis, and speed both candidates. Those are the general instructions, and all the instructions I gave during the progress of the campaign. During the summer Mr. Hornaday was the political criterion; he was our Washington correspondent. Mr. Richard Smith is managing editor." This defendant read the *Chicago News* article in that paper in the evening edition when it came out. That was the first knowledge he had of it. He was at Lake Forest and had no knowledge that it was going to be published in *The Indianapolis News*. He probably read it there after it was published, but has no distinct recollection of having seen it at all. He had no knowledge of the Chicago dispatch sent by Mr. Lewis and published in *The News* of October 8 before it appeared in *The News*. He was then at Lake Forest. He gave no directions to Mr. Lewis or anyone else in reference to the publication of either of these articles. Defendant had seen the cartoon that appeared in *The Indianapolis News* October 10,

He had nothing to do with the preparation or publication of it. He was at Lake Forest and was not consulted about it. He was still at Lake Forest on October 20 when the article headed "Panama Secrets" (see Appendix), set out in the second count of the indictment, was published, and had no knowledge of the preparation of that article nor of its publication before it was published. The same was true October 23, when the editorial appeared in *The News* on which the third count of the indictment was based. On October 29, 1908, when the article was published which is set out in the fourth count of the indictment (see Appendix), defendant was in Indianapolis, but had no idea of its preparation or publication, and was not consulted about either before it was published. This defendant came to Indianapolis a week or ten days before the election (November 3) and remained until the second day following the election. He was in Indianapolis when the editorial of November 2 (see Appendix), on which the fifth count of the indictment is based, was published. But he had no knowledge of its preparation or intended publication, was not consulted, and gave no directions about it. He was not in Indianapolis on November 17, when the editorial on which the sixth count is based (see Appendix) was published. He was either in New York or Chicago. He was not consulted about the preparation or publication of that editorial before it was published, gave no directions for its publication, and had no knowledge that it was being prepared or published. Witness has seen all the articles on which the different counts of the indictment are based. As to the article which purported to be the answer of the *New York World* to the denial made in Mr. Roosevelt's letter to William Dudley Foulke in connection with these publications (see Appendix), printed in *The Indianapolis News* of December 8, on which the seventh count is based, it was carried by the Associated Press's dispatches as a part of its regular report. *The News* is a member of the Associated Press, an organization for the distribution of news to its members—the proprietors of newspapers. It has some four hundred members in all parts of the country. The news distributed by the Associated Press goes to all these papers that are members, scattered throughout the whole country. On December 8 this witness was in New York. The article referred to was read in evidence.

The witness (defendant Smith) identified two other articles entitled "Josiah Quincy's Statement" and "Charles P. Taft's View" (see Appendix), published in *The Indianapolis News* on December 8, in connection with its publication of the article from the *New York World,* and they were read in evidence. He also identified

an Associated Press dispatch printed in *The Indianapolis News* on December 7 containing the correspondence between William Dudley Foulke and President Roosevelt with reference to the articles which had appeared in *The Indianapolis News*. (See Appendix.) That, he said, was brought to *The News* by the Associated Press, which on the following day sent the *New York World's* answer above referred to, which was published in the same way. Defendant did not have any personal acquaintance with Mr. Douglas Robinson, Mr. Pierpont Morgan or Mr. William Nelson Cromwell. He knew Mr. Charles P. Taft as a newspaper man, and his relations with Mr. Taft were friendly. So far as he had any connection with or knowledge of these various publications in *The News*, there was no desire or purpose or intention on the part of defendant to defame or malign these gentlemen or anyone else. He had no motive that he can see; it was a matter he didn't give any particular attention to. He had no particular interest in these publications so far as the campaign was concerned. They were not essential and he was busy with other matters. During most of the period that these articles were appearing this defendant was up in the country (at Lake Forest). While at Indianapolis he was busy in seeing that preparations were properly made for gathering the election returns throughout the State—those especially affecting the State, and of course the national returns, too. It was State matters that were taking this defendant's particular attention. He was not, at any time during the publication of these articles, in the District of Columbia. *The Indianapolis News* is published at Indianapolis.

During the months of October, November and December, 1908, the entire circulation of *The Indianapolis News* was about 90,000, probably all confined to the State of Indiana, except about 2,000. That was scattered. Mr. Hornaday, *The News's* correspondent at Washington, has an assistant, and an office with the *Boston Transcript;* joint offices where they prepare the news matter that is sent to *The Indianapolis News*. There is no other business of the paper, especially relating to the circulation or publication or the preparing of articles, except those prepared by Mr. Hornaday, transacted in that office at Washington. The office has nothing to do with the circulation or publication of the newspaper in the District of Columbia, and no papers were sold from that office in the District of Columbia. Not to exceed fifty or sixty copies of *The News* were sent to the District of Columbia, either to the subscribers of the paper or to news dealers, during said months. The greater part of these copies went to individuals who were subscribers to the paper. They were all mailed

directly to subscribers through the postoffice. These subscribers were in departments of the Government and former residents of Indiana, mostly in the Government service. Two or three news dealers down there buy a copy or two each. They order papers from the circulating department at Indianapolis, and these are sent to them from Indianapolis, in accordance with their orders, and paid for by them as ordered. Defendants do not sell any of the papers in the District of Columbia. The circulation and publication of *The Indianapolis News* in the District of Columbia was confined simply to this: they sent papers to these subscribers and particular copies ordered by the news dealers, who sold the papers to their own customers. This had always been the practice.

Prior to the appearance in *The News* of these articles this defendant had read what appeared in the newspapers about the investigation of the purchase of the Panama Canal in the United States Senate. He knew that Mr. William Nelson Cromwell had been examined before the Senate committee, and knew as a matter of general information that he had refused to answer numerous questions which were propounded to him, on the ground of privilege. He had read in the papers that a power of attorney was produced and put in evidence which had been executed to Mr. Cromwell, in the year 1899, to handle the affairs of the French Panama Canal Company. He identified said instrument. (See Appendix.) He had also read in the papers that the articles of association of two companies which had been incorporated in the United States for the purpose of Americanizing and taking over the property of the French Canal Company were introduced in evidence with the testimony of Mr. Cromwell in that investigation. The witness identified the certificates of incorporation of the Panama Canal Company of America, and of the Interoceanic Canal Company (see Appendix), and said power of attorney and both certificates of incorporation were read in evidence. Mr. Smith further testified that by subsequent investigation he has learned that the said article which appeared in the *Chicago News* under date of October 6 was reprinted and published in several other newspapers in the United States prior to its reproduction in *The Indianapolis News* of October 8. He knew that the *Daily States* is and was in 1908 a newspaper published in New Orleans. He identified a copy of the paper of October 7, 1908, and stated that it is a leading paper in New Orleans, published daily, with a large circulation, of Democratic politics. An article entitled "An Amazing Story," in the paper identified, was read in evidence, as was also a second article entitled "The Panama Scandal is in the Limelight." (See Appendix.)

Mr. Smith further testified that the *Courier-Journal* is published at Louisville, of Democratic politics, and is responsible and reputable and one of the leading papers in the South, with a large circulation in the South, being a general circulation among the southern States. He identified a copy of the *Courier-Journal* of October 7, and stated that it was a morning paper and that the publication of this paper preceded the publication of *The Indianapolis News* of the same date. But he stated that the *New Orleans Daily States* is an evening paper. The article from the *Chicago Daily News* of October 6, exactly reproduced in the *Courier-Journal,* was given in evidence.

Mr. Smith further testified that *The News* circulated in other States besides Indiana to a small extent. There are probably five or six hundred papers going into Illinois, a few hundred into Ohio and the rest of the circulation is scattered. Some to California, and some through all the States; a good deal the same in Boston and New York as in the District of Columbia.

Delavan Smith, on cross-examination, testified that Mr. Hornaday is a high-salaried employe of *The News* and its correspondent at the Washington office. He does not maintain that office, and there is no head to it. He has a man that does certain work there, and he does certain work. On the issues of the paper they carry the address of that office, "Washington Bureau, Wyatt Building, James P. Hornaday." They have had an office there for several years, and Mr. Hornaday is their correspondent. He sends news articles to *The Indianapolis News.* He is not always there when Congress is not in session. Sometimes he goes off on vacations or on special assignments. The other man's name is Tracy. Fifty or sixty copies of the paper go to subscribers in Washington daily. They are sent by mail. Possibly papers are sold in the Riggs House and the New Willard and the National Hotel. If they order them, they sell them there. Witness knows the paper is sold at some of the hotel stands. The news stands have orders that they may change from time to time—any subscriber may. The paper is also sent to the Congressional Library, but defendant doesn't know whether it is on file in the public reading room. He doesn't know just how many copies are sent there. They had correspondents at Washington before defendant was connected with the paper; they have had several. Defendant was familiar with the proceedings in the Senate committee about this Panama matter in the sense that he saw it in the papers at the time, and read it as he read general news. He read about the investigations where Senator Morgan had Mr. William Nelson Cromwell on the stand and was asking him certain questions; and

also read where Mr. Cromwell declined to answer. He read where the committee sustained Mr. Cromwell in his refusal and decided it was not contempt. He has since read the full reports of Congress, and did not find any other power of attorney to Mr. Cromwell, except the one introduced in evidence above. He also read about the proposed organization of the New Jersey corporation for the canal company at the time of the committee investigation in 1904, just as he would read anything else; he had no particular interest in the matter at that time. He read the article in the *Chicago News* of October 7 at Lake Forest, and at that time was familiar with what he says he knew in 1904. He probably read his own paper the next day when it published that article. He probably saw the cartoon on October 10, but does not recall it. It did not make any particular impression; he has seen it so often since that he would not be able to state. He knows he was at Lake Forest on October 15 and 20th, because from the time of the Republican convention—or the Democratic convention—he was continuously at Lake Forest until he came down to Indianapolis. He does not specifically recall reading the article of October 20 entitled "Panama Secrets." It is his habit to read the paper and the editorials. But this indictment has been before him since so that it would be difficult to say whether he read it or not before he saw the indictment. Occasionally he misses a number. He was friendly with Charles P. Taft at the time, has known him for a great many years and never had any difficulty with him personally. But he cannot recall definitely whether he read this article at that time. Neither does he remember specifically whether he read the article of October 23 in *The News* when it came out, nor the one published on October 29, entitled "The Panama Canal Deal," and must give the same answer for the same reason as to all the remaining articles.

As to the article reprinted from the *New York World,* which appeared on December 8, this defendant saw that at the time it came out. He was then in New York City and saw it in the *New York World,* and probably afterward in *The News.* He can't say whether he saw the earlier articles first in his own paper or elsewhere. The knowledge he had of the Panama investigation before the Senate did not particularly impress him that it required instruction on his part to the members of the office force about what they should publish when these articles and the cartoon appeared, because Mr. Williams is in charge of the editorial page. "That is his matter and not mine." As the articles appeared one after the other he felt no inclination to speak to anybody to modify the articles or to restrict

such publications in the future, and did not do so. Notwithstanding his direction given to Mr. Hornaday and Mr. Smith about the attitude of the paper towards the campaign, he felt he had no province to interfere as to the editorials. And as to the news item he couldn't have stopped that, because it was published before he could have stopped it if it was objectionable. It was distributed by the Associated Press and was of general news interest, and it was quite proper that the paper should print it. On October 29 this defendant was here in Indianapolis and in touch with the office. At Lake Forest he maintains connection with the office from time to time. He votes at Lake Forest. This defendant is a stockholder of the Associated Press. He was on the road to New York when Mr. Roosevelt's letter was transmitted by the Associated Press, about the first of December. He stopped at the Plaza Hotel. The article which appeared in the *New York World* in answer to Mr. Roosevelt's letter was carried to *The Indianapolis News* by the Associated Press. He identified a telegram, saying that he was filing the article to *The News,* but *The News* replied that the Associated Press had already carried it. He sent this telegram from the station at the Plaza Hotel shortly after he read the article in the *World.* It was read in evidence as follows: "New York, Dec. 8, 1908. Henry Palmer, *The News,* Indianapolis, Ind. Am filing here *World's* editorial on Panama. Delavan Smith." He was placing the article with the operator for transmission to Indianapolis, but Mr. Palmer at once notified the Western Union to kill the matter. He knew *The Indianapolis News* had this article before he got the paper and before he got back to Indianapolis. It would have gone if the Associated Press had not carried it, but witness had forgotten for the time that he filed it for transmission. Mr. Palmer was the acting managing editor of the paper. Mr. Richard Smith is the managing editor, and this defendant and Mr. Williams are the partners owning it, and were all the time covered by these articles. No other person employed on *The News* is a member of this partnership; the others are paid salaries. This defendant has read the other stories in the *Daily States* of New Orleans and the *Louisville Courier-Journal* subsequently to the publications in *The News. The Indianapolis News* is sent regularly to defendant's house at Lake Forest.

Delavan Smith, on redirect examination, testified that it was the practice of *The News* to have a daily cartoon. He was on board a train on the way from Chicago when the Associated Press correspondent got on the train and showed him a copy of Mr. Roosevelt's letter to Mr. Foulke, which was published in *The News,* December 7, and

contained a violent direct attack upon this defendant. His first knowledge of the answer made by the *New York World* to that letter was when he read it at the Plaza Hotel in New York in the morning edition of the *World* of December 8. This witness identified a copy of the *Chicago Daily Journal* of October 16 containing an editorial entitled "Open the Canal Records," which was read in evidence. Also another copy of the *Chicago Daily Journal* of October 19, containing an article entitled "Roosevelt Hit in the Canal Deal," and an editorial entitled "Mr. Roosevelt Should Act," which were read in evidence; also a copy of the *Chicago Inter Ocean* of October 14 containing an article entitled "Identity of Those Who Got $40,000,000 for Canal Hidden," which was read in evidence. He also identified a copy of the *Chicago Inter Ocean* of October 19, containing an article headed "Canal Records Fail to Show Recipients," which was read in evidence. These publications are entirely independent of and do not make any reference to or mention of *The Indianapolis News*. (For these articles see Appendix.)

Delavan Smith, on re-cross-examination, testified that at the time these articles were printed in *The Indianapolis News* he knew that the *Chicago News* did in fact have a correspondent in Paris and maintained a bureau.

Delavan Smith, on redirect examination, knew this fact by talking to Mr. Lawson, who wanted *The Indianapolis News* to take the Chicago paper's service.

TESTIMONY OF CHARLES R. WILLIAMS.

Charles R. Williams (a defendant), on direct examination, testified that he lives at Indianapolis and is one of the owners and the editor-in-chief of *The Indianapolis News*. Prior to October, 1908, he had kept in touch with the dealings between the Government and Mr. Cromwell with reference to the purchase of the canal from the Panama Canal Company, and his efforts to organize companies to do what was called "Americanize the canal," from what *The News* and other papers printed; and "we" had commented upon the developments in the case at that time. This defendant knew that an investigation had been made in the Senate in reference to that matter, and that Mr. Cromwell had been examined as a witness before the Senate committee and had declined to answer a number of questions put to him by Senator Morgan in reference to the canal. His recollection is that he commented on it at the time. He can't say positively as to the power of attorney produced before the committee, but hasn't a doubt his attention was called to that also. He remembers noticing

the fact as having been developed in that investigation that there had been a plan at one time on foot to "Americanize the canal" by an organization in which citizens of this country should be interested, and to which the canal property should be transferred by the French company. All these facts were gone into in that investigation before the Senate. This defendant had nothing to do with the preparation of the cartoon that appeared in *The Indianapolis News* October 10, on which the first count of the indictment is based. That is under the immediate charge of the managing editor, who consults with the artist. As to the different editorials on which certain counts of the indictment are based, he "edited them all"; if he wrote any he does not remember; they all passed through the hands of this defendant and received his imprimatur, and none of them was written by him in their original form, but all were edited and modified by him, and sent to the composing room. At the time of the publication of these articles this defendant knew that there had been a publication in a Chicago paper called the *News* under date of October 6, purporting to be a cablegram from its correspondent in Paris. That was published in defendants' paper, and along with "our previous knowledge" growing out of the first investigation and the general knowledge of the history of the case, was the foundation of the subsequent articles. The quotation contained in the editorial of October 20, on which the second count of the indictment is based, was made from a copy of the *Chicago Journal*. He met Charles P. Taft some years ago and their relations were entirely friendly. He never met Mr. Pierpont Morgan and did not know Mr. Douglas Robinson or Mr. William Nelson Cromwell. In passing these articles for publication in *The News* and permitting them to be published he was not actuated by the slightest feeling of ill-will or any purpose of doing injury to any of these gentlemen. As to his motive, "we thought it was a matter of public concern; it was a proper subject for comment in connection with the affairs of the nation; and that it was time that the scandals or reported scandals should be thoroughly ventilated in the interest of the public morality of the country and the national integrity. There was no more personal ill feeling in the matter in commenting upon that than there is in commenting on other topics of news of the day." This defendant knew that similar articles were being independently published in other papers throughout the country. He does not know exactly to what extent, only that he knew generally other papers were printing it and commenting on it and discussing it, and that the publication was general in cities widely remote throughout the country. Publications in the *Chicago News*, which was supporting Mr. Taft,

and the *Chicago Journal,* which was supporting Mr. Bryan, and the *Inter Ocean,* another strong Republican paper, were the basis for the earliest editorial comments in *The Indianapolis News.* Few papers have a better standing that the *Chicago News* for conservative methods in news gathering and in choice of news, and it has no reputation at all for being a sensational or yellow newspaper. The *Inter Ocean* is still more conservative, if anything. During this series of articles *The News* published the letter that Mr. Foulke had written to Mr. Roosevelt, and Mr. Roosevelt's answer. The latter contained a severe personal denunciation of Mr. Smith, but was published in *The News* as soon as it could get it. The reply of the *New York World* to Mr. Roosevelt's letter was used in the natural course of events, because it was a comment upon this extraordinary letter of the President and it was the indignant answer of the *World* to the allegations made by the President against it. It came by the Associated Press. This defendant had not been in the District of Columbia at any time during the months of October, November and December, 1908.

Charles R. Williams, on cross-examination, testified that he remembers when Mr. Cromwell declined to answer certain questions during the Senate investigation in 1904, that the Senate committee sustained him in this position and made no effort to punish him for contumacy. The paper commented upon it at the time. His "previous knowledge" about the matter referred to in previous testimony was the history of the entire Panama enterprise and the investigation in which Mr. Cromwell testified. Defendant had no personal knowledge of the existence of any syndicate—nothing except what was brought out in that investigation and the repeated publication of that allegation in Paris publications, newspapers and magazines. He knows there were such publications charging the existence of an American syndicate prior to the articles in the Chicago papers. He had not the slightest knowledge that those who were members of the syndicate had bought up the property for $10,000,000 and afterwards sold it to the United States for $40,000,000, nor of any connection of Douglas Robinson, Charles P. Taft, or Cromwell or Morgan with that syndicate. References to these matters were based upon these articles published at that time. Witness had in mind the entire history of the Panama transaction, including the Panama revolution, the shifting of the Government from one route to the other very suddenly after United States experts had declared in favor of the Nicaragua route, and the entire history of the Panama matter from beginning to end. That was the previous knowledge which was in the minds of persons conducting the newspaper when these publications began to be made for which it

had prepared the way. Witness had heard earlier in the campaign at Indianapolis (but had not seen it in a newspaper) that men had been sent to Paris to make investigation. This information was given to him gratuitously, without any previous expectation on the part of witness of receiving such information. Witness read some of the report of the transactions of the Walker Commission as to their examination of the two routes for the canal, but can't recall definitely. He remembers that the American experts favored the Nicaragua route for various reasons and believes that one reason was that the Panama route could not be bought except for $101,000,000 or $109,000,000. He doesn't remember precisely what the report said. In the publication of these articles he had not the slightest ill-will against the gentlemen involved.

The COURT: Let me ask a question. What was the Senate Committee investigating? The purchase of the Panama Canal from the French people?

Mr. WINTER: Yes.

The COURT: Was it suggested by anybody that it had been purchased at a much less price than it was tendered to the Government for?

Mr. WINTER: I think that was the point they were trying to get at. Senator Morgan was examining Cromwell and they asked him questions about that, and his objection was that the questions were privileged. He fell back on the proposition that all he knew about the matter was professional confidence, that he was attorney for the French Panama Canal Company and had a power of attorney from them to Americanize the company, and he refused to testify as to who the people who had expected to go into the American company were and said it was a privileged communication and refused to answer. Two companies were organized by him with dummy directors, but when the question was put to him as to who the people were who subscribed the five million dollars that was to be the supporting capital of the American Canal Company, he said that was a professional confidence and he declined to answer. He said that of all the questions. He did say finally that the scheme of Americanizing the company was abortive and was dropped.

The COURT: Is that accurate, Mr. McNamara?

Mr. MCNAMARA: No, sir. The fact is this: Senator Morgan, of Alabama, had an idea that there was something in the charges that were made that Mr. Cromwell had received a very large sum of

money, and he called upon Mr. Cromwell to tell what his fee was. He said it was a professional confidence that existed between him and his client and refused to answer. That was prior to the purchase.

They asked him then if he received any of the forty million dollars, and he said "As to that, it is not privileged. I have not and none of my firm ever received a penny." Then they asked him whether he or Mr. Farnum, in his office, or any one of the forty or fifty people in his office got any of the proceeds of the stocks and bonds of this company, and he denied absolutely that they did. Said it was not so. And the absurdity of the thing is so great that no person after a moment's reflection could possibly accept it as truth, and we will show it before we get through.

These securities extending up in the billions, were all over France and if any individual had tried to get a half dozen together it would have given notice to the public.

Now, they tried to get Cromwell to tell some of the internal workings of his office with the Paris concern. They asked him, for instance, what was his authority and asked him to show the letters he had received. He said as to some of these, "They are professional communications; I cannot disclose them."

Then they asked him if there was not an American syndicate, and he said "Absolutely no," and then it was that the Senator flashed this paper which was referred to in the Senate committee, and that paper was a power of attorney from the company to give him a right to represent them in the transaction, a thing that does not contain a word about the purchase, but, on the contrary, it authorizes Cromwell to represent the company in its dealings with the United States.

Now, the other paper which was produced at that commission by the Senator was a copy of the articles of incorporation, and they asked him about that, and he explained how this Panama Canal had been a heritage of failure in France, how the old company failed in 1889, and in 1894 the new company came into existence. He was the attorney for that. And how that was not altogether in the best circumstances, and they thought they would Americanize it and make the American corporation a legal corporation to own the canal. But when the Frenchmen heard that the pride of their country was to be Americanized they refused to ratify the action of the incorporators, and it was dropped. The articles were filed in the office of the Secretary of State of New Jersey, but nothing afterwards happened.

Now, when the money was paid and when Senator Knox, who had been Attorney-General at the time this transaction took place, was on the Senate committee, then it was they asked Cromwell about whether

he or any of his friends or people had received any of the forty million dollars, he said, "I thank you for that question. I can answer as to that." And he answered, "Absolutely no." Now, there was some indignation in different papers about the attitude of Mr. Cromwell. There were suggestions as to why he was not taken before the court and compelled to answer. But the Senate committee took the position that he was not obliged to answer any question that he had declined to answer. They took the position that the questions which they had a right to insist upon he had answered, and therefore they took no further steps. It was a matter which was absolutely settled so far as any of these questions were concerned. It was known absolutely there was no syndicate. It was known that this money was not distributed in this fashion. The Senate had passed it up as a matter not deserving any comment; and here four years after that time the matter is revived as a matter of political campaign.

Mr. WINTER: If the Court please, all this has very little bearing upon the question here. The point I have in mind is that this had been a matter of public discussion and public interest long before this publication was made, and it never was, as Mr. McNamara has stated, definitely and finally decided by any competent tribunal that these facts, which had so much substance to them as far back as 1906, two years before these publications, as to lead to a Senate committee to set on foot an investigation, were unfounded. All that was ever developed in that matter was that Mr. Cromwell, who everybody supposed and understood was thoroughly familiar with the transaction from beginning to end, did avail himself of his right as attorney to refuse to testify and the questions that were put to him, which if he had answered would have thrown a good deal of light upon this subject, were not answered. He refused to answer. It is true that long afterwards, in 1906, when the original investigation, where he had persistently refused to answer was at an end, upon some further investigations being made he seized upon a question put to him as to whether he had got any of the forty million dollars, and he said "No." But as to all of the questions preceding the purchase, as to the attempt to Americanize this company and as to the formation of a syndicate in this country, which was to take the stock of the American company to the extent of five millions, he flatly refused to give the names and said it was a professional confidence; and the fact that as a matter of law the Senate committee afterwards decided that he had a legal right to refuse to testify, did not settle the question that there was not in existence an American syndicate, or that there had not been any

participation in the distribution of these moneys by Americans holding securities.

The Senate committee simply decided as a legal proposition that he was right in taking advantage of his professional privilege. There was no evidence introduced except the general statement he made long afterwards in answering a question, as Mr. McNamara says, that they put to him in 1906, that he did not get any of this money.

The COURT: You say the grounds upon which an attorney is excused from testifying as to confidential matters of his client is public policy, and that was based upon public policy as against an investigation dictated by every public policy?

Mr. WINTER: Certainly, and he took tnat ground and was sustained by a majority of the Senate committee and he never answered these questions. The record of that committee will show it.

The COURT: In other words, you think it is a circumstance that if forty million dollars of the people's money was expended in the purchase of something and there was suspicion—if you want to put it that way—that that thing cost the American go-betweens but twelve million dollars, that public policy would dictate that a person should not refuse to come and tell the truth about that?

Mr. WINTER: He professes that the only client he had was the French Panama Canal Company. Now, the French Panama Canal Company, upon the theory of this prosecution, was not implicated in anything and had no reason in the world, if it was not true that this transaction had occurred, not to say "Mr. Cromwell, we welcome the opportunity to have you tell to everybody in the United States the whole history of this matter."

But there was nothing of that kind. Mr. Cromwell put himself forward at the very outset and blocked the path of that investigation at every stage by falling back on his professional privilege and declining to answer any questions or throw any light upon what had taken place between him and his clients in reference to the selling of this property. One of the questions was that when this Americanization project was on foot it went so far as the incorporation of two companies to take over the property from the French company, and one of the first steps was that there was to be a subscription of capital stock of five million dollars. Now, the question was asked: was there a syndicate formed of American citizens who subscribed that five million dollars' worth of capital stock? "I decline to answer," was the answer he made. "Why?" "It is a communication between me and my clients and is privileged." And in no matter what form

the question was put, he fell back upon that, and when the certified copies of the articles of association from the office of the Secretary of State of New Jersey were put in evidence, he admitted that; but it was not until they had been put in evidence that he said they had been prepared in his office and the company organized with dummy directors who were clerks and employes in his office, and when this question came as to who subscribed this five million dollars, he said, "I decline to answer." When asked if a subscription paper had been prepared, he refused to answer on the same ground, and finished up by saying the whole scheme was abortive; it amounted to nothing. The committee did not require him to answer, and when it went to the entire Senate he was not required to answer. I do not say that without having instructions from his client he ought to have answered. But the question here is, wasn't that conduct of Mr. Cromwell's a matter of public interest, having a tendency to attract the attention of the public at large to the fact that there might be something behind all of this matter that required him to resort to professional privilege to keep it from being disclosed? What we are seeking to do in this case is not to prove that twenty-eight millions of dollars paid by the Government went into the pockets of an American syndicate, your honor; what we are attempting to prove is that this was a matter of public interest that the community had a right to have discussed and ventilated by discussion, especially during the pendency of a presidential campaign, when one-third of the membership of the United States Senate was to be elected and the entire House of Representatives of the United States was to be elected. It is a matter that the public were interested in having discussed and ventilated before the election.

Now, it may turn out, of course, that there was no foundation for this. That is not the proposition here at all. It is only the matter of public interest that enters into this question.

The witness (Mr. Williams) had only the general knowledge that the *Chicago News* maintained a correspondent in Paris from the fact that *The News* received a statement some years ago from Mr. Lawson that it was establishing news agencies in various capitals of Europe. Witness knew that M. Hutin had been president of the French Canal Company, and after certain negotiations he was put out and M. Bo was made president, and was president when the sale was made.

TESTIMONY OF HENRY A. PALMER.

Henry A. Palmer, on direct examination, testified that he was acting managing editor of *The Indianapolis News* in October, 1908.

That the cartoonist and he consulted about the cartoon, entitled "Unpleasant," on which the first paragraph of the indictment is based, and that he is responsible for it. He is city editor, and in the absence of Mr. Richard Smith, who was then sick, was acting as managing editor. There was no previous consultation between him and either of the defendants in reference to the cartoon. It was just the cartoon—the liveliest current news—that was the thing that was being most generally commented on at the time. He had knowledge at that time that the publications had appeared in the *Chicago News* and had been reproduced in *The Indianapolis News*, and that led to the cartoon. He was not acquainted with Mr. Charles P. Taft or Mr. William Nelson Cromwell or Mr. Pierpont Morgan at that time; they were entire strangers to him, and he had no malice whatever in the preparation and publication of that cartoon as against these gentlemen. It was published as pictorial comment upon a matter of current interest and news.

Henry A. Palmer, on cross-examination, testified that this cartoon was published in the regular course of business.

TESTIMONY OF LOUIS HOWLAND.

Louis Howland, on direct examination, testified that he is and in October, November and December, 1908, was an editorial writer upon *The Indianapolis News*. As far as he can recollect he wrote all of the editorials on which counts of the indictment are based, with possibly one exception. He wrote them because he thought it was good matter, interesting stuff. He saw the *Chicago News* article and several pieces in the *Chicago Journal* and the *Cincinnati Enquirer*, "and it occurred to me it would be about the biggest thing in the campaign, and if I had not discussed it I should have been failing in my duty." The subject was a matter of current discussion in the newspaper press of the country, and continued to be so at the time he was discussing it in *The News*. Witness had seen it in a good many papers. "I read about fifty or sixty papers a day. I am confident I saw it in the two Chicago papers, the *World*, the *Courier-Journal*, the *Cincinnati Enquirer*, and I can't say what others." At the time it impressed witness as a widely distributed comment by the press. Witness has never met and does not know Mr. Charles P. Taft, Mr. Douglas Robinson, Mr. Pierpont Morgan or Mr. William Nelson Cromwell. As far as he can recall, he doesn't believe there was anything suggested to him in advance of writing those articles by either of the defendants. He wrote them and handed them to Mr. Williams (editor-in-chief). He had no previous consultation

about them at all, either with him or Mr. Smith. Witness was not actuated by any feelings of malice or ill-will or desire to do any injury to any of the gentlemen mentioned.

Louis Howland, on cross-examination, testified that he did not make any effort to find out if Mr. Taft, Mr. Robinson or Mr. Morgan was implicated in this syndicate conspiracy, but wrote the articles without making any investigation. "If a newspaper waited to make investigations it would have to go out of business." Witness hasn't been to Washington for three or four years. He didn't examine the records there nor have anybody there look into them. He thought it (the Panama affair) was the best thing current at the time and thinks so yet.

Louis Howland, on re-direct examination, testified that the Senate investigation of the general subject in 1904 was in his mind at the time. "I was suspicious of it and I am yet. I think there was very good reason for everything that was written about it." Witness knew that the *Chicago News* had a very good standing in the newspaper world. He knew it had a correspondent in London, and, inferentially only, that it had one in Paris. He believed the facts stated in the *Chicago News* to be true.

Louis Howland, on re-cross-examination, testified that when the language was used in one of these articles: "We hope that the *New York World,* which has been zealous and efficient in this canal deal, will persist. It may be short on evidence for a time, but it can be long on presentation and not weary in well doing. Some day we shall know who the thieves were that robbed their country," he believed such statement. He meant that they couldn't prove it to the satisfaction of a cross-examining lawyer, but they might be morally certain of it.

It was admitted by the Government that Mr. Root was a resident of the State of New York, and an official resident, as Secretary of State, of Washington, during the publication of these articles; that Mr. W. H. Taft's residence was at Cincinnati, and that Mr. Roosevelt was a resident of the State of New York, with an official residence as President at Washington.

Articles published in the *Rocky Mountain News,* of Denver, October 16 and 24, respectively, and the *Morning World-Herald,* of Omaha, October 24 and 28, and the *Sunday States,* of New Orleans, October 11, were introduced in evidence (see Appendix). Also certain testimony of Mr. Cromwell (pp. 329, 333, *post*).

And here the defendants rested.

REQUEST FOR CONTINUANCE AND ARGUMENT THEREON.

Mr. McNAMARA: If the Court please, owing to the wide scope of the evidence which defendants have introduced, it will be necessary for the Government to introduce some other evidence. That evidence consists of certain witnesses; four or five of them reside in New York City; as many more in Washington, one in Buffalo and one in Nebraska. We have not those witnesses here today, nor could we have contemplated or foreseen they would be necessary, not knowing until yesterday what would be the character of the evidence the defendants desired to offer; but even if we had them here it would be quite impossible to have their evidence adduced in less than two or three days, and from what I understand of the engagements of the Court, we should have to get through today or tomorrow. After a conference we are constrained to ask for a continuance of this hearing until some day in the future which would be convenient to the Court's arrangements. I therefore ask for a continuance to whatever day the Court may decide upon.

Mr. WINTER: I should like to have a statement from these gentlemen as to what they expect to prove by these witnesses. Of course when we have a statement it is possible we may be willing to admit whatever they offer to prove. I am not conceding that under the circumstances of this case the Government is entitled to a continuance. It is perfectly well settled and they are entirely familiar with the rule that the Government is entitled to supplement this indictment by other evidence and that the indictment is only *prima facie* evidence.

It is decided in Beavers v. Henkel that the Government may introduce other evidence. Certainly they cannot claim to be surprised when they were notified of the fact that defendants intended to introduce evidence on this hearing. I did not think there would be any controversy between me and these gentlemen. When the case was set down for hearing a month ago, when we were discussing the question of bringing the matter before a United States commissioner or before your honor, I stated at that time that I proposed to introduce evidence and did not want to have the hearing before a commissioner and then have to have the same matter gone over before the Court and that the whole question, in the interest of saving time, should be heard at once by your honor, and at that time the suggestion was made by the other side, by one of the gentlemen, that there was not any question in a hearing of this kind except the question of identity. I said that was not my understanding. The question of probable cause was open and I expected to introduce evidence here to show that these publications were privileged. Certainly the gentlemen

cannot say that they are surprised. I am a little surprised at the statement that the evidence in this case has taken an unexpectedly wide scope. That was the understanding, the very ground upon which I put my insistence that we should not be exposed to having this matter heard before a United States commissioner, which was the suggestion that Mr. Miller made as being the ordinary practice, but that it should go before your honor, in the first instance, in the interest of saving time and labor. And the gentlemen will remember that in the course of the discussion there it was suggested that the whole matter could be gone into before your honor sitting on the application for removal or upon a writ of *habeas corpus*. I stated then that I did not want to do that. I said I was not going to apply for a writ of *habeas corpus,* because in the hearing upon a writ of *habeas corpus* the Court would be confined to simply determining whether upon the evidence that had been heard before the commissioner there was some evidence that supported his finding as to probable cause, and if so, the Court should order a warrant to issue. I did not propose to be in that attitude. I wanted the Court to be free to consider *de novo* the whole matter. It was discussed very fully. I do not think that after a month the Government should ask that this matter should be postponed. As I say, it was affirmatively stated to them at the time, a month ago, that the reason why this matter should be heard by your honor in the first instance instead of having a hearing before a commissioner and then having it come before your honor again was to save labor and time. Of course we have no statement here, in the first place, as to what is expected to be proved by these absent witnesses. It might be we would be entirely willing to admit what it is expected they will testify to.

Apart from that, I do not think under the circumstances of this case this application should be granted by the Court. The questions of this case, as suggested by Mr. Lindsay, are really in the main questions of law.

Mr. McNAMARA: Do you want to base it merely upon the questions of law in the case?

Mr. WINTER: I want to base it upon the fact that the evidence shows that these publications were made in good faith and under circumstances that made them privileged. On the question of good faith the authorities are all one way. That is, the burden is upon the Government to show actual malice, if there is anything in the publications tending to show that they were conditionally privileged. But I introduced the evidence which I had readily at hand on the question

of the motives and purposes which influenced the defendants in these matters. Now, the Government certainly must have been anticipating that such evidence would be introduced, even if nothing had been said; but I stated distinctly that I was going to introduce evidence to show that these were privileged publications.

Mr. McNAMARA: If the counsel would act as he says the associate counsel thinks, that there is only a question of law involved, we would be only too glad to proceed with the matter, as we have those matters of law prepared to argue it. But there is a different case here. It is a case made up on evidence which by no possible means could be anticipated by the Government. When we met Mr. Winter here the first of last month, we had some discussion, it is true, as to why we should not pursue the proceeding before a commissioner and before your honor later, because, he said, he desired to raise a question of privilege. That is as far as he went. He will agree, I am sure, that he did not make the slightest statement as to what that claim which formed the basis on which his plea of privilege should rest, would be. Now, the delay in the meantime, of course, was not attributable to the Government any more than to Mr. Winter. On the other hand, the hearing here has practically developed into a full hearing of this matter. The case is certainly an important matter, not only in this jurisdiction, to the Government as well as to he defendants, but important to the Government in another jurisdiction, where a matter almost the same is pending. In justice to that, the case ought not to be dealt with summarily. We ought to hear the matter thoroughly here. That situation renders it necessary. From the evidence the defendants have offered, as I said, if we had our evidence here this morning, we could not conclude it possibly under two or three days.

The COURT: It does not take so long to try cases as counsel often think.

Mr. McNAMARA: At this time this is my judgment and the judgment of Mr. Miller. Therefore, I must ask that the case be adjourned until some day which the Court may indicate.

The COURT: In the first place, I do not think the Government is in a position to insist that it is surprised. I never heard of the case decided by our own Circuit Court of Appeals until my attention was called to it yesterday. This morning I looked it over. If counsel for the Government read that case, in view of what has happened here before, I do not see how they can claim they are surprised at the extent of the investigation here. The particular question there was

whether or not the Court sat, as I am sitting here, to receive evidence to the fact that the offense, if any, had been committed prior to the beginning of the running of the statute of limitations, that is, more than three years prior to the indictment.

Now, it is conceded here that the question, for example, as to the physical presence of the defendants at the place where the crime is said to have been committed, if that is essential to the commission of the crime, should be inquired into. On this sort of a proposition our Circuit Court of Appeals have held that it was the duty of the district judge to hear evidence, and after proof had been made of the fact that the alleged offense occurred more than three years prior to the returning of the indictment, the case was dismissed.

I have been thinking of this matter some since yesterday, and in my mind there is no escape from the proposition that these two things have been established, these two propositions I speak of having been established by the decision in 205 U. S. and by the decision of our own Circuit Court of Appeals in 160 Federal. There is no escape from the conclusion that the defendants have the right now to go into evidence upon the question as to any ingredient of the offense, intent, malice, or whatever it may be.

I have not any doubt at all that if a justice of the peace had brought before him here in Marion County a man charged with the murder of another man, that the defendant would have the right to show before that justice of the peace that whereas, he shot and killed a man, he shot and killed him in his own personal defense when the man was trying to burglarize his house. He admitted the fact that he killed him, but proved that he killed him in self defense and proved that he had no guilty intent. I do not have any doubt about that at all; and if the justice of the peace, as an examining magistrate, could conclude that the killing took place under the circumstances as I have alleged, it would be the duty of the examining magistrate to discharge the defendant. I do not think there can be any question about that proposition. Now, it surely cannot be said that when I am sitting here investigating such a question as this, that the defendants are not entitled to give in evidence circumstances or facts which will show, or tend to show, that any one of the ingredients of the offense did not exist.

Now, I will assume that the Government's counsel could anticipate as much as the Court did in regard to what would come up, particularly when it is their business to anticipate and prepare. It is not the business of the Court to anticipate. In running the matter over in my mind, I could see at once the scope that this investigation might take.

If, for example, these defendants had nothing personally to do with the publication of one or more of the articles, I should expect them to show that in this court. If their participation in the publication of the articles was conceded, I could perfectly plainly anticipate what the contention of the defendants would be—that it was published as ordinary matter of news without any malice whatever, in perfectly good faith. I would not want to say that I could anticipate more in this short time than the Government's counsel could anticipate with all this time to think about it. So I cannot hold that the Government can be surprised. This matter came up something like a month ago, two or three weeks ago. This time was fixed. It was well understood at that time that these defendants would offer evidence. As I say, I cannot imagine what the Government's counsel could have anticipated of the scope of this investigation. So I cannot conclude that there is any merit in the proposition that the Government is surprised.

Mr. MILLER: May I make a suggestion, your honor?

The COURT: Yes.

Mr. MILLER: I am not entirely familiar with all of the facts in this matter, but I understand it to be a fact that when the newspaper reporters went to the Republican headquarters—Mr. Lewis's testimony here, for example, was to the effect that he and others went to the Republican headquarters and asked about these reports, and there met Mr. Hitchcock and Mr. Nagel or Mr. Haywood or Mr. McClain—I understand the fact to be that when newspaper men did go to the headquarters, Mr. Hitchcock told them—if it would be limited to Mr. Hitchcock that they would see—that he told them expressly there was absolutely nothing in these reports; and the same is true in reference to going to the Democratic National Committee, that when Mr. Mack was there, he informed them that he had investigated these matters and there was nothing true, no truth in them. Now, surely we could not anticipate any such evidence as Mr. Lewis' statement, and without any limit as to the person. We feel that it is necessary, under the present circumstances, to have Mr. Hitchcock here and Mr. Mack here, and other people here. Now, the situation in many respects, as I now understand it, is along similar lines. I do not see how I, for example, or any one else could anticipate that a report, a public document, would be introduced in evidence in reference to the statements of Mr. Cromwell before the Senate committee, and it should be limited to one particular document and without going carefully through the entire matter, when as a matter of fact, there

are four volumes of several hundred pages; and to know just what took place and the effect of this investigation before the Senate committee, it would be necessary to go through those volumes, to go through that entire investigation to determine the real basis and to determine what inferences should be drawn from the examination of Mr. Cromwell, taking the entire examination and not some particular part of it, and matters of that character. We certainly feel that we would have a right to go into it fully and show exactly the situation.

There are many other matters where I am not prepared to say just exactly what the facts are, but my understanding is there are many other matters which would throw light upon these propositions that ought to be heard.

Mr. McNAMARA: If the Court please, I do not want to trespass unduly upon the time of the Court, but I would like to make this statement: When the statement is made that the defense of privilege ought to be raised, of course we would imagine there would be a contention that the privilege of the press is meant, but what facts would be adduced to support that privilege we would not know. I am not taking the position that the Government is surprised, that something entirely unforeseen is sprung upon them, but questions may arise in any case that make a continuance necessary.

Take the case of Greene and Gaynor in New York in 1900. When that case first came up before the judge he held they had the right to introduce more evidence. The Government then asked for time to do it. It was granted, and they spent two months in bringing up the entire record from Georgia to New York and all the witnesses in the case, practically trying the case there.

Now, if it was a situation where a burden would rest upon the defendants, where it would bear harshly upon them, there would be some reason why the Government should not have this time. There is no deprivation of liberty. There is no extra burden cast upon them by delay. The burden, if there is any, is upon the Government, but, just as your honor said yesterday, that reason alone would not be sufficient for continuing the case.

Undue stress yesterday was placed upon some of the Senate investigations of the canal matter. What was offered to the Court was an extract from two of the sessions. Those investigations ranged over some four or five years, and in order that the whole matter might be fairly presented to your honor, so that your honor might be able to see whatever you might think it was worth while seeing in these matters, we think it necessary to produce the rest of those hearings

and supplement that by such oral testimony as would explain the situation. We desire to introduce papers that would present a different view from papers my brother on the other side has introduced. As Mr. Miller has said, it has been testified here that the newspaper correspondents went to the political headquarters to get statements from the men in charge. We want to show that there was an absolute denial of this whole canal story given out at those places and a warning given to newspaper men that the thing was a fabrication and absolutely untrue. Further than that we desire to produce some members of the Isthmian Canal Commission to testify as to what they actually bought. They did not have anything to do with the stocks and bonds of these old companies. And we desire to show your honor the impossibility of any reasonably prudent man accepting the report printed in the *Chicago Daily News*. All these things go to the very foundation question as to whether there was any malice in the writing of these articles. If what they contain would not commend itself to any prudent man as being a reasonable or probably true story, or a matter of real public concern, the Government would have a right to show that here; and now that they have gone into that thing, we ought to have a right to do it. It is the Government that is pushing this matter, and we want to supply to the Court all the evidence necessary. We will undertake to get this evidence in the shortest possible time.

I do not know what arrangements the Court has for the rest of this month, as it is approaching vacation time, but any day at all that would be assigned which would be agreeable to the Court and the other side would be agreeable to the Government. We only want the necessary and reasonable time to produce this evidence which this case demands. I might say we will want Norman E. Mack, who lives in Buffalo, New York; we will need at least one Cabinet officer in Washington, who is at the present time away from his post on Government business. I will need the officers of the department—they are always there—I can bring them. There is another witness who has recently lost a member of his family, and the Court will appreciate the impracticability of our asking him to come here at the present time, at least for a couple of days. These are all witnesses that go especially to the question of the attitude of Mr. Cromwell before the Senate, which was spoken of as furnishing at least reasonable ground for the publication of the articles. Those investigations ranged, not over a day, as was said yesterday, but over four years. The testimony was continued over four or five years. It took the Senate of the United States that long to go over

the matter. I therefore very earnestly ask, on behalf of the Government, such a reasonable continuance as may commend itself to the Court.

The COURT: Well, now, in the first place, in regard to testimony that is proposed to be brought here about the statement made by the National Committee in Chicago. Of course we understand I am not bound by anything I say. I may change my mind. It occurs to me that that is irrelevant. As to the Cromwell incident—or, in other words, before I go to the Cromwell incident, even if Mr. Hitchcock and Mr. Mack both come here and state they had investigated the matters and told these men there is nothing in it; without stopping to state why, I will state now my practical impression is it would be quite irrelevant. Now, as to the Cromwell incident: of course I do not hesitate to say I can go through the Cromwell investigation in a much shorter time than the Senate of the United States. The fact that it took a committee in the Senate four years does not indicate to my mind that it would require very much time for a court to find out what portion of it was relevant and what was not. Now, I may be in error about the Cromwell case. If I am, I shall be pleased to be corrected—but generally speaking, the situation as—I hardly want to use the word "understand," because when I say I understand a thing, I mean I understand it. But the situation as I have gotten it was substantially this: The people who were concerned or concerning themselves in the proposed Isthmian Canal, as I recall it, were a majority of them in favor of the Nicaragua route. If I have got any of this wrong, I would be glad to be corrected. Rather suddenly—I do not wish to suggest that there was anything necessarily wrong in doing the thing quickly, or in one's changing his mind, or in other people changing their minds suddenly—but rather quickly or suddenly the people who had this thing in mind or who were charged with it, came out in favor of the Panama route. I want to be corrected if I do not get it right.

Mr. MILLER: I have not had time to go through the report of the Walker Commission, but I understand the facts to be that that commission showed very clearly that they were in favor of the Panama Canal route, and that the reason and the only reason for recommending the Nicaragua route was because they could not get a price. There was not an offer made to sell the Panama Canal route for such a price as they could pay. There was an appropriation made for the purpose of purchasing the Panama Canal, or a route across the Isthmus, of so much money—forty millions, I believe—I would not be sure I am right about the amount.

The COURT: What part of my statement are you correcting?

Mr. MILLER: I am trying to correct the statement that they were in favor of the Nicaragua route.

The COURT: Do you say that it is not true that large numbers of people who were charged with this matter were in favor of the Nicaragua route?

Mr. MILLER: I say the commission and the experts, the engineers.

The COURT: I haven't said a word about the experts. I mean those people—just as I put it—those people who were interested in the subject, both in Congress and out, and talked most about it, and were charged with the settlement of it, the majority of them, as I understand, were in favor of the Nicaragua route—that is my recollection—and that thereafter the change in favor of the Panama route was somewhat sudden. Do you challenge those statements? Those are the statements I made.

Mr. MILLER: I do, on the ground that here was a commission created for the purpose of making a thorough investigation of this matter, and they were discharging their duty and did make an investigation and a most thorough one and were in favor of the Panama route, and so stated. However, they stated the price was a hundred and one or a hundred and nine million dollars and they could not buy it, and as they believed it was their duty to report in favor of a route, they reported then in favor of the Nicaragua; and I challenge the statement of the Court that where a commission is appointed for that purpose, and they call good men to their assistance, men of experience, that their report should have as much weight as that of men on the outside.

The COURT: I have not the slightest objection to your making these remarks, but they are inappropriate; they do not meet my statement at all. I have not said a word about the commission. I repeat what I said: I understand that originally, when this matter came up originally, that the larger portion of those people in the United States who interested themselves in the subject, or who were by reason of their public position charged with an interest in the subject, in Congress or elsewhere, those who had charge of it, in a sense—it is my understanding that the major portion of those people favored the Nicaragua route.

Mr. LINDSAY: That is true. In fact, there was an act passed by Congress for the purpose of authorizing the Isthmian Canal Company to construct the Nicaragua Canal.

The COURT: I do not wish to have any inferences drawn from the suddenness or quickness with which the thing was done. But thereafter there was a change of sentiment on the part of the people of whom I have spoken in favor of the Panama route. I have not said a word about any commission. I have not said a word about who investigated this thing or what the facts are. I do not know anything about the facts, but I do understand that is substantially correct, that originally the larger part of the people who were charged or who charged themselves with an interest in this matter favored the Nicaragua Canal, and that thereafter there was a change, somewhat sudden, as I recall. I may be in error about that. That is as far as I made a statement, and I think it is correct. Now subsequently the purchase of the French properties took place, and questions came up as to that transaction; some people's suspicions were aroused. I am conceding that some people's suspicions are sometimes aroused too easily, but passing that question, some people's suspicions were aroused, and without going into detail—the fact is, I would be unable to go into detail—I understand that a committee of the Senate was appointed to investigate this transaction. I mean by this transaction, the transaction treated of in the alleged libelous articles. The defendants have proved, as I understand it—I have not read this document—as I understand it, the defendants have proved that one Cromwell, who is generally understood to have known more about this transaction, or as much about this transaction as any one, while upon the stand in regard to one feature of it—and I do not think it makes much difference what feature of it it was—availed himself of his privilege as an attorney to refuse to give to the committee certain information. Now, I am not criticising Mr. Cromwell for resorting to that, nor am I criticising the committee of the Senate for allowing the privilege. But the force and effect of that incident to my mind, as I understand it, and as relied upon by the defendant, is: Here was a matter of public concern; this forty million dollars was our money, part of it was mine, part of it was yours; the people of the United States, whether rightly or wrongly, had their suspicions aroused as to this forty million dollars. Mr. Cromwell knew all about it. He knew that was the purpose of the investigation, that is, that is the way I understand, and in that investigation he stood upon his privilege as an attorney and declined to answer a question which was conceived by the committee of the Senate to be relevant to that inquiry. Now, it occurs to me that that was calculated to arouse the suspicions of the layman; and the defendants, upon the question of good faith, put that before the Court.

Now, I have recited my understanding of this matter in order to suggest to Government's counsel: Suppose it is true, and I understand it is true, that thereafter, two or four years after, whenever it was, Mr. Cromwell made a statement absolutely denying the facts upon which these alleged libelous statements are based; what difference does that make? The circumstance that was relevant as bearing upon the good faith and the want of malice of these defendants stands just the same, and to my mind the significance of it is not taken away by proof, if there be such proof—I am going now on my general recollection of what took place—that at a subsequent time Cromwell made a categorical denial of the facts on which these libelous articles are based. It is the fact that he stood upon his privilege, a privilege, which, as I said yesterday, stands upon the grounds of public policy; he stood upon that privilege against a greater public policy, and that aroused suspicion, rightly or wrongly I am not now saying. So the question in my mind would be: Suppose now that you had here persons cognizant of that whole investigation and the facts in regard to it, the records, what part of it would tend to take away from the testimony of the defendants upon the question of their good faith, what part of it would take away the effect which the Court ought to allow them to the fact that when Mr. Cromwell was confronted with a question, he stood upon his privilege and refused to answer in a matter that the public wanted to know?

Mr. McNAMARA: That is just the question. Did he do that?

The COURT: Do you deny that he did?

Mr. McNAMARA: I deny that at any time he ever refused to state whether he got any of the forty million dollars. We ought to have no misunderstanding about that. The questions propounded to him, as you will see if you read that record, were the result of a personal encounter between Senator Morgan and Mr. Cromwell—improper as it may be, and undignified—but the result of constant attrition of these two men; and the questions which Mr. Morgan wished Mr. Cromwell to answer were as to his salary and compensation from his client, the canal company, up to the time of the purchase of the canal.

The COURT: It was stated here yesterday that the question he refused to answer was as to who the people were who subscribed this five million dollars.

Mr. WINTER: Yes, sir, that is correct. I do not want to have any misunderstanding.

Mr. McNAMARA: Now, that was the first thing. He declined to answer that on the ground that it was a matter of no concern to the public. Afterward he did tell that his salary was simply an annual retainer, that was thirty-five hundred dollars a year, I believe, from the Panama Railway Company. I believe from the canal company proper he received a retainer of ten thousand dollars a year. When asked whether any of the forty million dollars came into his hands, Mr. Cromwell said: "As to that, I conceive it to be a public question. It is the people's money, and I thank you for the question," turning to Senator Morgan. In another connection, when the question came up, he said he had not received a cent, nor had any of his people received a cent. Now, about this other matter. They produced a certificate of incorporation of the New Jersey concern, and asked him whether this thing had gone through. He said no, it was a project which failed; it was never completed, because the French people would not take it up. They then asked who were the real parties in interest, the subscribers, that is, to the certificate of incorporation, and he said they were clerks in his office and in some other offices.

Mr. WINTER: I have here the formal executive document No. 457, where the matter is grouped, the questions which were put to Mr. Cromwell and which he refused to answer, and in which is set out the power of attorney given by the French company, the syndicate agreement, the articles of association for the two companies which he incorporated in New Jersey, and the questions asked in reference to that matter and what he said to the committee. He just simply fell back on the proposition that it was a professional matter, and he would not answer any question and he did not answer anything.

Mr. McNAMARA: In that very hearing one of the senators asked if the agreement was signed, and he said no, it was not signed.

Mr. WINTER: Which agreement do you refer to?

Mr. McNAMARA: I mean the subscription agreement.

Mr. WINTER: Not at all. He said the whole scheme became abortive. When they asked him about the syndicate agreement, he said "that was a professional confidence and I refuse to answer." He said the whole scheme was an abortive project, but he did not tell the committee who signed the subscription agreement; he refused to give any information on it, because he said it was a professional confidence.

Mr. McNAMARA: Mr. Cromwell simply refused to say who were the men who were connected with this subscription agreement. He said that the original certificate of incorporation fell and never went

through and the subscription was simply ancillary to that; it fell with it. That was the principal, but this was simply an incident to it.

The COURT: The significance of the whole thing, as I understand it, is that when the people were trying, in the best way possible, I suppose, to find out the true inwardness of the canal business, the man who by common consent knew all about it, as to one feature of it—I will put it that way—as to one feature of it, stood upon his privilege as an attorney and declined to answer. Now, as I understand, the fact does not materially change the matter, that the matter about which he was asked was incidental or ancillary; that it was not the real question. The question is, so far as it has any pertinence to the inquiry here, what effect would the refusal of an attorney under those circumstances to answer any question have upon the lay mind? I will leave out of the question what effect it would have upon the lawyer—say, the lay mind. That to my mind is the significance of this portion of the investigation which has been introduced in evidence. Mr. Cromwell may have the right to decline to answer any matter which he knew, or became cognizant of, in his relation as attorney for any person. The relation of attorney to client requires such confidence, the preservation of it, but the natural inquiry is why, in a matter which concerns the public, which is of so much interest to the public, why should he stand upon a privilege, and it naturally would arouse an inquiry in the minds of those who were interested. All this without any intention on my part to intimate or suggest that there was anything in regard to the transaction itself, or Mr. Cromwell's connection with it, to be criticised in any way. I do not know anything about that at all. He is entitled to the presumption of innocence. Now, the question is this: that being the scope of this matter, so far as it is pertinent here, that being its effect, what difference does it make if the whole record should show subsequently that he told all about it? I may be in error about it, but I have thought Mr. Cromwell did not make any denial before the committee. He subsequently denied it in the newspapers. I have the impression that Mr. Cromwell did not categorically deny that this charge was true.

Mr. WINTER: In the Senate investigation?

Mr. MCNAMARA: In the Senate investigation and more than two years before this thing appeared in *The News*.

Mr. WINTER: He did, after having declined to answer any of the questions that were put to him by Senator Morgan; the same question being put to him by some other party, he said: "I am glad to be able

to answer the question," and denied that he had ever received any of the forty million dollars.

The COURT: That is important. Why take time to produce evidence. If that part of the inquiry is conceded, take it as conceded, the significance of the incident being his refusal. And if at the same time or during the inquiry or two years prior, under oath, he answered the exact question, why take time to bring the whole record here? This much by way of preface.

Mr. MCNAMARA: I do not understand, your honor, that it was two years later.

The COURT: Well, say two months later for our purpose.

Mr. MCNAMARA: That statement has been made a number of times by Mr. Winter, that it was two years after. My understanding is it was in connection with the same investigation and running over a certain period of time; that the investigation where he was examined was in 1906, as far as I have been able to look into these matters. It was not in regard to two years later that I made this statement, but along in connection with the same investigation.

Mr. WINTER: I understand the matter was before the committee time and again. Senator Morgan was conducting the investigation and examining Mr. Cromwell, and the record will show it. I do not profess to have it all in mind. It was all summed up in that executive document. I have two books. The records will show that on every question, I think, with scarcely an exception, he just fell back on the ground of his professional privilege and categorically refused to answer, and finally at a late stage of the investigation, probably after the matter had been reported to the Senate itself by Mr. Morgan, a question was asked him by some member of the committee in reference to the money, the forty million dollars that had been paid. He said: "I am glad to answer that," and then went on to say he had not gotten any of it at all.

Mr. MCNAMARA: And no American.

Mr. WINTER: Not to his knowledge.

Mr. MCNAMARA: We are both agreed, then, that two years prior to this publication in *The News* there was this denial in the Senate by Mr. Cromwell that he or any of the members of the firm or his people got one cent of the forty million dollars?

Mr. WINTER: He made a denial, I won't agree to the exact language. I understand all these documents are public documents

which do not have to be introduced in evidence at all and the gentlemen can at any time put before your honor the language that was used by Mr. Cromwell. But I am willing to say generally that Mr. Cromwell did, and the records of the proceedings of the Senate so show, deny that he or any member of his firm, or so far as he knew, any American—I don't know whether his language was quite so free, I haven't in mind any very accurate recollection of his denial. I do say he made the denial that any of the forty million dollars was received by himself or any member of his firm, and if the gentlemen say it went to the extent of any American citizen, I am willing to accept that. The exact form of his denial can be found very easily.

The COURT: Let me have the floor now. It is perfectly manifest now that that entire proceeding, extending over a number of years, cannot be relevant. The only relevancy which the part that is already before the Court has is that if Mr. Cromwell made the statements that the Government claims, that is a matter that can be easily ascertained and stipulated and put into the record without delay. Now, then, of course this proceeding is somewhat anomalous, but nevertheless I do not understand that people can start into a hearing and then get a continuance upon the ground that some evidence has been introduced which they want to inquire into and see whether, or how far they may want to rebut it. My understanding is a statement should be made of the witnesses and to what they will be expected to testify, because the opposing party may admit it, and go on. I do not see how I can arrest a hearing right in the middle and put it off simply because one side or the other wants more time. I will make another suggestion. Suppose I put this case off to a certain day on this statement; then the defendants at the close of whatever the Government sees fit to introduce, may rise to say they have been surprised, and they will want further time. If the Government wants time to produce witnesses to testify to certain facts, I think the Government either should put it in writing, or should state here where it can be taken down just what witnesses the Government wishes to produce and what the Government expects to prove by them, so that the defendants may, if they see fit, admit the evidence and go on with the trial. I will make another suggestion. Ordinarily this Court is not very busy, but just now the Court is quite busy. I have the rest of this week full up and I have most of next week full up, and I have all the time after a week from Monday full up until the summer vacation. So it is perfectly manifest that if this case goes over, it will go over until fall.

Mr. WINTER: That would be a very great hardship to the defendants. It has been said here that they are at liberty. I do not understand it so. They are on bond.

The COURT: They are in custody.

Mr. MCNAMARA: To each other.

Mr. WINTER: It is no light matter.

Mr. MCNAMARA: I appreciate that. Of course it is a legal custody, and I do not want to ask that they be kept in it longer than necessary. As to the suggestion of your honor as to the time to which it will have to be continued—

The COURT: First, I think you should make a statement of the witnesses you want a continuance because of and what they will testify to. Counsel on the other side may admit it, and we will go on.

Mr. MCNAMARA: I will follow that suggestion right now. The Government will desire this testimony: First. Testimony showing many other newspapers around the time of publication of these articles in *The Indianapolis News* taking an entirely different and absolutely contrary position with respect to this charge of a syndicate. In other words, these newspapers which we desire to offer in evidence will show that they took the position that there was no such thing as a syndicate or a conspiracy; that the money did not go into the pockets of Americans, but into the hands of the French people; that the money was delivered into France, and that the officers of the French court, the receivers of these two companies, received this money and paid it out to something like two hundred and twenty some thousand Frenchmen and got their receipts, and these receipts are on file in the offices of these companies in Paris. Now, we will show that these facts were published from the time these articles appeared in this paper. The newspapers which gave publicity to these statements I am now quoting were among the more reputable and more influential of the organs of the country. We will further show that the papers which have been introduced in evidence here were simply reprints of the articles appearing in the larger papers, the Chicago paper and the *New York World*. There is not a question of multiplying the number of papers, but simply showing these papers copied from the two papers. These things are material as going to show that there could not have been an interest on the part of *The News* in getting at the truth of the matter. One of the witnesses said: "I read sixty papers a day." We will show that a great many of these papers published the other side of the story.

The COURT: Mr. Howland? Mr. Howland is not a defendant.

Mr. MCNAMARA: I am speaking simply of Mr. Williams, if the Court please. I am sure that would be directly relevant, because, of course, he is a party to the case. Now, I will further show that on the morning of the 3rd of October there appeared in the *New York World* an article which was copied by the Associated Press and appeared in other papers, in which Mr. Cromwell came out with a positive denial again of all these charges of the American syndicate and the receipt by any American of a sum of money, and that denial was given to the *World* on the night before that paper published the beginning of these stories. Now, that was received three days before the publication of the first of these articles in *The Indianapolis News*, and that circumstance of Mr. Cromwell again making a denial, once making it in Congress and now out of Congress, right the very night before they began publishing these things, came under the notice of these defendants and again removed any probable cause to make comment on the matter in the columns of their paper. You see the article that appeared in the *World* was the first of a series of articles published in that paper, and dovetailed onto the article was an emphatic and full denial by Mr. Cromwell of every one of these charges. He denied the existence of the syndicate, of the receipt of any money by these parties or the knowledge by these parties of anything of the kind. Now, we will show that this came under the eyes of the defendants; that it was in the public press. That was one of these public matters which they said they, as newspaper men, claimed the right to make comments upon, and that testimony will tend to show that there could not have been any good faith on their part in copying these stories from the press, because the very press from which they got these articles carried the denial with it. Will that be admitted?

Mr. WINTER: One of the statements was that there would be a large number of papers that took a contrary view; that fact will be admitted, that there were some papers that published these articles and commented upon them and took the other side of the controversy.

Mr. MCNAMARA: It was said that there was no such thing as a conspiracy and it was denied that Charles P. Taft and Douglas Robinson were in the conspiracy. In the language of one paper, it was said it was a grotesque outrage to charge these men with it.

Mr. WINTER: Well, they made their denials and took the other side of it. I have not the papers. I will admit that. There were

parties taking other sides of the controversy, of course. What is the exact statement that you want us to admit?

Mr. McNAMARA: The very statement which the stenographer has.

Mr. WINTER: There is a part of it that I certainly will not admit, and that is that these papers that were taking the other side were the most reputable and had a better standing than the others. I will not admit anything of the kind. I think that would be an indictment that you ought not to ask me to admit. I do not think it is competent evidence in the case, as to the comparative standing and character of these papers.

Mr. MILLER: I think it is. They asked a question as to the character and standing of the papers.

Mr. WINTER: I asked a question as to the standing of the *Chicago News,* its standing and character as to being a conservative paper, and also as to the *Courier-Journal* and the *New Orleans Daily States.*

Mr. McNAMARA: All the papers you referred to.

Mr. WINTER: But I do not think that opens the door for the Court to go in here and try the question as to which papers of the country are of better or worse standing. I am perfectly willing to admit that these articles were a matter of general newspaper discussion throughout the whole country beginning, say, with the first publication, or as early as the first publication in *The Indianapolis News* and the *Chicago News.*

The COURT: What is the next point?

Mr. McNAMARA: The second proposition is this: I want to produce the full report of the Isthmian Canal Commission, showing the fact that they purchased only the physical properties, that is to say, the strip of territory and the machinery.

The COURT: Now you are going into the question of the truth of the articles.

Mr. McNAMARA: I am not going to the truth, because I think the burden is on the other side. I am going to show the public knowledge of the actual transaction of the purchase of the Panama Canal. If it were shown that it was common public knowledge that there could not have been an American syndicate, then these men could have had no connection whatever with such a syndicate, and could not possibly be charged with such a thing.

Mr. WINTER: State facts. You cannot ask me to admit arguments.

The COURT: Just state facts and what you expect to prove by them.

Mr. MCNAMARA: I want to produce the report of the Isthmian Canal Commission. It will show that it was the common public knowledge of the country that there was no syndicate. It was distributed in the libraries of the Senate and House and all the public libraries of the country.

Mr. WINTER: That is an argument. State the fact. I have not got at the precise fact; what is it?

Mr. MCNAMARA: I want to produce the report of the Isthmian Canal Commission, consisting of about, I think, 150 pages.

Mr. WINTER: To prove what fact?

Mr. MCNAMARA: I want to introduce it in evidence; if the Court desire me I will say exactly what that will show. This report shows what the American Government bought, and from whom, and for what. It shows the property they bought, the vendors of that property and the price this Government paid.

Mr. WINTER: What is the ultimate fact as to what the Government bought, and from whom it was bought, and what it paid, that you want to show?

Mr. MCNAMARA: If I produce that in evidence the ultimate fact is that the Government did not buy any stock, that it did not buy any of the securities which the syndicate was supposed to have cornered. I want to show that it is a public document, distributed in the libraries and a part of the general knowledge of the case, which these gentlemen must have been cognizant of.

Mr. WINTER: If the Court please, upon that point I want to state right here that on the 28th of July, 1902, Congress passed a law which specifically directed and authorized the President to purchase the physical property of the French Panama Canal Company and its documents, records, archives and papers, and all of the shares of the Panama Railroad Company owned by the French Panama Canal Company, and that was all which any person, authorized on the part of the United States Government, was authorized to purchase, and it was all that was ever purchased by the authorities of the United States Government, and that property was purchased from the officers or the liquidator, who was in charge of the affairs of the French

Panama Canal Company, either the old or the new company, whichever one it was.

Mr. McNAMARA: That of course was the law. That begs the question, if you admit we did act under that Act.

Mr. WINTER: Certainly, I do admit it.

Mr. McNAMARA: And we bought it from the French owners.

Mr. WINTER: It is set out in your indictment; it is a matter of public record that the United States Government bought from the French Panama Canal Company the physical property and the papers and documents and archives and records and the shares of stock in the Panama Railroad.

Mr. McNAMARA: I can make this suggestion, if the Court please: In the indictment in the inducement we state provisionally some of the extracts from this report. If that be not rebutted or admitted to be contradicted here, I will abandon the two propositions. You have no objections to the statements in the inducement of the indictment, have you?

Mr. WINTER: The indictment is *prima facie* evidence. We have not introduced any evidence to contradict what is covered by your suggestion.

Mr. McNAMARA: We abandon those two propositions then. I want to introduce the records of the department of the treasury at Washington showing the receipt of the forty million dollars by the officers of the French company, the representatives of the French people; also the receipts of the J. P. Morgan Company, first, from the United States for the forty million dollars which was paid that company, and then the receipts which the J. P. Morgan Company got from the French owners when they paid the money into their hands.

Mr. WINTER: The inducement to the indictment avers that the American Government paid to the firm of J. P. Morgan and Company, as the financial agents employed to make the payment of the forty million dollars. I admit the statement of the gentleman is covered by the statements in the indictment. That is *prima facie* evidence of it.

The COURT: All right. What is the next?

Mr. McNAMARA: I understand that is admitted as stated.

Mr. WINTER: It is admitted as stated in your indictment. Your statement is no broader than that, is it?

Mr. McNAMARA: I will have to ask for a ruling, if the Court please. I want to produce these people from Mr. Morgan's office to show they paid the money into the hands of the French people, and not into the hands of any American.

Mr. WINTER: Do you claim your statement is any broader? It is a little more in detail.

Mr. MILLER: Any objection to your admitting his statement? What is the objection to admitting it if it is true?

Mr. WINTER: I will admit this: that the American Government paid the forty million dollars. I am admitting just what I recall is the fact, of which the Court takes notice, because it is a matter of public record. I will admit that the American Government paid forty million dollars to J. P. Morgan and Company to be paid by them to the new French Panama Canal Company, and that the receipt of J. P. Morgan and Company is on file in the office of the treasurer. I do not know that that is material. I admit that J. P. Morgan did in fact pay that forty million dollars to the New French Panama Canal Company for the property that was purchased by the Government.

The COURT: Is that satisfactory?

Mr. McNAMARA: And that the money was distributed to the stockholders of the company?

Mr. WINTER: It is averred in the indictment that this money was divided between the two companies, the new and old one.

The COURT: You have not introduced any evidence on that.

Mr. WINTER: It is stated in the indictment how much the old and new companies got.

The COURT: This is rebuttal on the part of the Government, if anything; only that would be relevant which is rebuttal. I think, if he will admit it is true as stated in the indictment, we will pass to the next point.

Mr. McNAMARA: As to the third point, I want to introduce in evidence the fact that simultaneous with the appearance in the *Chicago Journal* and *News* of these articles of October 6, there was issued from the Republican headquarters a general information on this Panama matter, denying the articles appearing in the *Chicago News* and informing all those who wished to be informed that there was nothing in the stories. I want to introduce evidence to show from the Democratic headquarters Norman E. Mack, the chairman

of the Democratic Committee, much to his credit, in the liberal way in which he conducted that campaign, stated that he had examined the testimony of this Panama matter, this so-called report, and found that it was absolutely untrue and could not be verified. He therefore would not accept it, and that information was procurable at the Democratic headquarters. If the Court please, that only goes to show this: Mr. Lewis, the correspondent of *The Indianapolis News* at Chicago, got this first article and sent it on to the paper. I want to show by this evidence that that knowledge was in the possession of the owner of *The News*. If it is admitted I will abandon that offer of testimony.

Mr. WINTER: On that point I do not think I ought to be called upon to make admissions as to utterly immaterial and irrelevant testimony. I will admit there was a statement made by Mr. Mack, published in the public press, and it was reproduced and reprinted in *The Indianapolis News*. I do not want to put that in as an admission. I will prove that fact if this other goes in. It is not nearly as broad as the gentleman has stated it. He said they were investigating it. As to any statement by Chairman Hitchcock, I do not know anything about that. I have never seen or heard of anything of that kind. It is utterly immaterial, anyway.

The COURT: It is Mr. Mack now; Mr. Hitchcock is not up.

Mr. MCNAMARA: I am relying upon a more complete statement he made. It was made to some correspondent.

Mr. WINTER: That would not throw any light upon this case. Anything made to the public by either of these gentlemen is competent. Mr. Mack did make a statement to the public, and that statement was reproduced in *The News*. So far as Mr. Hitchcock is concerned, I am not called on to admit any statement Mr. Hitchcock may have made to some correspondent on this situation. As to Mr. Mack, he did make a statement, which was made public, and I can show that we published it in *The News* during the course of these articles.

Mr. MCNAMARA: Now, the first point we have not passed upon; the second is admitted, and this, the third, I don't know what the position of counsel is on that. I want to produce fully the statement of Mr. Mack, in which he went into this thing completely and said there was nothing in it.

Mr. WINTER: Do I understand that was a statement made in the public press?

Mr. McNAMARA: Yes, sir.

Mr. WINTER: At what stage of this matter?

Mr. McNAMARA: I think October 2 and 3.

Mr. WINTER: All I know is he made one statement, which I will show was reproduced in *The News,* but I never heard of another one, and if there was another made by Mr. Mack, I think it certainly could not have been made publicly.

Mr. McNAMARA: That is exactly what the Government claims. The first of these articles began on October 3, and I want to say that that began just at the time that Mr. Mack made this statement. The truth of the whole thing is that these articles were offered for sale in New York City, first to the Republican Committee, and then to the Democratic Committee. I want to show these facts and to show further that they were taken to Mr. Cromwell and an attempt made to levy blackmail. In some manner the article first came out in the *New York World,* and with it came the denial of Mr. Cromwell and the statement of this fact, that the purveyors of this story had been to him demanding twenty-five thousand dollars for suppressing its publicity; that he threw the people out of the office and brought the facts to the attention of the district attorney. This matter was published in the *New York World* on the morning of the 3d. As I said, it had been brought to the attention of the Republican and Democratic Committees and rejected by them. We further offer to show that the chairman of the Democratic National Committee came out with the statement that these things were not true; that the story was brought to him, that he found it could not be verified and that he refused to publish it, or push it, unless it could be verified; that he had referred it to a committee consisting of Qunicy, of Boston, Culberson, of Texas, and McGuire, of New York, but these men found it could not be substantiated. I want to show that it came out in the public press and in the public journals at the time *The Indianapolis News* published these articles; that the *New York Herald* and the *New York Times,* which took an interest in these matters, came under the observation of these defendants, and that they were charged with notice that these stories were absolutely false, and in the face of that, proceeded to publish them.

Mr. WINTER: Are you claiming that anything that appeared in the *New York World* prior to the first publication in *The Indianapolis News* was brought to the knowledge of anybody connected with *The Indianapolis News?*

Mr. McNAMARA: I say yes.

Mr. WINTER: You say you can prove it?

Mr. McNAMARA: I want to finish this. I want to show the foundation of the articles which appeared in *The Indianapolis News,* and I want to show that they started from this little beginning in New York City in the *World.* Our testimony which we wish to offer is, as I have said, about the beginning of these stories. We want to show that four years ago stories of this kind were gotten out that were exploded; that the matters then remained dormant, and that they were revived only at the time of this last election; that they were first revived by a number of men in New York, known as the blue pencil gang, as they are called in the language of their circles, who are in the business of blackmail; that these men took these stories for the purpose of sale, first, to Mr. Cromwell, asking twenty-five thousand dollars for them, and that he then went to the district attorney's office and complained of it. Mr. Bacon and a man named Engelman, it is claimed, got the story together for the purpose of trying to sell it to the Democratic campaign committee. I want to say that an account of all these things was in the public papers and was known to these defendants when they published this matter in their columns. I want to go that far to show that there was no good faith on their part. If that is admitted, it disposes of that proof.

Mr. WINTER: It is easy enough for the gentleman to make broad statements.

The COURT: Is there anything further?

Mr. McNAMARA: If those things should be admitted, I won't ask to have any other evidence offered. I might want to prove by some members of *The Indianapolis News* who the owners of it were. If this is admitted, I will then rest. If it is not admitted, I want to state a few things more that I wish to prove.

Mr. WINTER: I certainly ought not to be called upon by the Court to admit any such argument as has been stated by the gentleman. He has stated that there was a publication made in the *New York World* of the 3d of October. I will admit that fact and furnish them a copy of the newspaper that contained that publication. He has undertaken to state that we knew about it. I do not understand him to state here that he has any evidence to show that any man connected with *The Indianapolis News* ever saw that article in the *World.* The fact is, as I understand it, that after this matter came

up I called upon *The News* to find all the papers relating to it. They sent to New York to the *World* for papers, and among those that were sent was the paper of October 3, containing this article, and my information is that there was not a man connected with *The Indianapolis News* that saw that article in the *New York World* until it was produced on my request after this arrest was made; but I will admit that on the 3d of October an article was published in the *New York World*, and I will furnish the Court a copy of the article, and then I will ask to put upon the witness stand the people connected with *The News* to testify that they never saw that article, and that it was never reproduced or commented upon in *The News*, *The News* starting the publication of these articles with the article from the *Chicago News* on October 6. This article did not contain any such reference to Mr. Mack as the gentleman has stated, however.

Mr. McNAMARA: I am not saying that article was the one that contained the reference to Mr. Mack.

Mr. WINTER: That is the only one in the *New York World* that we have ever had down to this day that is dated October 3.

Mr. McNAMARA: That is the account of the application of Mr. Cromwell to District Attorney Jerome for the arrest of these men who were trying to blackmail him.

Mr. WINTER: This article is in the *New York World* of October 3, 1908.

Mr. McNAMARA: There are five editions of the *New York World* every day.

Mr. WINTER: The gentleman will certainly not say that he will prove that *The Indianapolis News* had copies of every edition of the *New York World* on October 3. We have only had possession of this article since these gentlemen were arrested.

Mr. McNAMARA: May I ask, Mr. Winter, if after what you have said, you admit my statement?

Mr. WINTER: No, sir, I do not admit it, and I do not think I should be called upon to admit it. The gentleman has not stated that he offers to prove that knowledge of the publication in the *World* containing a statement in regard to Mr. Mack, was brought to the attention of *The Indianapolis News*.

Mr. McNAMARA: I have offered to show that it was.

Mr. WINTER: Do you state now on your oath as an attorney that you expect to show that either Delavan Smith or Charles R. Williams had knowledge prior to the publication of the first article in

The Indianapolis News of the publication of a statement by Norman E. Mack denying the truth of the story?

Mr. McNAMARA: I hope to prove it.

Mr. WINTER: Do you expect to prove it?

Mr. McNAMARA: I hope and expect to prove it.

Mr. WINTER: It is qualified by a hope. I am not called upon to make admissions upon a statement of that kind.

Mr. McNAMARA: If there is any doubt about it I will simply be a little more accurate in my use of language. I expect to prove it, certainly, and I add, too, that I hope to prove it. I want to show both my intention and my desire.

Mr. WINTER: Will you go so far as to state by what witnesses you expect to prove it? Here is the whole force of *The Indianapolis News*. We will produce every man connected with the paper. Have you some gentleman that will come and testify that he sent to Mr. Smith or Mr. Williams a copy of that article in the *New York World*, or that some gentleman told them about it? Do you expect to introduce evidence of that kind?

Mr. McNAMARA: I cannot answer every question it is the will of the gentleman to put to me. I say that is my third offer to prove; whether I succeed or not I cannot tell. If it is admitted, we simply abandon it. If not, I want the Court's ruling upon it.

Mr. WINTER: I would like to say another word on this proposition. If there is one proposition settled by the decisions of the Supreme Court with which we are all familiar, it is that the burden of proof to show actual malice is upon the Government or the plaintiff. Now, that issue of the *World* was right here at the very forefront of this investigation, and now after this case has been set for hearing a month, the gentlemen come here and ask to have the case continued, because there is in a newspaper published broadcast in this country upon the 3d day of October, a statement by Norman E. Mack. What excuse, what pretense of an excuse, is there for the Government not having been prepared with that paper, and all the evidence they expected to bring to prove what they desired to prove? It is just trifling with the liberty of the citizens of the United States. These defendants are under arrest and have been under arrest over a month at the instance of the Government. The Government is charged by law with notice of the fact that the burden is upon it to prove that these people acted with knowledge of the falsity of these articles, and with malice; and with all the burden of showing the circumstances

of this publication. They come here and say that on the 3d of October there was published a newspaper containing denials of all this matter, and these defendants knew of it. It is a part of their case in chief, if it is possible for anything to be a part of their case in chief. They were notified when this hearing was set down that we expected to introduce evidence to show that these articles were conditionally privileged, that it was a matter of public interest and public concern; they had a right to publish articles about it in the newspapers and comment upon it, and therefore there was no libel unless actual malice was shown, the burden of showing which would be upon the Government.

Mr. McNAMARA: You never said a word about that to us.

Mr. WINTER: You do not deny I told you we expected to introduce evidence that these communications were privileged?

Mr. McNAMARA: Something has been said about depriving citizens of their liberty. Now, the fact is that every proceeding that we have taken in this case has been at the instance and request of these defendants. We came here at their instance—not to Chicago—that was not arranged by Mr. Winter, but by the other counsel of these gentlemen, Mr. Harlan, of Chicago. We came here at the very day—May 1, when these proceedings were begun—that they desired, the day that they selected. As to the delay, they wished to have the case put over until fall. I simply want to say that there was no intention on the part of the Government to delay or unduly prolong these matters. The Attorney-General personally undertook to oblige the defendants in this case by selecting the jurisdiction in which to proceed, and the time when we would proceed. I do not think they can impute to us the month of delay. That was due to the engagements of the Court, to Mr. Winter's engagements and to my engagements. We are asking simply for such time as we need to produce further testimony, or if the offers of testimony be admitted, then I withdraw the request for time. Now, the fact that the Court had other engagements is nobody's fault. It is just something that is unfortunate, and while we deprecate that, yet it is the Government's interests only which are being delayed. While the defendants are under some form of arrest, of course, it is not anything that deprives them of liberty or of the ability to carry on their business. So the Government asks this extension of time.

Mr. WINTER: If the Court please, the gentleman has made the statement that the delay has been at the instance of the defendants. The facts are that when the indictments were returned in February

Mr. Smith and Mr. Williams were both in Indianapolis and I went and saw the district attorney and the United States marshal, expecting that the Government, having had the indictments returned against these men, would proceed promptly. I told the district attorney and the United States marshal that both these defendants were in Indianapolis, and, although Delavan Smith did not live here, he would remain here and be ready to be arrested at any time that might suit the convenience of the Government. I asked them to telephone me when the warrant came, and we stayed here, if the Court please, for nearly four months—Mr. Smith at great personal inconvenience remaining here at Indianapolis—and not a move was made by the Government on these indictments that had been returned in February. Then Mr. Smith became restive and uneasy at being detained in Indianapolis and took steps to find out when the Government was going to proceed with his arrest. The gentlemen have stated that I suggested delay, when the fact is that I said to the district attorney, and I think to Mr. McNamara, that we were then ready to hear this case.

Mr. McNAMARA: I cannot admit that.

Mr. WINTER: I came before your honor on the 1st day of May with my papers and my brief and everything else, and insisted that the case should be heard, and your honor stated that you could not hear it at that time. It was on Saturday. And there was no suggestion on my part that this case should go over until next fall.

The COURT: Your emphatic insistence was after I stated I could not hear it.

Mr. WINTER: I was ready then and I have been ready at all times to go on with the hearing, and have never, at any time, suggested delay.

The COURT: You see, one trouble about this is that if I grant an extension, then we should all be up in the air, if I may be allowed to use that expression, when the next sitting came on, and counsel for the defendants would then insist that he have an opportunity, to get evidence to meet that which he is surprised in. Now, I understand the general rule to be that where a continuance is asked for on the ground of the absence of witnesses whose testimony is material, the ordinary rule in civil cases is well understood. We have a statute in Indiana that will apply here as far as the Court sees fit to apply it: that the prosecuting attorney may make a statement. He makes the statement under his oath of office, therefore he does not have to put it in writing, as to the names of the witnesses whom he desires to

introduce and the evidence which he expects them to testify to. Thereupon, upon certain admissions being made by the defendant, the hearing proceeds as if the evidence were introduced. I desired counsel to comply with that rule in the hope that a continuance might be obviated by an admission of such facts as could be admitted. So far as oral testimony is concerned, as to anything that took place here in Indianapolis, witnesses could be procured at once. Now, counsel for defendants is not willing to admit statements made by Government's counsel. If this were an ordinary suit, whether on a criminal or civil docket of this court, set down in the ordinary course, announcements made in the beginning, and the respective parties ready for trial, my understanding is that I could not entertain such a continuance. But this is a somewhat anomalous proceeding, and in addition to that it is more anomalous by agreement. Counsel for both sides have made an agreement about how and when to try this matter. It is before the Court. There is no jury. So that the ordinary rules in regard to continuance ought not to apply. I suppose, of course, the statements have not been made in such a definite way. I do not criticise the way they are made. Perhaps it is not possible to make them offhand in such a way. Some of them, I think, can be admitted and others singled out for evidence. A good deal of the testimony spoken about, in my judgment, is—I won't say totally irrelevant, but it is irrelevant and a good deal of it, I think, is relevant, possibly quite material. On the question of malice counsel for the defendants has stated the rule repeatedly, and no admission has been made on the part of Government's counsel, or contradiction, of the statements.

Mr. MILLER: We deny that to be the rule. We have not got to that argument; we have the authorities.

The COURT: All I said was you did not deny it. It is a very interesting question. The principal contention here goes to that question. If I had supposed that upon the introduction of the defendants' testimony the Government would ask for additional time, I would have said two days with about two weeks' adjournment. As it is, it comes at a very inconvenient time for me. After having threshed this out, don't you think we can get through in less than two or three days?

Mr. MCNAMARA: Not more than two or three days. I will undertake to make it that.

The COURT: I will help you.

APPLICATION FOR A SECOND CONTINUANCE.

September 29, 1909, Mr. Miller (district attorney) presented an application for a second continuance of the case until after November 20, 1909, the date alleged to have been set for the trial in New York of one of the *New York World* cases (see p. 15, *ante*), which was overruled. In overruling this motion the Court said:

Well, now, as far as the decision of the Court in the case in New York is concerned, I guess it might have a good deal to do with the desires of the Government in reference to the proceedings in this case. For instance, if that should result one way, it might have the effect of having the Government abandon the suit here, the proceeding here; if it should result in another way it might have just the opposite effect. Of course, I can speculate about that. Then so far as any questions that come up for decision in that case and are decided are concerned, the decision of the Court might be persuasive upon the same questions that arise here. So it is easy to see how the Government might desire to try one case ahead of the other, upon either one of these two theories, and if the Government had not begun this case it would be at liberty to select the way in which it should begin and decide which case it would begin first. Of course the result of that suit there could not possibly have any bearing upon the Court's action in the case here, except upon the second view of it. There might be questions arising in that case and decided in that case, the decision of which would be persuasive here. Now, I am not much impressed with the suggestion that it cannot do anybody any harm. I think I may say I uniformly refuse to make any ruling in any case on the theory that it would not hurt anybody. The fact that it won't hurt another party is no reason why a man should have a ruling in his favor. Now if this were an ordinary case where the Government was proceding in a civil suit, of course it might have its option and push one case and delay the other; but these men are under bond; they are under custody just the same as if they were in jail; and if they were under their own personal recognizance, I do not think that would make any difference, but as a matter of fact they are not under their own personal recognizance. Now the only ground that the Government could ask this, and the only ground that the court could take hold of and act on it, is the suggestion that Mr. McNamara makes—the only ground that really is a semblance of a ground is the suggestion that he will be otherwise occupied in preparing to try the case in New York; but this is completely answered by what I assume to be the fact that this matter was set long before

the case in New York was set—even if the case in New York is set—and if Mr. McNamara cannot be in two places at once—and I think we can take that as a fact—and if he cannot be ready to try the case in New York on the 20th and be here in the case on the 11th, he should have seen to it that the case in New York was not set on the 20th. That is the way it appears to me. Whatever questions there are in that case which are similar to the questions in this case, the decision of the Court, as I have said, can only be persuasive. It does not settle anything as far as this case is concerned. Now the question is, here are men indicted in the District of Columbia, the indictment returned sometime and proceedings were begun here. The Government waits until it is ready to proceed and begins proceedings. These men are arrested and brought into court on a criminal charge. At that time nobody was ready and it went over to a later day. Then after the defendants introduced their testimony Government's counsel claimed they were surprised. At any rate they wanted time to meet certain matters they claimed they did not know the defendants were going to bring up and the time was fixed almost four months later. Now the Court is asked upon this state of facts to indefinitely postpone it, not to any particular time, just put it off and leave the defendants up in the air until the Government sees fit to pull the string and let them down.

Mr. MILLER: I might make a suggestion to that point. I probably ought to have said any time after the first of November.

The COURT: The November term of this Court begins with the second day of November and the circuit business will in all probability absorb most of the time of this Court until Christmas. The Government was at liberty after it procured an indictment in Washington to have its warrants issue at once and present its case. The Government did not see fit to do it right away. I do not criticise them for that. But after considerable time had elapsed then the proceedings began by issue of a warrant and putting these gentlemen under arrest and bringing them into custody of the Court. They were brought into Court and the day was fixed and the hearing begun. The defendants introduced their testimony, and after they had fully disclosed their defense the Government asked for time and was given four months' time. My personal feeling about it is that they either ought to have their hearing or to dismiss. I do not believe I will grant this motion or request, or whatever it is. You can tell the Attorney-General I won't do it.

SECOND HEARING.

October 11, 1909, the case came on for hearing, pursuant to the order for its continuance, and the following evidence was introduced, argument heard, and rulings made:

Irving C. Sauter, on direct examination, testified that he was a special agent of the Department of Justice during the months of January, 1909, and at that time visited the office of *The Indianapolis News* in Washington in the Wyatt building. *The Indianapolis News* is and was at that time on sale in the District of Columbia at the Willard Hotel news stand, at the Riggs House and at a news cart in front of the *Star* building. Witness got a paper also in the office of *The Indianapolis News* several days old, for which he paid five cents to somebody in the office there that he did not know.

MR. CROMWELL'S TESTIMONY INTRODUCED BY THE GOVERNMENT.

The testimony of Mr. William Nelson Cromwell before the Senate committee in 1904 and 1906 (two years before the publication of these articles) was introduced in evidence and portions were read. (See Appendix.) That was followed by the reading of the conclusions announced by the Walker Commission that in view of the demand for $109,141,500 for the Panama Canal, "and other facts detailed, this commission is of the opinion that 'the most practicable and feasible route' for an isthmian canal to be 'under the control, management and ownership of the United States,' is that known as the Nicaragua route." (Report in full afterward read in evidence by Mr. McNamara, p. 121, *et seq. post.*)

The article in *The Indianapolis News* of October 26, 1908, entitled "The Canal Deal," and the one of December 10, 1908, entitled "Who Got the Money?" were offered in evidence to rebut the contention that there was no malice and to show a continuous pursuit of the parties. The defense refused to make any admissions that the original papers containing the articles referred to in the indictment were actually present in the District of Columbia. (See Appendix.)

Mr. McNAMARA: On page 1083 of the original report of the Senate investigating committee, Mr. Cromwell is asked by the committee as to what his relations were to the Republic of Colombia. The date of this testimony was February 26, 1906. Now I will read: (For portion read see Appendix, pp. 343 to 348.)

Mr. McNAMARA: All these questions, may the Court please, were put and answered in February, 1906. I now wish to offer in evidence the Government publication in 1901, with the appendix in 1902, of the report of the Isthmian Canal Commission, and I will

refer briefly to a few places I have marked under the plan suggested as to the introduction of the testimony of Mr. Cromwell before the Senate. I presume the entire report is in for any purpose either side may desire.

Mr. WINTER: Is that the first report?

Mr. MCNAMARA: It is the first and second, the report made November 16, 1901. It is the Government publication in the bound form, got out by the Government printing office, including the report to the Senate of the 57th Congress, first session, Document No. 54. This report is quite voluminous and contains practically everything that is available with respect to the history of the Panama canal, the properties there, the history of the organization of the old company, its failure, the new company and the proceedings leading up to the passage of the statute in 1902 authorizing the purchase for $40,000,000. I invite the attention of the Court to page 101, wherein the commission makes an appraisement of the properties they found on the Isthmus, putting the figures at $27,474,033, that is to say, this appraisement relates to the excavations and the diversions, the Chagres diversion, the Gatun diversion and the railroad diversion. Then on page 103 they make the total valuation of the canal in the language following:

"Summing up the foregoing items, the total value of the property is found to be:

Excavation already done	$27,474,033
Panama railroad stock at par	6,850,000
Maps, drawings and records	2,000,000
Total	$36,324,033

to which add 10 per cent. to cover omissions, making the total valuation of the Panama canal $40,000,000."

That is the way that figure was reached. This is the report which was filed November, 1901. On page 209 of the report the commission has been detailing the negotiations it has had with the Panama Canal Company looking forward to a purchase. This commission was authorized under the act to report in favor of such a route as would be feasible and which could be purchased and brought under the control of the United States. Therefore the commission says that they had these dealings with President Hutin, who was then president of the New Canal Company, and that he had given them this figure as the price which he wished for the canal. The figure is itemized on page 209 and the total is 565,500,000 francs, or $109,141,500. The commission adds:

"The total valuation is largely in excess of that fixed by the commission, the greatest variance being in the amounts for the excavation and work already done that can be utilized in the completion of the canal."

On page 225 of the report will be found the correspondence between Chairman Walker, of the commission, and President Hutin, of the New Company, their correspondence being simply in reference to Hutin's fixing a definite price and as to whether or not the concessions that the New Company enjoyed from the Republic of Colombia could be sold to a foreign government. On page 235 we call attention to a letter of Admiral Walker, the chairman of the commission, to President Hutin, in which Walker has been complaining that he does not receive from the president of the New Company the definite price which he had asked him to fix. On page 257 there commence the conclusions of this Isthmian Canal Commission. We offer this in evidence as showing that at no time did this canal commission prefer the Nicaragua route; that at all times they preferred the Panama route and testified to its advantages.

(The said part of the report of the Isthmian Canal Commission, so offered, was admitted and read in evidence, and is as follows:)

"CONCLUSIONS.

"The investigations of this commission have shown that the selection of 'the most feasible and practicable route' for an isthmian canal must be made between the Nicaragua and Panama locations. Furthermore, the complete problem involves both the sea-level plan of canal and that with locks. The Panama route alone is feasible for a sea-level canal, although both are entirely practicable and feasible for a canal with locks. The time required to complete a sea-level canal on the Panama route, probably more than twice that needed to build a canal with locks, excludes it from favorable consideration aside from other serious features of its construction. It is the conclusion of this commission, therefore, that a plan of canal with locks should be adopted.

"A comparison of the principal physical features, both natural and artificial, of the two routes, reveals some points of similarity. Both routes cross the continental divide less than ten miles from the Pacific ocean, the Panama summit being about double the height of that in Nicaragua. For more than half its length the location of each route on the Atlantic side is governed by the course of a river, the flow from whose drainage basin is the only source of water supply for the pro-

posed canal; and the summit levels, differing but about twenty feet in elevation, Panama being the lower, are formed by lakes, natural in the one case and artificial in the other, requiring costly dams and wasteways for their regulation and for the impounding of surplus waters to reduce the effect of floods and to meet operating demands during low-water seasons.

"The investigations made in connection with the regulation of Lake Nicaragua have demonstrated that that lake affords an inexhaustible water supply for the canal by that route. The initial proposition, on the other hand, for the Panama route is to form Lake Bohio so as to yield a water supply for a traffic of 10,000,000 tons, which can be supplemented when needed by an amount sufficient for more than four times that traffic, by means of the Alhajuela reservoir. For all practical purposes this may be considered an unlimited supply for the Panama route. So far as the practical operation of a ship canal is concerned, therefore, the water-supply features on both lines are satisfactory.

"The difficulties disclosed and likely to be encountered in the construction of the dams are less at Conchuda on the Nicaragua line than at Bohio on the Panama route. Both dams, however, are practicable, but the cost of that at Bohio is one-half more than that at Conchuda. A less expensive dam at Bohio has been proposed, but through a portion of its length it would be underlaid by a deposit of sand and gravel pervious to water. The seepage might not prove dangerous, but the security of the canal is directly dependent upon this dam, and the policy of the commission has been to select the more perfect structure, even at a somewhat greater cost. The wasteways at both locations present no serious difficulties. The advantages in the design and construction of the dams are in favor of the Nicaraguan route.

"The system of regulation at Lake Bohio consists only of the discharge of water over the crest of a weir, as the lake level rises under the influence of floods in the Chagres river. The plan of regulating the level of Lake Nicaragua is less simple, though perfectly practicable. It involves the operation of movable gates at such times and to such extent as the rainfall on the lake basin may require. The experience and judgment of the operator are essential elements in the effective regulation of this lake. The regulation of Lake Bohio is automatic.

"The only means of transportation now found on the Nicaragua route are the narrow-gauge Silico Lake Railroad, about six miles in length, and the limited navigation of the San Juan river and the lake, but the Nicaraguan government is now building a railroad along the

beach from Greytown to Monkey Point, about forty-five miles to the northward, where it proposes to establish a commercial port. By means of a pier, in the area protected by the point, goods and material for canal purposes can readily be landed and transported by rail to Greytown. Such piers are in constant use on our Pacific coast. This railroad and port would be of great value during the period of preparation and harbor construction, and should materially shorten that period. A well-equipped railroad is in operation along the entire length of the Panama route and existing conditions there afford immediate accommodation for a large force of laborers.

"The Nicaraguan route has no natural harbor at either end. At both the Atlantic and Pacific termini, however, satisfactory harbors may be created by the removal of material at low unit prices, and by the construction of protective works of well-established design. An excellent roadstead, protected by islands, already exists at Panama, and no work need be done there for either harbor construction or maintenance. At Colon, the Atlantic terminus of the Panama route, a serviceable harbor already exists. It has afforded harbor accommodations for many years, but it is open to northers, which a few times in each year are liable to damage ships or force them to put to sea. Considerable work must be done there to create a suitable harbor at the entrance of the canal, which can be easily entered, and will give complete protection to shipping lying within it. The completion of the harbors as planned for both routes would yield but little advantage to either, but the balance of advantage, including those of maintenance and operation, is probably in favor of the Panama route.

"The existence of a harbor at each terminus of the Panama route, and a line of railroad across the isthmus, will make it practicable to commence work there, after the concessions are acquired, as soon as the necessary plant can be collected and put in place and the working force organized. This period of preparation is estimated at one year. In Nicaragua this period is estimated at two years, so as to include also the construction of working harbors and terminal and railroad facilities.

"The work of excavation on the Nicarauga route is distributed; it is heaviest near Conchuda, at Tamborcito, and in the divide west of the lake. On the Panama route it is largely concentrated in the Culebra and Emperor cuts, which are practically one. As a rule distributed work affords a greater number of available points of attack, contributing to a quicker completion; but in either of these cases such difficulties as may exist can be successfully met with suitable organization and efficient appliances.

"The time required for constructing the Nicaragua canal will depend largely on the promptness with which the requisite force of laborers can be brought to Nicaragua, housed and organized at the locations of heaviest work along the route. The cut through the divide west of the lake probably will require the longest time of any single feature of construction. It contains about 18,000,000 cubic yards of earth and rock excavation, or a little less than 10 per cent. of the total material of all classes to be removed. With adequate force and plant this commission estimates that it can be completed in four years. This indicates, under reasonable allowance for ordinary delays, that if force and plant enough were available to secure a practically concurrent execution of all portions of work on the route, the completion of the entire work might be expected within six years after its beginning, exclusive of the two years estimated for the period of preparation.

"The securing and organizing of the great force of laborers needed, largely foreigners, so as to adjust the execution of the various portions of the work to such a definite program of close-fitting parts in a practically unpopulated tropical country, involves unusual difficulties and would prolong the time required for completion.

"The greatest single feature of work on the Panama route is the excavation in the Culebra section, amounting to about 43,000,000 cubic yards of hard clay, much of which is classed as soft rock, or nearly 45 per cent. of all classes of material to be removed. It is estimated that this cut can be completed in eight years, with allowance for ordinary delays, but exclusive of a two-year period for preparation and for unforeseen delays, and that the remainder of the work can be finished within the same period. The great concentration of work on this route and its less amount will not require so great a force of laborers as on the Nicaragua route, hence the difficulties and delays involved in securing them will be correspondingly diminished.

"The total length of the Nicaragua route from sea to sea is 183.66 miles, while the total length of the Panama route is 49.09 miles. The length in standard canal section and in harbors and entrances is 73.78 miles for the Nicaragua route and 36.41 for the Panama route. The length of sailing line in Lake Nicaragua is 70.51 miles, while that in Lake Bohio is 12.68 miles. That portion of the Nicaragua route in the canalized San Juan is 39.37 miles.

"The preceding physical features of the two lines measure the magnitude of the work to be done in the construction of waterways along the two routes. The estimated cost of constructing the canal on the Nicaragua route is $45,630,704 more than that of completing

the Panama canal, omitting the cost of acquiring the latter property. This sum measures the difference in the magnitude of the obstacles to be overcome in the actual construction of the two canals and covers all physical considerations, such as the greater or less height of dams, the greater or less depth of cuts, the presence or absence of natural harbors, the presence or absence of a railroad, and the amount of work remaining to be done.

"The estimated annual cost of maintaining and operating the Nicaragua Canal is $1,300,000 greater than the corresponding charges for the Panama Canal.

"The Panama route would be 134.57 miles shorter from sea to sea than the Nicaragua route. It would have less summit elevation, fewer locks, 1,568 degrees and 26.44 miles less curvature. The estimated time for a deep-draft vessel to pass through is about twelve hours for Panama and thirty-three hours for Nicaragua. These periods are practically the measure of the relative advantages of the two canals as waterways connecting the two oceans, but not entirely, because the risks to vessels and the dangers of delay are greater in a canal than in the open sea.

"Except for the items of risks and delays, the time required to pass through the canals need be taken into account only as an element in the time required by vessels to make their voyage between terminal ports. Compared on this basis, the Nicaragua route is the more advantageous for all transisthmian commerce except that originating or ending on the west coast of South America. For the commerce in which the United States is most interested, that between our Pacific ports and Atlantic ports, European and American, the Nicaragua route is shorter by one day. The same advantage exists between our Atlantic ports and the Orient. For our gulf ports the advantage of the Nicaragua route is nearly two days. For commerce between North Atlantic ports and the west coast of South America the Panama route is shorter by about two days. Between gulf ports and the west coast of South America the saving is about one day.

"The Nicaragua route would be the more favorable one for sailing vessels because of the uncertain winds in the Bay of Panama. This is not, however, a material matter, as sailing ships are being rapidly displaced by steamships.

"A canal by the Panama route will be simply a means of communication between the two oceans. That route has been a highway of commerce for more than three hundred years, and a railroad has been in operation there for nearly fifty years, but this has effected industrial changes of but little consequence, and the natural features

of the country through which the route passes are such that no considerable development is likely to occur as a result of the construction and operation of a canal.

"In addition to its use as a means of communication between the two oceans, a canal by the Nicaragua route would bring Nicaragua and a large portion of Costa Rica and other Central American states into close and easy communication with the United States and with Europe. The intimate business relations that would be established with the people of the United States during the period of construction by the expenditure of vast sums of money in these states and the use of American products and manufactures would be likely to continue after the completion of the work, to the benefit of our manufacturing, agricultural and other interests.

"The Nicaragua route lies in a region of sparse population and not in a pathway of much trade or movement of people; conditions productive of much sickness do not exist. On the other hand, a considerable population has long existed on the Panama route and it lies on a pathway of comparatively large trade along which currents of moving people from infected places sometimes converge, thus creating conditions favorable to epidemics. Existing conditions indicate hygienic advantages for the Nicaragua route, although it is probable that no less effective sanitary measures must be taken during construction in the one case than in the other.

"The cost of constructing a canal by the Nicaragua route and of completing the Panama Canal, without including the cost of acquiring the concessions from the different governments, is estimated as follows:

"Nicaragua $189,864,062
Panama 144,233,358

"For a proper comparison there must be added to the latter the cost of acquiring the rights and property of the New Panama Canal Company. This commission has estimated the value of these in the project recommended by it at $40,000,000.

"In order to exercise the rights necessary for the construction of the canal, and for its management after completion, the United States should acquire control of a strip of territory from sea to sea sufficient in area for the convenient and efficient accomplishment of those purposes. Measures must also be taken to protect the line from unlawful acts of all kinds, to insure sanitary control, and to render police jurisdiction effective. The strip should not be less than five miles wide on each side of the center line of the canal, or ten miles in total width.

"No treaties now exist with any of the states within whose territory the two routes lie authorizing the United States to occupy its territory for the construction and operation of a canal. When it has been determined to undertake the work and the route has been selected, the consent of Colombia, or of Nicaragua and Costa Rica, for such occupation must be obtained before the inauguration of the enterprise, and one or more conventions must be entered into by the United States to secure the necessary privileges and authority.

"The republics of Nicaragua and Costa Rica are untrammeled by any existing concessions or treaty obligations and are free to grant to the United States the rights necessary for the attainment of these ends; and in December, 1900, demonstrated their willingness to have their territory so occupied by the United States by executing protocols by which it was agreed that they would enter into negotiations to settle in detail the plans and agreements necessary to accomplish the construction and provide for the ownership of the proposed canal whenever the President of the United States is authorized by law to acquire the necessary control and authority.

"The government of Colombia, on the contrary, in whose territory the Panama route lies, has granted concessions which belong to or are controlled by the New Panama Canal Company and have many years to run. These concessions, limited in time and defective in other ways, would not be adequate authority for the purposes of the United States, but while they exist Colombia is not free to treat with this Government. If the Panama route is selected these concessions must be removed in order that the two republics may enter into a treaty to enable the United States to acquire the control upon the isthmus that will be necessary and to fix the consideration.

"An agreement with the Panama Canal Company to surrender or transfer its concessions must include a sale of its canal property and unfinished work, and the commission undertook, soon after its organization, to ascertain upon what terms this could be accomplished. Much correspondence and many conferences followed, but no proposition naming a price was presented until the middle of October, 1901, and after prolonged discussion it was submitted to the commission in a modified form, on the 4th of November, to be included in its report to the President. The itemized statement appears in an earlier chapter of the report. The total amount for which the company offers to sell and transfer its canal property to the United States is $109,141,500. This, added to the cost of completing the work, makes the whole cost of a canal by the Panama route $253,374,858, while the cost by the Nicaragua route is $189,864,062, a difference of

$63,510,796 in favor of the Nicaragua route. In each case there must be added the cost of obtaining the use of the territory to be occupied and such other privileges as may be necessary for the construction and operation of the canal in perpetuity. The compensation that the different states will ask for granting these privileges is now unknown.

"There are certain physical advantages, such as a shorter canal line, a more complete knowledge of the country through which it passes, and lower cost of maintenance and operation in favor of the Panama route, but the price fixed by the Panama Canal Company for a sale of its property and franchises is so unreasonable that its acceptance can not be recommended by this commission.

"After considering all the facts developed by the investigations made by the commission and the actual situation as it now stands, and having in view the terms offered by the New Panama Canal Company, this commission is of the opinion that 'the most practicable and feasible route' for an isthmian canal, to be 'under the control, management and ownership of the United States,' is that known as the Nicaragua route.

"We have the honor to be, sir, with great respect, your obedient servants,

"J. C. WALKER,

"Rear-Admiral, United States Navy, President of Commission.

"SAMUEL PASCO.

"ALFRED NOBLE.

"GEO. S. MORISON.

"PETER C. HAINS,

"Colonel, United States Corps of Engineers.

"WM. H. BURR.

"O. H. ERNST,

"Lieutenant-Colonel, United States Corps of Engineers.

"LEWIS M. HAULT.

"EMORY R. JOHNSON."

Mr. McNAMARA: Now, that was in the last of November, 1901. I refer now to the second report, or the supplemental report, as it is called, of the Isthmian Canal Commission, to the President of the United States, known as Document 123, of the 57th Congress, first session of the Senate, which was sent there in the month of January, 1902, two months after its first report. Now, it appears from this record, which I will read, that in Paris, on the 4th of January, 1902, the following cable was sent to Boeufve, in Washington, and I am

sure there will be no difficulty here in having it admitted that Mr. Boeufve was in charge of the French embassy in Washington, and had known these people in Paris, and this cable was sent in his care:

"Paris, January 4, 1902.

"Inform Admiral Walker immediately, and without awaiting Lampre's arrival, that the company declares itself ready to transfer to the Government of the United States, on payment of $40,000,000, its properties and concessions, estimated at that amount by the Isthmian Canal Commission in its last report, page 103, in conformity with the terms and conditions of the estimates of said report.

"BO,

"President of the Board."

Mr. WINTER: It seems to me, if the Court please, that all these matters are matters of public history and the Court takes judicial notice of them. I have assumed this all along.

Mr. MCNAMARA: For the convenience of having it so that I can refer to it, your honor, I want to have it read at this moment. I think it will be admitted, also, that Lampre was the secretary-general of this company, who was then on the ocean.

Mr. WINTER: That is a part of the history of this matter. The House of Representatives had passed the Nicaragua bill with only two votes in the negative before that cable was sent.

Mr. MCNAMARA: Now, on January 9th another cable was sent to Admiral Walker by Bo, the president of the board of the New Panama Canal Company. This was five days later than the first, there having been a question as to what the first offer carried, and the word "totality" here, is a literal translation of the original. I have seen the original.

"Paris, January 9, 1902—4:07 P. M.

"Admiral Walker,

"President Isthmian Canal Commission,

"Corcoran Building, Washington:

"The New Panama Canal Company declares that it is ready to accept for the totality, without exception, of its property and rights on the Isthmus the amount of $40,000,000, the above offer to remain in force up to March 4, 1903.

"BO,

"President of the Board."

Now, on January 11th, two days later, another cable was sent to Admiral Walker by Bo, president of the board of the New Panama Canal Company:

"Paris, January 11, 1902—4:17 P. M.

"Admiral Walker,

"President Isthmian Canal Commission,

"Corcoran Building, Washington:

"Offer of sale of all property applies also to all maps and archives in Paris.

"BO,

"President of the Board."

On January 14th, another cable:

"Paris, January 14, 1902—9:45 P. M.

"Admiral Walker,

"President Isthmian Canal Commission,

"Corcoran Building, Washington:

"We send by mail letter confirming cable 11th of January, and, under registered package, judgment August 2, agreement with liquidator, and three extracts showing powers of board. All these documents are certified to by the United States consulate-general.

"BO,

"President of the Board."

Now, the commission goes ahead on page 4 of this supplemental report and describes the "totality" of the property and the rights on the Isthmus, including the following classes of property, in which they describe a lot of the personal property and the work done. Then they come to the Panama Railroad Company stock and they describe that, and then they review the matter I have just read as to the relative costs of construction and maintenance of the two canals, and finally:

"There is, however, one important matter which cannot enter into its determination, but which may in the end control the action of the United States. Reference is made to the disposition of the governments whose territory is necessary for the construction and operation of an isthmian canal. It must be assumed by the commission that Colombia will exercise the same fairness and liberality if the Panama route is determined upon that have been expected of Nicaragua and Costa Rica should the Nicaragua route be preferred.

"After considering the changed conditions that now exist and all the facts and circumstances upon which its present judgment must be based, the commission is of the opinion that 'the most practicable and feasible route' for an isthmian canal, to be 'under the control, management and ownership of the United States,' is that known as the Panama route."

This was signed by the entire commission.

I am now going to read what I want to call the Court's attention to on page 209, which, in connection with the cablegrams I have just read, shows the changed conditions which led to the substitution of the Panama route for the Nicaragua route. It shows that the price had dropped from $109,141,500 to $40,000,000, and how, after that was done, the changed price made it possible for the Government to acquire it, and therefore the commission reported favorably on it:

"Stock of Panama Railroad Company	$10,615,000
Buildings, lands, etc., on Panama Isthmus, constituting the company's private estate	1,737,000
Hospitals at Colon and at Panama	868,500
Amount expended for concessions, with interest	4,632,000
Work done by old company	80,095,000
Work done by new company to January 1, 1902	7,720,000
Technical surveys	3,474,000
Total	$109,141,500"

I believe, Mr. Winter, that I am correct in saying that the payment of the $40,000,000 by J. P. Morgan and Company into the Bank of France and a subsequent payment in the sum of $25,000,000 to the old company, and the remaining sum of $15,000,000 to the new company, as stated in the inducement to the indictment, is not controverted by any evidence in the case. If that is so, as far as it is material, I think it dispenses with proof.

MR. WINTER: That is my understanding from the records of the case.

Mr. MCNAMARA: We wish now, your honor, to offer in evidence the article appearing in *The Indianapolis News* Monday, October 26, and the one appearing on December 10, 1908, last year.

Mr. WINTER: For what purpose?

Mr. MCNAMARA: The one article being called "The Canal Deal" and the other "Who Got the Money?" If the Court please, the offer is made upon the theory that it is competent in rebutting the contention that there is no malice and to show other publications. Of course the indictment is in seven counts, six of which refer to specific publications. To some extent we can argue that each of those publications is a repetition of the general libel. It therefore shows pursuit of the parties, and so on.

Mr. WINTER: There is no objection to that.

The said articles, so offered, were introduced and read in evidence (see Appendix).

Mr. McNAMARA: Is there any question that the articles published in the six counts of the indictment were actually printed in the papers which were found in Washington, D. C.? In other words, is there any question that the articles were actually published in Washington, D. C.?

Mr. WINTER: That is a part of your case in chief.

Mr. McNAMARA: As I understand, the testimony is that forty or fifty copies during the time covered by the indictment were sent regularly from the Indianapolis office to Washington to different subscribers. There were also papers on the news stands there. If there is no objection to that, I will simply pass on.

Mr. WINTER: There is no objection to evidence already in the case, if the Court please. It proves what it proves.

Mr. McNAMARA: Will you admit that the original papers containing these articles were actually present in the District of Columbia?

Mr. WINTER: I am not making any admissions in this case. I was ready to make admissions last June, but they went into their evidence in chief in support of the case.

Mr. McNAMARA: If the Court please, I will have to constitute myself a witness.

(The witness was sworn.)

Mr. WINTER: If the gentleman is going upon the stand as a witness, I think it should go into the record in proper shape by questions and answers.

Mr. McNAMARA: Mr. Miller, will you examine me?

STUART MCNAMARA'S EVIDENCE.

Stuart McNamara, on direct examination, testified that he is a lawyer and lives in Washington, and knows personally that all the articles contained in the seven counts of the indictment, including the first count of the cartoon, were contained in copies of *The Indianapolis News* actually present and circulated in the District of Columbia. He obtained copies of those papers at the office of *The Indianapolis News* in the Wyatt building in that District.

Stuart McNamara, on cross-examination, testified that he saw two of the papers in question in the Congressional Library before he obtained copies in the Wyatt building, but did not examine the whole file.

Stuart McNamara, on redirect examination, testified that he obtained these copies about the second week in January, 1909.

Stuart McNamara, on re-cross examination, testified that he went to said office for the purpose of obtaining copies of the paper, and told Mr. Hornaday (*The News's* correspondent at Washington) that the Government wanted copies; he asked to have copies for the months of October, November, and up to December 13. He got the copies about three days later; had a subpœna served for refusing to produce them—had a subpœna *duces tecum* served on Mr. Hornaday. Witness went to the office and inquired if they had copies, and saw a large file of back papers on the side of the room, and Mr. Hornaday said he had a file and the papers came in each day in the afternoon; and a few days later witness obtained the copies. He was getting them primarily for the purpose of being used before the grand jury in the District of Columbia to prove publication in that District. The subpœna brought them. Witness could not testify that he saw all of the papers elsewhere. He has seen two copies of these papers in the library of Congress, and bought two copies of *The News* which did not contain these articles at the Riggs stand and the Willard stand after this matter came up.

ARGUMENT OF COUNSEL.

The COURT: Is there any further evidence?

Mr. WINTER: That is all the evidence, if the Court please.

The COURT: Do you want to argue this case?

Mr. MCNAMARA: Yes, sir, if the Court please.

Mr. MILLER: Will the Court indicate the length of time for the arguments?

The COURT: How much time do you want?

Mr. MCNAMARA: I should think about two and a half hours on a side, your honor.

The COURT: How much time do you want, Mr. Winter?

Mr. WINTER: We want as much time as the other side have.

The COURT: I will not fix any limit on the argument.

ARGUMENT BY MR. MCNAMARA.

Mr. MCNAMARA: If the Court please, in making the opening statement in this case, as the case we have comprises a good many features and is probably more rambling than an average case, I shall attempt to be as summary and yet as comprehensive as I can, owing to the peculiar conditions of this matter. There really are two

questions which arise before you, one in your capacity as committing magistrate, as to whether there is probable cause, and the other in your capacity as judge, as to the question of power of removal, and while they will be grouped together in what I have to say, they are so separable that your honor may give to each what consideration you may desire. Now, the first consideration is: Is there probable cause to suspect that these men have committed the crime of libel, and in the District of Columbia? The Government introduced the indictment, certified in this copy, and proved identity and then rested, and of course that, by all the authorities, raises the presumption *prima facie* that there is probable cause that these men have committed that crime. The defense now comes in and asks for a full hearing and seeks to show that there is no probable cause that they have committed the offense of libel in the District of Columbia. Let us analyze their proof—what is their defense, so that we can measure it with the charge. The defense is a defense that the words themselves are not libelous at all. That is not seriously pressed, and I shall not refer to it unless requested to do so. There cannot be any question at all of the libelous character of these publications. The second point made is that they are not libelous in the District of Columbia, and, third, even if they are, the publication comes under that law known as a conditional privilege. The last two considerations I will try to consider briefly together. (Mr. McNamara here briefly reviewed the evidence set out above.)

When it is added to this testimony that they had no malice about the matter, the defense is then complete from their standpoint. They assert that their publication is absolutely privileged. There has been no effort, of course, here by the defendants to prove the truth of these articles, and the articles stand admitted to be false in the exact language of the indictment, so that the precise case submitted to your honor in this: bearing in mind what the articles are and then taking the defense of the defendants—the defendants say: We published these things; they are not true; we found that other papers had been discussing them; we had some knowledge of the matter from the investigations of Congress and the other public discussions of the thing, and so went ahead and published them in the ordinary course of business; we did not investigate; of course we could not do that; we had no knowledge of the existence of the syndicate; no knowledge of the connection of Mr. Douglas Robinson, or Mr. Charles P. Taft, or Mr. Morgan with the syndicate; no knowledge of the sympathy of Mr. William H. Taft, then Secretary of War, or Elihu Root, his successor in office. We went ahead and published it because

it was the biggest thing in the campaign and we were entirely free from malice. Is it not a fact that if that is the law, if the defendants are right in their contention, we might just as well simply deliver the case to the defendants, burn our law books and close our courts? I propose, your honor, to show that the circumstances of this case show the malice which makes it a criminal offense as well as a civil offense. Let us turn briefly to the indictment and see what these articles are that these gentlemen published. (Mr. McNamara here exhibited the cartoon and read the articles recited in the first count of the indictment.)

Mr. McNAMARA (continuing): It is unnecessary to make any comment on the style of this cartoon, because you can never describe in words the thing that is actually detailed in the picture, but it is sufficient just to say that by this picture suggestions were made that the Democratic chairman in his investigations in the Panama Canal matter would find evidence which would reflect upon and expose the men who are now flying from the investigation he is making. And all through this it must be remembered that the law of libel with reference to the publication of a series of libels applies intimately to this case, considering that with the publication which appeared October 10 of this cartoon and running down to December 10, including other publications which were offered this morning, *The Indianapolis News* hammered and hammered, and its voice rang and rang on this one charge and did not stop until the rumor got out that the investigation for criminal libel as to this matter had begun. I now refer to the second count. This is the article headed "Panama Secrets," and appeared in the issue of the paper of October 20. (Reads it.)

Now, if the Court please, it will be immediately seen from that what was the common fund of knowledge on which these defendants started to write these articles. They had the testimony of the Senate committee which I read here this morning; they had the report of the Isthmian Canal Commission, which showed the original appraisement of the two canals, the preference at all times for the Panama Canal, and the contingent reason why the commission first reported in favor of the Nicaragua Canal, and showing how the price of the Panama Canal was finally changed to $40,000,000; and then there were the public records, showing that the money went to Paris and showing what became of it when it reached there. We all know about those records; as a matter of law, every law-abiding citizen has access to them, and they were for everybody to see if they had a mind to examine into a serious allegation of crime before they

published it broadcast. This article goes on to say it was not now known to anybody outside the gang of speculators that reaped a rich harvest, etc., and then goes on to designate them, first by the article naming them specifically and then by the cartoon picturing them so that they might be well known to the public. There is no statement here of a rumor to this effect, even if that would be explanatory, which it would not. There is no statement here, no suggestion, that it is not true, but on the contrary, in the most positive language in which it can be put it is stated that this gang of speculators has reaped a rich harvest by playing on the patriotism of the American people, and asks how much of the $28,000,000 went into the pockets of President Roosevelt's friends, who promoted the deal. It goes on to say that it has been said that the money was paid to Mr. Morgan, but no one knows how the sum was divided. Now, they admit that Mr. Taft has denied it—this man who is charged has denied the libel—and these people, in their endeavor, in their intent to hold him up to the public as implicated in it, come out in a series of libels and say you cannot accept his denial until he proves himself innocent according to their ideas of proof. Is it true that a man may be charged with an offense involving stealing funds from his own Government through his friendship and relationship with servants of the Government, charged with having got $28,000,000 of graft and then that man, having denied this charge, the world be told that he is not to be believed until he makes good his denial by proof? What is the reason assigned for this? That the records are on file in Washington. The inference is, of course, that his half-brother is an official of the Government and friendly with the President—a very infamous suggestion. The fact is that any one has access to these records and the knowledge of these records is imputed to these defendants in the investigation of this Panama matter. I will come to the next count. (Reads third count.)

I ask again, your honor, what is there in the history of this case, in the proceedings before the Congressional inquiry, in the Isthmian Canal Commission's report, or in any other records I have mentioned, which could form in the slightest way the basis for the libel which I have just read? These libels go to the extent of declaring that some day we shall know who the thieves were that have robbed the country; that all by an investigation will some day come to light. This investigation was simply one of the investigations like the Whisky Ring thefts, the Star Route frauds and the Credit Mobilier affair. If we needed any other confirmation that the defendants knew these things were not true when they printed them, then the

fact that the testimony and the proceedings were a part of the public records of the Government, and that they might have posted themselves on these matters and did not, confirms it. Now, the next count of the indictment, we will take that. (Reads fourth count.)

What I have said about these records being public and being open to the gentlemen of *The Indianapolis News* I might well have not said, because they say themselves that the records here are public records; they are in Washington; and then claim that the records have been suppressed from the people because of the fear of the men of the administration and Mr. Taft that if they were shown, they would implicate those men in the fraud they have charged so often in the columns of their paper. Then the article on "Departmental Secrecy." (Reads sixth and seventh counts.)

Now, we offered in evidence some other papers which were published in between these different times and which repeated these different libels. (Reads *News* articles of October 26 and December 10, 1908, "The Canal Deal" and "Who Got the Money?")

How much credit are we to give to editors who pervert and distort the sworn testimony before the Senate by saying that Cromwell organized a new Panama Canal company to take over the properties of the old company and entered into relations with both this Government and the holders of the stock of the old company? "Though the President says there was no 'syndicate,' it was shown by the late Senator Morgan, who conducted the examination on the part of the Senate committee, that there was such a syndicate, and that its members contracted with Cromwell to pay in $5,000,000 in cash and to take their several allotments in the enterprise. And here is what Cromwell said as to the disposition of the money received from the United States, as quoted by the *World.*" Now, this is the article that appeared in the *New York World* October 3, second edition, but it is not produced in *The News* until December 10th. I do not want to have any misunderstanding about that. (Reads it.)

That is, as late as December 10 and after the President of the United States had come out in a letter and said that this thing was absolutely false and after Mr. Cromwell had repeated his article of October 3, which by this time had reached the defendants, because they quote it in the paper, the last word that comes from *The Indianapolis News* is that they say not only was there a syndicate, but that it was an American syndicate, and they take that fact as proved, and the fact that some one got the money. Your honor can not help but notice in reading that article how they have controverted the statement of Mr. Cromwell, even ignored his statement,

that this syndicate was simply a branch of the arrangement with the French company, but that it was dead, it never had life and never had any existence. They go on to say that Cromwell was the organizer of the company and that it dealt with the government and got $15,000,000. They have taken the evidence disclosed in the Senate investigation, as brought out in the denial of President Roosevelt, as repeated by Cromwell on October 3, and have twisted it into an utterly false statement, and then handed that out to the world as their statement of facts. I am not going to dwell on that any more, though it can be considered as an element in the case. I shall refer to it, but I simply want to impress upon the Court that these men in the publications of what they have written have turned themselves away from the facts of the case, which on the testimony here, they say they knew; that they have departed from the Panama investigation in the Senate, with which they testified they were familiar; that they have ignored not only the denials of Charles P. Taft, but the denials of the President and the denials of Mr. Cromwell, both in the Senate and in the papers, and as late as December 10, after having all that time between, come out and the last word is, "We only say that there was not only a syndicate, but an American syndicate." And some other people got the money; we take it as proved.

Now, let us pass on rapidly to the further evolution of this matter. The defense here has alleged that kind of privilege which is called conditional. Of course if it is conditionally privileged, the men who wrote the articles are not to be held. But that it is not conditionally privileged I think must appear at the very outset against such men as Douglas Robinson and Charles P. Taft; and when we analyze it further it appears that it is not privileged even against Mr. Cromwell or Mr. Morgan, who were mentioned in the Senate investigation. It being a criminal case, the averments in the indictment are that these publications were maliciously published; in other words, with malice. What that malice is, how it may be inferred, how established, is a thing we have to come to in a minute. But if there be malice, there cannot be any privilege. If the defendants mean to establish that they have privilege in this case, they must show that they were free from that malice which the law understands and not the malice which we speak of in our ordinary acceptation of the word. If there be such malice as is to be inferred and deduced from the language used, the circumstances under which it is used, the information which they had and refused to use, the character and tone and temperament of the articles, or any other external or internal method of judging the existence of malice, then

the question of privilege absolutely disappears and cannot be a feature in this case.

Let us illuminate the matter by taking up, first, Mr. Cromwell. We heard here at great length from the counsel on the other side that his attitude before the Senate, which was inquiring into a matter of public policy, was such as gave the public the right to suspect, and by the same token, if it gave them the right to suspect, it gave that branch of the public consisting of these publishers, the right to talk about it and make fair comment on it; did they indulge in that reasonable criticism which the law vouchsafes to newspapers? Does it not appear, after his testimony that you heard today, that Mr. Cromwell denied in his very comprehensive method that he at any time had even a farthing out of the moneys which went from this government for the purchase price of the Panama Canal? And Senator Knox, who had been a lawyer and figured in the organization of the canal as a representative of the Government, took Mr. Cromwell out of the hands of Senator Morgan and committed him to the statement—under his oath, of course—that neither he nor his firm, or anybody he could mention had any profit whatever out of the forty millions of dollars, nor had received anything from the Republic of Panama, or anything from the Government of the United States. He came down to the subscription agreement. This subscription agreement was dated November 21, 1899—ten years ago; some six years, or five years before the purchase of the canal. The agreement was produced by Mr. Morgan in the Senate. In establishing the agreement it appears that according to the testimony of Mr. Cromwell, it was one of the steps taken by the French company in order to conduct these negotiations with the United States. They wanted to Americanize the canal. Mr. Cromwell testified that that agreement never reached fruition. It never was a live thing. You will recall, your honor, how Senator Kittredge asked if it ever was signed, and how Mr. Morgan, in defense of his pet project, attempted to say that it did not need any signatures when the party swore that he executed such a contract, and how the witness came back and said it never had any existence, never had any life. Like many of the corporations put through in that prolific State of New Jersey, it was taken out and suffered immediately to die, and there is not a scintilla of evidence in that record which would give any prudent, careful man the slightest basis for believing that that thing ever lived, much less of commenting that this thing afterward grew up to be the corporation which Mr. Cromwell dealt with and got $15,000,000. So that even with respect to Mr. Cromwell, who

appeared before the Senate committee, there is not the slightest suggestion of a reason why they should digress from what he testified and plead an utterly new thing about the American syndicate, about the money it got, the $12,000,000 it paid for the canal and the $40,000,000 it got from the Government for it, and the money which went from its hands into the hands of the friends of President Roosevelt, and brought for the first time into the literature of this subject the names of Charles P. Taft and Douglas Robinson. There is nothing in evidence to this point to show that the name of Charles P. Taft was known to one out of one hundred men in the East before his brother was nominated; the same might be said of Mr. Robinson. There is not even a suggestion of these names in the investigation in the Senate. There was no more reason to bring them into this matter than there was any other individual who might be living at the time, and whatever may be suggested with respect to Cromwell, it cannot be said with respect to these people that there was the slightest foundation of fact for the suspicion. So I think we can pass on that proposition. Whatever we may think about Mr. Cromwell's being in a public light and having been before the Senate, that there was a right to criticise him; that there was a right to discuss Mr. Douglas Robinson or Mr. Charles P. Taft certainly can not occur to anybody.

The right they claim here, your honor, is the right to say these men are guilty of this crime; and why? One man because he has not denied it, and the other man because, although he has denied it, he has not proved himself to be innocent. I take it that it has not yet become necessary in a tribunal of the United States to argue that this is not the law.

Referring now a minute to Mr. Cromwell, what is there in the testimony of that witness before the Senate committee that could justify any comment of this kind? Did not the committee, who are charged by law, over the solemn oath of their office, to conduct investigations of this kind, decide that that is and was an incompetent question? There is not another tribunal on the face of the earth that can take that matter of decision away from the Senate of the United States. It is a matter vouchsafed by fundamental law to their province, and they are the judges. It is absolutely as anarchistic to our Government to say that their decision is incorrect as to take the same attitude with respect to the decision of a court of the United States. It was their duty to decide and they decided he was privileged to refuse to answer those questions, and that he had answered every question material to the inquiry. Now, what else did we hear? We heard another statement that the fact that the Gov-

ernment had suddenly switched from the Nicaragua to the Panama route was a thing which should indicate to people that there was reason for criticism. So it was for criticism of the change; so it was proper to criticise a change in the tariff, but to criticise the fact that we thought we were going down and we found we were going up—

The COURT: That is a fact, is it? We are going up instead of down?

Mr. MCNAMARA: You must not take argument too seriously, your honor. If it be a criticism of the proper action and nothing more, that would still fall within the domain of privilege. For instance, I think I can illustrate this, even though the criticism may be a severe case. I read in the *New York Sun* the other evening an editorial of this kind—I shall not attempt to quote it exactly—but the substance is this: "We permitted ourselves to observe in an impulsive moment that a worse man than Judge Gaynor might be chosen for the mayoralty, but it would be a very hard task to find him. Since making this statement, we have heard the address of Mr. Shepard, and our sense of the situation is not impaired by this gentleman, whose declaration of his own sense of decency and propriety raises our wonder." It is a stinging criticism. It does not charge him with any crime. It does not promulgate anything new, and say that this individual in concert with some others had preyed upon constituents and made a lot of money. It said "A worse man than he might be chosen." He might be the most exemplary man in the world, a man of wonderful skill and ability, but for this particular position a worse man could not be chosen. He might not have known the law, but there was no attempt to impute to him any specific crime. There is no hint of anything new brought into the situation. Now, turn to our case. There is no attempt to criticise Mr. Cromwell for being contumacious. There is no attempt to say that probably he ought to be above taking notice of the actions of certain of the examining committee. Nothing of that, but we are launched far in the field from that by this wonderful statement that this syndicate did exist; that it was composed of these innocent men, and that its operations with Mr. Root and Mr. Taft were such that they were enabled to buy these securities and make this money. So they depart from the line of reasonable and fair comment. When a man puts himself in a public office and becomes connected with a public concern, his character is exposed, to a certain extent, to the consideration of the multitude. If I am a candidate for some office, the people have a right

to know what kind of a man I am; if I have a large enterprise in hand, the people have a right to consider that enterprise, and if I am drawn into the consideration and discussion of the enterprise, I can not object to that, so long as they charge me with no crime, or impute to me something that is not justified by a fair comment on the matter. But to say in this land of law, that the man who offers himself for office, or who becomes in innocence a public man, thereby bares his character to be criticised, maligned and libeled by every person, and that he has no redress, is to absolutely take away from that man the shield of the law. We have here in our briefs all the cases that bear on that question, and it would be simply an elaboration of the theme to cite them to the Court.

Let us now advance to the further consideration: Is there then malice? How are you to find out whether there was malice? How on earth can anybody prove a subjective state? The witnesses, of course, have come into court and testified that their relations with Mr. Taft were entirely friendly; that these things were published without investigation; without any suspicion of the existence of a syndicate or of the connection of these men with it; but they had no malice. They are the only men in the world who can say that there was no malice in their minds. In our human institutions we cannot search the hearts of men. We cannot know the elements that produce the outside act, but we have got to go solely by the evidence and decide that as the act is, so the intent must be which has fathered it.

And so in this case we find that the courts have decided time and again that the only way to determine whether or not there is malice, in the legal significance, is to look at the act and determine its color and see whether that act could have proceeded from anything but a mind affected by what is known as legal malice. It is not, of course, that malice which means ill-will, a specific hatred and aversion, or unfair predisposition to some man or some thing, but it is that action which is not excused by an ordinary legal defense. It is simply the deliberation of the mind and its direction to the accomplishment of a certain thing without legal excuse. The implied malice which would prevail in a civil action for damages, we are not considering here; the malice which might be imputed to a man in an action of tort, where, having fallen astride of a fence, he falls over into his neighbor's lot and trespasses. It is not at all our concern to discuss that kind of malice, but we will go a little further into that malice called express, that higher degree of malice, which in a civil action would warrant what we call punitive or exemplary damages; that kind which is be-

hind an act which inflicts injury upon some man and for which there is no good, adequate, or sufficient defense.

How are we to get at that malice? It is perhaps impossible without giving weeks to the consideration and reviewing all the cases which appear upon this point, and we are going simply to cite those cases which we think, by reason of the quality of the facts, would impress themselves as being germane to the case at bar, and I think your honor and counsel will find that these cases are from those jurisdictions which commend themselves particularly to the consideration of any court.

(Counsel reads from the cases of Times Publishing Company v. Carlyle, 94 Fed. 762, and Commonwealth v. Snelling, 15 Pick. (Mass.) 337.)

Therefore, in coming up to the question whether or not there is malice in the case, you have got to judge the tree by its fruit, even though the man thought it was the "biggest thing in the campaign and good stuff." That statement is certainly no defense in a court of justice, however much it might avail to the enterprise and financial benefit of the paper; even if we go further and give him a pure-hearted motive, that he was ridding society of a reputation a man falsely enjoyed by taking it from him. The question is not as to his ulterior motive, but as to his immediate present motive. Did he strike at that man's reputation without what the law determines is proper excuse? If he did that, his act is malicious, and the fact that I, from my altitude, looked upward to a higher law gives me no right to disregard the lower law. If it were so, we might go back to the days when they thought they were justified in ridding the world of a man who, by his culture and high intellectual training, was held unfit to live. Your honor can see the frightful consequences to which we come if we attempt to assert that a man can say "I had no malice, because I did what I did thinking I had a right to do it."

Now, the courts have held in numbers of cases that there are other earmarks by which you may measure the term malice and see if it were sufficient for a criminal case. They have said, for instance, the tone of the language used, the reiteration, the tireless charge, the intemperate abuse, the unbridled vilification, in which people may indulge, are all things you may consider in order to determine malice. The publication of an article containing what you know is not the truth, is conclusive presumption of malice, and my friends concede the case in Pennewell, the Delaware case, where it speaks about express malice having to be proved, which is true. But the same case

went further, and said that the publishing of statements contrary to the known truth was sufficient to prove express malice.

Thus in the case of 20 Massachusetts, page 379, the court held that the evidence of known falsity is conclusive evidence of express or what they call actual malice.

Where a crime is imputed, the case of State v. Shaffner, 2 Pennewell, 171, and also a New York case held that the imputation of a crime to a man which is not true is sufficient proof of express malice; and the cases hold that on the very good reason that before a man who has no malice would lay at the door of another man a charge of a crime, he would be sufficiently careful to investigate and see if it were true.

Then malice may be inferred from the contents of the article, and the jury, of course, may pass upon that. It is also competent to introduce in evidence other articles, just as we did here today, to show the insistence of the people; and it is especially competent, said the House of Lords in the case of Barrett v. Long, 3 House of Lords cases, 395, to show that after a denial had been made the paper still kept harping at the man and reiterating the charge, and the fact that no retraction was published after it was known the article was false. In the case of Warren v. Publishing Co., 132 N. Y., it was said that this was evidence of malice. Now, it can be taken that where in a civil case express malice would exist to furnish the basis for exemplary damages, in the same case express malice would afford support for a criminal information. It is a little historical, but it is interesting to note that in the very foundation of the action of tort, after the passage of the statute of Westminster the second, the old criminal bill of felony was abrogated in favor of the new tort action. In the old bill of felony the party injured had the right to go to the Crown and ask that he might have his blood from the man who had injured him, because it was his right of felony. Then, with the advance of civilization they gave him the right of tort, which had to have the support of express malice, which previously was not necessary to support the bill of felony. Now, if the Court please, the argument put forth here is that a very good paper, the *Chicago Daily News,* published this thing to the world, and that was sufficient. After that they found that the *Courier-Journal* and the *Chicago Journal* and the *Record-Herald* published these articles. What argument is it in a court of justice that "I committed this crime, but others committed crimes, and therefore I am not guilty." Where is the justification in saying "If I have committed libel, I must be let out because previously my newspaper friend in Chicago had pub-

lished the same things"? Did these defendants exercise that prudent care which would commend itself to any man at all careful of the reputation of his neighbor? When they found that this article came out in the *Chicago Daily News,* did they inquire if it were true? They told us they knew Mr. Lawson, of that paper. Did they ask them if they had a Paris correspondent, and where they got this news from? These men are certainly not such novices in the vocation of their lives that they do not know how papers get so-called cables, crediting them to a foreign country four thousand miles away. Is there any justification in simply saying that I published this? I was started, initiated into this enterprise because a paper for which I had considerable respect had this article, and I know it "had," or "probably had" a Paris correspondent. It had a London correspondent; as to whether it had a Paris correspondent "I do not know, I have not inquired." If that be the law, we can never convict men for conspiracy if they have fellows in the crime, and it would be equally impossible to convict any man. But what do the courts say about that? In the case of State v. Bateman, in 20 La. Ann. 167, the defense was that it was simply the reproduction of an article in another paper, and the Court held that that was no defense. To put it tersely, it was competent to show the truth of the charges preferred, but it was not competent to show the preferment of the charges. That is all that was done in this case. The gentlemen have come here and let these charges stand absolutely branded as false, and all they have told us is that it was through somebody else preferring the same charges. Now, in the case of Haley v. State, 63 Ala. 83, the defendant was indicted and convicted for slander of a female under the statute that it shall be a crime to falsely and maliciously charge a woman with unchastity, and the question came up as to what was necessary in order to prove malice, and the Court held: "Malice, in general phrase, is never understood to denote general malevolence or unkindness of heart or enmity towards the particular individual; but it signifies rather an intent from which flows any unlawful and injurious act committed without legal justification." In fact, to go a little bit outside just for a minute in winding up this consideration of this subject, Richard Brinsley Sheridan, in the "School for Scandal," gives us this:

"Mrs. Candour: But, surely, you would not be quite so severe on those who only report what they hear?"

Speaking to Sir Peter. Sir Peter replies:

"Yes, madam, I would have law merchant for them, too; and in all cases of slander currency, whenever the drawer of the lie was

not to be found, the injured parties should have a right to come on any of the indorsers."

So, if this situation be tolerated as the law of the land, a man can fabricate a pure lie, put it in print, and it then becomes a part of the news and through other publications which think well of the first paper can be disseminated and be given wide circulation, because they merely repeat a previous publication. The whole inference, however, of the question of malice, is one which has to be drawn and established from the publications themselves. We have got to consider the intrinsic evidence about which I have spoken, and Mr. Miller will show the Court further authorities on the subject. We have every authority which bears upon that question; but in the last analysis it is a question for the jury to decide, as to whether or not the men have told the truth on the stand, and second, if they have, does that take away the legal malice which the law says must be drawn from what they have done? It is a question of fact, a presumption of fact, which of course may be rebutted, but which, if not, stands in the eyes of the law as a complete proof of the express malice needed for a criminal information. What, then, is the question before your honor? "Is there probable cause?" not "Is there proved cause," because the language of the statute does not mean that. The word "probable," from "probo," the Latin root, means what is susceptible of proof. Had the men who framed the act regarding the care to inquire whether there is probable cause for the commission of the offense meant to find that they were guilty, they had the entire use of the English language at command, and they could have said "If there be proved or established cause of their guilt," they should be convicted. But the Court has simply to see if from all the testimony in the case there is such a situation that cause may be proved and to inquire whether these men probably have been guilty of the act charged and should be dealt with according to law. "Was there probably malice?" is the question to be proved. This is to be proved from the facts in the case—from the testimony offered—and the facts which we have just been discussing here. As Chief Justice Marshall said: "A committing magistrate in determining whether probable cause exists could not acquit and let the man go free because he suspects that probably with a jury he might be acquitted; he is simply to determine whether or not there is a situation where the cause is susceptible of proof." And therefore, when the case of Beavers v. Haubert, in 198 U. S., was before the committing magistrate, the question was not whether Mr. Beavers, if these statements were to be believed, etc., was innocent

of the offense, but whether or not by these statements he had done away with the presumption of probable cause for the action.

Beavers was charged with having received bribes from a company supplying typewriting instruments, or something like that, to the Government. Now, there was only one way he could be guilty of accepting this money in an official action. He produced every officer of the company named and proved, as he might to a demonstration as far as their testimony went, that they or no one for them paid Beavers any money. But the question was, had he by those statements rebutted the probable cause of the indictment? Why couldn't he make a statement that he had not received any money? Is a man to come here on the stand, and say "Yes, I am guilty of it," when he has retained counsel and pleaded not guilty? Beavers might well bring these men, but their testimony did not remove all reasonable grounds of presumption of the commission of the offense.

The other question of the indictment is: If the crime was committed, has it been done in the District of Columbia? Now, the indictment charges that these matters were circulated in the District of Columbia, that is to say, that there was a legal publication in the District of Columbia. The testimony of the defendants is to the single effect that they sent every day to the District of Columbia forty or fifty copies of this paper, sent them to subscribers. The other testimony in the case shows that in addition to these subscribers, the paper is sent to the office or bureau of the defendants in the Wyatt Building, in Washington, that the paper is on sale in the Willard and the Riggs House, two hotels, and is also on sale in the little push cart newspaper stands on the street. Now, that is a legal publication.

The gist of the action of libel is not in the printing and manufacturing of the paper. It might well be that a libel could be manufactured, of course, and never disclosed. There would then be no crime, but when it is printed and sent out and circulated, it is in the circulation and the publication that the crime consists. And the charge of this indictment, which is verified by the testimony, is that the publication of *The News* in the sense of legal publication, was in the District of Columbia. It is surely not an element of law that a larger and wider publication may have occurred in the State of Indiana, or a relatively larger and wider one in the district of Ohio. It might well be that a paper with libelous articles in it could be sent to different jurisdictions, and if there were libel laws in those jurisdictions, it would be a separate crime against each of the sovereignties so offended against. But all that is required to secure a conviction is to prove

the circulation of the libelous articles in the jurisdiction where the crime was committed. That was the law at common law.

In the case of Commonwealth v. Blanding, in 3 Pick., Blanding published a paper in Providence, Rhode Island, and some copies of it were circulated over the Massachusetts line in Bristol county. He was indicted in Massachusetts. The jurisdiction of the plea was immediately raised, and the court held that that was a crime committed in the State of Massachusetts. The libel was published there; and so it is with respect to the District of Columbia. I can probably touch this at the same time when I come to the questions applying to the removal to the District. I simply mention it now to show that the two things required to be shown under probable cause, the tendency showing the commission of the crime and the commission in the District of Columbia, to which removal is sought, are borne out by this examination. There is absolutely no evidence here to contradict that. There is no sincere or real attack made upon the question that publication has taken place in the District of Columbia.

Let us now pass on to the proposition that granting there has been shown probable cause, or rather granting that the probable cause of the indictment has not been rebutted, are there legal reasons authorizing the removal of these defendants from the city of Indianapolis to the District of Columbia? In other words, under section 1014 of the Revised Statutes, can the Court, as the United States judge, order the removal of these defendants to the District of Columbia? I must confess that I am now at a loss to know how this proposition can be assailed; but because I am making an opening statement and because I want them to have the advantage, of course, of their reply, I will just touch briefly on the reasons which we say make that proposition entirely practicable. In other words, I shall anticipate their objection. It has been a most favorite occupation with the cases touching removals to the District of Columbia to challenge the application of the statute. Up to the time of the Dana case, in 1895, it was supposed that the statute of removal did not apply to the District of Columbia, and that a crime there was not a crime against the United States in the sense that a man could be removed from a State to the District of Columbia for that offense. The argument was that the District of Columbia is a separate locality; it is a commonwealth of its own, and only Congress legislates for the District; it does so in the capacity of a local legislature, not as the sovereign Congress of the entire United States. But, if the Court please, all those objections are now absolutely foreclosed. The Supreme Court of the United States, in the case of Hyde v. Shine, in 199 U. S. 63, laid down the law. It was ar-

gued there that section 1014 could not authorize the removal from a judicial district of the United States to the District of Columbia. The Supreme Court overruled this contention, and reaffirmed the case of Benson v. Henkel, holding that the section did apply to the District of Columbia.

The Wimsatt case, in 161 Federal, was a case in point. That was a case in New York, in 1908. Wimsatt was indicted in the District of Columbia for common law conspiracy. It was not a conspiracy under section 5440 of the United States statute, which required an overt act to make the crime complete, but it was the old common law conspiracy. He was charged with some associates of a conspiracy to rob a street car company of fourteen tickets. He was arrested in the Southern District of New York and brought before a commissioner. His defense was that it was not a crime against the United States. The court said the District of Columbia is a part of the United States and the commission of a crime therein is an indictable offense against the United States, as is held in Hyde v. Shine and Benson v. Henkel and Beavers v. Haubert. That is a doctrine to which the application of section 1014 is now established. You may be removed to the District of Columbia for an offense against the United States. The same doctrine was held in Price v. McCarthy, 89 Fed. 84, and In re. Cross, 20 Fed. Curiously enough, the very case of libel as a crime against the United States has been considered by the Federal Courts and has even been mentioned by the Supreme Court of the United States. (Explaining case of U. S. v. Buell, 3 Dillon 116.)

Now, the next case was the Dana case (7 Ben. 1), and the first of these cases came up in the time of Judge Blatchford, of the Circuit Bench in New York. He was not indicted by a grand jury and Judge Blatchford refused to honor the application on the ground, of course, that he would not have his trial in correspondence with the provisions of the Fifth and Sixth Amendments. Judge Blatchford afterwards came to the Supreme Bench, as of course we know, and in one of the cases in which he sat, the Palliser case, 136 U. S. 257, and in the decision of which he participated, the Supreme Court had occasion to remark that Judge Blatchford refused the application in the Dana case, not because the crime of libel could not be punished in the District, but because there was a failure to guarantee the defendant his constitutional protection. Now the Supreme Court in that case, which is In re Palliser, 136 U. S. 257—of course, your honor recollects that was a case of a man sending some orders from New York City to a

place in Connecticut, asking the postmaster to give him credit for stamps, which was a Federal offense. The question was, could he be tried in Connecticut? The court held that he could be tried in either New York or Connecticut. Now, in the consideration of that case, the court says: "In Dana's case, 7 Ben. 1, a warrant to remove to the District of Columbia a person alleged to have printed a libel in a newspaper published in New York and circulated by his authority in the District of Columbia, was refused by Mr. Justice Blatchford, then district judge, not because the offense could not be punished in the District of Columbia, but because the law of that District provided for its prosecution by information only and was therefore unconstitutional." The question, of course, of the constitutionality of that prosecution does not apply here, because it is not contested. The indictment was found by the grand jury and the trial must be by jury and the code provides for the competency of the truth, good motives and justifiable end as a defense to the action. So there is a recognition by the Supreme Court of the United States not only that it is a crime against the District of Columbia, a crime against the United States, but that the crime of libel charged where a man publishes a paper in a district and circulates it in another is a crime for which a defendant may be punished in the District of Columbia. It is a specific recognition of the facts.

If the Court please, I do not think of anything else to say in reply to these objections; if they are advanced, Mr. Miller will reply to them. I will close with this presentation which I think covers the features of our case and say that our case, as made out under the probable cause raised by the indictment, has not been rebutted.

The COURT: There is a statute of the United States, is there not, that provides in substance that when an act is done partly in one district and partly in another the jurisdiction is in either?

Mr. MCNAMARA: Yes, sir, 731.

The COURT: The Palliser case is under that statute. You do not claim that that has any application here?

Mr. MCNAMARA: No.

The COURT: The Palliser case does not help us out here. If a man stands on one side of the Marion county line and fires a pistol at a man standing over in an adjoining county and kills him, were it not that the statute provides for jurisdiction in either one or both counties, there would be no punishment. We have those statutes between districts and States. So in the Connecticut case, if a man stayed in Washington or wherever he was and mailed a letter to a

place in Connecticut, where he performed the act partly in one district and partly in another, either State would have jurisdiction.

Mr. McNAMARA: Yes, your honor, you have the situation there for what one might call a crime begun in one jurisdiction and completed in another and it can be tried in either. For classes of offenses begun in one district of the United States and completed in another you have a Federal statute which provides the same remedy.

The COURT: But this is not the same kind of a case.

Mr. McNAMARA: This is not a continuing crime. It is a consummated separate offense in the District of Columbia, and we have got to put our faces to that situation and see it. The crime of libel is not something which begins in one district and grows until it is completed in another. It is not the case of sending a letter which has no relation whatever until it is received by the addressee. It is a case where the crime may be an offense in several jurisdictions.

The COURT: You mean by that that the same act may amount to a crime in several jurisdictions; or do you mean by that if the act is performed in several jurisdictions, wherever it is performed that it may be a crime?

Mr. McNAMARA: Yes, sir.

The COURT: But there has to be a performance?

Mr. McNAMARA: There has to be a performance. For instance, if there be a copy of *The Indianapolis News* with some libelous matter circulated throughout the different counties of this State, under the laws of this State you could have the trial in any county.

The COURT: Suppose as a fact *The Indianapolis News* has deposited here in the postoffice and has sent libelous matter to the subscribers in each of the ninety-two counties of Indiana, do you say they can be prosecuted ninety-two times for the crime?

Mr. McNAMARA: No, sir.

The COURT: How many times?

Mr. McNAMARA: One.

The COURT: Where?

Mr. McNAMARA: In the first county that started the prosecution, if it is started.

The COURT: Why not in all? Would a conviction in Posey County be a bar to prosecution here?

Mr. McNAMARA: Absolutely.

The COURT: Why?

Mr. MCNAMARA: It would be *res adjudicata.*

The COURT: Why would it be *res adjudicata?*

Mr. MCNAMARA: Your counties are simply measures of venue.

The COURT: Could the same act by a man here be a crime in ninety-two counties of Indiana at the same time?

Mr. MCNAMARA: It would be susceptible to prosecution in any county, but if a man were convicted in Elkhart County, if there is a county of that name—

Mr. MILLER: Yes.

Mr. MCNAMARA: The state of Indiana is the sovereignty prosecuting and John Smith is the defendant. If he were put upon trial in Marion County he could plead in bar the previous conviction, because the parties were absolutely the same and under your statute the different counties would simply be the different venues providing for the prosecution.

The COURT: But venue is one thing in the sense in which I use it and another thing in the sense in which you use it. I am speaking of venue as the place where the crime is committed. You are speaking of it as the place where it is tried. They may not always be the same.

Mr. MCNAMARA: In the sense of a legal action they are not different.

The COURT: Are you quite sure that if a newspaper publisher in Indianapolis circulates his paper by means of the postoffice and brings, say, a thousand copies here to this office and mails them and they go to the ninety-two counties in the State, that a conviction in Elkhart County would be a bar to a conviction in Marion County?

Mr. MCNAMARA: That would be my judgment.

The COURT: If that is true, then a conviction or acquittal in Washington in this case would be a bar to a conviction here, provided, of course, the United States Court had jurisdiction here? Would that follow?

Mr. MCNAMARA: I can't say that, if the Court please, because the District is completely separate so far as sovereignty is concerned from the State of Indiana.

The COURT: I said if there was a crime against the United States in Indiana.

Mr. McNAMARA: I would not want to go that far, your honor, unless there was some statute to cover it. I do not know, of course, what statute there is as to your change of venue to a separate locality for prosecution. But the publication of *The Indianapolis News* in the different States as sovereign commonwealths is a separate and distinct offense in every community into which it goes.

The COURT: If a separate and distinct offense the prosecution of one could never be a bar to the other.

Mr. McNAMARA: Just like a man in New York who would circulate a paper in one of the counties in Massachusetts. The mere fact that the people of that county had been redressed for their grievances of course would not affect the people in New York; and I wanted to instance that, if the Court please, as showing that the crime is not one of those continuing things like sending improper matter through the mails.

The COURT: If that is true it necessarily follows that the crime of libel, if it happens to be by a newspaper man, could be punished as many times as there are jurisdictions or counties in which his paper goes; and if a man publishes a paper in Indianapolis and circulates it in ninety-two counties in Indiana, he can be punished ninety-two times.

Mr. McNAMARA: If those are separate counties, as you say.

The COURT: Separate counties?

Mr. McNAMARA: I would rather Mr. Miller, or somebody who knows more about Indiana than I do, would talk on this subject. If you were to ask me as to the States I would say yes; just as the Supreme Court says that a man has a different cause of action against another man from San Francisco to Maine. If a newspaper, in the language of a court in some case, I do not recall what one, chooses to make a foreign place the theatre of its crime, it cannot object to being obliged to accept that place as the forum of its trial. If the paper undertakes by a contract obligation to supply people in distant States and many of them with newspapers, and if it decided to libel people in all these jurisdictions, it must be prosecuted in all those jurisdictions.

The COURT: That might be in a civil proceeding. If a man puts a newspaper in the mail and sends it, for instance, to Washington and there it becomes published—sends it to his subscribers—and some citizen of Washington, for example, is falsely spoken about, the man here is liable in civil damages. The fact that he put it in the mail here

and the damage is done there does not make any difference; but there is no question here of the application of any statute such as upheld the Palliser case. So the question here is whether or not a man who deposits in the mails in Indianapolis a newspaper which contains, for the sake of the argument, a libel, addressed to a subscriber in Washington, can be said to publish that libel in Washington. That is the question and the trouble about that proposition is that if he published it in Washington in the legal sense—I mean publication—then of course he published it everywhere he sent it, in every jurisdiction. Now the question is, does it make a separate crime in every jurisdiction? If it does, why he can be prosecuted a hundred times, a thousand times; isn't that true?

Mr. McNAMARA: That is true.

The COURT: And one conviction would be no bar to another.

Mr. McNAMARA: Yes, sir. That is the consequence you have when you consider the nature of the crime of libel and the complex nature of our family of different commonwealths. But as the Supreme Court has said, in the review in the Palliser case, referring to the Dana case, and as Judge Dillon has said in the Buell case, even though it is published in one place in the sense of being manufactured and printed, if it is sent on and circulated in another place, it is a crime there because the publication takes place there and the man is injured the same there as in any other place.

The COURT: If a correspondent in Washington were to send a libel to a newspaper here, put it in the mail in Washington and send it here and it be published here, are you clear that he could be brought from Washington and tried here?

Mr. McNAMARA: No, sir.

The COURT: Because there is no statute covering that case as to the question of venue.

Mr. McNAMARA: If the Court will permit me, I should not assign that ground, but from the fact that there was no publication in Washington.

The COURT: No, no. I was supposing that a man writes a confessedly libelous article—libeling a citizen of Indianapolis—in Washington, and mails it here to *The Indianapolis News,* procures it to be published in *The Indianapolis News;* can he be indicted here for the publication of that libel?

Mr. McNAMARA: This man in Washington who merely composed and procured it to be published?

The COURT: Composed it and sent it here for publication and procured it to be published.

Mr. MCNAMARA: I should say he could be indicted.

The COURT: My understanding would be in that sort of a case that unless there was some statute governing that, in the case of the commission of a crime partly in one district and partly in another, if the jurisdiction could be in either, in that case there could never be a jurisdiction in Indianapolis. What is the matter with the proposition?

Mr. MCNAMARA: If a man did that in New York you could remove him under your State statute. That I believe is correct.

The COURT: It could be done if there was a statute providing for it. But without the statute there could be no prosecution here; isn't that true?

Mr. MCNAMARA: Yes, sir, I think that is true. I do not want to commit myself. My present judgment is that it is true. A thoroughly Federal offense, like violating the postoffice regulation, could be removed from the district of New York to the district of Indiana under 731.

The COURT: If it were a crime committed partly in that district and partly in this?

Mr. MCNAMARA: Yes, sir, like the Palliser case. You come to the case you cited where the man in Washington composed a libel and sent it to Indianapolis and procured its publication here; you would take an appeal to the Chief Justice of the Supreme Court of the District of Columbia, under that special statute and the only question which you would have to argue would be the question whether he was a fugitive from justice.

The COURT: Suppose he got here and the question was whether he was guilty?

Mr. MCNAMARA: If you ever got him here you could prove him guilty.

The COURT: Suppose his counsel should rise up and say he was not here and never was here?

Mr. MCNAMARA: He did it through an agency.

The COURT: Yes.

Mr. MCNAMARA: I will stand by it. I say you can't commit a crime by an agent at common law.

The COURT: Undoubtedly. I am not talking about committing a crime by an agent.

Mr. MCNAMARA: Of course I am not trying to say it is not an awfully close case. In extradition proceedings you would have trouble because he would come under the statute concerning fugitives from justice. The Court has held that if a man should happen to be in a state and a crime was committed, after he had left there with or without the knowledge of the authorities on his own motion, the question of his flight is utterly unimportant—the fact that he is outside of the State when he is wanted in the State.

The COURT: Of course if the charge against him was true he was legally there, else he cannot be found guilty. The indictment charges that he did then and there. So if he is not there now and is found somewhere else, you do not have much trouble finding he is a fugitive.

Mr. MCNAMARA: It is very largely a fiction of law. In the Appleyard case the Supreme Court of the United States held that although the man was not a fugitive from justice in the actual sense, they wanted him there. So in the McNichols v. Pease case; in the case of Pierce v. Creecy.

The COURT: Suppose a man on the other side of the Ohio line fired a revolver at a citizen on this side of the Indiana line and killed him. He could be indicted in Indiana and the indictment would say the defendant was then and there in Indiana; he did then and there kill, or wound, etc. Now, so far as that is true, so far as that is concerned, it is not a very great stretch to say that this man had never been here at the time he committed the offense, and being in Ohio, he is a fugitive. Strictly speaking, he is not a fugitive and has not fled.

Mr. MCNAMARA: The closest approach is probably the well-known Guiteau case, where, as your honor recollects, the defendant shot Garfield in Washington and he died at Elberon. The indictment charged he shot the defendant and he did die at Elberon, to-wit, in the District of Columbia, and Justice Cox, in that decision, held that that was an offense which began, it is true, in one jurisdiction and was consummated in another, and that he was responsible in the district where he had started that thing for the crime. We know, of course, the contention that took place. Now, section 731 of the Revised Statutes could not apply in that case. It was not an offense against the United States in so far as the consummation of the offense was concerned. It could not be an offense against the district in which

he died. That was a case where the act originated in one locality and was not completed there but was consummated in another locality; yet the man was brought back and tried in the District of Columbia, and in the report in the decision in the case Mr. Justice Cox decided it could be tried in the other. I have not read that case for many years. Do not hold me to that. But it is my impression.

Mr. Winter: The jurisdiction was in the District of Columbia. It was the reverse.

The Court: The question before the court in Washington was whether it could be tried there. I do not suppose there would be any question if a man this afternoon should shoot me in Indianapolis and go over into an adjoining county—there is not any question about the man being amenable to trial and conviction here. I do not think there is any question about that.

Mr. McNamara: I suppose not. It would be a horrible perversion of the law if there were. I have nothing more on the proposition of removal.

Mr. Winter: If the Court please, in this case I have asked Mr. Lindsay to present the branch of the case which Mr. McNamara has closed upon. He has made a pretty careful examination and preparation on that question and I should be glad to have the Court hear him.

MR. LINDSAY'S ARGUMENT.

Mr. Lindsay: With your honor's permission, I will suggest some considerations which are common to this case and the case of my clients in New York, who are defendants in a prosecution instituted the same day as this prosecution was instituted. The defendants in that case are the Press Publishing Company, which is the proprietor and publisher of the *New York World*, and Mr. Joseph Pulitzer, Mr. Van Hamm and Mr. Lyman, who are charged in an indictment containing some eight counts, filed February 17 last, with having libeled the same gentlemen whose names are mentioned in the indictment against Mr. Smith and his co-defendant here. Subsequently under a statute of the United States, section 5391, by which the State laws are transplanted into places ceded by the States to the Federal Government, which cover military reservations, postoffices, custom houses and other territory of that sort, an indictment was found against two of these same defendants, the Press Publishing Company and Mr. Van Hamm, charging these two defendants with having published, by depositing in the postoffice building in the city of New

York, which is within Federal jurisdiction, and by circulating, by sending to a supply store in the military reservation of West Point, both West Point and the postoffice being within the southern district of New York, the same or substantially the same series of articles which in both indictments are charged to constitute libels of the individuals in question. No attempt has yet been made to institute proceedings to remove any of the defendants to Washington, but we have been informed that there may be an attempt to place the Press Publishing Company on trial for the violation of section 5391 in the near future, there has been an intimation of a subsequent proceeding for removal. That is why I am here and have accepted Mr. Winter's courtesy to allow me to make suggestions bearing on this case, which would certainly have a very important effect on the New York case. Without going into any very lengthy history of this transaction, I think there are certain facts which should be called to the attention of the Court, which might influence its views as to the ultimate disposition of the case and have a bearing upon the discretion which, of course, is vested in your honor under section 1014. So I desire to call your attention to these points before leading up to the legal propositions which affect the right of removal under that section.

This prosecution was not instituted by any private individual, but was the result of an executive communication from the White House to Congress on the 15th of December last, in which the articles are characterized as constituting, not libels on individuals, but upon the United States. The charge formulated, according to the executive finding, was, not as to the defendants in this case, but that one of my clients, the proprietor of the *New York World,* had been guilty of a libel on the Federal Government, and therefore the Attorney-General was at that time instructed by the executive to find a means of reaching him under Federal law; so that instead of an indictment under the laws of the State of Indiana, in the case of Mr. Smith, or an indictment under the laws of the State of New York, in the case of my clients, we have two proceedings, one under section 5391 in New York, and another under the laws of the District of Columbia charging this act as constituting an offense against the United States. I am now talking of the form of this indictment.

Mr. McNAMARA: That is your opinion and not a statement of fact.

Mr. LINDSAY: In other words, this prosecution is for a libel, not against individuals, but against the United States, notwithstanding the Sedition Law expired some hundred years ago.

Mr. McNAMARA: Do you claim that is the indictment?

Mr. LINDSAY: I claim that is the nature of this prosecution.

Mr. McNAMARA: We will match the indictment against your statement.

Mr. LINDSAY: Of course, your honor, it is no part of my argument to consider the merits of this case, or the New York case, but I do in this connection, as having a proper bearing as to whether these defendants should be removed to Washington, wish to call your honor's attention to the fact that both of these prosecutions occur within jurisdictions where the laws of the State apply, and furthermore, where the publications had greater circulation than anywhere else. These articles have been characterized in the following language in the message of President Roosevelt to Congress:

"Now, these stories as a matter of fact need no investigation whatever. No shadow of proof has been, or can be, produced in behalf of any of them. They consist simply of a string of infamous libels. In form, they are in part libels upon individuals, upon Mr. Taft and Mr. Robinson, for instance. But they are in fact wholly, and in form partly, a libel upon the United States Government. I do not believe we should concern ourselves with the particular individuals who wrote the lying and libelous editorials, articles from correspondents, or articles in the news columns. The real offender is Mr. Joseph Pulitzer, editor and proprietor of the *World*. While the criminal offense of which Mr. Pulitzer has been guilty is in form a libel upon individuals, the great injury done is in blackening the good name of the American people. It should not be left to a private citizen to sue Mr. Pulitzer for libel. He should be prosecuted for libel by the governmental authorities. In point of encouragement of iniquity, in point of infamy, of wrongdoing, there is nothing to choose between a public servant, who betrays his trust, a public servant who is guilty of blackmail, or theft, or financial dishonesty of any kind, and a man guilty as Mr. Joseph Pulitzer has been guilty in this instance. It is therefore a high national duty to bring to justice this vilifier of the American people, this man who wantonly and wickedly and without one shadow of justification seeks to blacken the character of reputable private citizens and to convict the Government of his own country in the eyes of the civilized world of wrongdoing of the basest and foulest kind, when he has not one shadow of justification of any sort or description for the charge he has made. The Attorney-General has under consideration the form in which the proceedings against Mr. Pulitzer shall be brought."

Your honor has seen "the form" in which these proceedings were brought; and the question is whether these gentlemen shall be taken from the jurisdiction where the offense was committed and be placed on trial before a Federal tribunal at the seat of the Government, where the penalty is just ten times as much as it is in the State of Indiana, and five times as much as it is in the State of New York. Now, the first legal proposition which I desire to present, I think is the one which was suggested by your honor in some of the questions put to Mr. McNamara at the close of his argument, as to whether or not there ever has been any jurisdiction in the courts of the District of Columbia to try for a criminal offense a citizen of the United States not a resident of the District of Columbia, who was not in the District at the time the alleged offense was committed. There is, of course, no power in any Federal court in respect of criminal prosecutions, except as it is based upon some statute of the United States; there never has been in the District of Columbia any enabling statute, such as within the last fifty years, for instance, enabled the English courts to try certain offenses, which are referred to in the cases which I shall presently cite. There was never any rule in force in the State of Maryland permitting the courts to exercise jurisdiction over the person of an individual who had by construction committed a crime in that jurisdiction. The law of the District of Columbia at all times and today provides no means for subjecting to its criminal laws a person who has acted in that way regardless of the effect of the act. I call your honor's attention to the case of R. v. Keyn, 13 Cox C. C. 403, where the English courts within a comparatively late period have held distinctly that they are without jurisdiction in a case of that sort. Your honor is doubtless familiar with this case. It is the case of a German vessel, traveling along the English coast within the three mile limit, running down an English ship, resulting in the death of one of the passengers, a young woman, and the case was participated in by some of the greatest criminal judges of England, Justice Denman, Lord Coleridge and Mr. Justice Lindley, and they held distinctly that there was no jurisdiction in the English criminal court to proceed against the German navigator. He was in the court building and subjected himself for trial, but there was no jurisdiction because of the absence of any statute giving the English courts jurisdiction in such a case and the common law did not provide for it. The common law never provided for the punishment of an offense which was not committed wholly within the county, so that it was necessary to pass a statute for that purpose. The decision in that case is very clearly summed up by Mr. James Fitzjames Stephen. He refers to two

decisions, one English and one American case, which also have a bearing on the question presented here. (Reading from Stephen's History of the Criminal Law of England, Vol. 2, pp. 10-11.)

Mr. LINDSAY: Now, your honor, I say that there being no statute of the United States in force in the District of Columbia giving the courts of that District authority to try offenses committed by construction, by legal fiction, in the District, the courts of that District cannot take cognizance of the publication of a libel in that District by somebody outside of the District by sending it there, regardless of the question as to whether or not that constitutes such a publication. Of course it is a technical publication.

The COURT: That is not the case. This case, so far as the evidence stands, depends upon the fact that these defendants put in the mails to be carried by the United States mail certain publications mailed to persons in Washington. It is quite different from sending a paper to a man in Washington who should there publish it. I am not saying it is not a publication. I am saying it is a different kind of a case.

Mr. LINDSAY: Your honor, it is like the publication of which Judge Cooley speaks in the Dana case. He says the offense is actually committed at the place, although a technical publication may take place elsewhere. It is like the case of a man at a point where the boundaries of three States converge exploding a bomb and killing twenty persons in one of the States and wrecking a hut in one of the other States and an attempt being made to prosecute him for wrecking the hut instead of the other offense. It is absolutely ridiculous. The law does not intend any such consequence. It does intend, especially under American law, and regardless of the laws in England two hundred and fifty years ago or in the time of the Star Chamber—the American view has always been—that you must prosecute a man in the place where he was at the time he committed the offense.

The COURT: Our Constitution provides that a man should be tried in the State where the offense was committed. I take it that if John Smith here in Indianapolis writes out a libel and sends it to William Jones to publish it in the city of Washington and requests William Jones to publish it in the city of Washington, that John Smith is guilty of publishing a libel in Washington.

Mr. LINDSAY: Without a doubt, your honor.

The COURT: Now, is this that case?

Mr. LINDSAY: Certainly not. It is like the case of a man who

upsets a vessel full of some evil-smelling gas which for a long period of time is wafted by the winds in various jurisdictions. He is guilty of maintaining a nuisance at that particular place and should be prosecuted there; and if the nuisance takes effect because of the wind taking a certain direction across the boundary line an indictment would lie against him because it would be assumed he intended that his acts should take effect in that place. In either case the offense will be prosecuted and the courts where it takes effect only will have jurisdiction of it. I do not suppose it is necessary for me to call your honor's attention to the proposition that unless there are very extreme reasons for taking away a man from his friends and the neighborhood where he is known and putting him on trial somewhere else, the courts are not justified in doing so. I think it is hardly necessary to comment upon the justice of that law, but I think I should point out one of the many considerations which have a bearing upon the application of that doctrine. Of course this offense of libel is looked upon with great severity by the Federal Government so that it increases its penalties out of all proportion. That is a question of legislative discretion, but, as Lord Camden said in his great judgment in the memorable case of Entick v. Carrington, 9 Harg. St. Tr. 323:

"There are some crimes, such, for instance, as murder, rape, robbery and housebreaking, to say nothing of forgery and perjury, that are more atrocious than libeling."

I am only referring to the difference in the penalty as one of the reasons why your honor should not go out of your way to send these defendants away from home and friends, even though perhaps the juries are not so favorable to the disposition of the case on behalf of the prosecution. It was one of the reasons, your honor will recollect, why the English ministry of the time of George III called upon the King to exercise the prerogative of shipping persons accused of treason to England. One of the reasons was that in America you could not get the juries in Boston to convict Boston citizens of crime—perhaps that is a very good thing.

The COURT: Would you say that was a reasonable objection to them?

Mr. LINDSAY: It sounded to me so, but it did not sound like a very good legal reason.

The COURT: That is what a jury is for.

Mr. LINDSAY: We have not only juries, your honor, but constitutions; and in this State you have a constitutional provision that in

libel cases the truth is an absolute defense; whereas in the District of Columbia in a criminal case, the defense must include not only the truth, but good faith.

Mr. McNAMARA: That is the statute, but the Government stated at the time this indictment was returned that if these charges were proved to be true, a conviction would not be asked.

Mr. LINDSAY: But Mr. Roosevelt did not say that.

Mr. McNAMARA: We have heard a lot of persiflage, your honor, about Mr. Roosevelt.

Mr. LINDSAY: Of course your honor must view this case in just the same way as if the defendants were not so fortunate as to be the owners of a great newspaper, but were the conductors of some little country newspaper who just about manage to get along.

The COURT: With a mortgage on the paper.

Mr. LINDSAY: And who were not perhaps able to make a legal fight. I am glad that this is not true of these defendants.

Mr. MILLER: We have no doubt that you are glad about that.

Mr. LINDSAY: In the State of Indiana, your honor, a defendant is by the statute able to call witnesses into court to testify in his behalf. In the District of Columbia you have a rule by which it is left to the Court to decide just exactly how many witnesses the defendant shall have, unless he brings them there and pays their expenses from Indianapolis to Washington, and he must pay each of them one dollar and twenty-five cents a day and five cents a mile both coming from and going to the witness's home, and he may not have any witnesses called into court without the expenditure of this money, unless application is made by the defendant himself under oath before the trial, or, in case of manifest necessity, during the trial, setting forth that he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses, and setting forth, also, the names of such witnesses and what he expects to prove by them, in order that the Court may be advised whether or not the testimony be material to the issue. These are but a few of the hardships to which these defendants in these cases would be subjected if a departure was made from the rule which has always prevailed in cases of this sort.

The COURT: To go back to the suggestion made a while ago about this message of the former President, and the history and order of the prosecution. The question in my mind, as far as that is concerned, is this: Suppose he recognized the fact that in a prosecu-

tion for crime the motive of the prosecuting officer is immaterial. If a citizen comes to an officer and informs him of the commission of a crime, the fact that the citizen does it from malicious or bad motives of any kind makes no difference; the offense can be prosecuted just the same. But this has occurred to me: This is a political question. The Government of the United States was about to engage and is now engaged in the construction of this canal. It is a great political enterprise. The political consequences are far-reaching and we know now that it is of far more importance and from a personal standpoint far more interesting to the citizens of this country than we thought, because it is costing so much more than we thought. Now there is a question up as to whether they should do a certain thing; whether or not the Government should go on with a certain enterprise. People differ about it. Now the question is whether if they decide to build the canal they will build this one or that one, and people differ about that, and there is a commission which votes first one way and then another and people differ about that, and then people begin to discuss it and an investigation takes place. Those who are supposed to know what the people want to find out are to say the least fencing. Now the question as to how this thing originated; what the discussion was about; the political character of the enterprise and the political character of the discussion—the question and the discussion. it has occurred to me that it bears upon this question of good faith, of privilege. I know that newspapers—I will not stop now to specify; I could specify from my own observation—newspapers go too far and do not regard the rights of others sufficiently a great many times.

On the other hand a newspaper has a public duty to perform. It is its business to discuss these political questions. It is not only its privilege, but it is the duty of the owners of a paper, in the language of a former President, to "print the news and tell the truth about it," and it is the duty of the owners of a paper to tell the people of the United States what the facts are, as far as they can find out, and see that proper inferences are drawn, and if the indications point to the wrongdoing of anybody it is their duty to talk about it, speak out and talk about it. Now, that being the case, that being the duty of the newspapers, to discuss matters of this kind, then the question arises, how far must they go? It is not the case of a paper publishing the record of a woman, something that is a purely private and personal matter. I can very readily think of some reason why that sort of thing would be utterly indefensible; and yet why severe comment and erroneous conclusions and inferences and suspicions and suggestions might be made about a great public and political question. So, while

I am not going to approve or disapprove of anything said in that message, or to consider in any way the effect of it upon the prosecution, yet there is a question in my mind pertinent here upon which that has some bearing. That is the question of privilege, conditional privilege. It surely cannot be because those in power see a thing in one way that those who are out of power cannot see it in another way, and it is one of the incidents of public life, one of the penalties of those who hold public positions, or semi-public positions—one of the things that is incident to those situations. It is a question sometimes whether or not liberty is not more safely guarded by passing over discussions which technically pass the line. I remember in reading the Dana case that there was a note quoted there from Cooley on Constitutional Limitations. I was looking at it last Saturday. I take it that the note is by the author where he speaks of the Dana case. The idea was this: That it was a curious thing that in a government founded on a revolution, one of the causes of which was the dragging of people from the Colonies to England for trial, the same abuse should be attempted here. That is the substance of it.

So, while I do not care to hear any more about that branch or about this message—I read it—I do not think it is merely persiflage, so far as this case is concerned. This is a more or less political case—I say more or less; that gives you an opportunity to put your own construction on how much I think it is and how little I think it is. And I say when it comes to the question as to whether or not these defendants are shown to have had that thing which in law is known as malice, when it comes to determining that question, those matters are proper to be considered; and as this same English author has said who has been quoted here several times, Sir James Fitzjames Stephen, malice is one thing in murder, it is another thing in malicious trespass, and it is still another thing in libel. Now, what is it in libel? I think I will go a step further and counsel can govern themselves accordingly. I can very readily understand how, if a man puts in motion that which injures another that the question as to where it is put in motion, where the injury occurred, whether the act was completed by the defendant himself or through the agency of others at the place where the defendant is or elsewhere, and the question is whether or not the defendant is civilly liable for the injuries that flow from the act, the questions of venue, presence, participation become immaterial on a plain and simple proposition or principle. In other words, if a man prints and publishes a libel in Indianapolis and puts it in the mail and it goes to Washington and is there circulated to the detriment of others, I can very readily understand how the

persons in Indianapolis may be held responsible for the injury in Washington.

But we are not much aided by that sort of consideration. The question here is whether or not these men shall be transported to Washington for trial for an offense alleged to be committed there. There is a wide difference between a civil action for libel and the crime. The one is a tort which injures the individual and the other is a crime against society. Now, one of the essential ingredients of crime is guilty intent. I publish concerning a reputable citizen of Indianapolis a statement recklessly, I do not pay much attention to it, I do not ask whether it is true; I just simply publish it and let it go at that. If he is injured and his reputation is damaged, he may sue me for damages and I cannot be heard to say that I did not know it, did not stop to think about it. But when I am indicted under those same circumstances for crime, then I have an impression that the Government has to go further than the individual himself, just how much further I would like to hear, I would like to find out. It doesn't help me much to say they have got all the cases in their briefs. I do not expect to read all the cases. I could go to the encylopedia and get them myself. As far as I have looked them over there are a good many loose expressions in them. It occurs to me that, before a man can be guilty of a crime for libel, there has to be present that guilty intent. Just how far that goes and just what that means I have not yet made up my mind, but I am satisfied that it goes further than in an ordinary civil case. I know the text books say that this question as to express and implied malice shades into nothingness when you get right down to the cases, and there are a number of statements of that kind in the books. Anything wrong that is done by one person to another person is a tort; it is not a crime. I am at a loss to know how any act can be a crime unless there is present that thing, an absolutely essential thing in all crime, the malicious intent. Now what is the malicious intent here? So when it comes to the question of conditional privilege and malice, the fact that it is a public matter, publicly discussed, of public interest and in the midst of a campaign, I think does have a good deal to do with it.

Mr. LINDSAY: Will your honor allow me to call your attention to one fact, which appears from the record of the New York case, namely, that the introduction of the names of Mr. Taft and Mr. Robinson, which was commented upon by counsel for the Government, was the result of a complaint made by Mr. Cromwell to the district attorney of New York County that an attempt was being made to blackmail him? That is a part of the history of this case shown by

the New York indictment. That was the first time those names were mentioned. That publication was followed by the article in the *Chicago News* and subsequently by the dispatches from Paris and then by the publication out here, etc. That was the origin of the introduction of those names.

Mr. McNAMARA: Of course that is not exactly accurate from our standpoint. We would want a question here.

Mr. LINDSAY: What possible doubt is there about that? Mr. Cromwell made that complaint through Mr. Curtis of his office, who went to District Attorney Jerome.

Mr. McNAMARA: Mr. Lindsay and I know perfectly well that in the New York case one of the questions of fact is whether somebody for Mr. Cromwell gave this story to the paper; but it is not proved whether it was through Mr. Cromwell that these names were given or simply that he went and complained and in writing up the story these names were put in.

Mr. LINDSAY: The story was that he complained that these names were being used.

Mr. McNAMARA: It is perfectly true that the first article in the *World* appeared the morning after Mr. Curtis went to see District Attorney Jerome, but our case will show when it is tried in New York that the introduction of the names of Douglas Robinson and Charles P. Taft resulted from an attempt to blackmail Mr. Cromwell and that these people took that material to the *New York World* containing a list of the alleged names of the syndicate, in which list were the names of Douglas Robinson and Charles P. Taft.

The COURT: I meant to ask a question a while ago. You read a case and commented upon it in which the libel consisted in charging a man with crime. What is the crime that these men are charged with?

Mr. McNAMARA: In this case, your honor?

The COURT: Yes.

Mr. McNAMARA: If the Court please, if the story is true the men are guilty of a conspiracy against the United States. There is, I think, no reasonable doubt about that.

The COURT: There is no conspiracy against the United States.

Mr. MILLER: The articles do not have to charge a crime.

The COURT: Nobody suggested that. I do not want to be sup-

posed for an instant to say that now. Just a moment. There is no statute that I know of defining conspiracy, that is, no United States statutes except those statutes which make criminal a conspiracy to accomplish an offense against the United States; is that true?

Mr McNAMARA: A little more than that, your honor. It is to commit any crime against the United States or defraud the United States in any manner or for any purpose. It is the second branch.

The COURT: I did not remember that last part. Now, what I want to get at is this: The substance of this alleged libel is that whereas the Government of the United States paid forty million dollars for the property, it only cost the people who turned it over to the Government of the United States twelve million dollars. In other words, that somebody went out and bought up this stock for twelve million dollars and sold it to the Government of the United States for forty million dollars; is that correct?

Mr. McNAMARA: That is not all of it. The substance of the charge is that this gang of speculators, we will say, aided by the intimacy they enjoyed with the administration, Douglas Robinson, through his relationship to President Roosevelt, and Charles P. Taft, through his half-brother, and Cromwell, by the remarkable influence he is supposed to have with the administration, went out and scoured around and bought up the control of the entire securities for twelve million dollars.

The COURT: They could not do that by virtue of their intimacy with the powers that be. I cannot understand what that relation to this country, or any officers of the country, would have to do with gathering up the stock in France.

Mr. McNAMARA: Aided by the interest they enjoyed and knowing that this thing would go through, knowing that they could take advantage of their familiarity with the Panama securities and buy them up, get the Government to take the Panama route and make the difference between twelve millions and forty millions.

The COURT: Where is the crime in that? Suppose that had actually been done, where is the crime? I admit it was nasty and they ought not to do it. A man who would do that ought to be held up to contempt of the whole country, but where is the crime?

Mr McNAMARA: Your honor, there is a conspiracy to create misconduct in office and defraud the United States by having the United States pay the forty million dollars.

The COURT: I do not think a man could be convicted in a justice

of the peace court for that; but I admit it is nasty, and a man who would have anything to do with it ought to be pilloried in public opinion, but there are a number of disagreeable things not crimes. I wanted to know whether or not you gentlemen were claiming it was a charge of a crime, and if so, I wanted to know what crime it is. It is a charge of conduct decidedly unbecoming to a gentleman; I will admit that. It is something which I never think of as anything but downright larceny, but still it is not a crime under the law. If I found out by reason of my relations with the Government and its officials that they had about determined to buy a certain piece of ground for a public institution, and I slipped out and bought that piece of ground for twenty thousand dollars and sold it to them for sixty thousand dollars, it doesn't look very nice—I wouldn't want to do it and be found out in it—but it is not a crime.

Mr. McNAMARA: Suppose, then, your honor, you gave to the officers who gave you that information some of the money you made in this deal?

Mr. WINTER: There is no suggestion of that in this case.

Mr. McNAMARA: Would you think that was conduct unbecoming a gentleman?

Mr. WINTER: That would be bribery.

The COURT: Is there any charge of that kind?

Mr. McNAMARA: There is a charge that this had been done and that it was not known how much money went into Mr. Roosevelt's friends' pockets.

The COURT: I watched the testimony this morning and I have read over the testimony that was given last June. Now, what I gathered from that is this: That the body of this charge, this thing that is false and therefore defamatory and libelous, is that certain men, some named and some not named, bought the securities of the Panama Canal Company, the stock, for twelve million dollars, and sold it to the Government of the United States for forty million dollars and pocketed the difference; that is the substance of it.

Mr. McNAMARA: In some of the articles, yes, sir.

The COURT: That is the principal thing that is charged in this case; that is what this newspaper was hammering about—they said: "Who got the money?" The substance of it is that whereas the Government paid forty million dollars the people got only twelve million dollars and the smart men who got between got the twenty-eight

million dollars. I do not wish to be understood as approving of that. I think it was a nasty piece of business, but where was the crime?

Mr. McNAMARA: Unfortunately you do not state the facts and I cannot accept that. You will find that the statement is made from the beginning to the end in both the *World* and *The News* that Roosevelt, Taft and Root abetted the crime. Cromwell, Morgan, Robinson and Charles P. Taft had to gain possession of the properties of the canal at this low figure, getting their knowledge from the men in power I have just mentioned that the trade was going to be made, and they sold it for forty million dollars and the difference was put into the pockets solely of these men. That charges a crime on the part of these men to defraud the United States and a crime on the part of Roosevelt, Taft and Root to help these men.

The COURT: I have supposed up to this time that the people who were libeled were Morgan, Taft, Robinson and Cromwell.

Mr. McNAMARA: A little more than that.

The COURT: Who else?

Mr. McNAMARA: The former President and the present President and Secretary Root. The private citizens you have mentioned have been the ones chiefly libeled, but in several counts of the indictment we have mentioned Mr. Roosevelt, Mr. William H. Taft and Mr. Root.

The COURT: What constitutes the libel of the former President, what statement?

Mr. McNAMARA: The statement there was that he was the one who was chiefly with Secretary Taft in the confidence of Mr. Cromwell.

The COURT: I do not see how that libels Roosevelt, unless you want to take the ground that it libels Roosevelt to say he was intimate with Cromwell.

Mr. McNAMARA: I have not said that, if the Court please.

The COURT: I do not see on what theory that libels Mr. Roosevelt.

Mr. McNAMARA: The paper had published that Cromwell was the one man who knew all about the stolen loot and that these officials were in his confidence in that matter. I read that article to the Court. I probably was reading it a little fast.

The COURT: As far as I gathered from the reading of the articles, the charges of misconduct did not include the former President

of the United States, except that possibly he had access to the records and could produce the records and disclose the whole matter. I have not up to now discovered that it was claimed that *The Indianapolis News* in matters brought before me libeled the President of the United States. Is it averred in the indictment?

Mr. McNAMARA: In two or three counts is a charge of the intent to libel and defame Theodore Roosevelt and William H. Taft. Your honor will also recall one place in an article in *The Indianapolis News* where it is said, in speaking of the election of Mr. Taft, "We shall never get these facts now, because the people who investigate are the ones who should be investigated, unless Congress should drag this matter to light," and where they say, "We wonder if President Roosevelt wants this matter investigated."

The COURT: It would not be a crime for a newspaper to suggest that an officer of the law might or might not want an investigation. I do not gather from any article that has been read in the indictment or out of it—I do not recall—any charge of misconduct of the former President or the President that would amount to a libel.

Mr. McNAMARA: If they are guilty of misconduct at all in office they are guilty of a crime.

The COURT: Oh, no.

Mr. McNAMARA: The Court already has had this question of misconduct under consideration in the Southern District of New York, and I think some time before that in the Court of Appeals in the District of Columbia. While in the District of Columbia in one case they refused to hold it to be a crime, in another case they held the indictment to constitute an offense of misconduct in office. Of course this question of misconduct in office is an old English crime brought into recent consideration in the last four or five years because of the defect in our statutes to provide laws for certain cases. Of course your honor will probably remember in the cotton conspiracy cases the assistant statistician had an agreement with some of the cotton operators that he would indicate to them the condition of the market by the fall of the curtain of the window. There was no law covering that.

The COURT: That was the end of it. Let Congress pass a law.

Mr. McNAMARA: That man is certainly guilty of misconduct in office. Now if other men conspire to have him do that, they are guilty of conspiracy against the United States. That question has been decided by the Circuit Court of the Southern District of New York and also by the Court of Appeals of the District of Columbia.

In this case if these men conspire to have Roosevelt give forty million dollars for what could be bought for much less, I think there can be no doubt there is gross misconduct.

The COURT: These counts of the indictment cannot be classed as indictments charging the commission of a crime.

Mr. MCNAMARA: Of course, as Mr. Miller has said, we do not rest our case solely upon that; any gross misconduct which is offensive to ordinary rules of propriety is the basis of libel proceedings, as Judge Brewer decided on the State bench of Kansas. There are many things, not even misdemeanors, yet which impute to a man that kind of hateful and invidious conduct that stings a man more than some other offenses. The insurance agent who would refuse to pay reasonable commissions to his men working for him, under certain circumstances that would be very dishonorable. I have a case in mind of libel where a man was given a certain amount with which to employ his secretary and he was charged with employing the secretary and making a hard bargain of one-half the price and putting the rest in his pocket. It is a species of dishonorable conduct that would form the basis of a charge to make him odious in the community.

The hour of five o'clock having arrived, the Court adjourned until 9:30 o'clock tomorrow.

TUESDAY, October 12, 1909.
9:30 o'clock A. M.

The court met pursuant to adjournment.

Present, the same as on yesterday.

The trial of the cause was resumed.

ARGUMENT BY MR. LINDSAY.

Mr. LINDSAY: The position which these defendants take, if your honor please, with reference to section 1014, is that that statute was never intended by Congress to authorize the removal of offenders against Federal laws from one district to another except in the case of actual flight, that is to say, that the defendant must have been in the district in which it is alleged the offender committed his offense at the time of that offense and be subsequently found in another district. The provision of the judiciary act of 1789, which was enacted almost immediately after the ratification of the Constitution, and which is now a part of the revised laws of the United States, at section 1014 provides:

"For any crime or offense against the United States, the offender

may, by any justice or judge of the United States, or by any commissioner of a Circuit Court, to take bail, or by any chancellor, judge of a Supreme or Superior Court, chief or first judge of Common Pleas, mayor of city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * * And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue and of the marshal to execute a warrant for his removal to the district where the trial is to be had."

Our claim is that the principle or doctrine of constructive presence has never been a part of the extradition law of the United States, or of the American colonies before the formation of the Federal Union. That doctrine was, of course, purely statutory. As long ago as the time of the Henry VIII Parliament deemed it necessary to pass a special law to give to the courts of Great Britain the right to try offenses such as treason or misprision of treason, which struck at the very body of the state—I suppose printing presses existed in those days and printed seditious libels—it was found necessary to pass a law enabling the courts of Great Britain to try British subjects who in foreign jurisdictions conspired against the safety of the state. That resulted in the passage of the Act of Henry VIII, providing that "all offenses already made or declared, or thereafter made or declared, to be treason, misprision of treason, or concealment of treason, committed by any person out of the realm of England, might be tried by the Court of King's Bench by a jury of the shire in which the court sat, or before commissioners assigned for the purpose by the King in any shire; this not to interfere, however, with the privilege of peers to be tried by their peers." Of course the theory upon which the prosecution of these cases rested was that an offense, the result of which took place in England, should be made cognizable by the courts of England. But it was necessary for Parliament to pass this act, which it did pass, and it was necessary for Parliament to pass the act making punishable in the court of either county offenses beginning in one county and completed in the other, without which neither court would have jurisdiction. In 1764 the two Houses of Parliament presented a joint address to the King requesting him to take proceedings

under the authority of this act to transfer persons guilty of treason or misprision of treason, or offenses falling within this description, committed in Massachusetts, to England for trial. The colonists throughout America, in all the colonies protested, as your honor knows, against any such proposition being applied to the colonies. They did not enter into any discussion as to the legality of this act of Parliament, knowing perfectly well that the act of Parliament was the supreme law of England, but they protested against the injustice of such a principle being applied, their attitude being that if the statute of Henry VIII permitted the trial in England of persons charged with offenses in the colonies, it was wrong, and that Parliament had exceeded its authority in admitting the validity of a statute so opposed to the sense of natural justice. The result of that protest your honor well knows. Then we have the resolutions of the House of Burgesses in Virginia: "That all trials for treason, misprision of treason, or for any felony or crime whatever, committed by any person residing in the colony, ought to be in, and before his majesty's courts in the colony; and that the seizing of any person residing in the colony, suspected of any crime whatever, committed there, and sending such persons to places beyond the seas to be tried, is highly derogatory of the rights of British subjects, as thereby the inestimable privilege of a trial by jury from the vicinage, as well as the liberty of producing witnesses on such trial, will be taken away from the party accused." Then came the act of 1774, proposing to transport persons guilty of murder or other violent offenses committed in the colonies to England or Nova Scotia for trial, where it appeared the offense was committed in resisting the execution of the laws of Great Britain in the colonies, the theory of that being that the act took effect in Nova Scotia or England, or any domain that Parliament wished to name. The attitude of the colonies in respect to that act is shown by Prof. Bigelow, in the Cambridge Modern History, and I should like to read to your honor an extract from his work.

The COURT: I read all that last night.

Mr. LINDSAY: It was the agitation on this subject that resulted in the Declaration of Independence and was followed by the constitutional provision. All that, of course, shows the view of the American people that a man should be prosecuted in the place where he was when he did what is claimed was a crime. That principle was absolute throughout the history of the American colonies in respect to their inter-colonial compacts and arrangements, commencing in 1643 and down to the Articles of Confederation, every one of which

speaks specifically either of fugitives or persons seeking asylum in other colonies. Your honor will recollect the very first case which can be called in any way similar to the one now before your honor, where the Governor of Massachusetts refused to send to the colony of New York a man who had composed a libel in Massachusetts and afterwards circulated it in New York, on the ground that if he had committed any offense, he should be tried in Boston, where he actually composed and put in circulation the libel. The provision of the interstate law on the subject, of course has been held time and time again to apply only to persons actually present in the demanding State at the time the crime was committed, and the same rule, by the express legislation of Congress, applies to fugitives from the District of Columbia. In other words, if the editor of a Washington newspaper does what it is charged these defendants did, thereby causing the circulation in the same manner in Indianapolis of an alleged libel, there is no possible way of bringing him from the District of Columbia to this jurisdiction, but he can only be tried in the District of Columbia for his offense. The same rule applies to all our extradition treaties with foreign countries. That has always been the position of the United States Government. Mr. Moore, who is an authority on this subject, and with whose position as an international lawyer and in the State Department your honor is doubtless familiar, says, in speaking of these treaties, which employ very much the same language that section 1014 does:

"The extradition treaties of the United States generally provide for the surrender of persons who, having committed certain offenses within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the 'territories' of the other. The treaty with the Netherlands of 1887 adds: 'Such persons being actually within such jurisdiction when the crime or offense was committed.' A similar clause is contained in the treaty with Spain of 1877. But, as the term 'jurisdiction' is construed by the Government of the United States, no additional words are necessary to confine the operation of the treaties to offenses committed within the territorial jurisdiction of the contracting parties." (Moore on Extradition, Vol. I, pp. 134-5.)

And your honor will see that this provision, this section 1014 as far as libel is concerned, is practically the same thing, and refers to persons who in one jurisdiction commit an offense and are found in another jurisdiction of the United States. Now, we say further that this construction applies only to persons corporeally present in the

District of Columbia, to which removal is sought. That principle must be recognized in the construction of section 1014. The act of 1903, in extending this provision to offenders in the Philippines, or offenders from the Philippines found in this country, uses this language, and this is very significant, your honor:

"The provisions of section 1014 of the Revised Statutes, so far as applicable, shall apply throughout the United States for the arrest and removal therefrom to the Philippine Islands of any fugitive from justice charged with the commission of any crime or offense against the United States within the Philippine Islands, and shall apply within the Philippines Islands for the arrest and removal therefrom to the United States of any fugitive from justice charged with the commission of any crime or offense against the United States." (32 Stat., 806; U. S. Comp. Stat. 1905, p. 164.)

There was a special act passed by Congress in 1901, for the express purpose of covering the case of a resident of this State, Mr. Neely, who was charged with certain offenses in Cuba during the American occupation, and this special act, in order to be made general, used the language "any place occupied by the United States" or "any foreign territory occupied by the United States." It specifically confined its operation to persons who were fugitives from justice by applying these provisions of the Revised Statutes ordinarily applicable only to fugitives as between the States. I invite your honor's attention to the expressions by the text writers and by the courts in considering this section 1014. Mr. Moore says that the provision of section 843 of the Revised Statutes relating to the District of Columbia "does not cover the case of a fugitive from the District. Such case is covered only by section 1014 of the Revised Statutes of the United States." Speaking of offenders against Federal laws, he says: "By section 33 of the Judiciary Act of 1789, provision was made for the recovery of fugitive offenders against the laws of the United States." Judge Dillon, in the Buell case, accepted the view that there must be a presence in the District before there can be a removal there. "The District of Columbia is not a sanctuary to which persons committing offenses against the United States may fly and be beyond the reach of justice; nor is the law so defective that persons there committing such offenses and escaping or found elsewhere cannot be taken back there for trial." In Benson v. Henkel, 189 U. S. 1, the Supreme Court, in talking on the subject, said:

"It certainly could never have been intended that persons guilty of offenses against the laws of the United States should escape pun-

ishment simply by crossing the Potomac River, nor upon the other hand that this District should become an Alsatia for the refuge of criminals from every part of the country."

The same principle is recognized in that part of the dissenting opinion of Mr. Justice Peckham in Hyde v. Shine, which I have quoted at length in the brief. Now, of course, if you place the other construction that persons not corporeally present ought to be taken to the District from other jurisdictions, then you must impute to Congress the intention to apply an entirely different rule to the District of Columbia than prevails in any other part of the United States, and a power denied by the Constitution to a State itself, because no State can recover a criminal charged with an offense within its borders, except upon affirmative proof that he was in the State at the time it is alleged he committed his offense. The difficulty and embarrassment resulting to the administration of justice from the application of this rule was commented upon, and has been in every case which has come before the courts. As a matter of fact, however, your honor well knows that in the great case of State against Hall, where a man stood on a boundary line and fired a gun and killed a man in another State, the Court said while under those circumstances he was guilty of an offense in the State where his shot took effect, nevertheless he could not be extradited, and while the seeming hardship in the administration of justice was great in that case, nevertheless it had to give way to the great principle underlying this rule. In the entire history of our country, this case of State against Hall is the only case where that situation has arisen, as far as our records show. This was the argument advanced in the Corkran case in support of the proposition that "constructive" fugitives should be surrendered under the interstate rendition clause of the Constitution. It was argued in that case that the doctrine for which we contend might render the several States asylums for criminals, the effect of whose offenses is injury to persons or property in the District of Columbia or other places over which Congress exercises exclusive legislation. But the New York Court of Appeals thought otherwise. Judge Cullen said:

"There is no practical danger of the kind. It may be safely stated that nearly every State, as well as our own, punishes crimes committed within the State although the results of the crimes are effected without its territory. * * * On the other hand, there is great danger that citizens may be carried into other States to be punished for acts which are not criminal in the jurisdiction in which they were committed. * * * These considerations equally apply to prosecutions for libels alleged to have been committed in newspapers published

here and circulated throughout the country." People ex rel. Corkran v. Hyatt, 172 N. Y. 176.

Now, we say in conclusion upon this point of the case, that there cannot result the slightest embarrassment to the United States by the application of the rule for which we contend, because there is no situation in which, under the Federal statutes, a man cannot be prosecuted for a Federal offense at the place where he was when he did the act which is charged to have constituted the offense. There are two provisions of the United States law which cover the situation completely. Section 731, to which your honor referred yesterday, expressly provides that in the case of Federal offenses commenced in one district and completed in another, the trial can be had in either; and there are authorities to the effect that where an overt act, in pursuance of a conspiracy entered into in one jurisdiction, is committed in another, an indictment will lie in the latter jurisdiction. Since, then, an offender against the laws of the United States can always be tried in the district where he really acts, it is obvious that there can never be any proper occasion, much less necessity, for removing him to another district for trial. If, on the other hand, he voluntarily leaves the district, where he has acted, and is subsequently found in any other, however remote, the statute, section 1014, then affords a means of securing his return to the scene of his crime for trial there. So that construing section 1014 so as not to extend it in such a manner as to lead to any such operation or absurd consequence to which it must be, of course, extended if it has the effect of subjecting or enabling the prosecution of defendants in cases of this sort in any jurisdiction of the United States that the department of justice seeks to fix upon, we must read into it this fundamental principle of American law that a man is not to be taken away from his home and friends and removed to some jurisdiction selected by the United States Government, when he can be prosecuted at the place where he actually committed his offense. As a rule of interpretation applicable to this case, I hope your honor will allow me to read what Lord Bacon said a great many years ago, but which seems to be equally applicable now.

The COURT: I have read it.

Mr. LINDSAY: That statutes must not be strained.

The COURT: I have read all of that.

Mr. LINDSAY: Then, with these suggestions, I will submit the proposition that there is no power under section 1014 on the part of this Court to send these defendants to a place where they never were.

BRIEF FILED BY MR. LINDSAY AND MR. NICOLL.

It has been proved (among other things):

1. That neither of the defendants was in the District of Columbia at any of the times mentioned in the indictment.

2. That the alleged "publication" in that District, which is the basis of the prosecution, consisted solely in the circulation and distribution there, in the course of and as a part of the general circulation of *The Indianapolis News* of fifty or sixty copies of the paper which were sent by mail daily from Indianapolis by the circulating department (with which neither of the defendants had any direct relation, so far as the testimony discloses), out of a total issue of about 90,000 (pp. 145-148); that the entire circulation of *The News* outside of the State of Indiana was only about two thousand, of which five or six hundred copies went into Illinois, and a few hundred into Ohio, the rest being scattered throughout the union from Maine to California (pp. 194-195).

On the same day that the indictment against these defendants was returned the grand jury of the District of Columbia returned an indictment against the Press Publishing Company, proprietor and publisher of the *World,* which is published in the city of New York, but, like *The Indianapolis News,* circulates throughout the United States, as well as in foreign countries, Joseph Pulitzer, the president of the Press Publishing Company, and Messrs. Caleb B. Van Hamm and Robert H. Lyman, two of the editors of the *World.* This indictment was based upon the circulation in the District of Columbia of copies of the *World* containing news and editorial comment upon the Panama Canal purchase, reflecting, as charged, upon the same gentlemen who are alleged to have been libeled by the publications which appeared in *The News.* [1]

The assertion of the right of the Federal Government to take the proprietor of a newspaper from his home to Washington and put him on trial as a criminal there because of the circulation of his newspaper at the seat of the national Government is a matter of great concern. Prior to the institution of these prosecutions it was generally supposed that the power did not exist. The courts had, indeed, expressly

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[1] Subsequently the grand jury of the Southern District of New York returned another indictment against the Press Publishing Company and Mr. Van Hamm charging them with the publication of the same libels in the Post Office Building in the City of New York, and within the United States Military Reservation at West Point, this indictment being drawn under section 5391 of the Revised Statutes, which is quoted in full in note on page 197, *post.*

No attempt has so far been made to remove Messrs. Pulitzer, Van Hamm and Lyman to Washington. The United States Attorney for the Southern District of New York has, however, announced that he will soon put the Press Publishing Company on trial on the indictment under Section 5391 (p. 199, note, *post*).

denied it. The question is, therefore, one of extreme importance, not merely to these defendants, and to the clients whom we represent, but to the entire press of the country, for if the author of every publication sent into the Federal capital, which is regarded as objectionable to the local libel law, can be taken there for trial, no author or publisher will be secure.

The authority under which it is supposed that the present proceeding may be maintained is to be found in section 1014 of the Revised Statutes (which is a reproduction, in substance, of the thirty-third section of the Judiciary Act of 1789):

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court, to take bail, or by any chancellor, judge of a Supreme or Superior Court, chief or first judge of Common Pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * * And where any offender or witness is committed in any district other than that where the offense is to be tried it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue and of the marshal to execute a warrant for his removal to the district where the trial is to be had."

U. S. Comp. Stat., 1901, p. 716.

FIRST.—The fact that the supposed offenses charged against the defendants were committed within the jurisdiction of the State of Indiana, and are cognizable in its courts, is a sufficient reason for refusing a warrant of removal.

When a resident of the State of Indiana commits in his own State a violation of its laws he is entitled as a matter of right to be tried under and in accordance with its constitution and laws, and should not be withdrawn for trial for such an act from his constitutional judge. Speaking of the first Dana case, Cooley says:

"The *New York Sun,* of which Mr. Charles A. Dana was editor-in-chief, published an article reflecting upon the public conduct of an official at Washington. This article was claimed to be a libel. The actual offense, if any, was committed in New York; but a technical publication also took place in Washington by the sale of papers there. The offended party chose to have his complaint tried summarily by a police justice of the latter city instead of submitting it to a jury required to be indifferent between the parties. A Federal commissioner

issued a warrant for Mr. Dana's arrest in New York for transportation to Washington for trial; but Judge Blatchford treated the proceeding with little respect, and ordered Mr. Dana's discharge. Matter of Dana, 7 Ben. 1. It would have been a singular result of a revolution where one of the grievances complained of was the assertion of a right to send parties abroad for trial, if it should have been found that an editor might be seized anywhere in the Union and transported by a Federal officer to every territory into which his paper might find its way, to be tried in each in succession for offenses which consisted in a single act not actually done in any of them."

Constitutional Limitations, p. 459, note.

In Hyde v. Shine, 199 U. S. 62, Mr. Justice Brown, speaking for the Supreme Court, sternly reprobated the practice here resorted to, namely, of "indicting citizens of distant States in the courts of this District, where an indictment will lie in the State of the domicile of such person, unless in exceptional cases where the circumstances seem to demand that this course shall be taken."

He said: "To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction."

SECOND.—Not only are there no exceptional circumstances in this case authorizing a departure from the rule thus laid down by the Supreme Court, but the removal of these defendants would occasion them great hardship.

This application is addressed to your honor's discretion. It is for you to decide, in view of all the facts, "whether the ends of justice will be best subserved by granting or refusing the warrant."

Price v. McCarty, 89 Fed. Rep., 84, 88.

What are the facts here? The offense charged is libel, but it affirmatively appears that the actual offense, if any, was committed in Indiana, although a "technical" publication is claimed to have taken place in Washington. It would have been quite as easy for the offended parties to have instituted a criminal prosecution in Indiana as in the District of Columbia.

True, by the law of the District of Columbia the penalty for publishing a libel may be five years' imprisonment, while in Indiana the extreme term of imprisonment cannot exceed six months. But though the crime is ten times more serious at the national capital than in the State of Indiana, it must be remembered that, as that great jurist and patriot, Lord Camden, said in the memorable case of En-

tick v. Carrington: "There are some crimes, such, for instance, as murder, rape, robbery and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libeling."

9 Harg. St. Tr., 323.

If these defendants should be taken to Washington they will be deprived not only of the right of a trial by a jury of the vicinage, but of many other advantages to which the laws of Indiana entitle them. Thus the constitution of Indiana provides: "In all prosecutions for libel, the truth of the matter alleged to be libelous may be given in justification."

Constitution of Indiana, Article I, 55.

Under this provision the truth is a complete defense, regardless of good faith or motive.

State v. Bush, 122 Indiana, 42.

But by the law of the District of Columbia the publication of a libel is not justified unless "it appear that the matter charged as libelous was true, and was published with good motives and for justifiable ends."

Code, Section 817.

Again, in Indiana witnesses subpœnaed on behalf of the defendant in criminal prosecutions may be compelled to attend and testify "without their fees being first paid or tendered."

Revised Statutes, 2109.

But in the District of Columbia it is left to the justice trying the case to say how many witnesses the defendant may have; and he must moreover pay the fees of his witnesses at the rate of $1.25 per diem, and for traveling, at the rate of five cents per mile, coming and returning from the witness's home when summoned from without the District (Code, section 1114), unless he "makes application under oath before the trial, or, in case of manifest necessity, during the trial, setting forth that he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses, and setting forth also the names of such witnesses and what he expects to prove by them in order that the Court may be advised whether or not the testimony be material to the issue."

Code, section 929.

The Supreme Court has said that no defendant should be subjected to such hardships as these if the case can be tried in a court of his own jurisdiction.

THIRD.—The Supreme Court of the District of Columbia is without jurisdiction to try the defendants for the supposed offenses charged in the indictment.

Section 1014 enables the removal of offenders against the United States "for trial before such court of the United States as by law has cognizance of the offense." The defendants not having been within the District of Columbia at the time when the supposed offenses charged in the indictment are alleged to have been committed, no court in that District can take cognizance thereof.

Section 1 of the Code of Laws for the District of Columbia provides: "The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code."

By the common law the local presence of the offender within the country at the time of the offense was necessary to give the criminal courts jurisdiction over him. Offenses not actually but only constructively committed within the jurisdiction were not cognizable.

This subject was discussed at length in R. v. Keyn, 2 Ex. D., 63; 13 Cox, C. C., 403; 46 L. J. (M. C.), 17, where the defendant in command of the Franconia, a German ship on the high seas, navigated her so negligently as to run into and sink the British ship Strathclyde, causing the death by drowning of a passenger. The question was whether the Central Criminal Court had jurisdiction to try the defendant for manslaughter. This question, after most elaborate discussion, was decided in the negative.

Speaking of this case, Sir James Fitzjames Stephen, in his History of the Criminal Law of England (Vol. II, pp. 10-11), says: "One of the questions raised in the case was whether Keyn's act was done on board the English ship. Mr. Justice Denman and Lord Coleridge thought it was. Their reasoning, or rather Mr. Justice Denman's reasoning, to which Lord Coleridge and Mr. Justice Lindley assented, was founded principally on Coombes' case (2 Leach, 389). Coombes, from the shore, shot a man engaged in pushing off a boat aground on a sand bank in the sea, one hundred yards from the shore. It was held that Coombes' crime was committed on the high sea, and that he was subject to the admiralty jurisdiction. An American case (U. S. v. Davis, 2 Sumner, 482) went further. An American sailor in a ship in one of the Society Islands' harbors fired a shot which

killed a man in (apparently) a foreign ship. The American court held that the crime was committed on board the foreign ship, and that therefore the American court had no jurisdiction to try it. On these grounds the learned judges mentioned thought that Keyn committed a crime on an English ship. Lord Chief Justice Cockburn agreed in the premises, but denied the conclusion. He thought that Coombes' case was rightly decided, putting his conclusion on the principle that in such a case the act in lieu of taking effect immediately is a continuing act till the end has been effective; that is, till the missile has struck the blow, the intention of the party using it accompanying it throughout its course! He thought also that it by no means followed that because the act was done where the bullet struck its mark, it was not also done where the shot was fired, and considered that in holding the contrary the American case went too far; but he also thought that wherever the act was done the local presence of the agent within the country was necessary to give jurisdiction over him. He thought, in short, that a foreigner shooting an Englishman on shore from a foreign boat on the high sea would be guilty of murder in England, but not of a murder for which an English court could try him."

The judgment in the Keyn case led to the passage of 41 and 42 Vict., c. 73 (the Territorial Waters Jurisdiction Act, 1878), the second section of which enacts that "an offense committed by a person, whether he is or is not a subject of her majesty, on the open sea, within the territorial waters of her majesty's dominions, is an offense within the jurisdiction of the admiralty, although it may have been committed on board or by means of a foreign ship; and the person who committed such offense may be arrested, tried and punished accordingly."

Warburton's Leading Cases (fourth edition), 465.

The authority of the Keyn case is not shaken by the cases which relate merely to venue within the territory of the same political community, e. g.: Burdett's Case, 4 B. & Ald., 95, 113 and 135; King v. Johnson, 7 East., 65; or where the offender was at the time within the territory where the offense is charged, as appears to have been the case in Commonwealth v. Blanding, 3 Pickering, 304; or where there is an express statute as in Palliser's Case, 136 U. S., 257.

Assuming, for the moment, that it is within the power of Congress to confer upon the courts of the District of Columbia jurisdiction to try persons for acts done when they were not within the District, and assuming further that it would be within the judicial power to arrest and remove such persons to the District of Columbia for trial, yet Congress has not granted that power to the courts of the District.

FOURTH.—Even though Congress had, by legislation, conferred jurisdiction on the courts of the District of Columbia to try offenders for crimes not actually but only constructively committed in the District, jurisdiction of the person of the offender could not be obtained except in pursuance of express statutory authority.

It may be conceded that a State may, under proper limitations, punish offenses committed within its territory by persons corporeally in another State, and that in such cases there may be concurrent jurisdiction, the State within whose territory the offenses was affected having jurisdiction by reason of the locality of the act, and the other also having jurisdiction by reason of the locality of the action. "In such cases the latter State may punish the perpetrator, or may give him up to the State; or, if it see fit, may decline to do either. But the fact that a State may be unable to obtain jurisdiction of the offender is not a test of its jurisdiction over the offense, for such inability may exist where the person who committed the offense was, at the time of its commission, within the territory, but subsequently fled to the jurisdiction of another country."

Report on Extraterritorial Crime and the Cutting case, Washington, 1887.

"Jurisdiction of the offense or subject matter and jurisdiction to try the offenders are very different things. The first exists whenever the offense was committed within this State, and the second when the offender is brought into court, and not before."

Bronson J., in Adams v. People, 1 N. Y., 173, 179.

And so it was said in State v. Grady, 34 Conn., 118, that "if an offense is committed in this State by the procuration of a resident of another State who does not himself personally come here * * * such non-resident can be punished for the offense by the courts if jurisdiction can be obtained of his person."

FIFTH.—There is no statute of the United States authorizing the removal of offenders to the District of Columbia for crimes against the local laws of the District not actually but only constructively committed there.

The District of Columbia is not the State or district where the offense here charged was committed, within the meaning of the Federal Constitution.[1] Those provisions were intended to preserve substantial and real rights, dependent upon actual conditions and not upon legal fictions. It was to override such fictions that the Revolution was fought, and these provisions embedded in the organic law.

[1] Art. III, Sec. 2, Par. 3 and Sixth Amendment. See *post*. pp. 190-191.

(a) The principle that a man must be tried at the place where he was when he is alleged to have done the act of which he stands accused was asserted long before the Revolution, and to prevent its encroachment was made a part of our organic law.

In 1693, Governor Phips, of Massachusetts Bay, refused the demand of Governor Fletcher, of New York, for the surrender of Abraham Governeur, charged with circulating in the latter colony a seditious letter attacking Fletcher's administration. Governeur had been a supporter of Leisler and was clerk of the Committee of Safety in 1689. He was imprisoned and condemned as a traitor, but was afterwards pardoned and went to Boston, at which place he wrote a letter to his parents in which he spoke of Governor Fletcher as "a poor beggar" who "seeks nothing but money and not the good of the country." Fletcher, after reciting "the ill consequences which this letter has produced, being sent from one hand to another of ye discontents in these parts of their majesties' domains," called upon Governor Phips to secure Governeur's person, "and return him to this place" (New York), "being that of his former residence, and from whence he has fled with apparent designs of disturbing the peace of this government."

Governor Phips told Fletcher's messenger that "if Governeur had done any wrong Coll. Fletcher might prosecute him at Boston." [1]

In February, 1764, the two Houses of Parliament presented a joint address to the King in which he was requested, in order to bring to condign punishment the instigators of the disorders then prevalent in Massachusetts, to direct the Governor of that colony "to take the most effectual methods for procuring the fullest information that can be obtained touching all treasons or misprisions of treasons committed within his government since the 30th of December last, and to transmit the same, together with the names of the persons who were most active in the commission of such offences, to one of his majesty's secretaries of state, in order that his majesty may issue a special commission for inquiring of and hearing and determining the said offenses, within this realm, pursuant to the provisions of the 35th Henry VIII, [2] if his majesty shall, when receiving the said information, see sufficient ground for such a proceeding." [3]

[1] N. Y. Col. Dec., Vol. III, 386; Id. Vol. IV, 2-5, 8-9.

[2] This act (c. 2) enacted that all offenses already made or declared, or thereafter made or declared, to be treason, misprision of treason, or concealment of treason, committed by any person out of the realm of England, might be tried by the Court of King's Bench by a jury of the shire in which the court sat, or before commissioners assigned for the purpose by the King in any shire; this not to interfere, however, with the privilege of peers to be tried by their peers. See Stephen, Hist. Cr. L. Eng., Vol. II, pp. 14-15.

[3] Pitkin, Vol. I, p. 235; Appendix, p. 463, note 13.

The colonies entered into no discussion of the legality of this measure. Their attitude was that if the statute of Henry VIII permitted the trial in England of persons charged with offenses in the colonies, it was wrong, and that Parliament had exceeded its authority in admitting the validity of a statute so opposed to the sense of natural justice. As Lord Acton expresses it, in describing the position taken by James Otis with reference to the odious writs of assistance: "There are principles which override precedents. The laws of England may be a very good thing, but there is such a thing as a higher law." [1]

Thus the House of Burgesses in Virginia declared "that all trials for treasons, misprision of treason, or for any felony or crime whatever, committed by any person residing in the colony, ought to be in, and before his majesty's courts in the colony; and that the seizing of any person residing in the colony, suspected of any crime whatever, committed there, and sending such person to places beyond the seas to be tried, is highly derogatory of the rights of British subjects, as thereby the inestimable privilege of a trial by a jury from the vicinage, as well as the liberty of producing witnesses on such trial, will be taken away from the party accused."

In their petition to the King they said, on the same subject: "How truly deplorable must be the situation of a wretched American who, having incurred the displeasure of any one in power, is dragged from his native home and his nearest domestic connections, thrown into a prison, not to wait his trial before a court, jury or judges from the knowledge of whom he is encouraged to hope for speedy justice, but to exchange his imprisonment in his own country for fetters among strangers; conveyed to a distant land, where no friend, no relation will alleviate his distress or minister to his necessities, and where no witnesses can be found to testify to his innocence; shunned by the respectable and honest and consigned to the society and converse of the wretched and abandoned, he can only pray that he may soon end his misery—with his life." [2]

Among the tyrannical measures of the Parliament of 1774 was the act providing that any one accused of a capital offense should, if the act was done in resisting the execution of the law in Massachusetts, be tried in Nova Scotia or Great Britain." [3]

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[1] Lectures on Modern History, p. 308.

[2] Pitkin, Vol. I, p. 236-7.

[3] Pol. Hist. Eng., Vol. X, p. 129; Grahame, Vol. IV, p. 345; Bryant, Vol. III, p. 375.

"Against this, and other new legislation affecting Massachusetts, it was resolved, at the time of the emigration, the colonists were entitled to all the rights, liberties and immunities of free natural-born subjects within England, that they had not by their emigration forfeited, surrendered or lost any of those rights, and that their descendants were still entitled to exercise and enjoy the same, so far as circumstances enabled them to do so. Accordingly the colonists were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried for crime by their peers of the vicinage by the course of that law. The legislation in question was unjust, unconstitutional, destructive of the rights of Americans. Necessity was, of course, the justification urged. Boston juries could not be depended upon to convict Boston citizens of crime in resisting officers of the British government, or to acquit officers under indictment for acts done by them in the discharge of their duty; to which sarcasm might reply that British juries could be depended upon to convict in the one case and acquit in the other for want of witnesses who heard and saw. Men accused of crime in Massachusetts must be tried by a Massachusetts jury, not merely because British juries would be apt to be prejudiced against them for what they had done against natives of England, but because witnesses in favor of the accused would not be present at the trial there, or, if present, would probably be overawed. So Americans maintained, and that view passed into the State constitutions, and then into the Sixth Amendment to the Constitution of the United States." [1]

In the Declaration of Independence the King of Great Britain is arraigned "for depriving us, in many cases, of the benefits of trial by jury. For transporting us beyond seas to be tried for pretended offenses."

In Alexander Hamilton's Frame of Government or First Plan of Government, presented by that statesman to the Constitutional Convention on June 18, 1787, it was provided in Article V, section 1, that: "All crimes, except upon impeachment, shall be tried by a jury of twelve men, and if they shall have been committed within any State shall be tried within such State."

Federalist, p. 35, Introduction.

In the South Carolina plan, drafted by Charles Pinckney, and laid before the same convention on May 29, 1787, we find this provision in Article IX: "All criminal offenses (except in cases of impeachment)

[1] Prof. Bigelow, in Cambridge Mod. Hist., Vol. VII, p. 187.

shall be tried in the State where they shall be committed. The trial shall be open and public and be by jury."

Elliot's Debates, Vol. I, p. 149.

In the draft of a constitution reported to the convention by the committee of five on August 5, 1787, section 4 of Article XI reads: "The trial of all criminal offenses (except in cases of impeachment) shall be in the State where they shall be committed, and shall be by jury."

Elliot's Debates, Vol. I, p. 224.

On August 28, 1787, it was moved and seconded to amend the fourth section of the eleventh article to read as follows: "The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the legislature may direct," which passed in the affirmative.

Elliot's Debates, Vol. I, p. 270.

In the revised draft of the Constitution, reported on September 12, 1787, by the committee of revision, we find the existing provision of the Constitution.

Elliot's Debates, Vol. I, pp. 298, 304.

The convention of the State of New York, held to ratify the Constitution, at Poughkeepsie, on July 26, 1788, among other things declared: "That (except in the government of the land and naval forces, and of the militia, when in actual service and in cases of impeachment) a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes cognizable by the judiciary of the United States, and such trial should be speedy, public and by an impartial jury of the county where the crime was committed."

Elliot's Debates, Vol. I, p. 328.

The Rhode Island ratification, done in convention at Newport on May 29, 1790, declared: "That, in all capital and criminal prosecutions, a man hath the right * * * to a fair and speedy trial by an impartial jury in his vicinage."

Elliot's Debates, Vol. I, p. 334.

The Sixth Amendment provides: "The accused is entitled to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

Speaking of these constitutional provisions Judge Story says: "It

is observable that the trial of all crimes is not only to be by jury, but to be held in the State where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some distant State, away from his friends, and witnesses, and neighborhood, and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant State or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence. There is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable a manner. But upon a subject so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion. By the common law the trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its jealousy still further, and required that the jury itself should come from the vicinage of the place where the crime was alleged to be committed."

Story on the Constitution (5th Ed.), Vol. II, p. 560.

Therefore the Constitution, both in the original article and in the amendment, limits the place of trial to the State wherein the crime "shall have been committed," not into which it may extend, or wherein it takes effect, wholly or in part, but wherein it was actually done. The makers of the organic law were expressing their repudiation of the parliamentary doctrine that criminal offenses might be tried elsewhere than at the place where the offender was when he acted, and where, consequently, the crime was really perpetrated. Hence the territorial limitation by the Constitution upon the power both of the nation and of the States, whereby criminal prosecutions must be had in the State or district where the crime was actually committed. This is the view of Cooley, who says: "The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit on his trial of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witnesses who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses."

Constitutional Limitations (7th Ed.), p. 459.

(b) The system of inter-colonial rendition in vogue in this country prior to the Revolution applied to actual fugitives from justice only.

"The provision of the Constitution for the rendition of fugitives from justice involves no new principle. It merely prescribes the method of doing what up to and even after the adoption of the Articles

of Confederation of 1778 was usually accomplished through the courts, without the intervention of the executive."

Moore on Extradition, Vol. II, p. 821.

Among the evidences of this fact, which the learned author says are "abundant and conclusive," he refers to the Articles of Confederation of 1643 between the plantations of Massachusetts, New Plymouth, New Haven, and those in combination therewith, one of which provided (among other things), "that upon the escape of any prisoner or fugitive for any criminal cause, whether breaking prison or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the jurisdiction out of which the escape is made, that he was a prisoner or such offender at the time of the escape, the magistrate * * * shall forthwith grant such a warrant as the case will bear for the apprehending of any such person and the delivery of him into the hand of the officer or other person who pursueth him," etc.

Id., p. 821.

By the treaty of Hartford, concluded in 1650, between the English colonies and Governor Stuyvesant, of New Netherland, it was agreed as to fugitives: "That the same method shall be observed between the United English colonies and the Dutch nation in this country of New Netherland."

O'Callaghan, Laws & Ord. of New Neth., pref., p.

This provision of the Hartford treaty was renewed in 1670 as between the English colonies by Article VII of the new confederation, the only change being that the certificate of one magistrate (instead of two) should be sufficient.

Mass. Rec., Vol. IV, pt. 2, 471, 473; 13 Am. Law. Rev., 181.

Among the propositions submitted by William Penn to the Lords of Trade in 1686 was that of an assembly composed of deputies from each colony with power "to hear and adjust all matters of complaint or difference between province and province, as * * * where offenders fly justice, or justice cannot well be had upon such offenders in the province that entertain them."

100th Anniversary of the U. S., Vol. II, pp. 450-1.

In 1720 the colony of Connecticut passed an act which, after reciting that it had sometimes happened that persons convicted of crime in the neighboring colonies had "come into this colony to hide from justice, or to take up their abode here," provided that "whatsoever persons convicted as aforesaid, or that shall hereafter be convicted as aforesaid, or that are, or shall be pursued for such crimes, if they make their escape, as aforesaid, and come into this colony, and continue here for the space of two months, without having first obtained leave

therefor of the General Assembly, and shall not depart out of the colony within one month after they shall be warned so to do, * * * shall suffer a fine of five pounds," etc.

Moore, Vol. II, pp. 822-3.

"This act," says the learned author, "is found in a somewhat modified form in the Acts and Laws of Connecticut, Revision of 1784, under the title of 'an act for remanding persons who have committed crimes in other States, and to escape justice flee into this State,' and yet again, with further unimportant modifications, in the Revision of 1795, p. 218."

Id., p. 823.

He adds: "There is also evidence in the colonial records of Pennsylvania of the existence of a custom of delivering up fugitive criminals as between Pennsylvania, New Jersey, Maryland and Delaware * * * both before and after the adoption of the Articles of Confederation. That a similar custom was general among the British colonies in North America is further evidenced by the early legislation of the Canadian provinces, and the practice was in accordance with the early decisions of the English courts."

Id., p. 824.

(c) Offenders against the laws of the States and Territories can be reclaimed for trial only on proof of their actual presence in the State or Territory to which their removal is sought at the time of the alleged offense.

The provision of the Articles of Confederation governing interstate rendition subsequently engrafted in the Constitution (Art. IV, subd. 2) specifically limits the right of reclamation to persons "who shall flee from justice and be found in another State."

The legislation of Congress applying this provision to the Territories similarly excludes "constructive fugitives" from its operation, and it is settled law that no person charged with a crime against State or Territorial laws can be reclaimed except upon affirmative proof that he was physically present in the demanding State or Territory at the time of the alleged crime.

Hyatt v. Cockran, 188 U. S., 691.

In Indiana the rule is laid down by a special statute: "No citizen or resident of this State shall be surrendered under pretense of being a fugitive from justice from any other State or Territory, where it shall be clearly made to appear * * * that such citizen or inhabitant was in this State at the time of the alleged commission of the

offense, and not in the State or Territory from which he is pretended to have fled," etc.

Rev. Stat. Indiana, 1881, Sec. 1605.

(d) Offenders against State and Territorial laws found in the District of Columbia can only be surrendered on similar proof of actual flight.

By the sixth section of the act of March 3, 1801, Congress made special provision for the rendition of criminals taking refuge in the District of Columbia. This provision was subsequently embodied in the Revised Statutes relating to the District of Columbia, and is now reproduced in section 930 of the District Code as follows:

"In all cases where the laws of the United States provide that fugitives from justice shall be delivered up the Chief Justice of the Supreme Court of the District of Columbia shall cause to be apprehended and delivered up such fugitives from justice who shall be found within the District, in the same manner and under the same regulations as the executive authorities of the several States are required to do by the provisions of sections 5278 and 5279, title 66, of the Revised Statutes of the United States, 'Extradition'; and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose and to aid and assist in such delivery."

(e) The extradition treaties of the United States incorporate the same principle, and permit the surrender of such persons only as are within the territorial jurisdiction of the contracting parties at the time of the alleged crime.

"The extradition treaties of the United States generally provide for the surrender of persons who, having committed certain offenses within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the 'territories' of the other. The treaty with the Netherlands of 1887 adds: 'Such persons being actually within such jurisdiction when the crime or offense was committed.' A similar clause is contained in the treaty with Spain of 1877. But, as the term 'jurisdction' is construed by the Government of the United States, no additional words are necessary to confine the operation of the treaties to offenses committed within the territorial jurisdiction of the contracting parties."

Moore on Extradition, Vol. I, pp. 134-5, citing 1 op., 83 (March 14, 1798), 8 op., 215 (November 29, 1856), and 14 op., 281 (July 21, 1873).

Although the question was determined otherwise in the case of Stupp (11 Blatch. 124), the Government has adhered to its position, holding the contrary view to be unsound and not sustained by authority. In the case in question a Prussian subject was charged with the commission of murder, arson and robbery in Belgium. There being no extradition treaty between the United States and Belgium, Stupp's surrender was demanded by Prussia, whose laws made provision for the punishment of her subjects for the crimes of which Stupp was accused, when committed outside of the national territory. Stupp was taken before Judge Blatchford on *habeas corpus,* and a motion was made for his discharge on the ground that the crimes of which he was accused were not committed within the jurisdiction of Prussia. Judge Blatchford, in overruling the motion, delivered an exhaustive opinion on the meaning of the word "jurisdiction," and Stupp was committed for extradition. The department then submitted the question to the Attorney-General, who held, in accordance with the settled view of the Government, that jurisdiction meant territorial jurisdiction. Of Judge Blatchford's opinion he said: "I have carefully read the elaborate opinion of Judge Blatchford upholding the jurisdiction of Germany in this case, transmitted in your letter, but with diffidence and regret I am compelled to dissent from his views. They do not appear to me to be sound in principle or sustained by authority."

14 Op., 288.

Acting on this advice the President refused the application of the Prussian minister for a warrant of surrender. [1]

For. Rel. 1873, pp. 80-85, 301.

(f) There is nothing in the language of section 1014 to warrant an inference that Congress intended to apply a different rule to the removal to the District of Columbia of offenders against the local laws of that District.

There is, in one respect, at least, a striking similarity between the phraseology of section 1014 and that employed in the extradition treaties. Both make provision for the surrender of a person who, having committed a crime in a particular jurisdiction, is subsequently "found" in another, to be tried before the appropriate tribunal. If the treaties apply only to persons actually within the territorial jurisdiction of the demanding nation at the time of the alleged crime, the same principle and policy must be deemed to underlie the statute.

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[1] For further proceedings against Stupp under a subsequent treaty with Belgium, see 2 Blatch. 501.

(g) The act of February 9, 1903, extending section 1014 to the removal of offenders to and from the Philippine Islands, is a legislative recognition that section 1014 only applies to fugitives from justice.

The act of 1903 is as follows: "The provisions of section 1014 of the Revised Statutes, so far as applicable, shall apply throughout the United States for the arrest and removal therefrom to the Philippine Islands of any fugitive from justice charged with the commission of any crime or offense against the United States within the Philippine Islands, and shall apply within the Philippine Islands for the arrest and removal therefrom to the United States of any fugitive from justice charged with the commission of any crime or offense against the United States."

32 Stat., 806; U. S. Comp. Stat., 1905, p. 164.

(h) So far as removals to the District of Columbia are concerned, there is ample authority for this view.

"This law," says Mr. Moore, referring to section 843 of the Revised Statutes relating to the District of Columbia, subsequently reenacted as section 930 of the District Code, "does not cover the case of a fugitive from the District. Such case is covered by section 1014 of the Revised Statutes of the United States."

Moore on Extradition, Vol. II, p. 851.

Speaking of "offenders against Federal laws," he says: "By section 33 of the Judiciary Act of 1789, provision was made for the recovery of fugitive offenders against the laws of the United States." And according to his view this provision, with modifications in accordance with section 4 of the act of March 2, 1793, and with section 1 of the act of August 22, 1842, is reproduced in section 1014 of the Revised Statutes.

Judge Dillon in the Buell case, 3 Dill. 116, said: "The District of Columbia is not a sanctuary to which persons committing offenses against the United States may fly and be beyond the reach of justice; nor is the law so defective that persons there committing such offenses and escaping or found elsewhere cannot be taken back there for trial."

In Benson v. Henkel, 198 U. S. 1, the Supreme Court said: "In conclusion of this branch of the case it may be said that any construction of the law which would preclude the extradition to the District of Columbia of offenders who are arrested elsewhere would be attended by such abhorrent consequences that nothing but the clearest language would authorize such construction. It certainly could never have been intended that persons guilty of offenses against the laws of

the United States should escape punishment simply by crossing the Potomac River, nor upon the other hand that this District should become an Alsatia for the refuge of criminals from every part of the country."

In Hyde et al. v. Shine, 199 U. S. 62, the indictment charged the defendants with an offense against the United States, namely, a conspiracy under section 5440 to defraud the United States out of possession and use of and title to public lands, alleged to have been entered into in the District of Columbia, December 30, 1901. It was averred in the application for the writs of *habeas corpus* and *certiorari* in the case of Hyde that the evidence taken before the commissioner showed indisputably that the petitioner was never in the District of Columbia, except upon one occasion in 1901, and then only for about six hours, and that he was not then guilty of any of the offenses charged in the indictment; and in the case of one of the other co-defendants it was alleged that the evidence showed that the transactions complained of as a conspiracy occurred in California or Oregon, of which he was and had been for twenty years a resident. "In other words," said Mr. Justice Peckham, in his dissenting opinion, concurred in by White and McKenna, JJ., "it was claimed that the evidence before the commissioner showed conclusively and without contradiction that there was no probable cause to believe the defendants guilty of any offense as charged in the indictment."

Mr. Justice Brown, writing for the majority of the court, was of the opinion that the circuit judge did not abuse his discretion in refusing to grant a writ of *certiorari,* in order that this evidence might be brought before him, saying: "While the Circuit Court may have had power to issue a writ of *certiorari* auxiliary to the writ of *habeas corpus, ex parte* Burford, 3 Cranch, 448; *in re* Martin, 5 Blatch, 303; *ex parte* Bollman, 4 Cranch, 75, 100; Church on *Habeas Corpus,* section 260, it was under no obligation to do so, and its refusal cannot be assigned as error. *Certiorari* is a discretionary writ, and is often denied where the power to issue it is unquestionable. People v. Supervisors, 15 Wend., 198, 206; People v. Stilwell, 19 N. Y., 531; Rowe v. Rowe, 28 Michigan, 353. Petitions for *habeas corpus* are frequently accompanied by applications for *certiorari* as ancillary thereto, and both are awarded or denied together. Appellant had nothing to complain of in the denial of the writ, and his petition should have set forth the evidence relied upon to show a want of probable cause. Terlinden v. Ames, 184 U. S., 270, 279; Craemer v. Washington, 168 U. S., 124, 128."

The minority, in expressing the grounds of the dissent from this conclusion, said, per Peckham, J.: "I think this is not the case for the application of the rule stated in the cases cited in the opinion of the Court. * * * The result of the refusal in this case is to prevent the review of the findings of the commissioner before whom the original proceeding was had, upon the question of probable cause. I admit that the weight of evidence will not in such cases be reviewed here, but evidence which conclusively rebuts the presumption of probable cause arising from the indictment and which is uncontradicted, may be looked at, and a finding of probable cause reversed. In order to refer to it the evidence must be part of the record, and in such a case as this the application for a writ of *certiorari* to bring up the evidence which the petitioner avers shows such fact is not addressed to the discretion of the Court, but on the contrary the petitioner has the right to demand that it shall be granted. The right is none the less, when the want of probable cause rests upon conclusive evidence of the absence of the defendants from the District at the time when the indictment alleges the conspiracy was formed in such District. If defendants were not then there they could not be guilty of the crime charged in the indictment. This case is an extreme illustration of the very great hardship involved in sending a man 3,000 miles across the continent, from California or Oregon, to this District for trial, where he is to bring his witnesses, and where on such trial it will appear that the Court must direct an acquittal, because the averment of the formation of the conspiracy at Washington, D. C., is shown to be false to a demonstration. The expense of a defendant in his necessary preparation for trial, and in procuring the attendance of witnesses in his behalf from such a distance, must necessarily be enormous, and in many, if not in most cases, utterly beyond the ability of a defendant to pay. The enforcement of the criminal law should not be made oppressive in such cases, and, therefore, when it appears there was no probable cause to found the indictment upon, the order of removal should be refused."

(i) It will not be assumed that Congress intended by section 1014 to introduce a class of removals in favor of the District of Columbia alone, which is denied under the Constitution and laws to every State in the Union.

The view for which we contend will harmonize the system of removals under section 1014, with the principles which by American law have always been held to govern the rendition of offenders from one territorial jurisdiction to another. Construing section 1014 as

intended to give recognition to the fundamental American doctrine which forbids rendition as between separate jurisdictions unless the offender actually and personally committed the offense in the territory to which it is sought to take him, there is no difficulty whatever in its full and adequate application to the purposes it was designed to serve. Of course, if section 1014 permits the removal to the District of Columbia of alleged offenders who have never been there, it also permits the removal to any district containing a military reservation or Federal building of a person charged with a violation of section 5391;[1] so that a New York publisher sending a newspaper, magazine, book or other product of the press into the Presidio at San Francisco could be dragged from his home and put on trial before the Federal Court in California on the complaint of any one deeming himself aggrieved by the publication. Inasmuch as statutes are to be interpreted in the light of all that can be done under them (194 U. S., 83), and not in the light of what a just, broad-minded prosecuting attorney would probably do in a given case, it is easy to see into what an instrumentality of tyranny and oppression section 1014 might be converted were the claim here advanced by the Department of Justice to be upheld. We are confident that so far from thus extending the operation of the section, this court will read into it the implied exceptions which will limit its application to the purposes it was intended to serve.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

Field, J., in U. S. v. Kirby, 7 Wall, 486.

In Varick v. Briggs, 6 Paige (N. Y.), 323, Chancellor Walworth said: "In construing statutes, however, it is not reasonable to presume that the legislature intended to violate a settled principle of natural justice, or to destroy a vested title to property. Courts, therefore, in construing statutes, will always endeavor to give such an interpre-

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[1] "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 by, 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."

tation to the language used as to make it consistent with reason and justice."

The rule laid down by Lord Bacon, in his Essay on "Judicature," is controlling today: "Judges must beware of hard constructions and strained inferences; for there is no worse torture than the torture of laws; especially in case of laws penal they ought to have care that that which was meant for terror be not turned into rigor; and that they bring not upon the people that shower whereof the Scripture speaketh, *pluet super eos laqueos;* for penal laws pressed are a shower of snares upon the people. Therefore let penal laws, if they have been sleepers of long or if they be grown unfit for the present time, be by wise judges confined in the execution."

(j) The doctrine of corporeal presence will not render the States asylums for constructive offenders against the laws in force in the District of Columbia or other Federal territory.

It will doubtless be urged that the doctrine for which we contend will render the several States asylums for criminals, the effect of whose offenses is injury to persons or property in the District of Columbia or other places over which Congress exercises exclusive legislation. Such was the argument advanced in the Corkran case in support of the proposition that "constructive" fugitives should be surrendered under the inter-state rendition clause of the Constitution. But the New York Court of Appeals thought otherwise. Chief Judge Cullen said: "There is no practical danger of the kind. It may be safely stated that nearly every State, as well as our own, punishes crimes committed within the State, although the results of the crimes are effected without its territory. * * * On the other hand, there is great danger that citizens may be carried into other States to be punished for acts which are not criminal in the jurisdiction in which they were committed. * * * These considerations equally apply to prosecutions for libels alleged to have been committed in newspapers published here and circulated throughout the country."

People *ex rel.* Corkran v. Hyatt, 172 N. Y., 176.

(k) Nor will the due and orderly enforcement of the criminal laws of the United States be in any wise interfered with by applying the rule to removal for purely Federal offenses.

If it be objected that the doctrine for which we contend will prevent the removal of persons charged with Federal, as distinguished from purely local, offenses, except on proof of their presence at the time of the commission of the supposed offense in the district to which removal is sought, a complete answer is that, conceding this to be true, it affords no obstacle to complete enforcement of the criminal laws of

the United States, and that that precise result was realized by Congress. The prevalent practice of indicting residents of distant judicial districts in the courts of a particular jurisdiction selected by the Department of Justice, because some part of the transaction which is the basis of the prosecution was done, or took effect, in that jurisdiction, the parties being actually elsewhere, is doubtless very frequently convenient from the standpoint of the Government, by enabling the joint trial of several defendants, because of the easier production of evidence, or otherwise; but these considerations cannot justify the corresponding disadvantages and hardships to which such a course subjects the accused. The argument of convenience might, perhaps, have some force if, without the power of removal in this class of cases except on proof of actual flight, the United States would be disabled from prosecuting and punishing violations of its laws. But there is no difficulty in this respect. Section 731 of the Revised Statutes expressly provides that in the case of Federal offenses committed in one district and completed in another, the trial can be had in either; and there are authorities to the effect that where an overt act, in pursuance of a conspiracy entered into in one jurisdiction, is committed in another, an indictment will lie in the latter jurisdiction.

See Hyde v. Shine, 199 U. S., 62, 76.

Since, then, an offender against the laws of the United States can always be tried in the district where he really acts, it is obvious that there can never be any proper occasion, much less necessity, for removing him to another district for trial. If, on the other hand, he voluntarily leaves the district where he has acted, and is subsequently found in another, however remote, the statute then affords a means of securing his return to the scene of his crime for trial there.

SIXTH.—Section 1014 is unconstitutional and void if it permits the removal of a publisher to the District of Columbia or other places within Federal jurisdiction to be tried there for a libel actually published elsewhere.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

First Amendment to the Constitution of the United States.

At the time this amendment was ratified the territory which now constitutes the District of Columbia was a part of the sovereign State of Maryland. That State by the express terms of the Constitution never had the power to drag a non-resident before its criminal courts

except on proof that he had fled from its justice. Yet this power, denied by the States to themselves, has, according to the claim now put forth by the Department of Justice, been conferred by Congress on the District of Columbia; and that political community can arraign the editor of every newspaper, yea, the author of every book deposited in the Library of Congress, at the bar of its tribunals whenever an angry chief executive, an influential politician or a powerful individual in any walk of life is able to procure an indictment from a friendly grand jury. More than this, if the theory of the Government is sound as to the District of Columbia, section 1014 also permits the removal of editors and authors to every district containing a Federal custom-house or postoffice building to which they have sent their publications, to be tried under the adopted State law (Revised Statutes, section 5391) for the "technical" publication thus occasioned. Prior to the enactment of the removal statute, editors and authors were immune from the methods of penal discipline which the Government contends that statute permits. If so, it is quite apparent that the statute, by denying that immunity, infringes the liberty of the press.

SEVENTH.—There is no precedent in American law for the removal of these defendants to Washington for trial on the indictment which is the basis of this proceeding.

There is no precedent in American law for the transportation of the publisher of an alleged libel from the place of its actual publication to another jurisdiction into which the circulation of the alleged libel has extended, in order that he may be there tried for the technical re-publication thus occasioned. On the contrary, every attempt of a similar character has been ineffectual. The answer of Governor Phips to Fletcher's demand for the surrender of Governeur for trial in New York was that if Governeur had committed an offense "Fletcher might prosecute him at Boston."

Ante, p. 187.

Judge Dillon refused to send Buell to Washington because, it plainly appearing that the alleged libel was actually published in the State of Michigan, there was no allegation, as there is none in the case at bar, "of a substantive and distinct publication in the District of Columbia."

3 Dillon, 316.

In 1876 the Governor of Wisconsin demanded the rendition from Illinois of Mr. Storey, editor of the *Chicago Times,* for libel. The Governor of Illinois referred the matter to the Attorney-General of that State, who advised that, while the offense was renditionable, and Wisconsin might punish it if she had the offender within her juris-

diction, yet it not being shown that he was in Wisconsin when he committed the offense, it was not a proper case for surrender. The Attorney-General also observed that, so far as appeared from the papers, Mr. Storey might have been in Illinois when the offense was committed, and if so he was answerable in that State, whose statutes provide not only for the punishment of the crime of libel but also for the punishment of those who while within the State there aid or abet, incite or procure the commission of crime in other States.

Storey's case, 3 Cent. L. I., 636.

The doctrine of a technical publication, by the sale in Washington of papers actually published in New York, was, as Judge Cooley observed, "treated with little respect" in the first Dana case.

Ben. 1 ; Cooley Const. Lim., p. 459, note.

In the second Dana case a warrant of removal was refused on the ground that "libel in the District of Columbia" is not a "crime or offense against the United States" within the meaning of section 1014.

68 Fed. Rep. 886, 898.[1]

So far as we have been able to ascertain, these are the only reported cases in which an attempt has been made to place the author of a supposed libel on trial at a place other than that at which he really published it, and in every one of them prominence was given to the principle that a libel cognizable under the laws in force at the place of its original publication should be tried there and nowhere else.

ARGUMENT BY MR. WINTER.

Mr. WINTER: May the Court please, the proposition which has been discussed by Mr. Lindsay in this case is one of far-reaching importance. This case may well be disposed of on other grounds which I shall present, which are peculiar to the case itself, but the question as to whether the publisher of a newspaper in Indianapolis may be indicted under the libel law of the District of Columbia and removed into the District for trial is of universal application. If the proposition can be maintained it may well be said—and I think

[1] Although the question did not arise in Benson v. Henkel, 198 U. S., 1, 14, Mr. Justice Brown took occasion to express a contrary view in the latter case, observing:

"If this objection might have been a sound one under section 33 of the Judiciary Act, since the Revised Statutes, local offenses have also been treated as offenses against the United States."

There is, however, nothing in the Benson case or in any reported decision detracting from the force of our contention that section 1014 does not authorize removal for offenses not actually, but only constructively, committed in the District.

without any exaggeration at all—that the freedom of the press and the freedom of speech, which it is declared in the Constitution of the United States shall not be abridged by any law passed by the Congress of the United States, is a mere fiction, a mere myth. It is no answer to say that the freedom of the press or freedom of speech does not extend to license. We all grant that. But as a practical question to determine whether the freedom of speech and of the press, which is protected by the provisions of the Constitution, has been exceeded in a given case, will be of very little benefit or of very little value, when the person who is called upon to speak, or who feels impelled to speak upon a given subject, or to write upon it in the public press, has hanging over him the penalties of such a law as obtains in the District of Columbia in reference to libel. And in addition to the extreme penalties of that statute he has hanging over him the consequences that if it is claimed that he has violated the law of the District of Columbia he may be dragged from his home, thousands of miles away, from his friends, from those who know him, his character and reputation and standing; from the witnesses of the transaction upon whose testimony he may depend for his acquittance, and be carried to the District of Columbia and there be put upon trial.

The ordinary hardships that would result from such a construction of the law as I have adverted to have a more serious aspect when you consider the situation that the defendant in such a case would be confronted with in the District of Columbia; when you consider the character of the population of the District of Columbia. It is the seat of the general Government of this country. It is largely inhabited by persons who are occupying official positions under the Government of the United States—persons who are dependent upon the Government of the United States. If there is one place in the United States where official power and prestige and authority have weight and influence, it is the District of Columbia. The jurors in the District of Columbia, in a case that would involve any question of policies, any question of the character of a public man, would almost inevitably be swayed by the influences that exist there, official and otherwise. Now, if we consider what would be the result of the indictment and transportation to the District of Columbia of a newspaper publisher from another part of the country for trial in that District, even in an ordinary case where the person who it was alleged had been libeled was simply some member of Congress, some Senator, a comparatively insignificant person, with comparatively little influence, you can see at once that even in such a case the defendant would be placed at a very serious disadvantage.

But when you come to consider the question as it is now of the late President of the United States, the source of all power, of all profit, I might say, of all office, whose influence is greater than that of any crowned king in the world; when you consider that these indictments were brought about as the result of an inflammatory message that he sent to the Congress of the United States; when you consider that in all probability the whole influence of the executive department of the United States Government, with the President of the United States at the head of it, was behind the finding of this indictment; and when you consider that at the time these defendants would be tried upon this indictment, if they could be removed into the District of Columbia for trial, the President of the United States, whose influence, whose demands had led to the return of the indictment, might well himself have been in office presiding in the District of Columbia as the President of the United States, with his prestige, with his dominating influence reaching to every nook and corner of the District; and that these defendants would be put upon their trial in the District of Columbia before a jury made up largely, perhaps, of employes, officeholders under the Government of the United States, deriving their positions and holding their positions either directly or remotely from the President of the United States; when you consider that if the jury was not made up of that kind of members directly, yet that it would be almost impossible to put into the box in the District of Columbia a jury that would not be connected with persons occupying positions of that kind under the Government of the United States, the seriousness of the question can hardly be overestimated.

Now, these conditions are proper to be considered in this case, and the question arises whether it is possible under the Government of the United States, under the guarantees of the Constitution of the United States that no law shall be passed by Congress which abridges the freedom of speech or of the press, that a statute enacted by the Congress of the United States for the District of Columbia, can by any court be construed as leading to consequences such as you can readily perceive would result, if it could be held that a defendant, such as these defendants, could be removed from anywhere into the District of Columbia and put upon trial there for the offense charged in this indictment. The situation could not be any more correctly described than it is in the language that is quoted from Cooley on Constitutional Limitations, where, in speaking of a case similar to this, it is said that it would be a remarkable situation if, as the result of a revolution, seven long years of bloody war, one of the causes of which was that the king of Great Britain had asserted the right to take from

this country persons accused of pretended crimes for trial in Nova Scotia or Great Britain, that the Government formed as the result of that revolution, a revolution which was fought against the assertion of such a proposition as that, had as one of the very first things that was done after its organization, made it the law of its own seat of Government, the District of Columbia, that they could reach out from that District to the remotest part of the United States and drag from his home a man charged with the offense of libel, a comparatively insignificant crime, and take him to the District of Columbia and there put him upon trial under influences and with surroundings that would put him at a hopeless disadvantage. Now, I submit, if the Court please, that upon the question of the construction of this statute and of the removal statute, section 1014 of the Revised Statutes, considerations of this kind are entitled to controlling weight. The Supreme Court of the United States has declared in many cases that the construction of a statute to be adopted is one that, if possible, will avoid results that are not in harmony with not merely the letter of the Constitution, but the spirit of the Constitution.

One case which I desire to call your honor's attention to on that point is Granada County Supervisors v. Brogdon, 112 U. S. 539. There the Court uses this language:

"It certainly cannot be said that a different construction is required by the obvious import of the words of the statute. But if there were room for two constructions, both equally obvious and reasonable, the Court must, in deference to the legislature of the State, assume that it did not overlook the provisions of the Constitution, and designed the act of 1871 to take effect. Our duty, therefore, is to adopt that construction which without doing violence to the fair meaning of the words used brings the statute into harmony with the provisions of the Constitution."

Citing Cooley on Constitutional Limitations and other authorities, the Court further says:

"It ought never to be assumed that the law-making power of the Government intended to assert or assume power prohibited to it, and such construction (if the words will admit of it) ought to be put on its legislation as will make it consistent with the supreme law."

And again, the Supreme Court of the United States, in the case of Beavers v. Henkel, in 194 U. S., which has been referred to quite frequently, used this language upon the question of the construction of a statute:

"Statutory provisions must be interpreted in the light of all that may be done under them."

That was said in reference to a case where removal was sought into the District of Columbia under the provisions of section 1014 of the Revised Statutes of the United States.

"Statutory provisions must be interpreted in the light of all that may be done under them."

So here, if the Court please, in construing the libel law of the District of Columbia, in construing section 1014 of the Revised Statutes of the United States in reference to the removal of parties for trial, the construction must be in the light of all that may be done under the statute if a given construction is maintained; and if the consequences of a given construction are such that it cannot be contemplated that the legislature intended them, it is the duty of the Court to reject such construction, and put upon the statute a construction which will not do violence to what the Court must assume was the intention of the legislature, and that will not put the statute in conflict with the language or spirit of the Constitution. Considering what may be done under the libel law of the District of Columbia as bearing upon the construction that should be put upon it and the removal statute, some light may be had from a consideration of what has been done and attempted to be done in the past.

The libel law of the District of Columbia was originally simply the common law of England which was carried into the District of Columbia by force of the statute of the United States adopted at the time of the organization of the District. It enacted or provided that the common law that obtained in the State of Maryland at the time of the creation of the District of Columbia should remain in force. Now, the common law criminal offense of seditious libel was in force in the State of Maryland, and of course under the act of Congress it continued to be and remained the law in the District of Columbia. Now, that libel law (and this has a bearing upon the construction that should be given it as to whether it provides for removal into the District of Columbia of accused persons from remote parts of the country for trial of offenses such as are charged in this indictment) was administered in England almost exclusively for libels which took the character of sedition, in other words, for offenses which affected the government. A most notable illustration of the character of prosecutions that were brought under the law is the case that is reported in Cowen's Reports, Rex v. Horn, and it has a bearing upon the question as to the construction that the Court here should put upon the law, which it is claimed is simply the law that obtained in England prior to and during the Revolution.

The facts in this case of Rex. v. Horn were briefly these. Horn,

who was a citizen of London, shortly after the battle of Lexington was fought in this country, circulated a paper calling for a meeting of persons who were sympathizers with the American colonists in their resistance to the British government, "our fellow citizens," as he spoke of the American colonists, who had been slain by the king's servants at Concord and Lexington on the 19th of April, 1775. That was in substance the phraseology of the invitation for contributions, and he invited persons contributing to send their money to him and he would place it in the hands of Dr. Franklin, to be transmitted for the benefit of the widows and orphans of persons who had suffered in that battle. He was indicted and put on trial in London for seditious libel, and in the report of the case one of the items of evidence was the testimony of a captain in the British army, who had served in the battle of Lexington and was wounded and taken prisoner, and who testified, I think, while he was still in the power of the colonists, and who spoke with great kindness of the way in which he was treated by the colonists. As a result of that trial Horn was convicted and sentenced to pay a heavy fine. The judge in passing sentence upon him spoke in the severest terms of the flagrant character of the offense that he had committed. Now, that was a notable case at the time. It necessarily attracted a great deal of attention. Is it to be supposed that in the State of Maryland the law of criminal libel, which they had taken from the common law of England and which had been applied in the city of London to Horn, was continued in force during the Revolution and after the Revolution and after the adoption of the Constitution of the United States, with the same force and effect that it had in London, and with which it was applied in the conviction and sentence of this man Horn? It is hardly to be supposed that any such enforcement of the statute could have been contemplated as possible in the State of Maryland or in the District of Columbia after it was carved out of that State upon the organization of the United States Government.

Now, another thing illustrates the character of this statute in the District of Columbia. I find the case of United States v. Crandall, reported in the Federal Cases. It was applied in that case to the prosecution of an anti-slavery man, an agitator, who had issued a publication in reference to slavery in the District of Columbia. He was a resident of the District of Columbia and was prosecuted under the statute. The case is reported in the Federal Cases, and I think he was held not guilty and was not punished. The statute was continued in force in the State of Maryland and the District of Columbia as a means of suppressing the anti-slavery agitation. This may explain

its severe penalties—a fine not exceeding $1,000 and imprisonment for five years, or both. Certainly it was used for that purpose in the Crandall case, which, like the Horn case, by showing what has been done, or attempted in the past, illustrates what may be done or attempted under it in the future; as the case now under consideration shows how in the present it is attempted to be used to destroy the freedom of the press. There has been no case in the reports where this statute and section 1014 of the Revised Statutes have been held to be applicable to publications in newspapers outside of the District of Columbia, or where there has been a removal into that District of a person charged with a violation of its purely local laws.

The cases cited by Mr. McNamara are perhaps the only ones that appear in the reports. The two Dana cases: In the first case, which was heard before Judge Blatchford, the removal to the District of Columbia was refused upon the ground that the prosecution had been instituted by an affidavit filed in the police court of the District of Columbia, which, under the statute of the District of Columbia, heard cases without a jury, and Judge Blatchford held that, under the Constitution of the United States, the defendant was entitled to a trial by jury, and as this right was denied to him in the police court of the District of Columbia, the prosecution could not be sustained, because it would be a violation of the Constitution of the United States. That was the ground, and the only ground, that was involved in the decision in that case. The next case that arose under this statute, in which it was sought to be applied to publishers of newspapers, is the second Dana case, which is reported in 68 Federal Reporter, page 668. Your honor is, I suppose, more or less familiar with that case. There were several points decided by the Court. One was that the courts of the District of Columbia were not courts of the United States within the meaning of section 1014 of the Revised Statutes. Another was that the District of Columbia was not a district within the meaning of section 1014 of the Revised Statutes. These two holdings were based upon the proposition that this section of the Revised Statutes was simply section 33 of the original judiciary act of 1789, at the time of the enactment of which the District of Columbia was not in existence, nor were the courts of the District of Columbia in existence. Therefore, they were not courts of the United States, nor the District of Columbia a district within the meaning of section 1014 of the Revised Statutes.

A third point decided in that case was this: Conceding that the District of Columbia was a district within the meaning of section 1014, and that the courts were courts of the United States within the mean-

ing of that section, the crime of libel as it existed in the District of Columbia was not an offense against the United States within the meaning of section 1014. Now, this point was the one that was principally considered in the opinion of the Court, and to which much of the discussion of counsel in the case was given, and is the one, it seems to me, upon which that case stands today in full force. It states the grounds upon which section 1014 cannot be regarded as applicable to offenses local to the District of Columbia very fully and clearly, and I can simply call your honor's attention to the decision in that case, if your honor has not already considered it, as stating the proposition much more clearly than I could state it. I am perfectly well aware of what has been said by the Supreme Court of the United States in the case of Benson v. Henkel, in 198 United States, but what was said in that case upon this point is a mere dictum. The question was not involved. Benson was indicted in that case under section 5440 of the Revised Statutes, for entering into a conspiracy in the District of Columbia to commit an offense against the United States—a violation of a criminal statute of the United States, enacted by the Congress of the United States, in its capacity as the Congress of the whole United States—a statute of the United States which has application, not only in the District of Columbia, but in every State and in every Territory of the United States, and his removal was sought to answer that indictment. So that the question upon which Judge Brown expressed his opinion in passing to the effect that offenses created by Congress as offenses local to the District of Columbia were crimes against the United States, for which removal could be had, was, as I say, a dictum; it was not involved in the case at all.

The Wimsatt case, in 161 Federal, which has been referred to here as establishing the proposition that section 1014 is applicable to offenses which are local to the District of Columbia, is also, I think, not at all in point. There the proposition which the Court passed upon was, as shown by the language of the Court, whether or not section 1014 was applicable to a common law offense in the District of Columbia. The offense, as I gather from the opinion in that case, was one which was a crime under the general statutes of the United States, for either committing a larceny of railroad tickets or having them in possession, knowing them to have been stolen, both of which were offenses under the general laws of the United States.

Mr. McNAMARA: Mr. Winter, pardon me, but that is not correct. It was not under that general law of the United States; it was the old common law of conspiracy.

Mr. WINTER: To do what?

Mr. MCNAMARA: To defraud a company—not the United States, but to defraud a railroad company. Just so we have it straight, as you go along.

Mr. WINTER: Well, the opinion of the Court does not indicate at all the character of the offense, except that railroad tickets had been stolen, and he was in possession of them in the District of Columbia. But the Court said that section 1014 applies to removal to the District of Columbia for common law offenses, and referred to the case of Benson against Henkel as authority for that. In that case there was no statement of the Court that a party could be removed to the District of Columbia under section 1014 for common law offenses. What they did say, and that was said as a dictum, was that offenses which were made by the Revised Statutes of the United States applicable to the District of Columbia—in other words, by the revised code of the District of Columbia of 1901—offenses in the District of Columbia, local to the District of Columbia, were offenses against the United States, within the meaning of section 1014. So that in the Wimsatt case the reference to the case of Benson v. Henkel as authority for the proposition, is not justified by the case itself, and in so far as that case attempts to decide any proposition, it is simply passing upon a matter that is entirely foreign to the case before the court, and is not an authority. But the Wimsatt case is in direct conflict with the later decision in the same court in the Cotton Frauds case mentioned by Mr. McNamara, United States v. Haas, 167 Fed. 211, where in answer to the contention that misconduct in office was a common law offense in the District of Columbia and that for a conspiracy to commit such offense the accused could be removed into the District under section 1014, the Court, which denied removal, said:

"Assuming that Holmes (the official accused of misconduct) could be indicted for misconduct in office in the District of Columbia, no person can be indicted in the Federal courts for a conspiracy to commit misconduct in office, especially a person who does not reside in the District of Columbia."

The Buell case was the case of a newspaper correspondent who lived in the District of Columbia, who composed and wrote an article in the District of Columbia which was claimed to be a libel and sent it from the District of Columbia to be published in a paper in Detroit, Michigan, where it was published; and it was charged that he afterwards caused it to be published in the District of Columbia, and

extradition was sought. In that case the extradition was denied by Judge Dillon, but before coming to pass upon the proposition upon which the removal was denied, Judge Dillon took occasion to say, without citing any authority, and apparently without any very serious consideration of the question, that a removal could be had to the District of Columbia in a libel case. He was passing upon the law as it existed before the code of the District of Columbia of 1901 was adopted, and when it was merely a common law offense. It was a common law offense, in one sense, but still it was a statutory offense, because Congress had declared by the Act of 1801 that all offenses at common law should be offenses in the District of Columbia. So that made it a statutory offense in the District of Columbia at the time the Buell case was being passed upon. By an examination of that case your honor will see that without passing upon the question as to whether section 1014 authorized removal into the District of Columbia for offenses local to that jurisdiction, and without any very careful consideration (at least none is indicated by the opinion), it was assumed that section 1014 applied to any offense—as well one which was committed against a law of the United States which is applicable only in the District of Columbia, as one which is applicable throughout the United States. But, coming to the statute in addition to section 1014 to which Judge Dillon adverts, as his authority for his holding—that is the statute of June 22, 1874. Now, that statute was pressed upon the Court in the Dana case, and in the opinion of the Court reference was made to the discussions which took place in Congress at the time of its enactment, as showing that it was not intended in any way to authorize the removal into the District of Columbia of a person indicted for libel. There is a quotation in the opinion of the Court in the second Dana case, from the report that was made in the Senate, when that act was upon its passage, bearing upon that question. It is perfectly proper for the courts to look to the history of legislation, to look to the debates that took place upon the passage of a bill, all the facts and surroundings, to see what the proper construction is, and what its meaning is. I desire to call your honor's attention to what took place in Congress at the time of the enactment of this statute of June 22, 1874, not because it is particularly important at this time, but because of the bearing upon the construction of the statute of 1874.

The COURT: What are you going to read from, Mr. Winter?

Mr. WINTER: I am going to read from the full quotation that was given in the brief in the Dana case.

The COURT: That was submitted to me long ago.

Mr. WINTER: Very well, then, your honor has read what was said there, and I will not take up the time of the Court in reading it again.

Mr. MILLER: What brief is that?

Mr. WINTER: It is the brief of Mr. Bartlett. The fact is this, that at the time this act was pending in the Senate, it was evident from the discussion in the House that the Buell case was either pending or was fresh in the recollection of the members of Congress, because Mr. Speer inquired at the time the act was up as to what bearing, if any, it would have upon the Buell case, and was assured that it would have none. The bill was in charge of Mr. Poland, of Vermont, and he was asked what effect it would have on the Buell case, and he stated it could not have any at all. Now, when this bill came into the Senate the question was there raised again as to whether or not it would authorize the bringing into the District of Columbia for trial of persons who were charged with having published a libel—newspaper publishers—and a resolution was passed referring this to the judiciary committee of the Senate to report upon that proposition, and the judiciary committee of the Senate made their report, signed by George F. Edmunds, Roscoe Conkling, Frederick T. Frelinghuysen, George G. Wright, Allen G. Thurman and J. W. Stevenson, in which they stated that that bill could not have any possible effect whatever to provide for the removal into the District of Columbia of persons charged with libel. Now, I call attention to that, if the Court please, as having a bearing upon the question as to whether when section 1014 of the Revised Statutes, which is a revision of section 33 of the judiciary act, was re-enacted in 1878, and later, when the revised code of the District of Columbia was enacted in 1901, it could have been contemplated by Congress that under any provision of the code of the District of Columbia, which declares in so many words that the courts of the District of Columbia shall be regarded as courts of the United States (something that is adverted to in the Henkel case as doing away with one of the features of the Dana case) and also that the District of Columbia shall be regarded as a district of the United States (another proposition that is adverted to in the Henkel case as doing away with one of the other propositions of the Dana case), and when it is enacted in that code that the common law remains in force, under which, as shown in the authorities cited by Mr. Lindsay, the actual presence of the accused, or at least his active agency, within the territorial jurisdiction whose law he was charged with having violated, at the time of such violation, is required

to be proved, and there is an entire omission to abrogate this principle of the common law—could it have been contemplated or intended that the common law offense of libel, which was simply preserved in force by the code, should extend to the merely constructive presence of the accused and to acts only technically committed within the district? In other words, that the clear expression of Congress to the contrary, as manifested in reference to the act of June 22, 1874, and the express decision to the contrary in the Dana case, upon this point, are to be done away with, not by express provisions, as is done with the other points decided in that case, but by construction—a construction which makes Congress do what it could not have been induced to do in express terms, and which is opposed to the very spirit of our institutions? Now, I think, if the Court please, that it is a consideration proper to be taken into account in this matter in connection with the view presented by Mr. Lindsay as to the preservation by the express language of the code of the common law as applicable to all of the law that obtained in the District of Columbia, to show that it is not possible to construe this statute or section 1014 as providing for the removal into the District of Columbia of parties from remote parts of the country for libel, where the offense was not actually, but only technically committed in the District by circulation of copies of the newspaper which had been previously circulated at the place of publication. Now, upon the proposition, if the Court please, as to where the offense is committed, I will state that it is not a question of venue in this case. It is a question that goes to the jurisdiction. If this offense was not committed in the District of Columbia, no court of the District of Columbia has jurisdiction of it. It is contended that the offense was committed in the District of Columbia by the circulation of copies of the publication there. The evidence in this case shows that *The Indianapolis News* is published in the city of Indianapolis. It has a circulation all told of about ninety thousand copies daily. All of these copies are printed and published in the city of Indianapolis. Of the total circulation of this paper possibly two thousand copies go beyond the State of Indiana, four or five hundred copies to adjoining States, and a few copies to other States and perhaps forty or fifty copies to the District of Columbia. They are carried there by the United States mails and perhaps by express companies. They go into the news stands and into the hotels in the District of Columbia. Some copies go to the congressional library. Other copies go to persons who are serving in the Government offices in Washington, and who formerly resided in this State and are interested in local affairs here for that reason.

The COURT: You say the copies are sent by mail and perhaps by express. Is there any evidence as to that?

Mr. WINTER: There is no evidence as to that; that was simply a suggestion. They have a mailing list and they go by mail, as testified by Mr. Smith on the witness stand. They do not go by express. Mr. Smith testified they have a mailing list and that forty or fifty copies was the circulation of this paper in the District of Columbia. They are published, even these copies are published, if the Court please, the very moment they are deposited in the postoffice. They go as second-class matter and they go unsealed; they have to be unsealed. They are not sealed, they are not closed up. They are open for inspection. So that I submit that the depositing in the mail of forty or fifty copies that ultimately go to the District of Columbia is, so far as any connection is had by the defendants in this case with them, a publication of those copies here in the city of Indianapolis. The initial publication is here. You may say that every time they are handled in transporting the mail between Indianapolis and the District of Columbia they are published again because they pass through the hands of some person, and that when they get to the District of Columbia and are distributed in the postoffice there that they are again published, because as unsealed documents they come into the hands of persons there. They may not be read by them, but they may be read by them. They are not sealed. They get to the news stands and while lying there they are unsealed. Now, there are several decisions that I want to cite to your honor as to where the effective publication takes place. I may say the effective publication as to every paper that is issued. In the case of *The Indianapolis News* it is in Indianapolis. The cases I refer to are where a charge of libel is brought on account of an article derogatory to certain persons, which is transmitted by telegraph and the final delivery of which is to the libeled person himself. This final delivery is, of course, not a publication, and the question is whether delivery to the telegraph operator is a publication. In all those cases cited it is held that the very moment a person writing or composing a libel takes it to the telegraph office and deposits it for transmission, it is a publication by him. Why? The telegraph operator sees it, and becomes familiar with its contents, or he may become familiar with its contents. We know he may transmit it in the most automatic manner. It may make no impression on him. But he sees it and transmits it and it is held that the publication is complete by the act of delivering it to him. To this point I cite:

Monson v. Lathrop, 96 Wis. 386;

Peterson v. Western Union Telegraph Co., 75 Minn. 368.

So in this case when from *The Indianapolis News* they send their package of newspapers to the Indianapolis postoffice unsealed, those papers are published here in the city of Indianapolis precisely the same as they publish a newspaper every time they deliver over the counter a copy to a person that comes in there and seeks to buy one. Now, I submit, if the Court please, that under the evidence in this case the offense is complete; that the only substantial act that is done by these defendants is done in the city of Indianapolis, and that brings up the proposition suggested by your honor in the question put to Mr. McNamara on yesterday. If it is not true that the substantive act, the substantive publication is done here in the city of Indianapolis when the papers are passed from the press and are delivered upon the market, your honor is compelled to hold that there is a substantive publication when any copy of the paper that is issued in the first instance in Indianapolis, circulates beyond the confines of Marion County and goes into Hancock County, or Shelby County, or Johnson County, or any other county in the State of Indiana to the remotest boundaries of the State—to any one of the ninety-two counties of the State. It is not a question of venue. It is a question of the commission of a separate and distinct offense in every one of those counties. If the circulation of the paper in a particular county is of itself a publication in that county so as to constitute an offense, it is a separate and distinct offense, and therefore the circulation of every copy of the newspaper in every county in the State of Indiana is a separate and distinct offense; and as your honor has suggested we have the monstrous proposition presented here that under the laws of the State of Indiana, in one jurisdiction, there may be ninety-two offenses committed by the publication of a single article in a newspaper in the State of Indiana; and that a man may be put upon trial and convicted successively in each one of the ninety-two counties in the State of Indiana. Not only that, but going beyond the State of Indiana, in Ohio, or in any other State in which the paper circulates—

Mr. MILLER: Pardon me a suggestion, Mr. Winter, which may save time. Of course that could not be done in Indiana, because we have a statute in this State which provides that there can be but one prosecution in one county.

Mr. WINTER: Well, but there is no statute in the State of In-

diana that provides that there can be but one prosecution for separate and distinct acts.

The COURT: What is the statute?

Mr. MILLER: Section 1656, Revised Statutes 1901. "When the offense of libel is committed by publication in this State against any person, the jurisdiction is in any county where the libel is published or circulated by the accused. In no case, however, can the accused be prosecuted for the publication of the same libel in more than one county of this State."

Mr. WINTER: That just illustrates the proposition I am arguing. If the Court please, unless there was such a statute—

The COURT: Under that statute, if a man should compose a libel, write it out, and publish it here in Marion County, then take the train, go over into Hancock County and publish it there, and so on through all of the ninety-two counties of the State, he could only be prosecuted once. Yet, it is plain under the illustration I cited yesterday there are ninety-two offenses.

Mr. MILLER: Under this statute, where a man publishes a libel in ninety-two counties of the State he can be prosecuted and convicted not ninety-two times, but once.

Mr. WINTER: In the absence of the statute, he could be convicted ninety-two times.

The COURT: The argument is just as pertinent.

Mr. WINTER: Yes, if the Court please, the statute strengthens the view that I am now urging, because in the absence of the statute he could be convicted in every county where there was a paper circulated.

The COURT: Instead of doing away with that argument the statute strengthens it.

Mr. WINTER: So that in this case, there being no statute of that kind in the United States, as was said by Mr. Lindsay, there are not less than three thousand places in the United States where under the statutes of the United States, if such a construction as is contended for here is admissible, there could be a prosecution for this offense. We have two statutes of the United States which they say are equally enforceable under section 1014, the statute creating the offense of libel in the District of Columbia, local to the District of Columbia. For the violation of that statute, it is contended here that under section 1014 the defendant can be taken to the District of Columbia for

trial. Then we have section 5391 of the Revised Statutes of the United States, which transplants into the jurisdiction of the United States courts in the district of Indiana the libel law of the State of Indiana. So that copies of *The Indianapolis News* having been circulated containing these alleged libelous articles in the District of Columbia, the District of Columbia may indict for this offense there. Copies of *The Indianapolis News* having been deposited in the postoffice here, or having been read by some party in the postoffice, then under section 5391 an indictment could be returned in this court under the laws of the United States for that offense. Copies of *The Indianapolis News* are sent out to the military post at Fort Benjamin Harrison, in Marion County, and an indictment may be returned for that as a separate and distinct offense. Copies are sent to various postoffices of the United States in the State of Indiana. Indictments may be returned in this court as being separate and distinct offenses for every copy that is circulated in any of those postoffices. And the statute of the State of Indiana that provides that in the courts of that State there shall be but one prosecution would not apply in the United States Court at all, or may not apply at all. The statute of limitation of the State of Indiana does not apply to these matters, which are governed by the acts of Congress of the United States. Now, here is the situation: Here are two laws of the United States, they say under which there can be a prosecution—one for violating the libel law of the District of Columbia, and one for violating the libel law of the State of Indiana, both to be prosecuted in the United State courts.

Let us suppose a case, if the Court please. Suppose the defendants were publishing their paper in the State of Illinois, and that they published these articles, and thirty or forty copies were mailed to the District of Columbia. They are indicted in the District of Columbia for the publication of the papers there. A few copies of their paper published in Illinois come to Indianapolis and are sent to somebody employed in the postoffice here. They are indicted for that offense in Indiana under section 5391 of the statutes of the United States. A few copies of their paper go to the State of Missouri into some Federal military reservation. A few copies go into some other States of the Union where they have Federal reservations. The defendants are indicted in the United States courts in each one of those States, if they have a criminal libel law, under section 5391, and the proposition is that under section 1014 of the Revised Statutes they can be removed from the State of Illinois to the State of Missouri, or to the State of Nebraska, or to the State of California, if copies

of the paper had gone to the Presidio at San Francisco, and they may be put upon trial. And for what? For one act done by these defendants—one substantive act done by these defendants—the publication in the State of Illinois of a newspaper, every copy of which was in the beginning published and disseminated in the State of Illinois, but which by the mail was carried to various parts of the United States.

Now, I say if that doctrine can be maintained, it may well justify the astonishment that is expressed by Judge Cooley in his Constitutional Limitations as being one of the remarkable results of the war of the revolution which was fought in part upon the proposition that such a thing as that was not to be tolerated by a free people. Now, "publication," within the meaning of a criminal statute, a libel law, does not mean a technical, artificial, constructive publication such as is contended for in this case. It means the actual and substantive publication, if the Court please. And I take it that the decision of Judge Dillon in the Buell case can be upheld upon that theory, where he denied the extradition upon the ground that the indictment, taking all of its allegations together, showed that the substantive publication was made in the State of Michigan. I want to call your honor's attention to the language of that indictment, and then compare it with the language of the indictment in this case, to show that in this case substantially the same objection applies as in the Buell case. Now, as I have already stated, Buell was a newspaper correspondent, living in the District of Columbia, and writing there articles for publication in newspapers out of the District of Columbia. The indictment in that case contained this charge, or the material facts at least were these: Buell was indicted on the second day of July, 1874, in the Supreme Court of the District of Columbia, for criminal libel on one Zachariah Chandler. The indictment charges that Buell, "on the 19th day of February, 1874, in the county of Washington and District of Columbia—

The COURT: I have read that.

Mr. WINTER: Very well, I will not take your honor's time to read it again. Now, there was a distinct allegation in that indictment that Buell had composed this article in the District of Columbia, and had caused it to be sent to a newspaper in Detroit, Michigan, he being in the District of Columbia at the time.

The COURT: I know the argument that was made.

Mr. WINTER: And the Court held that the substantive publication

in that case was in Michigan, and the jurisdiction for the prosecution of the offense was not in the District of Columbia. Now, I say that decision is applicable here under the language of the indictment and under the evidence in this case. On this point I want to call your honor's attention to one or two other authorities, and then I will leave it for some other features. It was distinctly decided in the case of Mills v. The State, 18 Neb. 575, that the jurisdiction of a libelous charge contained in a letter written and mailed in Nebraska to a person residing in another State, was in the courts of Nebraska. This case, it seems to me, is precisely in point in the present case. The cases of Commonwealth v. Dorrance, 14 Phila. 671; Lando v. The State, 26 Tex. App. 580, and United States v. Worrall, Fed. Cas. No. 16766, are to the same effect. In the Guiteau case, if the Court please, the Court used this language, referring to the constitutional provision that a person should be tried in the district where the offense was committed:

"The provision referred to (Constitution, Sixth Amendment) contains, independently of that question, a rule for determining where a crime shall be said to have been committed. It imports that the crime shall be said to have been committed in the place where the offender manifestly acts, and it forbids any law which shall provide for his trial in a district where the ultimate consequences of his act happened, but where he does not act."

Now, that is applicable in every word to the situation here. "If we apply this construction to the crime of murder it is plain that the power of the United States to punish as murder a crime which proves ultimately to be murder, is plenary, and that it is the intent of the same supreme law that the crime shall be deemed to have been committed in the place where the act was done by which the murder was brought about." And in the opinion of Judge Hagner, at page 553:

"The expression 'where the crime should be committed' taken from statutes of States, is used in the Constitution in two places. It means upon every fair principle of construction and reason, and must be held to mean the county within which the act of violence was performed, or, as expressed in Riley v. State, 9 Hump. 656, 'where the active agency of the perpetrator was employed.' "

Upon the same proposition I want to call your honor's attention to a number of other cases:

State v. Bowen, 16 Kan. 475;
Minnesota v. Gessert, 21 Minn. 369;
Green v. State, 66 Alabama 40;
Tyler v. People, 8 Mich. 320.

In all of which cases it is held, as was held in the Guiteau case, that where the question is as to the jurisdiction of the court of an offense alleged to have been committed, it is to be determined by the consideration of where the manifest act of the accused was committed—where his active agency was employed. Now, applying that to the case here, where was the manifest act of these defendants done? Where was this active agency employed? In the city of Indianapolis, as the evidence shows beyond controversy. What took place in the District of Columbia was simply a remote consequence of the act done in the city of Indianapolis—of the active agency of the defendants operating in the city of Indianapolis.

Now, passing from that question; I come to two other questions that I desire to call your honor's attention to. The first proposition that I wish to speak to is as to the character of these communications, as to their being privileged, conditionally privileged.

The COURT: I do not want to limit you too much, but I cannot extend this argument beyond today.

Mr. WINTER: Very well, I will simply content myself, if the Court please, with calling attention on this proposition to one or two authorities that I have here. They are cases of criminal prosecutions for libel. There is no controversy between me and the gentlemen on the other side as to the question of malice. The authorities are all to the effect that in a criminal prosecution actual malice is the essence of the offense. There are no crimes by negligence. There are no crimes as the result of reckless acts. They are criminal because there is a criminal intent leading to the perpetration of the act, and the essence of the offense in the case of criminal libel is malice, actual malice, or the intent or desire to do wrong. Now, of course, as a matter of evidence, you may arrive at the existence or non-existence of malice in various ways. The character of the publication itself may afford evidence more or less conclusive of malice—of actual malice. The repetition of the offense may afford evidence of malice—actual malice. On the other hand, as the authorities show, you may prove, to rebut the existence of actual malice, the relations that existed between the accused and the persons claimed to have been libeled to show that they were friendly—that there was no ill feeling, no hatred, or anything of that kind. You may also show the circumstances under which the publication was made, and the occasion upon which it was made. You may show the sources of information upon which the publication was founded; and if, as the result of all this, it appears that the publication was not made with any evil intent, but that it was

made with good motives and upon a proper occasion, then the existence of malice, the essential ingredient in the offense, is negatived and there can be no conviction. It does not follow, as was argued on the other side, that if the charges that are made are untrue, and there was no investigation, that the person making them must be convicted upon a charge of criminal libel. The authorities are that even if the article is untrue, but it was published with proper motives and under proper circumstances, and upon a proper occasion, it is privileged. Now, the case I want to call your honor's attention to upon this point is a Kansas case. It is reported in 2 Pac. Rep., page 609, State against Balch. The opinion is by Valentine, Judge. Here is the libelous article:

"Voters of Chase County.—The people of Chase County have not forgotten the mutilation by changing of the election returns one year ago, and is it not time the people should know who the parties were that made the changes? The facts looking in that direction have as yet never been made public, and perhaps never will, but circumstances often show facts that cannot be controverted, and in this case, if Mr. Norton was guilty of the said mutilation, was not Mr. Carswell equally so? It is said, upon reliable authority, that Mr. Norton and Mr. Carswell were together all the evening and the night this deed was committed, in fact, slept together in Mr. Norton's room in the court house. If they were together, as it is said, is it possible that Mr. Norton would do so dastardly a trick without the knowledge and consent, if not the assistance of Mr. Carswell? Voters, think of this. Also, that it is a well known fact that this said Carswell worked for and supported, with all his might, Mr. Norton, for the office of sheriff of Chase County. Can you consent to intrust in the hands of a character such as an action of this kind would indicate, the most important office in the county, that of county attorney? GEORGE BALCH."

Now, there was an election, Carswell was a candidate for county attorney; Balch, who, as the evidence shows, had been a candidate at a previous election for sheriff, was accusing Carswell of having been a party to a fraudulent manipulation of the election returns, and he circulates this story to defeat the election of Mr. Carswell. It may be very well said that in this case his motive was to do injury because of personal enmity, a desire for revenge, a desire to get even with Carswell. The first question passed upon was that the county attorney had commented upon the fact that the accused did not go upon the witness stand. Coming to the point I desire to call your honor's attention to, the Court is discussing instructions, and this is the conclusion that the Court comes to. The Court, having charged

as to privilege, and as to what would constitute an exception to the general rule as to liability for publishing an article which was shown to be untrue in fact, summed up the discussion as follows:

"If the supposed libelous article was circulated only among the voters of Chase County, and only for the purpose of giving what the defendants believe to be truthful information, and only for the purpose of enabling such voters to cast their ballots more intelligently, and the whole thing was done in good faith, we think the article was privileged and the defendants should have been acquitted, although the principal matters contained in the article were untrue in fact and derogatory to the character of the prosecuting witness."

The Court cites a number of authorities, among which are White v. Nichols, 44 U. S. 266; and the Massachusetts cases of Brow v. Hathaway, 95 Mass. 239, and Commonwealth v. Clapp, 4 Mass. 163, and then says:

"Generally, we think a person may in good faith publish whatever he may honestly believe to be true and essential to the protection of his own interests, or the interests of the person or persons to whom he makes the publication, without committing any public offense, although what he publishes may in fact not be true, and may be injurious to the character of others. And we further think that every voter is interested in electing to office none but persons of good moral character, and such only as are reasonably qualified to perform the duties of the office."

The COURT: And yet such publications may result in a successful cause of action for tort.

Mr. WINTER: Yes, sir, but that is not the foundation of the criminal action. The authorities cited by the gentlemen here are to the effect that if a person is sued for damages and he fails to prove that the article is true, that then, if he was negligent in making the charge, or if he was reckless in making the charge, or if he did not make suitable investigations as to the truth of the article, he is not excused from paying the damages. But if any such proposition is to be applied to a criminal prosecution based upon the discussion of public questions—issues in a political campaign; if nothing can be said by a newspaper unless the publisher goes out and makes an investigation—and it must be remembered that he has no authority to summon witnesses or administer oaths; if he is to be muzzled simply because he does not know the facts or is not prepared to prove that everything he says is true, what becomes of that which certainly is most essential in this or any free government, in a government by the people—calling public attention and demanding investiga-

tion of charges relating to matters of public interest, and the discussion of principles and policies and of the merits of the candidates for public office? If that were the law, nobody would dare to say anything upon such subjects. If such penalties as are imposed by the libel law of the District of Columbia are to depend upon the sole consideration that if what you say is not absolutely true, you are liable, nobody would ever publish anything relating to the issues or candidates in a political campaign. Now, upon this proposition I cite to your honor a number of other cases, in which the same doctrine has been announced. Without taking time to read from them, I cite:

2 Bishop on Crim. Law, Secs. 905, 906, 909;
White v. Nichols, 44 U. S. 266;
State v. Ford (Minn.), 85 N. W. 217;
State v. Keenan (Iowa), 82 N. W. 792;
State v. Grinstead (Kans.), 61 Pac. 976;
Commonwealth v. Child, 13 Pick. 198.

In each and all of these cases the doctrine was laid down as stated in the case, from which I read, in Kansas where the rule was announced that if the nature of the article and the occasion upon which it was published show that it was conditionally privileged, then if good faith is shown, it is absolutely privileged. To the proposition that actual malice is of the essence of the offense, I cite 25 Cyc. Law and Procedure, 571; State v. Shaffner, 2 Pennew. (Del.) 171; 44 Atl. 620; United States v. Cooper, Fed. Case No. 14865. The last case was a prosecution under the alien and sedition law, passed under the administration of President Adams, and is the case where the presiding judge was Mr. Justice Chase, who was afterwards impeached on account of the rigor—

The COURT: Tried to be impeached.

Mr. WINTER: Tried to be impeached on account of the rigor with which he administered that law. And in that case Justice Chase charged the jury that there must be actual malice, evil intent, shown in order to sustain a conviction. Now, upon the proposition argued upon the other side that the untruth of a conditionally privileged statement is sufficient to show actual malice, the authorities are numerous to the proposition that no matter if it is untrue, the fact that it is untrue does not necessarily create an inference of malice.

Howard v. Dickey (Mich.), 79 N. W. 191;
Ritchie v. Arnold (Ill.), 79 Ill. Ann. 406;
Henry v. Moberly, 23 Ind. App. 305; 51 N. E. 497;
Coogler v. Rhodes (Fla.), 20 Sou. 109;

McDavitt v. Boyer, 169 Ill. 475, 48 N. E. 317;
Haft v. First National Bank, 46 N. Y. S. 481;
Cameron v. Cochran, 2 Mar. (Del.) 166;
Livingston v. Bradford, 115 Mich. 140; 73 N. W. 135;
Crane v. Waters, 10 Fed. 619;
Trimble v. Morrish, 152 Mich. 624; 116 N. W.451.

To the proposition that evidence that the defendant had no hostility toward the prosecuting witness and no intention to accuse him of crime, is competent to rebut express malice, I cite:

Faxon v. Jones, 176 Mass. 206, 57 N. E. 359;
Henn v. Horn, 56 O. State 442, 47 N. E. 248;
Bee Publishing Co. v. Shields, 68 Neb. 750, 99 N. W. 822.

That you may give in evidence the whole article in order to show in what connection the statement was made and the general purpose and object of the publication has been decided in this circuit and also in Michigan in

Scullen v. Harper, 78 Fed. 460;
Georgia v. Bond, 114 Mich. 196, 72 N. W. 232.

That you may give in evidence the sources of information as in this case we did—that we found this charge in the *Chicago News;* that we knew or understood that that paper had a correspondent in Paris; that the article purported to be a cable dispatch from Paris, in which M. Hutin, former president of the Panama Canal Company, stated it was a well known fact that this syndicate had been organized and had bought up the securities—to rebut the inference of express malice, we cite

Connor v. Standard Pub. Co., 183 Mass. 474.
Hearne v. DeYoung, 132 Cal. 357, 64 Pac. 576.

Now, I want to call the attention of the Court, right here, to some facts that bear upon the question of the good faith of these publications. They have read in evidence the denial that was made by Mr. Cromwell, before the committee, of the fact that he received any money. Now, we put in evidence here, in a summary form, the matters that he was interrogated about before the committee, and as to which he refusd to testify, in Senate Document No. 457, which document is the report presented by Senator Millard, chairman of the canal investigating committee to the Senate, of the matters as to which Mr. Cromwell had been interrogated. It sets out all the questions and refers to the pages of the original full report of the committee's proceedings, and submits for the action of the Senate whether he shall be compelled to testify. It is preceded by a brief by Senator Mor-

gan, who conducted the examination of Mr. Cromwell, and he cites the authorities which maintain that Mr. Cromwell was not protected by his privilege in refusing to answer. It was stated by Mr. McNamara that the Senate committee in this matter upheld Mr. Cromwell in his refusal to testify.

The COURT: Suppose they did?

Mr. WINTER: It would not amount to anything; but the fact is otherwise. I have before me Volume IV of the hearings before the committee on interoceanic canals, and in conclusion of the whole matter, here is what appears under date of June 19, 1906:

"Committee met at 10:30 o'clock. Present: Senators Millard (chairman), Platt, Kittredge, Hopkins, Knox, Ankeny, Morgan, Taliaferro, Simmons and Culberson.

"The committee met in executive session, upon the conclusion of which the examination of Mr. Cromwell was resumed.

"Senator MORGAN: Mr. Cromwell, I have been designated by the committee to repeat to you the questions which you have hitherto refused to answer, and before doing so, I will ask the clerk to read to you the resolution under which we are proceeding.

"The clerk read as follows: 'Resolved, by this committee, That the witness, William Nelson Cromwell, be required to answer questions propounded to him, as set forth in the record of the proceedings of the committee, which he has refused to answer, unless the committee shall excuse him from answering any specific question.'" (See Appendix.)

All of the questions are repeated again by Senator Morgan, and he again refused to answer, and he is not excused by the committee from answering any of those specific questions at all; and then that is followed by Senator Millard, chairman of the committee, reporting to the Senate the whole proceedings, for action, and the only reason, so far as we know, why action was not taken, is that shortly after that Senator Morgan died, and the whole matter was dropped. Now, one other matter I want to call your honor's attention to in reference to Mr. Cromwell's alacrity to testify as he did, that he didn't get any of the $40,000,000. As shown in this report, Mr. Cromwell being interrogated as to the scheme to Americanize this canal; as to the power of attorney that had been given to him by the French Canal Company in 1899; as to the subscription agreement which he got up, and which is in evidence here, for making a subscription of $5,000,000 toward the stock of the company, and as to the two companies which he organized under the laws of New Jersey, with enormous capital

to take over the property of the French Canal Company and go on and complete the canal—the whole scheme—he absolutely refused to testify upon the subject at all. He said it aborted. But, when he was asked whether the subscription was made or not, he refused to testify on the ground that it was a privileged matter. That is one of the questions which the committee refused to excuse him from answering and which was submitted to the Senate to take proceedings upon. Following every question, as to what had taken place leading up to the purchase of this canal by the United States, he shielded himself behind what he said was his professional privilege, and absolutely declined to give any evidence at all.

Now, as throwing light on this question—upon the public interest in this matter and as to whether or not there was occasion to suspect that there was something wrong in this proceeding—Mr. Cromwell became the attorney for the Panama Republic after it had sprung into existence, immediately after the Republic of Colombia had refused to ratify the Hay-Herran treaty. It was a treaty providing for the payment of $10,000,000 for the canal concessions and the Republic of Colombia refused to ratify it. Thereupon the province of Panama seceded from the Republic of Colombia and some very remarkable proceedings took place. If I had time it would be very interesting to read, your honor, the cablegrams that passed between the State Department and certain officials in reference to that revolution, but they are in the record here; how, on the 2d day of November, the day before the revolution occurred, the State Department of the United States was telegraphing, or cabling, to the captain of the war ship Nashville, warning him that a revolution was about to break out and to be ready to stop any transmission of troops; how, on the 3d day of November, they telegraphed for information as to whether the rumored revolution had broken out, and the consul telegraphed it had not broken out yet, but was scheduled to break out that night; and how it did break out at 6 o'clock that evening. And I would like to call your honor's attention to the speech of Senator Hoar in the Senate of the United States when he introduced the resolution of inquiry as to the conduct of this Government in reference to the Panama revolution, where he set out these cablegrams. Of course no action could be taken. The thing was consummated and done; but we see Mr. Cromwell immediately after the creation of the Republic of Panama become its counsel, and when he was before the Senate committee being examined and the question was asked him what became of the ten million dollars paid to the Republic of Panama instead of the Republic of Colombia, he testified

that he was made the fiscal agent of the Republic of Panama to take care of and invest that ten million dollars and went on and testified with alacrity and freedom as to investments, and the report sets out this testimony as to just what was done with it, how much was invested in mortgages in New York and how much in bonds, etc. Well, after he had so testified about that, Senator Morgan inquired of him as to why it was that his professional privilege, which had prevented him from giving any testimony at all as to what had led up to the sale of the canal to the United States Government, did not apply to the relations that existed between him and the Republic of Panama, and this is what took place upon that. I read from page 1144:

"Senator MORGAN: And you have mentioned the clientage of the Panama government and the Panama Railroad Company; why is there any more professional confidence connected with your relations to the Panama Canal Company than there is with the railroad company or the government of Panama, or your commissionership as commissioner of finance to the Panama government?

"Mr. CROMWELL: Because, as counsel for the Panama Railroad Company, I have a duty to this Government, through my relations as attorney for the Panama Railroad Company. In respect of what I have stated to you and the committee regarding the financial status, investments and so forth of the Panama government, I have consulted that government, before making these statements, and have received their written permission to make them. That is the only reason I give them to you.

"Senator MORGAN: Have you consulted the Panama Canal Company as to making these statements?

"Mr. CROMWELL: I have not.

"Senator MORGAN: Why?

"Mr. CROMWELL: It is too palpably an impropriety, because it relates to an entirely different class of business.

"Senator MORGAN: To what class of subjects does this business relate that you are employed by the Panama Canal Company to transact?

"Mr. CROMWELL: Professional service of all kinds.

"Senator MORGAN: Bringing lawsuits?

"Mr. CROMWELL: The relations to the Panama government, that I refer to, are physical matters, which are matters of public record."

Now, if the Court please, as throwing light upon this matter we

have Mr. Cromwell, knowing that he was to be called before this Senate committee, writing to one of his clients and getting its written permission to reveal everything, and relating everything with great alacrity, and omitting to write to his other client to get a similar authority, and absolutely refusing to reveal a thing! All these facts were known, and these facts point to the proposition as to whether there was not some cause, reasonable cause, to believe that there was something covered up in this matter. So I say, if the Court please, when you take into consideration the subject matter of these publications, the time of publication, the source of information upon which the publications were based, the fact that there was no ill-will or personal feeling behind it—all these circumstances being taken into consideration, there is an absolute failure in this case to show express malice, and the burden of proof is upon the Government to show express malice. That was decided in the case of White v. Nichols, 44 U. S. 266. As to these communications being privileged unless express malice is shown, that is, conditionally privileged, the character of the publications and the occasion of their publication is conclusive. Here was a presidential election at which the entire House of Representatives, one-third of the Senate, and the President of the United States were to be elected. The subject matter of the communications is the Panama Canal, which had recently been purchased by the Government of the United States, and upon which the money derived from taxation of the people of the United States, is to be expended to the extent of almost untold millions; a subject of the greatest public interest, a subject which of all subjects demands investigation and inquiry and diligent examination. That is the subject matter of these articles; and the time itself makes it peculiarly appropriate that it should be discussed. So I say that they are conditionally privileged, and unless express malice is shown, they are absolutely privileged.

Now, the final point to which I wish to call your honor's attention is this, that these articles are not libelous, even in a civil suit, much less the source of a criminal prosecution. What is the character of these articles? I had intended to go through them article by article, but it will take too long; but the substance of these articles, beginning with the first allusion in *The Indianapolis News* to the subject, preceding the publication of the cartoon, is that a syndicate was formed composed of American citizens, naming Pierpont Morgan, Cromwell, Douglas Robinson—not in the first place Robinson—and Charles P. Taft, and later Douglas Robinson, who, in anticipation of the purchase by the Government of the United States of the

Panama Canal for the sum of $40,000,000, went to the holders of the securities of the two French Panama Canal companies and bought up those securities in the market at a much less price than forty million dollars—for twelve million dollars—and when the canal was bought by the Government of the United States for forty millions, upon the distribution to the owners of the securities of those two canal companies of that forty million dollars, they reaped the profit of the difference between what the securities cost them and what the Government paid—an enormous profit. Now, it goes without saying, if the Court please, that there is nothing in that accusation that imports the commission of a crime by any of these persons. I say that so far as the law is concerned, Douglas Robinson, Cromwell, Charles P. Taft and Pierpont Morgan had a perfect legal right to go to France and buy up the securities of the French Panama Canal Company in anticipation of that property being bought by the United States Government, and make all they could. It may have been something that a good many people would not want to do, to go over there among a horde of ignorant peasants in France, holding these securities, who had despaired of ever getting anything for them, and having superior knowledge, being intelligent men, financiers, acquainted with the situation, possessing sources of information that those peasants in France did not possess, to go to them and, without disclosing to them the superior information they had, buy their securities at much less than they were worth. But unless there was some confidential relation existing between these parties and the people who held those securities which made it a legal duty upon their part to disclose their superior information, the law imposed no duty whatever upon them to do it, and they had a legal right to make whatever profit they could out of their superior knowledge, their superior information, their superior shrewdness and intelligence; and the law does not condemn it in any way or even make it the subject of a civil action for the recovery of damages, much less a criminal prosecution.

Why, if your honor please, when the Government a few years ago was about to locate the military post at Fort Benjamin Harrison, suppose some citizens of Indianapolis, having superior sources of information, being more than ordinarily shrewd, should have determined that the ground out here in Lawrence Township was the ground that the Government would seek to acquire for that military post, and thereupon they had gone to the farmers out there and had bought up their land at fifty dollars an acre, and afterward when the Government located the post there, because of the mere fact that the post was located there the price of land had advanced to a hundred dollars an acre, so

that these men in the course of a few months doubled their money; will anybody say for a moment that that was the commission of a crime against the United States or against the State of Indiana, or that it was even the commission of a tort against the individuals who had been induced to sell their land for so much less than it immediately afterward came to be worth? Certainly not. You might say, applying the Golden Rule, "You should do unto others as you would be done by," that these men ought not to do that. They ought to go to these farmers and tell them, "I think the military post is going to be located here; I have information that the military post will be located here; I believe this land will be much more valuable on account of that fact; I would like to buy your land." Putting them in possession of the facts, and buying from them with the knowledge of the facts upon both sides —the Golden Rule might call upon men to do that; but it is not the law. It is not the law of the land, and never was the law of the land.

Now, I submit, if the Court please, that that is the head and front of these articles. It is the meaning of the cartoon, because the prefatory matter published in the paper gives it that meaning. When the evidence was unearthed there was evidence that these men had gone and bought up these securities in the market, anticipating that the Government was going to buy the French Panama property. There is no suggestion whatever in any one of these articles that any one of these men whose names were mentioned occupied any confidential relation either to the Government of the United States or to these peasants in France, whose securities they purchased. Nothing of that kind is suggested. Not one of these men held an office under the Government of the United States that imposed upon him any duty to go out and affirmatively protect the interests of the United States in this deal. All that can be said is that they were American citizens, and that there was a patriotic obligation on their part to help the Government buy this property as cheaply as it could be done, and not themselves make a profit by buying the securities in the first instance and then holding out the property for a higher price.

The COURT: Or, if they made a profit, that they should be content with a reasonable profit.

Mr. WINTER: Well, your honor, the law does not measure the obligation to that of a reasonable profit. If they have a right to deal in a transaction, they have a right to deal in it for all there is in it and to get all there is in it. Now, it is suggested here that these articles contain an imputation of misconduct upon the part of the President of the United States, or upon the part of Secretary of War

Taft. The fact of the matter is, as stated in the bill, that Mr. Taft did not become Secretary of War until a month or two before this transaction was closed in 1904. He was Governor of the Philippine Islands from April, 1901, until February, 1904, as the bill itself states, and as we all know as a matter of history.

The COURT: You mean the indictment. You say the bill. You mean the indictment?

Mr. WINTER: I mean, your honor, that the indictment states that; so that there is not any imputation anywhere on Mr. Taft. The only fact stated is that Charles P. Taft is his brother. Nothing is said, whatever, against Mr. Roosevelt. The only thing that is said at all that reflects in any way, or tends to reflect on the Government of the United States, is that they were made the victims of a gang of expert swindlers. Is that any imputation upon Mr. Roosevelt? He might be offended to think that he could be made the victim of anybody. But to say that a man has been victimized by a gang of expert swindlers does not impute to him any misconduct. That is all that is said in this article. Another statement is that they were enabled to swing the Congress.

The COURT: That is a common performance, is it not?

Mr. WINTER: Men have a right to do that. Does that impute any bribery of a member of Congress, any bribery of the President, any bribery of any officer, any bribery of the Secretary of War, or of the Secretary of State? Nothing of the kind, if the Court please. We might go through, and last night I went through these articles and marked everything that could in any way be said to allude to the officers of the Government, and there is a total absence of anything—and I say this after a full and careful consideration of these articles—a total absence of any suggestion, of any charge that the President of the United States, or any officer of the United States, was bribed, or participated in the profits that were made out of this scheme, or expected to participate, or was a party to the scheme. The most that is said is that these men, owing to their prominence, owing to their relationships, had superior means of information as to what was going to be done, and took advantage of that to go and buy up the securities of the French canal. Now, the Government did not buy those securities. The Government bought the physical property itself. It never was in contemplation by the Government to buy these securities. I have called your honor's attention to the character of the articles, and I desire now to submit a few authorities upon the question:

2 Bishop on Criminal Law, 919:

"The charge must have a legal tendency to expose the one affected to ridicule or contempt." There is no charge of crime. The only contention, then, would be that it exposes them to ridicule and contempt. Mr. Bishop says:

"The charge must have a legal tendency to expose the person affected to ridicule or contempt. If he has a right to do what he is accused of, it is not libelous."

Townsend on Slander and Libel, page 204:

"To sustain an action for libel the plaintiff must either show special damage or the nature of the charge must be such that the court can legally presume he has been degraded in the estimation of his acquaintances, or of the public, or has suffered some other loss, either in his property, or business, or character, or in his domestic or social relations in consequence of the publication. There must be some certain or probable loss or damage to make the words actionable; but to impute to a man the mere defect or want of moral virtue, moral duties or obligations, which renders a man obnoxious to mankind, is not actionable."

25 Cyc. Law and Proc. 253:

"Defamatory words, to be libelous *per se,* must be of such a nature that the court can presume as matter of law that they will tend to disgrace and degrade the party, or hold him up to public hatred, contempt or ridicule, or cause him to be shunned or avoided."

Again:

"An indictment will not lie for publishing words charging a person with doing what he has a legal right to do."

The facts stated control epithets, inferences and opinions. Denouncing a man as a thief, if the facts are stated which show he is not a thief, does not constitute libel. Mere general abuse and scurrility, however ill-natured and vexatious, is no more actionable when written than spoken. Upon that point I wish to call your honor's attention to a notable case in Ohio, Tappan v. Wilson, 7 Ohio 190. Here an article was published in a newspaper in reference to Tappan. It denounced him as being a purse-proud aristocrat, "and having a large amount of money in stocks in several of the Ohio banks, is anxious to put down the United States bank so that his stock may become more profitable to him than it is at present. Tappan well knows that if the United States bank notes are withdrawn from circulation, the notes of the local banks will be substituted, greatly to his profit. This is his Democracy."

Then it goes on,

"Mr. Editor Tappan is an officeholder. He gets $1,000 a year for about one month's service, and yet he has the conscience to desire to make his $1,000 worth $1,250 by oppressing the farmers and mechanics and lowering their prices."

And again:

"Judge Tappan having in his last mud machine published the paragraph from the *Globe,* headed 'The Veterans of the Revolution,' he ought, we should suppose, to have availed himself of the earliest opportunity to show that the *Globe* had made a misstatement; but the judge has not yet done so. What makes the matter worse, on the part of Judge Tappan, is the fact that the above explanation was made in the United States Senate on the 25th of February, and was published in the *National Intelligencer* on the 27th, yet the offensive article is republished in the said mud machine on the 12th of March inst., without Mr. Webster's explanation and denial, thereby meaning that the said Benjamin had published a wicked and malicious libel on the said Webster, then being a member of the United States Senate."

The Court took up that article, and said it was not libelous, just general abuse, insinuation and suggestion; that there was no charge of committing any crime, no charge of doing anything that had a legal tendency to hold the plaintiff up to hatred, contempt or ridicule, and, therefore, it was not libelous at all. Now, an English case, Rex v. Granfield, 12 Mod. 98. Granfield was found guilty at the session of Hertford on an indictment for saying:

"The mayor and aldermen of Hertford are a pack of as great villains as any that rob on the highway."

Per curiam: "We are not satisfied that the words are such as he may be indicted for; for what is it to the government that the mayor, etc., are a pack of rogues?"

And to the same effect, Rex v. Baker, 1 Mod. 35; Rex v. Waite, 1 Wil. 22.

Coming now to the precise question as to whether a charge similar to this that a person is a swindler because he has speculated in stocks and bonds of the French Panama company, as to epithets of that kind meaning anything as a libel, I wish to call your honor's attention to decisions in which it has been held that to say a man is a thief, to say that he is a villain, to apply any derogatory term to him, which standing by itself, without any accompanying words to explain the meaning in which it was used, or the subject matter to which it referred, would be a libel, does not constitute a libel, if in connection with these accusations, or these epithets, the facts upon which they

are based are stated, and those facts show that the man is not a thief, or is not a scoundrel in legal contemplation. Take the case of Brown v. Myers, 40 O. St., page 39, an action of slander. There the plaintiff was charged with being a thief. That would be slanderous or libelous standing by itself, but the words were understood to refer to his having obtained money by fraud. Taking the whole charge together, that is what it referred to. He was a thief because he had obtained money by fraud, but that was not slanderous; it might have been libelous. Now, in this case these men are said to be expert swindlers and villains who robbed their country, but the facts are set out that they went into the market and bought up the securities of the French Panama Canal Company at a discount. Is that robbing their country? Not a dollar was taken from their country. Was there anybody swindled by that? Certainly not, unless it is shown that misrepresentations were made. Again,

"For one partner to charge another with stealing out of the store, when the hearers understood the charge to refer to the partnership property"—

That is not slanderous.

Alfele v. Wright, 17 O. St. 238;

Kennedy v. Gifford, 19 Wend. 296.

I want to call your honor's attention to a case which went twice to the Supreme Court of Connecticut. It is the case of Donahue v. Gaffy, first reported in 53 Conn., at page 43. This was the article that was published—I will not take the time to read it, but I can state the facts. Gaffy, who is the defendant in this case, was a retail liquor dealer. He had been engaged in purchasing his supplies from Donahue Brothers, who were wholesale dealers. Having discovered that he could buy his goods a little cheaper somewhere else, he transferred his business from them. Thereupon, they being men of wealth, went to Gaffy's landlord and induced him to refuse to rent the building that Gaffy occupied to him, but to rent it to them, and thereby they turned Gaffy out of his place of business and destroyed his business, etc. Now, Gaffy was naturally indignant. Gaffy realized that that was not the conduct of a Christian gentleman; that it was not observing the Golden Rule, and he wrote an article and had it published in the newspapers, addressed to the liquor dealers of Hartford and vicinity, in which he denounced the Donahue Brothers just about as bitterly as any denunciations contained in the articles in the present case—in which he accused them of rascality, of taking advantage of their wealth to crush him, a poor man. It was as bitter and severe an article as a man who felt that he had been wronged could write. But he

stated the facts, if the Court please, as to what these men had done, just as the articles here in question do. Here it is said there is a charge of being expert swindlers, of being villains who robbed their country, but in the course of the articles, in every article, the act that they are accused of having done is stated: that they had gone into the market and bought up the securities of these canal companies. The Donahue Brothers were accused of having resorted to mean and unfair methods of getting this lease. Now, the Court said this of that transaction, citing a number of authorities bearing upon the question:

"Leaving out the epithets which express the defendant's opinion as to the character of the transaction he relates, the analogy is perfect between this case and that of Homer v. Engelhardt, 117 Mass. 593, where it was held that to publish of a saloon keeper that 'to get rid of a just claim in court he set up as a defense the existing prohibitory law; we feel it our duty to make such conduct known, in order to caution beer brewers and liquor dealers,' was not libelous.

"And in Bennett v. Williamson, 4 Sandf. 60, it was held not libelous *per se* for the defendant to publish in a newspaper that the plaintiff requested the holder of a note, of which he was the maker, to wait for payment after the same had matured; that the holder waited accordingly and afterward, the note being sued, the plaintiff pleaded the statute of limitations and got off scot free."

Take that. What conduct could indicate greater moral obliquity than to request a man to wait upon the payment of a note, and after he had done so, and finally sued upon it, then plead the statute of limitations? The Court further says:

"All parts of the paper should be read in connection to collect the true meaning. If so read, the severe epithets applied to the plaintiffs lose all their force, except as they attempt to characterize a single transaction, which is manifestly referred to as the sole foundation for all the statements made. This transaction, or 'experience', as the circular calls it, clearly shows that the epithets, 'base treachery' and 'foul and unfair dealings', are not to have their ordinary meaning. The gist of the whole matter is thus stated by the defendant: 'I have been in the habit of buying nearly all of my goods from them for years, and because I quit buying of them they went to the Middletown Savings Bank, of whom I rented my place, and offered $10 more a month than I was paying, and, after getting their lease of the premises, served a notice on me to immediately vacate.' Now, all this is a perfectly lawful transaction, whatever the motive; and how can we legally presume from such a statement that the plaintiffs were thereby

degraded in the estimation of acquaintances or the public, or that they suffered loss in character, property or business?"

When the case was again in the Supreme Court of Connecticut, the decision was reaffirmed, and the law again stated as it was in the first report, but a little more fully. I will not take up your honor's time to read it. It is 54 Conn., page 257. That was a civil suit where, of course, the law would be more liberally applied to uphold a suit than it would be in a criminal prosecution; but I have a number of criminal cases where the same doctrine is laid down. In People v. Jerome, 1 Mich. 142, a case that is cited in Dillon on Criminal Procedure and in the Encyclopedia, there was a druggist living upon a street in the city of Detroit. His neighbor merchants wanted to sprinkle the street and they applied to him to join in doing so, which he refused to do. Thereupon one of these merchants published a card in the newspaper in which he stated that this merchant, upon being applied to to contribute to sprinkle the street, had refused to do it, and he announced that he would himself contribute his mite to pay for sprinkling the street in front of the druggist's property. The druggist had him prosecuted under the criminal libel statute of Michigan, and the Court says that while he might well, in view of the obligations that rested upon him as a fellow merchant and the convenience he would derive from having the street sprinkled, contribute, there was no legal obligation upon him to do so, and his refusal did not reflect upon his moral character or have a legal tendency to degrade him in the estimation of the public, or to expose him to contempt and ridicule, and therefore that the prosecution could not be maintained. Another case arose in the State of South Carolina. It was a criminal prosecution for libel, State v. Farley, 4 McCord 317. A certain woman named Reynal was living in the family of the person to whom a letter was sent. The letter contained this statement:

"As Mrs. Reynal says she has been most cruelly censured without a cause, which is absolutely false, I would advise her to beware, lest facts, which are stubborn things, be brought to light, and you will then see whom you keep under your roof," etc.

The Court said:

"Nothing but that which is criminal, immoral or ridiculous can be libelous, and it is incumbent on the prosecutor to stamp that character on this transaction. There is nothing in the paper itself, or extrinsic to it, which has been brought to light to fix its character. It contains in itself no specific charge of anything immoral or criminal, or which is calculated to render the prosecutrix ridiculous, or to exclude her from society, and is not, therefore, libelous."

Now, as bearing upon the same proposition, I cite a New England case, 117 Mass. 539, Homer v. Engelhardt. It was charged that a man, "to get rid of a just claim in court, set up as a defense the existing prohibitory law." The Court held that, as he had a legal right to do so, the charge was not libelous. In the case of Foote v. Pitt, 82 N. Y. Sup. 464, it was published that the plaintiff had endeavored to procure the enactment of a law which would relieve him of a sewer assessment and impose the cost of building a sewer for his benefit upon the taxpayers generally. The Court said it was not libelous, because he had the right to do it. In the case of Bennett v. Williamson, 4 Sandf. 60, it was held that it was not libelous to charge a man with having pleaded the statute of limitations, when there was no statement that he had interposed the plea dishonestly, although it was alleged that suit had been delayed at his request. In the case of Hollenbeck v. Hall, 103 Iowa 214, 72 N. W. 518, the publication was this:

"His attention has been repeatedly called to the subject, but to no purpose. We finally sued him, to which he responds by employing an attorney and contesting the claim. Having no other defense, he cowardly slinks behind that of statutory limitation. Such a course is not in accordance with our idea of strict integrity."

It was held, as in the New York case, that there was no libel, because he had a legal right to plead the statute of limitations. Now, here is a case in the State of Washington, 15 Wash. 155, 45 Pac. 747. The charge in a newspaper publication was that a hotel proprietor was a "hog," because he would not trade at home and build up the home trade at his home town as much as possible, but sent to another city for supplies. Now, that was the gist of the charge. He was denounced as being a hog. But the facts were stated. Saying that a man was a hog, standing by itself, would be libelous, but to say that he was a hog and state the facts upon which the assertion is based, is not libelous, unless the facts in themselves are libelous. To publish that plaintiff was "a little insignificant puppy" was held not libelous, in Foster v. Boue, 38 Ill. App. 613. That plaintiff "was an Englishman of more or less indifferent repute" was held in Crashley v. Press Publishing Company, 179 N. Y. 27, 71 N. E. 258, to be not libelous. That plaintiff "forged sentiments and words for Silas Wright, that he never uttered" was held not to be libelous, in Cramer v. Noonan, 4 Wis. 253. Here is a recent case—Sheibley v. Fales (Neb.), 116 N. W. 1035. The publication of a written statement that plaintiff had procured perjured statements concerning a candidate

for Congress, and had circulated a base and slanderous attack upon said candidate's character; that the animus of said attack originated in a case which said candidate had brought as an attorney against plaintiff; that said action was prosecuted by Dickson County to recover fees plaintiff had not accounted for as county clerk; and that ever since the termination of said case he had been active in originating and circulating the false and malicious reports attacking the character of said attorney. This was held not directly or by imputation to charge plaintiff with embezzlement, perjury or subornation of perjury.

I have references to many other cases to which I will not take time to refer. But the gist of the whole matter is that it is not libelous, even in a civil action, and much less so in a criminal action, to publish an article about a person, no matter how broad its publication or dissemination, denouncing him by opprobrious epithets, as being a thief, as being a hog, as being a swindler, or as being a scoundrel, provided that in the article the facts upon which the accusation is made are stated, and the facts themselves show that the man has not committed a crime, or is not accused of committing a crime, or anything that has a legal tendency to expose him to public hatred, contempt or ridicule. And no act done or omitted can have a tendency to expose him to public hatred, contempt or ridicule if he has a legal right to do or refrain from doing that act.

Now, in this case, your honor, I submit that these parties had a legal right to go and buy up the securities of the French Panama Canal Company. If they made no misrepresentations, if they resorted to no dishonest practices in obtaining them, they had the right to do it, and to buy them just as cheaply as they could, and to reap the profit in the enhancement of those securities above the price they paid, by the fact that the Government bought the property. They had the right to do it. It may not have been patriotic; it may not have been observing the Golden Rule with those people in France, but the law has not measured up to that rule as yet. It is stated in the Connecticut case that the law has not measured up to that standard. You can search every one of these articles and you will fail to find any charge of crime committed by Robinson, Cromwell, Taft or Morgan. You will fail to find any suggestion or charge that they bribed any officer of the Government, or that any officer of the Government conspired with them, or that any officer of the Government betrayed any trust imposed upon him, in giving them in advance secret information as to what the Government intended to do. On the contrary, the facts with reference to the matter were perfectly patent and noto-

rious. Congress passed a law in 1902—the Spooner Act—authorizing the purchase of the Panama Canal for forty million dollars. So that it was perfectly patent that if the French Canal Company would sell at that price the Government would buy.

So, if the Court please, we submit that there is no cause for removal of these defandants to the District of Columbia; that the facts stated in this indictment do not constitute an offense within the true meaning of the statute of the District of Columbia, making libel a criminal offense, or within the jurisdiction of its courts; that the communications were privileged absolutely, because there is no showing of actual malice, the burden to show which is upon the Government, and, finally, that the articles themselves are not libelous.

TUESDAY, October 12, 1909,
2 O'clock P. M.

Court met pursuant to adjournment.
Present, the same as before recess.

ARGUMENT BY MR. MILLER.

Mr. MILLER: May the Court please, the charge against the defendants is publishing a libel in the District of Columbia. If there was no publication in the District of Columbia, then, of course, there is nothing further to consider. If the articles that were published by the defendants were not libelous, then there is nothing further to be considered.

If the articles published in the District of Columbia by these defendants come within the domain of qualified privilege and the Government has failed to show malice on the part of the defendants, then, of course that ends this case.

If there is no law by which a defendant found here in Indiana can be removed to the District of Columbia for the violation of the United States law, or for an offense against the United States, then, of course, we need proceed no further in the consideration of these matters.

The argument of counsel, and, as I understand it, properly so, has taken up the consideration of all of the questions that are involved, both before the committing magistrate and before the district judge upon the application for a warrant of removal.

Of course, if it is decided that there was no offense committed in the District of Columbia, if nothing is established here except the identity of the defendants, and the Government has not established probable cause, then there are no further steps to be taken.

I do not want, in view of what has taken place here since the

arguments commenced, to spend an unnecessary amount of time in the consideration of any of these questions. I have heard all that has been said by counsel and the statements coming from the bench. I assume, however, that with propriety something more may be said upon the question of malice, something more may be said upon the question of privilege, something more may be said in reference to what these articles are.

I am not impressed with the argument made by the distinguished gentleman who last addressed the Court as to the conditions in the District of Columbia, and if the reasons that he advances for not having a trial in the District of Columbia are founded upon no better facts than some of the statements of facts which I know do not exist, then it seems to me that all of his reasons fail. One of the reasons advanced as bearing upon the question as to why these defendants should not be removed to the District of Columbia for trial was that a jury in the District of Columbia was made up of officeholders, surrounded by conditions that would not give to the defendants a fair trial. Why, it has been frequently decided, as late as within the last few months, that an officeholder is not competent to sit on a jury in the District of Columbia, and the Court went so far in the case of Crawford against the United States as to hold that a man who was a druggist, and who simply sold postage stamps in his drug store, was so connected with the Federal government that he was not competent as a juror. As a matter of fact, as a matter of history, as a matter of observation, we all know that no one votes in the District of Columbia. It is the seat of Government. If anything, there is a prejudice on the part of the citizens of the District of Columbia against the administration and against the Government. There is no prejudice the other way, and there could be no more independent place, there could be no place where a jury could be obtained that would be any more independent and disconnected from the considerations mentioned by Mr. Winter than the District of Columbia; and so far as the influence of the Congressmen is concerned in the District, I think we all know it absolutely amounts to nothing. So that when those reasons are advanced as to why these men should not be removed to the District of Columbia for trial, I do not believe that those considerations should weigh in any manner.

Now, the only reason I interrupted counsel this morning to call attention to the Indiana statute was because I was under the impression that counsel did not know of that statute, and that it had not been called to the attention of the Court. It was not particularly

for the effect or the bearing of that statute one way or the other that I called attention to it. I simply called attention to it because it was being stated, and honestly so, I have no doubt, that if our contention was correct, that in the State of Indiana simply the publishing, the physical publishing, of a libel in a newspaper here in the city and sending it in the ordinary way through the mails to the ninety-two counties of Indiana would make possible a prosecution in each county in the State for a separate and distinct offense, or for an offense committed in each county. Now, I am not prepared to say that without that statute there could be a prosecution, a successful prosecution in each of the counties in the State, but it certainly was in the mind of the legislative department of this commonwealth that it was necessary to enact that kind of a statute to prevent a prosecution from being successfully maintained under the circumstances that I have indicated in each county in Indiana, and I am inclined to think that is correct. Now, it has been suggested here that the publication, the physical publication of the paper here—it going across the State line into Ohio, into other States—constitutes a separate offense, that is an offense against the laws of Ohio, and the circulation of the paper there would be an offense against that State, if our position is correct. And it certainly must be true. It would be reasonable to argue that in the State of Indiana, in this sovereignty, there would be an offense, and that it might be limited to one prosecution, although there was no statute on the subject. It would be the State of Indiana against the defendant named, but in Ohio it would be the State of Ohio against the defendant named, and so on in other States. Now, it does not seem to me, if the Court please, that the extradition statute which has application to extraditions between the States has any particular bearing here. We have statutes by which a defendant can be removed from one State to another State for offenses committed within one or the other of these States. We have statutory provisions in Indiana providing for the prosecution in either county where the offense was commenced and completed, where it took place in two counties, and there are similar statutory provisions in most of the States by which cases of that character can be reached; and so we have an extradition statute permitting the removal from one State to another, and then in connection with the United States we have the section of the statute providing for the removal, or rather, not the removal, but for the prosecution of an offender where the offense is commenced in one district and is completed in another district; that he may be prosecuted in either district, and, of course, removed from one district to another under the removal statute.

Now, when we come then to offenses which are committed against the United States, when you come to crimes against the United States, that are commenced in one jurisdiction and completed in another jurisdiction, or commenced in one district and completed in another district, we find that they can be prosecuted in either district, and no matter where the defendant may be found, within the territory of the United States, he may be removed to whichever district it is determined that the prosecution shall be instituted and prosecuted in. But then we come to section 1014, which applies to removals for any crime or offense that is committed against the United States, and the offender may, "by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a Supreme or Superior Court, chief or first judge of Common Pleas, mayor of a city, justice of the peace or other magistrate of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested or imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

Now, you can read this section of the statute and in it you find no exceptions. It has reference to offenses against the United States and wherever the offender may be found he can be tried before the committing magistrate, his identity established, a showing made of probable cause, and upon that showing an application made for the warrant of removal and the removal made to the district, to the place where by law cognizance of the offense is given.

The publication of a libel in Indianapolis, in Marion County, in the State of Indiana, where the State of Indiana has exclusive jurisdiction, is not an offense against the United States, so that there is no jurisdiction here, and we are not in any way, of course, claiming that this offense was commenced within one district and completed in another. There is no question of something being done in the District of Columbia and completed in the State of Indiana, so that it has seemed to me that when we read this removal statute we must reach the conclusion that it refers to all offenses that were completed offenses in a certain district, in any district, and that the party may be apprehended anywhere where he may be found in this country and removed for trial to the place which by law has cognizance of that offense.

Now, it is said that there are some authorities upon the question of State extradition which militate against this determination, and the gentleman who first addressed the Court, representing the *New*

York World, but who appears here properly to be heard by this Court, said that in the dissenting opinion in the case of Hyde v. Shine the same doctrine is announced, but he did not say that in the real opinion of the Court and the last decision by the Supreme Court of the United States upon the question that there was any doubt of the application of section 1014.

In a case where it appeared that the defendant was not personally within the jurisdiction, was not personally in the District of Columbia at the time of the commission of the offense, and the theory was advanced as strenuously as it is possible to advance it, just as strenuously as it is advanced here, that it would be a great hardship to the defendant to remove him, in that case from California, a distance of 3,000 miles, to the District of Columbia, the Supreme Court of the United States said that the same rule of law applies whether the application is to remove from California, or whether it is to remove from Baltimore; so there can be no question here in view of the last statement made by the Supreme Court of the United States upon this subject as to the distance making any difference on the question of removal.

The COURT: What was the crime charged in that case?

Mr. MILLER: Conspiracy. Under the law of conspiracy, section 5440.

Mr. MCNAMARA: It is the statute of conspiracy against the United States.

The COURT: Part of the crime was committed in Washington as well as in California.

Mr. MCNAMARA: The part of the crime relating to the act of betraying the Government was committed in Oregon and California.

Mr. WINTER: The charge was that it was a conspiracy.

Mr. LINDSAY: The question here was whether a writ of *certiorari* should be allowed. It was in discussing that question that the language quoted was used.

The COURT: It went off on *habeas corpus?*

Mr. LINDSAY: Entirely.

Mr. WINTER: But in that case they expressly repudiated the idea of trying a man in the District of Columbia when he could have been tried in the place of residence. They said they did not endorse any such business.

The COURT: I recall, if I remember that case right, the Supreme

Court—the matter went up to the Supreme Court upon a writ of *habeas corpus* proceeding.

Mr. McNAMARA: Yes, sir.

The COURT: And the Supreme Court, as I recall—the point was made there about the record not containing certain evidence that might have been in.

Mr. MILLER: The case is found on page 62 of 199 U. S., so there will be no misunderstanding about it. Justice Brown delivered the opinion, and this was that the petitioner assigned as error, that the Revised Statutes, section 1014, does not authorize removal from a judicial district in a State to the District of Columbia, and that the Supreme Court of the District of Columbia has no jurisdiction over the alleged offense charged in the indictment, and that the indictment charges no offense against the United States, and that the evidence introduced before the commissioner proved that there was no probable cause for believing him guilty of the offense, and that the writ of *certiorari* should have been issued to bring the record before the Court, and upon its inspection the appellant should have been discharged. Now, the judge says:

"The first assignment is practically disposed of by the recent case of Benson v. Henkel, 198 U. S. 1, in which one of the co-defendants of the petitioner in this case, who had been arrested in Brooklyn, was held to be properly removed to the District of Columbia under Revised Statutes, section 1014. No additional considerations being presented, that case must be treated as controlling."

Just in this connection, your honor, in view of Mr. Winter's statement that we ought to look to the record of the judiciary committee in reference to the act of 1874 as controlling, and controlling to the question of setting aside the effect of what was said in the Henkel case, 198 U. S., where the Court there says if there was any doubt remaining about the courts of the District being United States courts and of the District of Columbia being a district, and of this section of the statute being applicable, that was all removed by the code which was adopted in 1901 and went into effect in January, 1902.

Now, the second assignment of the opinion states:

"In this connection it is also suggested that as the conspiracy is alleged in all the counts to have been entered into prior to January 1, 1902, as well as the overt act charged in fifteen of the counts, the Supreme Court of the District of Columbia cannot take cognizance of the case under the new code which took effect upon that date—"

The COURT: What was the overt act mentioned in the indictment? Where was it done?

Mr. MILLER: California and Oregon.

Mr. WINTER: The conspiracy was entered into in the District of Columbia, but the acts to be done under the conspiracy were to betray the Government in connection with lands in Oregon, or somewhere else.

Mr. MILLER: And in discussing this question that was argued extensively this morning the Court said:

"Although it involves a seeming hardship to commit an accused person in San Francisco for trial in the District of Columbia the terms of Revised Statutes, section 1014, are as applicable to such a case as they would be if the arrest were made in Baltimore. The section makes no discrimination based upon distance, and requires the commitment to be made for trial before the court having cognizance of the offense wherever that court may sit."

Now, the court that has cognizance of that offense and the court that has cognizance of this offense, so far as anything appears here is concerned, is the court in the District of Columbia.

It is claimed that these articles, these communications, are not libelous, and even a civil action could not be maintained upon them, and I recognize the fact that the Court has read this indictment and that counsel for the defendants have also read it carefully; but I claim to have given it some consideration, and if I may be permitted to do so, without taking more time than I ought to devote to this subject in view of the condition of the case, I feel that some reference can be very justly made to these communications. And it certainly seems to me that when we apply the rule of law that it is not what a man says he intended by the language that he used, but what in fact he did intend, and what in fact he published; what the people reading the communications would reasonably reach the conclusion he intended to mean, that controls; then it does seem to me that these articles are libelous *per se*. And, of course, while it has been stated by my associate that these communications amount to a charge of crime against some of the men at least who are named, of course that really makes no difference whether it amounts to a charge of crime, or whether the articles are of such a character that they tend to disgrace and degrade the individual; it is not necessary that they should charge a crime. But it does seem that when we come to analyze them and give to them the force and effect which the language itself imports, then they certainly amount to a good deal more than a mere statement that the Government of the United States paid forty millions

of dollars to an American syndicate for what that American syndicate purchased for twelve millions of dollars. They certainly go far beyond reasonable comment, fair comment, reasonable criticism; and when we come to an examination of the authorities upon the subject of motive in connection with the subject of libel the light is clear, I think, that when the articles that are published go beyond fair comment and criticism, when the articles that are published say something that naturally tends to disgrace and degrade, that injures a man in his reputation, injures him in his standing, or charges him with a crime, then to totally avoid either civil or criminal liability the defendant cannot come into court and wipe out what he has done by saying, "I had no ill-will. I had no feeling towards the persons named. In fact, I did not know them."

As is well stated by the learned author in the American State Reports, in one of the notes, that to permit a defendant, either in a criminal or civil case, to come in and make it a defense, a complete defense, along the line that his motives were good, that his purposes were pure, that he wanted to serve the public when he had published something that was false and defamatory, has only one recommendation, and that is the recommendation of simplicity; and the author adds further that it could still further be simplified by dispensing with the court and the jury and the witnesses and submitting it to the defendant for argument.

It does seem to me that when we start with these articles headed "That Panama Canal Deal," "The Cromwell-C. P. Taft Panama Canal deal is going to be a big campaign issue and some ugly charges are likely to be made concerning the purchase of the Panama Canal route for $40,000,000," and the reference to the *Chicago News* article, which does not avail the defendants, to the effect that "these French bankers tell of the deal and say that Cromwell, Morgan and C. P. Taft bought up the property and then unloaded it upon this country, has caused a good deal of comment among politicians," we find them libelous *per se*.

Now, it may be true, and undoubtedly it is true, that this was a matter in which the public was interested. People of the United States were much interested in the Panama Canal, have been interested in it for years, they are now; they are interested in what was done in connection with it; but when we concede this was a matter of public concern, we concede only that it was a matter about which there could be fair comment and reasonable criticism where any fact in connection with it could be shown.

Men cannot be charged with corruption, men cannot be charged

with thievery, men cannot be charged with putting a deal through in a dark corner, men cannot be charged with being a gang of speculators who robbed their country, and then have the persons who make these charges step back behind the proposition that they were only indulging in fair comment, a reasonable criticism in reference to a matter of public concern.

Now, it is not necessary for me to review the evidence and I do not expect to do so, but there are just one or two matters that I desire to mention in this connection.

True, the defendant, Mr. Delavan Smith, was in Lake Forest when the first article appeared, but he saw that article, and the other articles he saw before he came down to Indianapolis, and the articles that were published after he reached this city he saw. He was paying no particular attention to this business, however, it was no particular concern to him; and then he started to assist the paper to get the last communication, which is set forth in the last count of the indictment.

Now, Mr. Howland wrote these articles. They were turned over by him to Mr. Williams, who probably, as I think the evidence shows, made some modifications, but at least who, according to his testimony, approved them absolutely. Now, Mr. Howland was asked as to what he meant by certain things and he says, "Why, I don't know what I meant. I only knew that it was the biggest thing in the campaign—it was good stuff. I made no investigation. How could we make an investigation and run a newspaper?" Publish false and defamatory communications first and make your investigation afterwards! Now, that won't do. The liberty of the press is just exactly the same as the liberty of an individual, so far as writing a speech is concerned. The press has no greater right to write upon any subject, to write about any man, to publish any communication, than the individual has. So when I speak of the liberty of the press I am not speaking of a liberty to be enjoyed by the newspaper fraternity in a different way than the same right exists and is given and granted to each and every man. It must be true, however, that in reference to matters of public concern, in reference to the conduct of public officials, that fair comment and reasonable criticism and even severe criticism may be indulged in, not only by the newspaper but by the individual; but he must not step beyond the line and engage in abuse, he must not make unwarranted attacks under the guise of serving the public by indulging in what he terms fair comment and reasonable criticism. So that upon

the trial of a case of this character it would be for the trial court to determine as to whether the communications came within the class of qualified privilege; and then it would be for the jury to determine, under proper instructions from the Court, as to whether they have gone beyond the limits of fair and reasonable comment and criticism.

Now, we have this situation. There is not a single word uttered by the defendants, not a particle of evidence offered here to show the truth of any of the charges that were made in any of these articles. There is no attempt in any way to show the truth. And it is not fair comment and criticism to call the attention of the public to the fact that these records at Washington were probably suppressed; and to say that nobody can ascertain the facts except the President and his friends is certainly not a fact—is certainly not fair comment and criticism. Fair comment and criticism extend to a statement of fact. A man can always state facts, but he cannot state falsities.

The COURT: Can not he draw inferences?

Mr. MILLER: Reasonable inferences from the facts that he states and the facts that are within his possession.

The COURT: Do you know what an inference is?

Mr. MILLER: Would any two men agree on that, your honor?

The COURT: Yes.

Mr. MILLER: I would hardly be prepared to answer that question as to what a reasonable inference is. At least, if it is a matter where the inference is to be drawn as to whether what was said and what was done was fair and reasonable comment and criticism. Then it would be a question to be submitted to the jury in the trial jurisdiction with instructions from the Court.

The COURT: This Court has to determine it in the first instance.

Mr. MILLER: This Court only determines in the first instance probable cause, whether there is reason for putting these people on trial.

The COURT: If this Court should conclude it was fair comment and reasonable criticism this Court ought to so find and act accordingly; is not that true?

Mr. MILLER: If this Court is clearly of that opinion. If these articles are of such a character that in the opinion of this Court no other reasonable inference could be drawn except that it was fair comment and criticism, if the articles are of that character, then I can say with your honor that it would be necessary for you to say there was not probable cause, there is no libel, these articles are not

libelous if they are not susceptible on their face of saying that they went beyond fair comment and reasonable criticism. If it is so clear that they are fair comment and reasonable criticism that fair-minded and reasonable men would not be expected to differ on that subject, then it would be your duty to say that they are absolutely privileged, or they are such conditionally privileged articles that there could be no foundation for an action.

The COURT: Is not that substituting a well known rule in a civil action and applying it in a criminal case? Of course it is, if you offer me the doctrine that the question is one that reasonable men might differ about it is a question for a jury; but no such doctrine applies to a criminal case.

Mr. MILLER: I think that doctrine applies in a criminal case of libel, and I think we have authorities to that effect that the same inference will be drawn from what was done in a civil case and in a criminal case. The thing that was done stands forth, the unlawful act or the wrongful act; whatever it may be, there it is. Now the inference that arises from that wrongful act, or from that unlawful act, is the same inference in the civil suit and the same inference in the criminal suit; that what shows the fact in one shows the fact in the other, and that doctrine has been many times applied. We take it in connection with intent in the bank cases, the same doctrine must be applied.

The COURT: Well the same doctrine does not apply as to the weight of the evidence.

Mr. MILLER: Not as to the weight of the evidence, but the same inference arises from the same act.

The COURT: That is just another statement that the rules of evidence are the same in civil as in criminal cases.

Mr. MILLER: I am talking about what must be inferred from what was done. Now if a certain thing was done, it does not make any difference whether it is a civil proceeding or whether it is a criminal proceeding, the inference that arises from that act must be necessarily the same.

The COURT: They are not necessarily as conclusive in one case as the other.

Mr. MILLER: They are sufficient, however, for the jury to draw the inference, and the jury is entitled to draw the inference, and the jury is entitled to find that an offense has been committed on that kind of evidence.

The COURT: I do not know about that. Take the somewhat notorious Standard Oil case. The Court of Appeals held that upon one essential element of the Government's case reasonable men might disagree as to what the facts indicated—

Mr. MILLER: I am not talking about that kind of a case.

The COURT: I instructed the jury, and I think I was right, that if these three learned judges, reasonable men, were left in doubt, it certainly could not produce that state of mind in the jury which was necessary to a conviction. So it might very well be said in this case, as in an ordinary civil action between two citizens, that certain facts warranting an inference would be sufficient to support a verdict. It might be very well that the Court would allow a verdict to stand upon that, applying the doctrines of presumption of innocence and reasonable doubt. Wherever the question comes up, the same inferences must follow the same facts.

Mr. MILLER: Certainly; that is what I am claiming.

THE COURT: But the question here is whether or not, applying those rules, if any of those inferences arise, giving full effect to the evidence—whether they are probably guilty, and when you are considering that question you are not considering the question as to the weight, the mere preponderance of the evidence.

Mr. MILLER: That is true, you are not considering the mere weight of the evidence; but the point that I shall endeavor to present to your honor, and the matter that I was attempting to answer, was that the inferences that you draw are from a given state of facts, and it is exactly the same in a criminal case as you draw from those same facts in a civil case, so that when we find a false and defamatory communication, if it is a false and defamatory communication, if it is a wrongful act, standing there as you read it, then the inference arises from that act in the criminal case, from that communication in the criminal case, the same as the inference in the civil case.

The COURT: It is a refutable presumption.

Mr. MILLER: Most certainly.

The COURT: A man stands with a revolver in his hand and fires it at another man fifteen feet away and kills him; now it is not true and correct to say that it is an irrefutable and necessary inference that he is guilty of murder.

Mr. MILLER: I think if your honor understands me that way that I have not made myself clear. I did not intend to say that that absolutely forecloses him from coming in to make any defense. What

I say is this: that his coming in and saying his motives were good does not absolutely wipe out what he has done.

The COURT: The Court must take it all.

Mr. MILLER: Certainly. It won't do for me to take out my revolver to shoot at some one here in the courtroom and miss him and kill some other person, and say that I did not know the other person and I did not have any ill-will or malice or hatred toward that person.

The COURT: Of course, the trouble with that illustration is that you aimed at one man and hit another. That is not this case.

Mr. MILLER: That is simply the question of doing something that is wrongful. Of course if these communications are not wrongful, if these communications are not libelous, why, then, what I say falls to the ground. Then I will, of course, not press the matter any further. I am proceeding on the theory that these communications are wrongful communications, that these communications are not fair comment and reasonable criticism, that these communications go beyond that. Now, if these communications are not, in the opinion of the Court, and clearly so, because it must be that way, false and defamatory in the sense of the law, and do clearly come within the qualified privilege, then certainly we have no right here to proceed further; but what I am assuming is that the Court has not reached any such conclusion, and that therefore it is proper for me to call attention further to these articles on the theory that I have stated. I certainly do not wish to take up your honor's time and to present the matter along that line if I have said all along that line that you desire to hear.

The COURT: No; I prefer that you take your own course.

Mr. MILLER: Thank you, and that being the case, I will proceed.

The COURT: I did not mean to interrupt you.

Mr. MILLER: I do not believe with the distinguished gentleman who so ably presented the matter this forenoon that these articles are of the character that he indicates, and I hope I shall be able to show the Court what these articles contain to a greater extent than the Court may have examined them. If I can not do that, then it would be useless for me to take up the time.

So that I say this first communication starts out with the fact that there are going to be ugly charges made in connection with this Cromwell-C. P. Taft Panama Canal Deal. Now, let us see what these things are. Of course I will not attempt to read all of these articles and take up that time, but I want to briefly call attention to some of the most important statements. Where they make this statement that

this American syndicate purchased this canal property for $12,000,000 and sold it to the Government for $40,000,000, when the fact is there is no American syndicate, there was none, it must be understood in this connection that all of the history, of the antecedent history which is set forth in this indictment, is admitted to be true. There was no American syndicate; no American syndicate purchased this canal property for $12,000,000 and turned it over to the Government for $40,000,000. And then this article says:

"It is not now known to anybody outside the gang of speculators that reaped a rich harvest by playing on the patriotism of the American people, how much of that $28,000,000 went into the pockets of President Roosevelt's friends, who promoted the deal. It has been said on what seems to be good authority that the Government's check for $40,000,000 was paid to J. Pierpont Morgan. But no one knows how the sum was divided. Charles P. Taft has denied that he got any of the money. But he is the only person who has made a denial. We have seen no word from Douglas Robinson, a brother-in-law of the President. Yet he has, at least through rumor, been connected with the transaction.

"We do not think, however, that any denial, no matter how vehemently it may be made, ought to be accepted as conclusive. For all the records are in the possession and under the control of the Government. The appeal is to them. Mr. Cromwell, no doubt, knows who got the money. Possibly Mr. Morgan is not wholly ignorant of the details of the negotiation. As long as the facts are thus suppressed, the people cannot be blamed for suspecting the worst. They remember the close relation of our Government to the inspired revolution in Panama," and so on.

Now, stopping just for a moment before proceeding with this article. Take Mr. Cromwell. Granting that Mr. Cromwell did not do just what a man ought to have done at the time of this investigation by the Senate committee. What did Douglas Robinson have to do with it? What did Charles P. Taft have to do with it? What did William H. Taft have to do with it? What did Elihu Root have to do with it? What did any of these men have to do with this investigation?

The COURT: What article mentions William H. Taft and what does it say?

Mr. WINTER: I understood you to say the indictment alleges there was no American syndicate.

Mr. MILLER: The facts show there was no American syndicate.

The COURT: What charge was made against William H. Taft?

Mr. MILLER: I am not sure I can turn to that particular matter to answer your question instantly. I can, however, in going through these articles briefly, call your attention to it, your honor.

Now, if this second count of the indictment is read, this is what in my judgment it shows: The defendants admit the full and complete history of the Panama transaction as set forth in the indictment, they knowing, as I think the facts here demonstrate, of the denial of Cromwell. They did not claim to have the slightest evidence, or to have had the slightest evidence against Douglas Robinson. This is what this article charges: that the alleged American syndicate included Charles P. Taft, William Nelson Cromwell, J. Pierpont Morgan and Douglas Robinson and consisted of a gang of speculators who tricked the American people into buying the Panama Canal, by appealing to their patriotism.

That they knew all about the swindle.

That they knew how much of the $28,000,000 went to President Roosevelt's intimate friends.

That they encouraged and put through this unlawful and corrupt scheme.

That although Douglas Robinson has been connected with this unlawful and corrupt transaction, he has not denied it.

That the failure of C. P. Taft and Douglas Robinson to publish the records at Washington must be construed as an admission of their guilt.

That is the effect of what is charged in the second count of this indictment.

In the third count of the indictment the article says:

"We advert to it for the purpose of repeating the sentence, 'Sooner or later there will inevitably be an investigation of this whole canal affair, and it will come in some degree by keeping alive the idea, by living with the notion that a clique of manipulators can not, must not, for the integrity of the American Government, be able to perpetrate a great international transaction that, for all that is known, reeks with deceit, sharp practice and graft.'"

That is charging these men connected with this transaction with deceit, with sharp practice and with graft.

"The idea that supposed servants of the people can be wrought upon by expert swindlers to stultify the public reports of committees of experts, and with a sleight of hand, utterly undo all that was proposed, and put through a $40,000,000 transaction in a dark corner, is one that we have faith to believe will not come to fruition."

Now, it does seem to me that that is a very serious charge, "that supposed servants of the people can be wrought upon by expert swindlers to stultify the public reports of committees of experts, and with a sleight of hand, utterly undo all that was proposed, and put through a $40,000,000 transaction in a dark corner, is one we have faith to believe will not come to fruition. The people soon forget these things. In that has consisted the prosperity of many a rogue. But this rascality was unusual."

Now, to charge matters of this character, to say that it was graft, it was deceit, it was swindling and rascality that was unusual, certainly can not be fair comment and reasonable criticism, but must be an unjust attack.

"It involved a change in front of the President, the Congress of the United States, which was followed by a revolution in a friendly state (see Appendix) which looked as if it had been necessary in order to confirm title. Depend upon it, sooner or later there will eventually be an investigation of this whole canal affair. The 'Credit Mobilier,' the 'Whisky Ring,' the 'Star Route Frauds,' were all denied and apparently hidden away, but they came to light. We hope the *New York World,* which has been zealous and efficient in this canal deal, will persist. It may be short on evidence for a time, but it can be long on presentation. Some day we shall know who the thieves were who robbed their country."

Now, I say in the reading of these three counts of the indictment it shows:

That defendants, admitting the complete history as set forth in the indictment, charged Theodore Roosevelt, J. P. Morgan, Douglas Robinson, C. P. Taft and W. N. Cromwell with being connected with this fraud, this deceit and this graft.

The COURT: Where does it charge Roosevelt with fraud, or deceit, or graft?

Mr. MILLER: "It involved a change of front in the President," etc.

The COURT: There is no charge against him, as I understand.

Mr. MILLER: The last count has this charge: "As to the distribution of the Panama loot, only one man knows it all, and that man is William Nelson Cromwell. The two men who were most in Mr. Cromwell's confidence are Theodore Roosevelt, President of the United States, and Elihu Root, former Secretary of War, and now Secretary of State."

This article talks about the supposed servants of the people and the change in front on the part of the President and Congress.

The COURT: They did change front. They all of them changed front.

Mr. MILLER: I say this article reasonably bears that construction. That Taft and Morgan and Douglas Robinson and Cromwell were favored by officials of the United States and formed this syndicate and carried out this corrupt and unlawful scheme of defrauding the United States, which also concerned a foreign nation, that was full of fraud and deceit and graft, and put through in a dark corner; and if we eliminate the question as to whether the President of the United States here was charged with anything in the article, certainly we cannot eliminate that these other men were charged with fraud and with graft and with deceit and with being a gang of swindlers; and a comparison was made between what was done by them and the Whisky Ring frauds and the Star Route frauds and the other frauds that were perpetrated, putting it upon the same basis as those gigantic frauds. And then the article says that the *World* has in fact no evidence in reference to any of these matters; it is short on evidence, but it can be long on presentation and not weary in well doing; it can persevere and continue to make these attacks.

Now, the next communication in the next count of the indictment speaks about these rumors of corruption that have been afloat for weeks, and, "The administration has been challenged over and over again to speak on the subject—to give the country the facts. It has wholly refused to do so thus far. The time is short and there is need for prompt action. Why the issue should not frankly and bravely have been met when it was first presented we do not know, unless it was impossible to meet it satisfactorily. It has been charged that an American syndicate bought up the securities of the old French company for a mere trifle, and sold them to the Government for $40,000,000, making a profit of at least $28,000,000. This has never been denied by any one, and we suppose no one now questions the truth of the charge. This of itself is a serious thing. If the property was worth only $12,000,000 there was no reason why the Government should have paid $40,000,000 for it. The administration is responsible for this way of doing business.

"The question is as to the membership of the syndicate. Rumors have connected Charles P. Taft, a brother of the candidate, with it. He has denied the charge, but he brings no evidence to support his

denial, though the evidence is wholly in the control of his personal and political friends."

A man is charged with being connected with a swindle that was put through by deceit and in a dark corner, by which there was a purchase made for $12,000,000 and put through for $40,000,000, and he denies it, and then they say that he has not brought forward the proofs and introduced the evidence on his behalf to show the truth of his denial, and that the records are in his possession or under his control—these public records in Washington that are just as accessible to the defendants as to any other citizen in the country.

"It was made weeks ago, and is still, four days before the election, unanswered. Cromwell, who was Taft's adviser when he was Secretary of War, does not deign to give us any information."

There is no evidence whatever that Cromwell was Taft's adviser when he was Secretary of War. These charges of corruption, fraud and deceit, and then in the same connection—Cromwell was Taft's adviser when he was Secretary of War. That is a reflection of itself upon the Secretary of War.

"Cromwell, who got Sheldon appointed treasurer of the Taft committee. J. Pierpont Morgan has nothing to say, though the $40,000,000 check is said to have been made out to him. We do not suppose that the President is ignorant of what happened, but, though he has a great deal to say on many subjects, he is silent on this subject. And, indeed, the whole transaction is covered with a pall of silence. And yet the whole story is of record in Washington, and thus is absolutely at the disposal of the men with whose names rumor has been busy."

Now, there are charges, as I think, against the President, against Douglas Robinson, against J. P. Morgan, against Charles P. Taft and Mr. Cromwell. There is the intimation that the records may have been destroyed, and, if destroyed, this was a confession of the fraud, and the reasons for not answering the charges are fraud and corruption; and the reasonable inference is that Theodore Roosevelt was responsible to some extent at least for the fraud, in connection with the others named; that he knew of the existence of the corruption in connection with this purchase, and that the officials of the Government, including the President, would corruptly resist and thwart any investigation of the facts as to the purchase.

Now, without stopping further to read the next count in the indictment, which I think would add nothing particularly at this time, we will take this seventh count, which appears on the 9th day of Decem-

ber. The editorial appearing on the 9th day of December, 1908: "The *New York World* stands—"

Mr. WINTER: It was not an editorial. It was simply an Associated Press article.

Mr. MILLER: Oh, yes, that is right.

"Says Roosevelt's denial of Panama loot story is untrue. Upholds *The Indianapolis News*. It has been charged that the United States bought from American citizens for $40,000,000 property that cost those citizens only $12,000,000. There is no doubt that the Government paid $40,000,000 for the property. But who got the money?

"President Roosevelt's reply to this most proper question is, for the most part, a string of abusive and defamatory epithets. But he also makes the following statements as truthful information to the American people: 'The United States did not pay a cent of the $40,000,000 to any American citizen. The Government paid the $40,000,000 direct to the French government, getting the receipt of the liquidator appointed by the French government to receive the same. The United States Government has not the slightest knowledge as to the particular individuals among whom the French government distributed the same. So far as I know there was no syndicate. There certainly was no syndicate in the United States that to my knowledge had any dealings with the Government directly or indirectly.'

"To the best of the *World's* knowledge and belief each and all of these statements made by Mr. Roosevelt and quoted above are untrue, and Mr. Roosevelt must have known they were untrue when he made them. As to the detailed distribution of the Panama loot, only one man knows it all. And that man is William Nelson Cromwell. The two men who were most in Mr. Cromwell's confidence are Theodore Roosevelt, President of the United States, and Elihu Root, former Secretary of War and now Secretary of State. It was they who aided Mr. Cromwell in consummating the Panama revolution, arranged the terms of the purchase of the Panama Canal," etc.

Now, I say that this article—the reasonable construction that would be taken from this article is that the United States was defrauded of a large sum of money by the unlawful and corrupt scheme of a syndicate consisting, among others, of C. P. Taft, Douglas Robinson, William Nelson Cromwell and J. P. Morgan; that the story of the thievery and defrauding the Government by said syndi-

cate in its great scheme to steal the moneys of the United States in the purchase of the canal is true, notwithstanding the denial of Theodore Roosevelt, President of the United States; that the *World* defends Smith and Williams in making said charges; that the United States did pay a large part of said $40,000,000 to American citizens, and did not pay said sum direct to the French government, and the United States did not get the receipt of the liquidator for same; that the United States officials and Theodore Roosevelt, President of the United States, did know the particular individuals among whom were distributed the $40,000,000; that there was a syndicate as described in this and preceding counts, and that said Theodore Roosevelt did know that there was such a syndicate, and that said syndicate did deal with the United States and the officials thereof, including the said Theodore Roosevelt, President of the United States; that William Nelson Cromwell alone knows—

The COURT: What are you reading from?

Mr. MILLER: I say this is the effect of this article, the reasonable effect of it.

The COURT: You are not reading the language of the article.

Mr. MILLER (after reading it): That Theodore Roosevelt, President of the United States, and Elihu Root were entrusted by said William Nelson Cromwell with knowledge of the existence of said syndicate and with knowledge of his participancy in said syndicate and in the said unlawful scheme, and that said Theodore Roosevelt, President of the United States, and said Elihu Root, former Secretary of War, and also Secretary of State, knowingly and corruptly accepted such information and confidence, and connived at the purposes and scheme of said alleged syndicate.

Now, I would like to call attention to just a few authorities on this question of privilege:

Hallam v. Post. Pub. Co., 55 Fed. 457.

This was an action against the Post Publishing Company for damages for a libelous publication. The decision was by Judge Sage. The case was afterwards reported in 59 Federal, where the decision was by Judge Taft.

This was an action for damages for libel by reason of the publication of an article headed, "Berry paid expenses of Theodore Hallam in the Sixth (Ky.) District contest for the nomination of a Democrat for Congress." The article following is set out, giving the proceedings of the convention, speaking of Berry's wealth and Hallam's poverty, and that Hallam owes several hundred dollars for taxes.

There was a request for certain instructions, and the first reason assigned for a new trial is that the Court refused to give an instruction "That to entitle plaintiff to recover he must satisfy the jury by a preponderance of the proof in support of the innuendo set forth in the petition, that by the article complained of the defendant intended to charge the plaintiff with the transfer, by bargain and sale, of his supporters to Berry."

The Court said: "The charge was properly refused because the question was not what the defendant 'intended,' that was immaterial, but what was the fair and reasonable construction of the language used—what meaning it conveyed. Want of actual intent to vilify is no excuse for a libel."

The COURT: I would refuse to give that instruction in a civil case.

Mr. MILLER: And the same instruction ought to be refused in a criminal case.

The COURT: That does not follow.

Mr. MILLER: I think it follows according to the text-books, according to the decisions upon that subject, your honor. But the point that I am reading this case for is that it is not what they intended to charge, but what is the fair and reasonable construction of the language that was used.

The jury was told that every citizen has a right to make such comment freely upon the public affairs of the country by calling in question the acts of its officers, because the right to make such comment is inherent in our system of government, but that defamatory words spoken or published of an officer as an individual are not privileged on the ground that they relate to a matter of public interest, and are spoken and published in good faith. And the same rule applies to candidates for nomination for public offices.

The Court then stated the distinction between criticism and defamation and instructed the jury that when the defense of privilege is relied upon, it is for the Court to say whether the article complained of is of the class of articles deemed privileged, and for the jury to determine whether it is within the limits of the privilege. The charge then proceeded:

"In my opinion this article does fall within the class of privileged communications. Understand me, I am not saying that it is as published, a privileged communication. That depends upon whether the limitations that I have expressed have been observed. When I say

that it falls within the class of privileged communications—those that are conditionally privileged—I mean that it related to matters of public concern, which every citizen, every editor, has the right to criticise and comment upon. When I say that it is left to you to determine whether the article is itself privileged, or within the limits, I mean to be understood it is for you to determine whether the defendant has kept within the limits."

The attention of the jury was directed to the publication, and to the claim for the plaintiff that it was false, malicious and libelous, and to the claim for the defendant that there was no statement of fact that was not true; and no criticism not warranted by the facts; and it was left to the jury to determine upon the evidence and upon the charge, what constitutes malice, and what is libelous between these claims. The questions in dispute were largely questions of fact, and the Court had no right to do anything else than leave them to the jury.

Now, coming up to the same case decided in 59 Federal, the testimony of a certain witness was commented on. He testified on direct examination that the article had been submitted to him by the editor who prepared it, with the assurance that it truly stated the facts as they developed, after a thorough investigation, and that he thereupon approved its publication, because it was a matter of much public interest. He denied having any malice toward Hallam. McRhea was the general manager of the defendant company. The Court refused to give the following charge requested by defendant:

"To entitle the plaintiff to recover in this action it will be necessary that he shall satisfy you, by a reasonable preponderance of the evidence, of the allegation of the 'innuendo.' That is to say, that by the article published, the defendant intended to charge said Hallam with having requested his supporters to cast their votes upon the last ballot for Berry for a pecuniary consideration to be paid by Berry, and unless you shall find that the defendant did so intend and charge, you will find for the defendant."

Judge Taft said: "The charge was rightly refused. The question in the case was not what the plaintiff intended to charge in the article, but what in fact he did charge, and what the public who were to read the article might reasonably suppose he intended to charge."

Numerous other authorities are cited in support of the proposition, which I will not stop to read at this time. I think that the law is well settled upon this subject of privilege, without taking time to read through the authorities, and that the summary of the law upon the subject is that they were spoken in some public or private duty, and with that end in view; or in the conduct of some matter involving the

speaker's own interest, and that they were proper in that connection. and were uttered in good faith in the honest belief that they were true.

The basis of the publication must be a fact, not a falsehood. It may be prompted by duty either to the public or to a third party, or in which the party has an interest, and made to another having a corresponding interest, if made in good faith and without actual malice. The duty need not be one having the force of a legal obligation; it may be social or moral in its nature, and the defendant in good faith believes he is acting in pursuance thereof, although in fact mistaken. He will, however, not be protected when he exceeds his privilege, and the fact that a duty, a common interest, or a confidential relation existed to a degree, is no defense, even though he acted in good faith. It is founded upon the belief that it is advantageous for the public interest that persons should in no way be fettered in their statements, but it is also confined to cases where the public service or the due administration of justice requires that a person shall speak his mind freely in reference to facts and avoid falsehoods. It is strictly limited to fair and reasonable comment and criticism. It never extends to protect false statements, unjust inferences, imputations of evil, or criminal conduct and attacks upon private character, the publisher being responsible for the truth of what he alleges to be facts. If false, even if published in good faith, in the honest belief in its truth, it is not privileged. The inference of malice arising from the publication is not rebutted by proof that the defendant had reason to believe the charge true; but evidence of knowledge by the defendant of facts sufficient to induce a fair-minded man to believe that plaintiff was guilty of the charge is sufficient to disprove express malice.

The question always is, not what the defendant intended to charge in the article, which is false and defamatory, but what in fact he did charge and what the public, who were to read the article, might reasonably suppose he intended to charge. In determining whether a communication is privileged you must consider the nature of the charge, the right, the duty or interest of the parties in such subject, the time, the place, the circumstances of the occasion, as well as the manner, tone, character and extent of the communication. When all these facts and circumstances are conceded the Court may decide whether a communication is a privileged one, so as to require the plaintiff to prove express malice. When all the facts and circumstances are conceded, the Court may decide whether a communication is a privileged one. When not conceded, it should be determined by a jury under proper instructions from the Court.

Generally, the question of malice on the part of defendant is for the jury. Even if occasion is privileged, and there is any evidence of actual malice, the question as to whether a communication was made in good faith and without malice is one of fact for the jury. Where evidence is uncertain and conflicting, it is proper for the Court to instruct the jury as to what facts constitute privilege, and leave to them to say whether these facts are proved. Burden of proving that occasion was privileged is on defendant. The issue as to whether the words were published from a malicious motive, so as to take them from the protection of the occasion, arises only when it is shown that the occasion of publishing is one that is privileged.

What determines whether or not an act is lawful or unlawful, whether there is or is not a legal excuse for the doing of such acts, is the "occasion" upon which it is enacted. The occasion being the entire group of circumstances surrounding the act, including the actor, the person acted upon, the kind of act, the manner of effecting the act, the motive of the actor, and the consequences of the act,—we must in all cases refer to the occasion to ascertain whether there was a legal excuse for the act. Everything considered, was the act lawful or unlawful? Was it in the exercise of a right or in the performance of a duty?

Now, I want to call attention just for a moment or two—and the time passes so rapidly—I want to show that the same rule applies in criminal as well as civil cases, and refer to some authorities upon that proposition. We have numerous authorities, but I can not take time here to read them.

Libel being an indictable offense at common law and the punishment for libel being provided for by the Constitution of the United States, it is held at common law that where a civil action will lie, an indictment will also lie. Of course, statutes have been passed in many States making libel punishable as a criminal offense, etc., and it is said that libel is not a serious offense. It has not been so considered in this country. I only wish I had time to read some of the authorities by some of the distinguished judges upon this question in the discussion of how serious is this offense of libel.

The COURT: You may. I want to hear how serious an offense it is. You may take the time.

Mr. MILLER: Want of actual intent, in a criminal case, to vilify is no excuse for a libel, and if a man deems that to be right which the law pronounces wrong, the mistake does not free him from guilt.

This was decided in 44 Kansas, State v. Brady, Curtis v. Massey,

6 Gray 261, 1 Bishop on Criminal Law 309, and Reynolds v. United States, 98 U. S. 145, and many other authorities.

In the case of People v. Fuller, recently decided in the State of Illinois, reported in 86 N. E., page 337, the indictment is in two counts. Publishing in the *Dixon Daily Sun* a false, malicious and defamatory libel concerning one Walter B. Merriman, with intent to vilify and defame him, and to expose him to public hatred and contempt. Article set out in full in the indictment. Its heading is as follows: "Money Illegally Filched." Then it sets out details in the handling of funds of county.

The contention of the defendant was that the article as set out did not constitute a libel, as it charged no crime, but only the drawing of money from the treasury without previous authorization, and that the word "filch" does not necessarily mean a crime. The Court there said:

"Under the statute any malicious, etc. (common law definition), is a libel. Not necessary to charge a crime. The words must be taken in the sense which the readers of common and reasonable understanding would ascribe to them.

"The primary meaning of 'filch' is to steal. The primary meaning of 'graft' is the same thing. The charge is a libel (if false). Section 179 of our Criminal Code provides:

" 'In all actions for libel the truth, when published from good motives and for justifiable ends, shall be a sufficient defense.' "

The Court said the evidence failed to establish the defense. "Not only was the charge of taking money illegally or filching it, not sustained, but to be sufficient defense the truth must be published with good motives."

Objections were also made to the instructions by the plaintiff in error, that a verdict of guilty is authorized upon proof of criminal negligence only, in permitting the publication.

"It is the duty of the editor and publisher of a paper to use reasonable precaution to see that no libels are published. He is criminally liable unless the unlawful publication was made under such circumstances as to negative any suggestion of privity or connivance on his part, or want of ordinary care to prevent it. It is not enough to show that he has never seen the libel, or was not aware of it unless it was pointed out to him. Proof of publication through the criminal negligence of the editor and manager to exercise proper care and supervision over his subordinates, or criminal indifference to the character of the article appearing in the paper, will sustain the charge of unlawful, malicious and wilful publication."

At common law there is no defense. Under our Constitution truth is a defense when published with good motives and for justifiable ends. It is, however, an affirmative defense, and must be proved by the defendant. Com. v. Bonner, 9 Metz. (Mass.) 410.

Take the case of State of Kansas v. Brady, which is a much later decision than the one read by Mr. Winter from that State. This case is an appeal from the District Court of Morris County, where the defendant was prosecuted and convicted of criminal libel for publishing in his paper the following statement:

" 'Tis now almost forgotten that Governor Harvey pardoned his own brother out of the penitentiary. The convict Harvey had been sent to Lansing from Salina."

The information charged that the libel was published of and concerning James M. Harvey and others. The evidence showed that Dr. W. S. Harvey was a resident of Salina at the time of the publication and a brother of ex-Governor James M. Harvey. The publication was admitted. The claim is made by the defendant that the language is not libelous *per se;* that the court below erred in not giving the following instructions to the jury:

"The publication charged as libelous in this case is not libelous *per se;* and before the jury can find the defendant guilty in this case, express malice must be proven."

This instruction was refused by the trial court and the following given:

"I instruct you, gentlemen of the jury, that to print and publish concerning any person, that he has been a convict in the State penitentiary of the State of Kansas, is libelous *per se,* unless the same is true; and in this connection I further instruct you that there is no attempt on the part of the defendant in this case to prove the truth of the matter charged as libelous, or to show that same was published for justifiable ends."

The Court then said: "Libel has been defined by Judge Story to be 'any publication the tendency of which is to degrade and injure another person, or bring him into contempt, hatred or ridicule, or which accuses him of a crime punishable by law, or of any act odious and disgraceful in society.' "

The definition of libel in the code of Kansas is then given, which is substantially the common law definition. The defendant further contended that before the jury could convict, express malice must be proven, and the Court said:

"We do not think this is the legal rule. In prosecutions for libel, malice is inferred from the nature of the charge, and when the pub-

lication of words, libelous *per se,* is once proven, malice is inferred, as a person is presumed to have intended the consequences of his own acts."

Chief Justice Shaw has clearly stated the rule: "It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill-will towards the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of matters; but if in pursuing that design he wilfully inflicts a wrong on others which is not warranted by law, such act is malicious."

The want of actual intent to vilify is no excuse for libel, and if a man deems that to be right, which the law pronounces wrong, the mistake does not free him from the guilt.

Curtis v. Massey, 6 Gray 261;
I Bishop Crim. Law, sec. 309;
Reynolds v. United States, 98 U. S. 145; 25 L. ed. 244.

And so the same doctrine is applied in the criminal as in the civil case. In the case of the State of Oregon v. Mason, 26 L. R. A. 780, the defendant was indicted, tried and convicted of libel for publishing in a newspaper called the *Sunday Mercury* a libelous article in which the name of the person alluded to therein, who is the prosecuting witness, was not mentioned. The libel is not set out. It is first considered as to whether witnesses can testify as to what they understood from reading the article, and it was held that such evidence was admissible. The remaining assignments of error are based on the giving and refusal of certain instructions of the trial court. The instructions complained of as claimed by counsel for defendant are:

"1. That the proprietor or manager of a newspaper is liable, criminally, under our statutes for whatever appears in the paper, although it may have been without his knowledge or consent;

"2. That the publication being proven the malice and intent to injure are conclusively presumed;

"3. That a person may be convicted of a libel upon the property of another."

It was then stated by the Court that "in reference to the last two questions, as stated by counsel, it seems to us that he has misinterpreted the language used by the Court. We have carefully examined the instructions, but we do not find it stated anywhere that malice and intent to injure are conclusively presumed from the fact of publication."

The Court instructed the jury that "malice does not mean a personal ill-will towards the person libeled. If the publication be found libelous the law implies malice. If the publisher published carelessly, not knowing or indifferent what, he is held responsible as though he read every word. It is a settled principle of law that every person is presumed to intend the reasonable and natural consequences of his own acts. So, as I have said, if you are satisfied that the defendant published the newspaper article set out in the indictment, and that it was false and scandalous, you are obliged to presume that it was done maliciously with intent to injure and defame. This is but an application as to the facts of the case, of the rule that when an injurious publication is false and is in itself defamatory, the law infers malice whether the offender intended ill-will towards the person injured or not."

So that I say if these communications, these acts, were false, if these charges were false, this conduct was wrongful and unlawful in connection with these communications, then the law infers from what was done in the criminal case the same as in the civil case. The defendant intended those consequences and is responsible criminally for the consequences.

The Court further said: "Every injurious publication of and concerning another, if it contain libelous matter, is presumed to have been made maliciously; and this presumption continues until it appears that the matter charged as libel is in fact true, and was published with good motives and for justifiable ends."

The Court next considered the question as to whether, under the statute, it is a defense for the proprietor of a newspaper when indicted for libel to show that the libelous article was published without his consent or knowledge. The statute provides that: "If any person shall publish or cause to be published of or concerning another any false and scandalous matter with intent to injure or defame such other person, upon conviction thereof he shall be punished therefor."

It was contended by the defendant that to constitute the offense under this statute, the defendant must have entertained a specific intent to injure or defame the prosecuting witness, and that this intent could not have existed if the publication was made without his knowledge or consent, and the Court stated:

"But the law presumes that every person intends the natural and probable consequences of his own acts, and, therefore, as the natural and probable consequence of the publication alleged in the indictment was to injure and defame the prosecuting witness, the law will infer that the defendant, if he caused or negligently permitted, intended

such consequences, although he may have entertained no special ill-will or malice towards the person injured."

I will not read again from the opinion of Chief Justice Shaw, in the case of Commonwealth v. Snelling, 15 Pick. 340.

The COURT: Do I understand in that case the defendant did not know of the publication, had no knowledge of it, that it appeared in his paper without his knowledge?

Mr. MILLER: It does not clearly appear from the statement of facts. That was the claim presented, and the Court there held that he could not escape criminal prosecution solely on the ground that the libelous article was published without his knowledge.

The COURT: Then I would not follow that case. I think that is bad law and bad morals both.

Mr. MILLER: That is followed by the Supreme Court of Massachusetts, your honor.

The COURT: I do not care. To say that a man can be held criminally when he was not conscious of it violates fundamental principles.

Mr. MILLER: You will find that laid down in many, many decisions by the courts in connection with libel and slander.

The COURT: That is wrong. They cannot be held in a criminal case of libel. That a man can be convicted of a crime consisting of an act he is unconscious of violates fundamental principles.

Mr. MILLER: Of course, your honor, it is not necessary for me to argue that question. We have no such case here. But the rule is laid down here as to the question of the inferences that are to be drawn from the doing of the act in all these cases, in these criminal cases the same as in the civil cases.

The COURT: That shows it is not right. If I have a newspaper and I have men employed to work for me and a libelous article appears and I am unconscious of it, I don't know a thing about it, I am civilly liable; but it is just as plain to my mind that I am not criminally liable. I am so well satisfied of that principle that no amount of argument or authority would change my mind.

Mr. MILLER: I am only contending for this part of the proposition, your honor, that if a defendant, the proprietor of a newspaper, unknowingly publishes a false and defamatory article that reasonably bears that construction it amounts to an unlawful act. It is a wrongful act, and from that the inference follows that he did it knowingly.

The COURT: And you cite a case which holds that he had nothing to do with it and is guilty of the crime of libel, so that case don't count.

Mr. MILLER: I am eliminating that case.

The COURT: I eliminate it, too.

Mr. MILLER: I do not want to be understood as contending further than that. That has been my statement at all times, if the Court please.

The COURT: I do not understand that you approve of the doctrine.

Mr. MILLER: I do not approve of that doctrine, but I do approve of the doctrine upheld by many decisions—of course, I can not take the time now to go through all of those decisions—that when the act, when the communication was wrongfully, unlawfully and knowingly done, knowingly published, that the inference follows and the intent appears, and you can not come in and show that your motives were good and pure.

The COURT: I do not think that is the law at all. I think that where the act is defamatory and necessarily results in injury that the inference may be drawn that the injury was intended, and I think that upon a trial before a jury the jury might be justified in drawing that inference; but that it is conclusive and irrefutable I do not believe, and I do not care what court ever held it or holds it now.

Mr. MILLER: I have attempted to state several times, your honor, that I do not consider it conclusive; that I do not consider it irrefutable, but that a jury would be justified in drawing an inference in a criminal case just the same as the jury would be justified in drawing the inference in a civil suit.

The COURT: No. In a civil suit if an injury results, and the injured party is suing, the defendant cannot be heard to say that he did not intend the natural result of his act. In a criminal case he can say what his intent or motive was.

Mr. MILLER: How do we draw any inference in a criminal case with respect to the question of intent when a man commits a crime in connection with a national bank? It is a wrongful act; then the jury is entitled to infer the criminal intent from the nature of the act done.

The COURT: I have just been through all that. I have been very careful to hold that they could infer it, but if I had told them they must infer it, it would have been error.

I always like to go back to simple illustrations. They are easy to apprehend and comprehend. I raise my revolver and fire at you fifteen feet off and kill you. I can get on the witness stand and I am

allowed to testify that I did not intend to kill you when I am on trial for murder, can not I?

Mr. MILLER: I am not disputing that.

The COURT: And if the jury finds that I told the truth I am acquitted. Now, if your wife is suing me for killing you I cannot be heard to say that I did not intend to do it. In that case I am absolutely presumed to have intended to kill you. There is a difference between a criminal case and a civil case.

Mr. MILLER: But the jury are entirely justified in drawing the inference, notwithstanding your denial that you intended to kill me. Therefore, in effect when you come to the ordinary application it amounts to substantially the same thing in so far as what results from the act, and in drawing the inferences that follow from it. You say the question of liability in the one case would absolutely be established and you could not come in and make any defense on the ground you did not intend to do it.

The COURT: It is an irrefutable inference in the civil case, while in the criminal case it is an inference that does not follow necessarily.

Mr. MILLER: But it follows to this extent, that the jury are justified in coming to that conclusion in drawing that inference.

The COURT: They may do it, but are not bound to do it.

Mr. MILLER: No.

The COURT: Then it is not a conclusive presumption; it don't follow from the nature of the case.

Mr. MILLER: It follows to the extent I have endeavored to indicate. In drawing the distinction we may not at all times have been as clear in our statements as we ought to have been, but when we have a case that would entitle a jury in the trial jurisdiction under the instructions to draw an inference then it seems to me that the committing magistrate would hardly be justified in assuming that the articles are so clearly not false and defamatory, so clearly not libelous, that there could be no inference of that kind drawn when we are only here required to show identity and probable cause upon that branch of this case.

Now, if the Court please, there are many things that might be said and many authorities that might be cited, and many discussions that might be had on the question of malice and intent and privilege and what has been decided in these various cases. But I certainly do not feel that I am justified in taking up further

time of the Court; that it will be of no benefit to your honor or to the Government in taking more time here today in this discussion. We have established, of course, the identity of the defendants; that is admitted. The question of probable cause is to be determined from all the facts and circumstances that are before the Court, from these communications, from their character, from their tone, from what was done; and then, of course, passing that question, the question of the application of these statutes, the question of power of removal under section 1014, which seems to have been squarely decided by the last decision of the Supreme Court of the United States, and other cases preceding it, is to be considered.

OPINION (ORAL) ANNOUNCED BY JUDGE ANDERSON.

The COURT: This has been a very interesting discussion. It involves very interesting constitutional questions, and questions which are always interesting to a lawyer—questions of procedure. I suppose that when you take into consideration the general interest taken in this case, the nature of the circumstances out of which it grew, the unusual features of the proceeding itself, and the important questions involved, I should be entirely justified in reserving my decision and taking time to put down on paper the conclusions that I have come to. But I have other things to do besides write, and in the immediate future my engagements are such as will preclude my taking time from other business to put down on paper carefully, as I would like to do, the views that I entertain upon these questions. So, at the risk of being somewhat misunderstood and incorrectly reported—with no reflection on the reporters, however—I will give my views upon this case at this time, and decide the question, so far as it is up to me to decide.

I carefully read over the brief which was handed to me yesterday morning by Mr. Lindsay, which upon its face purports to have been prepared by himself and Mr. Delancy Nicoll, the latter of whom is well known by reputation to all members of the profession, and I was much impressed with the learning and the research shown in that brief, and if it were necessary to a decision of the question before me I would try to go into it further and see whether or not my conclusions would accord with theirs. I do not feel now, however, that I am called upon to decide the questions presented in that brief, and for that reason I do not propose to go further into it at this time.

I was very strongly impressed this morning with Mr. Winter's argument on the proposition that these articles are not libelous. Up to that time it had not occurred to me that there was any question

about their being libelous. But I am not so sure about it. I think myself there is a good deal in the proposition that when articles charge people with swindling, or with thievery, and in the articles there is contained a statement of the facts upon which the charges are based, it does not necessarily follow that because the words "thieving" and "swindling" are used it is libelous *per se*.

On two other questions that have been discussed I have more definite notions. I will take these up in their order, in the order in which they have been discussed and presented during this hearing. In the first place, it is seriously contended, earnestly contended here, by the defendants' counsel that these articles are conditionally privileged. When one undertakes to find a definition of privilege, or conditional privilege, it is very difficult to find one that is satisfactory. I ran across a statement of this thing by a very learned English judge. Under the head of "Malice," sub-head "Privilege and Justification," American and English Encyclopedia of Law, I find this statement, which is followed by the statement of the English judge of which I spoke a moment ago.

The reconciliation of the two classes of cases mentioned above—those in which motive is material and those in which motive is not material—is to be sought in an extension of the concept of privilege as understood in the law of libel, or in a coherent application of the idea of justification or excuse. "The conception"—this is the language of the English judge—"the conception of privilege in the law of defamation is that an individual may, with immunity, commit an act which is a legal wrong, and, but for his privilege, would afford a good cause of action against him; all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognizes, and shall not be prompted by a desire to injure the person who is affected by his act."

Let us go back a little. I have had occasion to say before that a newspaper has a certain duty to perform. It was well stated by a former President of the United States that it is the duty of a newspaper to print the news and tell the truth about it. It is the duty of a public newspaper, such as is owned and conducted by these defendants, to tell the people, its subscribers, its readers, the facts that it may find out about public questions or matters of public interest; it is its duty and its right to draw inferences from the facts known—draw them for the people. I might just digress long enough to suggest that it is not everybody that can draw an inference.

Here was a great public question. There are many very peculiar

circumstances about the history of this Panama Canal, or Panama Canal business. I do not wish to be understood as reflecting upon anybody, in office or out, in connection with this matter, except such persons as I may name in that way. The circumstances surrounding the revolution in Panama were unusual and peculiar. The people were interested in the construction of a canal; it was a matter of great public concern; it was much discussed. A large portion of the people favored the Nicaragua route. Another portion of those who were interested in it, officially or personally, preferred the Panama route. A committee was appointed to investigate the relative merits of the two routes. They investigated and reported in favor of the Nicaragua route. Shortly afterward—I do not now recall just how soon afterward—they changed to the Panama route. Up to the time of that change, as I gathered from the evidence, the lowest sum that had been suggested at which the property of the Panama Canal Company could be procured was something over $100,000,000. Then, rather suddenly, it became known that it could be procured for $40,000,000. There were a number of people who thought there was something not just exactly right about that transaction, and I will say for myself that I have a curiosity to know what the real truth was.

Thereupon, a committee of the United States Senate was appointed to investigate these matters—about the only way the matter could be investigated. The committee met. As stated in these articles, the man who knew all about it—I think that is the proper way to speak of Mr. Cromwell—who knew all about it, was called before the committee.

Mr. Cromwell, upon certain questions being put to him, more or less pertinent, stood upon his privilege as an attorney and refused to answer. That was the state of the case as shown by the evidence when we adjourned last June. At this session certain parts of the record showing the proceedings before the Senate committee have been introduced by the Government, and the impression made upon my mind from such parts as the Government has seen fit to introduce is not more favorable to Mr. Cromwell's position than it was upon the former hearing. So far as the record has been read—and that is all the part that I have any acquaintance with—Mr. Cromwell stood upon his privilege whenever questions were asked, the answers to which would or might reflect upon him and his associates. But whenever a question was asked which gave him an opportunity to say something in their behalf be ostentatiously thanked the examiner for the question and proceeded to answer.

To my mind that gave just ground for suspicion. I am suspicious

about it now. As shown by the evidence subsequently, upon further examination in this matter, I suppose, knowing that he would be examined about certain transactions in connection with it, he took the pains to get the privilege released by his then client, and the reasons given for varying his conduct in that instance from his conduct in the former instance were about as unsubstantial as the reasons given in the first instance for not answering them.

So we have this situation: Here was a matter of great public interest, public concern. I was interested in it, you were interested in it, we were all interested in it. Here was a newspaper printing the news, or trying to. Here was this matter up for discussion, and I cannot say now—I am not willing to say—that the inferences are too strongly drawn. I am not approving of the inferences; I am simply saying that I am not able to say that they were too strongly drawn. Now, if that is the situation—and, as I understand the truth, that is the way it stands—the question is: Did these defendants, under the circumstances, act honestly in the discharge of this duty of which I have spoken, and which the law recognizes, or were they prompted by a desire to injure the person who is affected by their acts? If it were necessary to decide this case upon the question of privilege, the lack of malice, I would hesitate quite a while before I would conclude that it was my duty to send these people to Washington for trial.

But that is not all. This indictment charges these defendants with the commission of a crime in the District of Columbia. The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed, which district shall have been previously ascertained by law." I will state what I find the evidence to be, and if I am mistaken about it in any way I shall be glad to be corrected, because upon that I shall proceed to a conclusion.

The Indianapolis News is owned, the evidence shows, by these defendants, is printed and published by them in the city of Indianapolis, in the State of Indiana, and at the time covered by this indictment it had a daily circulation of about ninety thousand copies. All but about two thousand of these copies were circulated and distributed in the State of Indiana; some four or five hundred were distributed in one or two adjoining States, and to the District of Columbia there were sent by mail, daily, about fifty copies to subscribers and persons who ordered them sent there. The defendants have no agent or

bureau, or office, and maintain no agency, bureau or office in the city of Washington or the District of Columbia for the circulation of papers within that District. I think that is what the evidence in this case shows as to the way in which these papers are published and circulated. It is perfectly manifest that so far as this case is concerned the publication and the circulation of these papers anywhere except in the District of Columbia may be disregarded for the moment. So the question is: Do the defendants, when they print and publish fifty copies in the city of Indianapolis and deposit them in the United States postoffice, in this building, to be transmitted by mail to fifty subscribers in Washington—do they publish those fifty papers in Washington? If they do, that court has jurisdiction of the offense. I will not go so far as to say that it has jurisdiction of the defendants. But if they do not then that court has neither jurisdiction of the offense nor of the defendants.

Let us look at it a little further. To my mind there is but one inference, one conclusion that can be drawn. These statutes which provide that where an offense is begun in one jurisdiction, in one county, for example, and completed in another, or where an act is done in one county and the effect results in another, throw considerable light upon the question we have here. In other words, if a man stands near the edge of Marion county, this county, and within this county, and fires a shot at a man in an adjoining county and kills him, were it not for the statute authorizing prosecution for the murder in the county in which the man dies, at common law he could be tried, convicted and punished only in the county where he fired the shot. It is only because of the statute that he can be tried in either county, and if it were not for the statute there would be no jurisdiction whatever to try him in the adjoining county. That is illustrated by a number of cases. But that is not this case. These defendants, as shown by the evidence, have not committed an act, a part of the doing of which was here and part of it in Washington. It is not that kind of case. A United States statute, I might stop to say, which would make a case triable in a district different from the district where the act was committed, would be unconstitutional. Their acts are not shown by the evidence to have been acts part of which were committed in this district and part of them in Washington. It is not that kind of case. Nor are they charged with doing an act here, the effect of which results in Washington. It is not that kind of case. Everything that the evidence shows that the defendants did they did in the district of Indiana, in the city of Indianapolis, in the county of Marion. I am not saying if these defendants had an agent in Washington

to whom they sent for circulation copies of this paper that they might not be amenable to prosecution in Washington. We must distinguish that sort of case from this.

It seems to me that I am compelled to take one of two views upon this question, and there is no middle ground between them. I cannot compromise it. When a newspaper owner or proprietor does what the evidence in this case shows these defendants did—composed, printed and deposited in the mails for circulation these papers containing (for the purpose of this statement) libelous articles, either they are guilty here and in every county and district and jurisdiction into which those papers go, or they are only guilty here. When these defendants put newspapers containing the alleged libelous articles into the postoffice here in Indianapolis, and they went through the mails throughout the country, to various States, counties and districts of the United States, either they committed a separate crime every time one of those papers went into another county, another State or another district, or there was but one crime, and that crime was committed here.

In the case that I put during the argument, where a paper is deposited here in Indianapolis and circulates throughout the ninety-two counties, when I asked counsel for the Government whether it would be an offense in each county he thought it would, and in the absence of the Indiana statute cited by the Government counsel, according to their theory, it would be. Then the question is, suppose there was a conviction, say in Posey county, would that be a bar to a prosecution in Marion county? Counsel for the Government think it would. Let us see if it would. The theory is that it becomes a crime in each jurisdiction where it is circulated. If so it must be a separate crime. If there is something in the circulation of it in the other county, or district, or jurisdiction, which makes it a crime there, it must be a separate crime. There is no escape from that. If it is a separate crime a conviction or acquittal of it, of course, could not be pleaded in bar of a prosecution for another crime.

I think that, as between those two views, the other view is the more reasonable one and the correct one. I am not saying now that there may not be circumstances where the publisher of a newspaper circulated throughout the country might be guilty of and prosecuted for more than one offense. I am speaking of the facts as shown by the evidence here. Where people print a newspaper here and deposit it in the postoffice here for circulation throughout other States, Territories, counties and districts, there is one publication, and that is here.

If that is true then there is no publication, under the evidence here, in Washington.

The discussion as to the hardship of taking a man away from his home to a distant place to be tried, and the discussion pro and con as to the desirability of the District of Columbia and the city of Washington as a place for trial was interesting. But those considerations, as suggested in one of the decisions of the Supreme Court, are not controlling, and I am not compelled to resort to anything of that kind to satisfy myself about what ought to be done here. To my mind that man has read the history of our institutions to little purpose who does not look with grave apprehension upon the possibility of the success of a proceeding such as this. If the history of liberty means anything—if constitutional guaranties are worth anything—this proceeding must fail. If the prosecuting authorities have the authority to select the tribunal; if there be more than one tribunal to select from; if the Government has that power and can drag citizens from distant States to the capital of the nation, there to be tried, then, as Judge Cooley says, this is a strange result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial.

The defendants will be discharged.

APPENDIX.

CERTIFICATE OF INCORPORATION OF PANAMA CANAL COMPANY OF AMERICA.

UNITED STATES OF AMERICA
STATE OF NEW JERSEY

We, the undersigned, hereby do associate ourselves into a corporation, under and by virtue of the provisions of an act of the legislature of the State of New Jersey, entitled "An Act concerning Corporations" (revision of 1896), and the several acts amendatory thereof and supplemental thereto, for the purposes hereinafter named, and do make this our certificate of incorporation.

First. The name of the corporation is Panama Canal Company of America.

Second. The location of the principal office of the corporation in the State of New Jersey is at 76 Montgomery street, in Jersey City, in the county of Hudson, and the name of the agent therein and in charge thereof, upon whom process against this corporation may be served, is William Brinkerhoff.

Third. The objects for which the corporation is formed are as follows:

To acquire, by purchase or otherwise, the maritime ship canal of the Compagnie Nouvelle du Canal de Panama and the railway across the Isthmus of Panama between the Atlantic Ocean and the Pacific Ocean; to construct, exploit, complete, equip, repair and enlarge; to operate, manage, maintain and control said canal and railway and the various enterprises connected therewith; to collect tolls and revenues therefrom and to use and enjoy the same.

To acquire, by purchase or otherwise, and to construct, operate, exploit, manage and control lines of railway along or in the vicinity of such canal.

To acquire, by purchase or otherwise, and to construct, operate and exploit, manage and control cable lines, telegraph lines and telephone lines along and to connect with such canal and such railway, or railways, and in and along the shores of the oceans, seas, gulfs and bays at, near, or to connect with such canals or railways.

To acquire, by purchase, lease, or otherwise, and to construct, maintain, operate, manage and control, and to sell, let, pledge or otherwise dispose of ships, boats and other vessels of every kind and nature and propelled by any power; to acquire concessions, grants, privileges or licenses for the establishment and working of lines of steamships or sailing vessels, and to establish and to maintain lines or regular services of steamships or other vessels between any parts of the world, and generally to carry on the business of shipowners, and to enter into contracts for the carriage of mails, passengers, goods and merchandise by any means, either by its own vessels, railways and conveyances, or by the vessels, conveyances and railways of others; and to collect, use and enjoy revenues therefrom.

To construct, purchase, or otherwise acquire, and to own, equip, maintain, use and manage wharves, warehouses, piers, docks, buildings, or works capable of being advantageously used in connection with the canal, shipping, carrying, or other business of the company; and to charge and collect dues and rentals for the use thereof.

To construct, purchase, or otherwise acquire, and to own, equip, improve, work, develop, manage and control public works and conveniences of all kinds, including railways, docks, harbors, lighthouses, piers, wharves, canals, conduits, locks, reservoirs, irrigation works, tunnels, bridges, viaducts, embankments, buildings, structures and any and all other works of internal improvement or public utility.

To enter into any arrangement with any governments or authorities, national, state, municipal, local, or otherwise, that may seem conducive to the company's objects, or any of them, and to obtain from any such government or authority any and all rights, privileges, grants and concessions which the company may think it desirable to obtain, and to carry out, exercise and comply with any such arrangements, rights, privileges and concessions, including the construction of any and all internal improvements of any and every nature.

To issue shares, stock, debentures, debenture stock, bonds and other obli-

gations; to subscribe for, to acquire, to invest in, and to hold and control the stocks, shares, bonds, debentures, debenture stock and securities of any government, national, state, or municipal, and of any canal, railway or other corporation, private or public, and to exercise all the rights, powers and privileges of ownership thereof; to vary the investments of the company; to mortgage, pledge or charge all or any part of the property, concessions, rights and franchises of this company acquired and to be acquired; to make advances upon, hold in trust, sell or dispose of, and otherwise deal with any of the investments or securities aforesaid, or to act as agent for others for any of the above or the like purposes.

In general, to carry on any other business in connection therewith, with all the powers conferred by the aforesaid act of the legislature of the State of New Jersey and acts amendatory thereof and supplemental thereto.

The corporation shall also have power to conduct its business in all its branches, to have one or more offices, to hold meetings of the directors, to keep its books (except the stock and transfer books), and to hold, purchase, mortgage, lease and convey real and personal property without the State of New Jersey and in any and all the other States, the Territories, the District of Columbia and the colonies, dependencies and possessions of the United States of America, and upon the Isthmus of Panama, and in the United States of Colombia, and in any and all other foreign countries.

The objects in this article specified shall not be limited or restricted by reference to, nor inference from the terms of any other article, clause, paragraph or provision, in this certificate contained.

Fourth. The amount of the total authorized capital stock of the corporation is $30,000,000, the number of shares into which the capital stock is divided is 300,000 shares, consisting of 50,000 shares of first preferred stock, 150,000 shares of second preferred stock and 100,000 shares of common stock, and the par value of each share is $100. The amount of capital stock with which it will commence business is $5,000, consisting of twenty-four shares of first preferred stock, nine shares of second preferred stock and seventeen shares of common stock.

From time to time the first preferred stock, the second preferred stock and the common stock shall be issued in such amounts and proportions as shall be determined by the board of directors, and as may be permitted by law.

From time to time the capital stock, and each class of the capital stock, of the corporation may be increased, as permitted by law, in such amounts as may be determined by the board of directors and authorized by the holders of two-thirds in amount of each class of the capital stock then issued and outstanding.

The holders of the first preferred stock shall be entitled, out of any and all surplus or net profits, to receive non-cumulative dividends whenever the same shall be declared set apart for or paid upon any other stock of the corporation.

In each and every fiscal year for which full dividends shall have been set apart for or paid upon all of the first preferred stock, the holders of the second preferred stock shall be entitled, out of any and all surplus or net profits, to receive non-cumulative dividends whenever the same shall be declared by the board of directors at the rate of, but not exceeding, eight per cent. per annum for such fiscal year; such dividend to be paid before any dividend for such fiscal year shall be declared, set apart for or paid upon the common stock.

In addition thereto, in the event of the dissolution or liquidation of the corporation, the holders of the first preferred stock shall be entitled to receive the par value of their preferred shares before anything shall be paid upon the second preferred stock or upon the common stock out of the assets of the corporation; and the holders of the second preferred stock shall be entitled to receive the par value of their preferred shares before anything shall be paid upon the common stock out of the assets of the corporation.

The common stock shall be subject to the prior rights of the first preferred stock and the second preferred stock, as above declared. If, after providing for the payment of full dividends for any fiscal year on the first preferred

stock and the second preferred stock there shall remain any surplus or net profits such remaining surplus or net profits shall be applicable to the payment of dividends, at the rate of four per cent. per annum, upon the common stock whenever the same shall be declared by the board of directors; and out of and to the extent of any such remaining surplus or net profits, after the close of any such fiscal year, the board of directors may pay dividends for such fiscal year at the rate of four per cent. per annum upon the common stock, but not until after said preferential dividends for such fiscal year upon the first preferred stock and the second preferred stock shall have been actually paid or provided and set apart.

After dividends for any such fiscal year shall have been paid at the rate of five per cent. upon the first preferred stock, and at the rate of eight per cent. per annum upon the second preferred stock, and at the rate of four per cent. per annum upon the common stock, any and all other dividends from any remaining net profits which may be declared by the board of directors, shall be declared and paid equally in respect of each and every share of the first preferred stock and the common stock of the corporation.

At all meetings of the stockholders of the company the holders of the first preferred stock shall be entitled to one and four-tenths votes (in person or by proxy) for each share of such first preferred stock; and the holders of such second preferred stock and of such common stock shall be entitled to one vote (in person or by proxy) for each share of such second preferred and for each share of such common stock.

With the consent of any holder thereof, any and all of the first preferred stock and any and all of the second preferred stock shall be subject to redemption, and may be redeemed at not less than the par thereof and accrued interest upon the 1st day of January in any year at the principal office of the corporation at Jersey City, N. J. On or before the 1st day of November next preceding such date for redemption notice of intention so to redeem shall be given as follows: Printed notice addressed to each several record holder of such preferred stock who shall have caused his address to be recorded upon the books of the corporation shall be mailed to him at such address, and also shall be published once in each week for the eight weeks, beginning on such 1st day of November, in one newspaper published in the city of New York, and in one newspaper published in the city of Paris, which notice shall invite tenders of such preferred stock for retirement.

To provide wholly, or in part, for such redemption and retirement of such preferred stock, from time to time the corporation, by its board of directors, and in the discretion of the board, may create and may issue common stock in an aggregate amount equal to the amount of such preferred stock so redeemed and retired; and, from time to time, upon the redemption and retirement of such preferred stock, certificates may be issued and delivered for corresponding amounts of common stock, which shall be deemed to be, and shall be, full paid and nonassessable if issued either for money or in exchange for a corresponding amount of such preferred stock.

Fifth. The names and postoffice addresses of the incorporators, and the number of shares subscribed for by each (the aggregate of such subscriptions being the amount of the capital stock with which the company commences business), are as follows:

	Number of shares.		
Name and postoffice address.	First preferred stock.	Second preferred stock.	Common stock.
William P. Chapman, Jr., 310 West Forty-fifth street, New York, N. Y.	8	3	6
Henry W. Clark, 329 West Seventy-fourth street, New York City, N. Y.	8	3	6
Francis D. Pollak, Summit, N. J.	8	3	5

Sixth. The duration of the corporation shall be perpetual.

Seventh. The corporation may use and apply its surplus earnings or ac-

cumulated profits authorized to be reserved as a working capital to the purchase or acquisition of property, and to the purchase and acquisition of its own capital stock, from time to time, to such extent and in such manner and upon such terms as its board of directors shall determine; and neither the property nor the capital stock so purchased and acquired, nor any of its capital stock taken in payment or satisfaction of any debt due to the corporation, shall be regarded as profits for the purposes of declaration or payment of dividends, unless otherwise determined by a majority in interest of all the stockholders.

The board of directors, by resolution adopted by a majority of the whole board, may designate five or more directors to constitute an executive committee, which committee, to the extent provided in said resolution or in the by-laws of the corporation, shall have, and may exercise, all the delegable powers of the board of directors in the management of the business affairs of the corporation.

The board of directors, by resolution adopted by a majority of the whole board, may designate a special committee of the board, consisting of directors resident in France; and such special committee shall possess and exercise such powers and perform such duties as may be delegated to it from time to time by the board of directors or by the by-laws of the corporation.

The board of directors, from time to time, shall determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholder shall have any right of inspecting any account, or book, or document, of the corporation, except as conferred by statute or authorized by the board of directors, or by a resolution of the stockholders.

The board of directors shall have power to make and to alter by-laws, but without prejudice to the power of the stockholders in general meeting to alter or repeal the same.

The corporation, in its by-laws, may prescribe the number necessary to constitute a quorum of the board of directors, which number, unless otherwise required by law, may be less than a majority of the whole number.

The board of directors, without any assent or vote of stockholders, shall have power to create, issue and sell bonds of the corporation, and to authorize and cause to be executed mortgages and liens upon the real property and the personal property, concessions and franchises of the company (acquired and to be acquired) to secure the payment of the principal and interest of any such bonds, and also to determine the amount of such bond issue or issues, the rate of interest upon such bonds and the conditions and price of issue; the holders of all the stock of the corporation, at any time outstanding, hereby expressly consenting to and approving of any and all bonds and mortgages so authorized; but in the event of the acquisition of the canal of the Compagnie Nouvelle du Canal de Panama there shall be accorded to the shareholders and bondholders of the Compagnie Universelle du Canal Interoceanique de Panama in liquidation a right of preference to subscribe for one-half in amount of such bonds whenever offered for sale.

In witness whereof, we have hereunto set our hands and seals the 27th day of December, 1899.

WILLIAM P. CHAPMAN, JR. (L. S.)
HENRY W. CLARK. (L. S.)
FRANCIS D. POLLAK. (L. S.)

Signed, sealed and delivered in the presence of Wm. Nelson Cromwell and Francis Lynde Stetson.

State of New York, County of New York, ss:

Be it remembered that on this 27th day of December, 1899, before the undersigned, a duly authorized commissioner of deeds for the State of New Jersey, in and for the State and county aforesaid, personally appeared William P. Chapman, Jr., Henry W. Clark, and Francis D. Pollak, who I am satisfied are the persons named in and who executed the foregoing certificate of incorporation, and I having first made known to them the contents thereof, they

did acknowldge that they signed, sealed and delivered the same as their voluntary act and deed.

It witness whereof I have hereunto set my hand and affixed my official seal as such commissioner for New Jersey on the date aforesaid.

[SEAL] CHARLES EDGAR MILLS,
Commissioner of Deeds for the State of New Jersey in New York.

CERTIFICATE OF INCORPORATION OF THE INTEROCEANIC CANAL COMPANY.

This is to certify that the undersigned do hereby associate themselves into a corporation, under and by virtue of the provisions of an act of the legislature of the State of New Jersey, entitled "An Act concerning Corporations" (revision of 1896), and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite their respective names:

First. The name of the corporation is the Interoceanic Canal Company.

Second. The location of its principal office in the State of New Jersey is at No. 83 Montgomery street, in the city of Jersey City, county of Hudson. Said office is to be registered with the New Jersey Title Guarantee and Trust Company. The name of the agent therein and in charge thereof, upon whom process against this corporation may be served, is "The New Jersey Title Guarantee and Trust Company."

Third. The objects for which this corporation is formed are:

To survey, locate, excavate, construct, enlarge, extend, use, maintain, own and operate a maritime canal and its accessories between the Atlantic and Pacific oceans through the territory of Nicaragua, or any other territory in Central or South America.

To acquire the concessions granted, or heretofore granted, by any government for the construction and operation of a maritime canal and its accessories between the Atlantic and Pacific oceans in Central or South America; and the corporation shall have all the rights, prerogatives and powers necessary to fulfill the duties and obligations imposed, and to enjoy the privileges conferred upon it by such concessions; and the corporation shall have the power to formulate rules and regulations for the construction, management, care, protection, improvement, use and operation of the canal and its accessories and appurtenances and for the collection of its tolls, and may modify such rules and regulations at its discretion.

To survey, locate, construct, purchase, lease, maintain, own and operate roads, railways with any motive power for the carriage of passengers and freight, navigation lines by boats or steamers, and any other means of transportation; and telegraph, cable and telephone lines in such place or places as the company may deem necessary or convenient for the construction and surveys of the canal and its appurtenances, and for the more advantageous maintenance and operation thereof.

To acquire, hold, deal with and dispose of, as to the company may seem proper, all spaces of lands and waters that may be necessary or convenient for the construction, extension, enlargement, maintenance, repair, protection, use and enjoyment of the canal and its accessories, including all spaces required for the deposit of materials from excavations and cuttings for the overflow arising from lakes, lagoons and streams, and from dams in rivers, and from all deflections and rectifications of streams, and for ports and extensions thereof, and for docks, dikes, piers, basins, sluices, weirs, locks, guard gates, reservoirs, embankments, walls, and drainage and discharge channels, for lights, light-houses, beacons, buildings, storehouses, machine shops, hospitals, shipyards, deposits of coal, wood and materials, and including all lands traversed or submerged by overflow or by surplus waters, and for whatever purpose may be necessary or convenient; also to acquire, hold, colonize, deal with and dispose of all lands and rights in land and real property which it may, from time to time, acquire.

To levy and collect transit, navigation, tonnage, light, light-house, anchorage and port dues, towage, lighterage, storage, wharfage, pilotage, hospital,

quarantine and all other similar charges from steamers, ships, vessels and boats of all kinds, and from passengers, merchandise and cargo of all kinds, for which purpose the corporation may, at its pleasure, establish and modify its tariffs.

To have and exercise all the rights and privileges enjoyed by mining enterprises, lumber companies, manufacturing companies of all kinds, importing and exporting companies, and, in general, all mercantile companies; and also to have and exercise all the rights and privileges enjoyed by enterprises which have for their object the establishment of shipyards, dry docks, warehouse business, the purchase, storage and sale of coal, the organization of express companies, agricultural pursuits and fishing.

To buy and sell and otherwise deal in real estate.

To operate hotels and boarding houses, hospitals and stores for the sale of provisions, clothing and every kind of merchandise.

To supply water from the canal and its appurtenances to persons, firms or corporations that may desire it for irrigation, supply of towns, motive power, or for any other purpose, and to fix and collect dues for these services.

To establish in countries foreign to the United States, and in accordance with terms of concessions granted by the governments of such countries, a police force duly organized for the protection of life and property and preservation or order along the route of the canal.

To survey, locate, construct, purchase, lease, maintain, own and operate railways, telegraph, cable and telephone lines, roads and lines of navigation by boats or steamers and other means of transportation anywhere outside the State of New Jersey.

To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock or any bonds, securities or evidences of indebtedness created by any other corporations of the State of New Jersey or of any other state or foreign country, and while owner of said stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

To build, construct and repair railroads, water, gas or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers and any like works of internal improvement or public use or utility outside the State of New Jersey.

To make and enter into contracts of every sort and kind with any individual, firm, association, corporation, private, public or municipal body politic,, or with any government, national, state, territorial or colonial.

The corporation shall have power to conduct its business in all its branches in any state or country, or have one or more offices, and, unlimitedly, to hold, purchase, mortgage and convey real and personal property in the State of New Jersey and in all other States and in all foreign countries.

Fourth. The total authorized capital stock of this corporation is $100,000,000, divided into 1,000,000 shares of the par value of $100 each.

Fifth. The names and postoffice addresses of the incorporators, and the number of shares subscribed for by each, the aggregate of such subscription being the amount of capital stock with which the company will commence business, are as follows:

Name and postoffice address.	Number shares.
William B. Crowell, Jersey City, N. J.	10
Levi P. Gilchrest, Jersey City, N. J.	10
James M. V. Rooney, Jersey City, N. J.	10
James J. Traynor, Jersey City, N. J.	10
George W. Bell, Jersey City, N. J.	10
Charles P. Cadley, Jersey City, N. J.	10
Richard D. Purcell, Jersey City, N. J.	10

Sixth. The board of directors may, by resolution, provide that any government, upon becoming, and while continuing to be a stockholder in this corporation, may have the right of naming one or more members of the board of directors of the corporation, which director, or directors, shall have all the rights, privileges and powers conferred upon any director by this certificate of incorporation by the laws of the State of New Jersey, or by the by-laws of this corporation. The board of directors shall have power, without the assent

or vote of the stockholders, to make, alter, amend and repeal by-laws for the corporation, but the by-laws shall always provide for notice of the objects of any special meeting of stockholders, and the by-laws shall require an annual meeting of the stockholders to be held at the principal office of the corporation in the State of New Jersey on the first Tuesday of May in each and every year at 12 o'clock noon, and no change in the time of holding the said annual meeting of the stockholders shall be made except by amendment made to said by-laws by the stockholders at any one of such annual meetings, or at a special meeting called for such purpose upon notice to the stockholders at least fifteen days before day fixed by such by-laws for such a meeting.

The directors shall have power to fix the amount to be reserved as working capital, to authorize and cause to be executed to any amount, bonds or other obligations of the corporation, and mortgages and liens, upon the property of the corporation, or any part thereof; and whether then owned or afterwards acquired, and, from time to time, to sell, assign, transfer or otherwise dispose of any or all of its property; but no sale of all its property shall be made except upon the vote of the holders of a majority of the stock. The board of directors, from time to time, shall determine whether and to what extent, and at what times and places, and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be opened to the inspection of the stockholders, and no stockholder shall have any right of inspecting any account, or book, or document of the corporation except as conferred by statute or authorized by the board of directors, or by a resolution of the stockholders.

The directors shall have power to hold their meetings, to have one or more offices, and to keep the books of the corporation (except the stock and transfer books) outside of the State of New Jersey, and at such places as may, from time to time, be designated by them.

The number of directors of this corporation, upon its organization, shall be five, but thereafter the directors can increase or diminish the number by power of the provisions contained in the by-laws.

The directors shall be divided as equally as may be into three classes. The seats of directors of the first class shall be vacated at the expiration of the first year, of the second class at the expiration of the second year, and of the third class at the expiration of the third year, so that one-third may be chosen every year.

The board of directors, by resolution passed by a majority of the whole board, may designate three or more directors to constitute an executive committee, to the extent provided in said resolution or in the by-laws of the corporation; shall have, and may exercise, the power of the board of directors in the management of the business and affairs of the corporation, and shall have power to authorize the seal of the corporation to be affixed to all papers which may require it.

The board of directors may, in like manner, designate one of their number to be a managing director, who may possess and exercise all such of the powers of the corporation as may be conferred upon him by the said board by resolution or by the by-laws of the company.

Seventh. The period of existence of this corporation is to be perpetual.

In witness whereof we have hereunto set our hands and seals this 31st day of March, A. D. 1900.

WILLIAM B. CROWELL.	(L. S.)
LEVI P. GILCHREST.	(L. S.)
JAMES M. V. ROONEY.	(L. S.)
JAMES J. TRAYNOR.	(L. S.)
GEORGE W. BELL.	(L. S.)
CHARLES P. CADLEY.	(L. S.)
R. D. PURCELL.	(L. S.)

Signed, sealed and delivered in the presence of Joseph Garrison.
(This was duly acknowledged.)

THE AMERICANIZATION OF THE PANAMA CANAL.

THE PANAMA CANAL COMPANY OF AMERICA.

Mr. William Nelson Cromwell is exclusively empowered under the formal agreement with the board of directors of the Compagnie Nouvelle du Canal de Panama (New Panama Canal Company, of France) to effect with an American syndicate the Americanization of the Panama Canal Compny under the following basis:

1. *American Company.*—A new corporation shall be organized under the laws of the State of New York, or New Jersey, or Delaware, under the name of "The Panama Canal Company of America" (or other title), which company shall have for its principal object the completion, maintenance, and operation of the Panama Canal, and any other object that may tend to the realization of that purpose, as well as such other objects that may be set forth in the articles of incorporation.

The articles of incorporation shall prescribe that at least three-fourths in number of the entire board of directors shall be citizens of the United States, and that the principal office of the company shall be located in the United States.

2. *Capitalization.*—Preferred stock, 600,000 shares of $100 each, $60,000.000.

(a) Entitled to preference over the common stock in dividends which may be declared in any year to the extent of 5 per cent.; and also entitled to participate pro rata with the common stock in all dividends which may be declared in any year in excess of 5 per cent. upon the preferred stock and 5 per cent. upon the common stock.

(b) Entitled to preference over the common stock, to the extent of the par value thereof, upon liquidation of the company.

Common stock, 450,000 shares of $100 each, $45,000,000.

The common stock subject to the aforesaid preferences in respect of the preferred stock, is entitled to the dividends which may be declared in any year to the extent of 5 per cent.; and also is entitled to participate pro rata with the preferred stock in all dividends which may be declared in any year in excess of 5 per cent. upon the preferred stock and 5 per cent. upon the stock.

3. *Both classes of stock shall have like voting powers.*—The American company, in consideration of $100,000,000 (of which $55,000,000 shall be paid in such preferred stock and $45,000,000 in such common stock), will purchase and acquire from Mr. Cromwell, or his nominees:

(a) The Panama Canal and concessions (and all existing deposits under such concessions), including all the canal works, plant, machinery, buildings, and all other real and personal fixed and movable property upon the Isthmus of Panama belonging to the Compagnie Nouvelle du Canal de Panama (the French Company), or in which the latter may be interested; all plans, surveys, reports, data, and records pertaining to the canal; also all lands ceded gratuitously by the Colombian Government under paragraphs 7 and 8 of Article 1 of the concessions necessary for the requirements of the construction and operation of the canal. (The subsidy lands granted by Article IV of the concessions and not upon the line of the canal are exempted from this transaction.)

(b) The American company will also acquire the rights of every nature belonging to the French company in the 68,534 shares of stock (out of the total issue of 70,000) of the Panama Railroad Company, a corporation created in 1849 under special act of the legislature of the State of New York.

These railroad shares are to become the absolute property of the American company, upon the completion of the canal, without any further payment whatever. In the meantime they will continue to be held in trust (as at present is the case in respect of the French company) to abide the fulfillment of said condition.

(c) The American company also shall receive $5,000,000 in cash as a part of this transaction.

(d) The American company also will have $5,000,000 preferred stock remaining in its hands for future sale.

4. *Absolute title to property and freedom from mortgage sale.*—The title of the American company to the property and concessions so to be acquired

shall be absolute (subject to said provisions as to said Panama Railroad Company stock); and such property and concessions shall be free and clear of any mortgage or other lien.

All money payments and deposits (amounting to many millions of francs) required by the concessions to be made to the Republic of Colombia have been made to date and the concessions are in full force. A large portion of the canal works is already constructed, and it is not doubted that the period (October, 1904) fixed by the concessions for the entire completion of the canal will be extended by Colombia in due course (as on each previous occasion) for such further period as may be found necessary, and that Colombia will thus continue to further the undertaking which is of such vast concern to its national and commercial welfare.

5. *Provision for completion of canal by bond issue.*—The Board of Directors shall be empowered to create, issue and sell bonds, secured by mortgage or mortgages upon all the canal property, concessions, etc., of the American company, acquired and to be acquired; and also to determine the amount of such bond issues, the rate of interest upon such bonds, and the conditions and price of issue. To comply with the requirements of the charter of the French company, there shall be accorded to the shareholders and bondholders of the "Universal Interoceanic Canal Company, in Liquidation" (the original French company), a right of preference to subscribe for one-half in amount of such bonds.

6. *Twenty-two million five hundred thousand dollars common stock trust.*—Agreeably to the requirements of the syndicate, a trust shall be established by Mr. Cromwell or his nominees, in respect of $22,500,000 par value of the shares of the common stock acquired by him or them, or in respect of trust certificates for such shares. The shares or trust certificates (and all dividends thereon) embraced in said trust (a) may be disposed of by the trustees for the best interests of the said certificate holders or shareholders and of the other stockholders of the American company, at such time and in such manner, under such conditions, and to such ends as they may deem advisable; and (b) upon the termination of the trust the shares or trust certificates and moneys then in hand shall be distributed for the best interests of such certificate holders or shareholders and the other stockholders of the American company, at such time, in such manner, under such conditions, and to such ends as the trustees may deem advisable; and in the meantime such shares or trust certificates may, by the trustees, be voted for the election of such board of directors of the American company and for such acts and measures as they may deem to the best interests of the syndicate and of the stockholders of the American company.

The trustees shall be five in number; a majority shall be citizens of the United States; of said trustees, two citizens of the United States shall be designated in the first instance by the advisory committee, and the vacancies in respect of two such memberships shall be filled by the holders (acting by and through a majority in interest) of the shares or the trust certificates purchased by the syndicate.

This trust shall continue until ten years after the opening of the canal to commerce, unless sooner terminated pursuant to the terms of the contract or trust covering the subject.

7. *Guaranty to American syndicate of full minority representation in directory of American company.*—Agreeably to the requirements of the syndicate, provision shall be made whereby the holders of the shares or trust certificates purchased by the syndicate shall be entitled to designate and cause to be elected the full minority (to wit, one less than a majority) of the members composing the board of directors of the American company, until ten years after the opening of the canal to commerce, unless such right be sooner terminated pursuant to the terms of the contract or trust covering the subject. Such minority shall, in the first instance, be designated by the advisory committee, and thereafter by such holders of shares or trust certificates, acting by and through a majority in interest of such holders; and all nominees of such holders or advisory board committee shall be citizens of the United States.

8. *Execution of plan.*—It is understood that the articles of incorporation, by-laws, trust deeds, contracts, and other instruments requisite for the ac-

complishment of the plan are necessarily subject to the approval of the French company, upon the acceptance by it of stock in payment from Mr. Cromwell, or his nominees; and it is also recognized that the unique character of the enterprise, the international interests involved, and the special circumstance of the case require that plenary discretion and power be possessed by Mr. Cromwell to effect the Americanization of the canal.

It is therefore understood and agreed that Mr. Cromwell may proceed to negotiate, determine, and agree upon all plans, terms, agreements, conditions, questions and details which he may deem necessary and advisable in respect of the purposes herein generally indicated, including the terms and provisions of all trusts and agreements which he may deem advisable to have established or made; the articles of incorporation and by-laws of the American company, which may include adequate provisions for the redemption and retirement of the capital stock, any merger, consolidation, reincorporation, dissolution, or other disposition, arrangement or rearrangement of all or any of the property, capitalization and concerns of the company upon any consideration approved by the board of directors and the holders of the specified proportion (not less than two-thirds) of the capital stock of the company outstanding at the time being, all titles, property, and transfers, all stock issues and trust certificate issues, and every other subject or matter which he may consider to be involved in the execution of the plan, and his action in any such regard shall be and become part hereof as if herein set forth; and, further, that he and any member of the advisory committee and counsel, like others, may become a subscriber to the syndicate agreement and be eligible to any trusteeship or directorate, and may occupy any official or personal relation to said enterprise without accountability for any benefit derived therefrom.

All the terms and provisions of this plan may be carried out by contracts, trusts, or other legal method, and certificates for shares of such stock or negotiable certificates of trust or other evidences of interest (duly registered with a trust company in the city of New York) shall be issued and delivered to the syndicate subscribers.

9. *Advisory committee and counsel.*—Messrs. ————, ————, ———— are constituted an advisory committee of the syndicate subscribers with the professional assistance of Messrs. Sullivan & Cromwell and Mr. ———— ————, as counsel, to possess and exercise the powers specified in Divisions 6 and 7 hereof and to advise with Mr. Cromwell in the execution of the plan. The reasonable charges and expenses of said committee shall be discharged by the trustees of the stock trust to be created under Division 6 hereof.

Dated November 21, 1899.

AMERICANIZATION OF THE PANAMA CANAL.

SYNDICATE SUBSCRIPTION AGREEMENT, $5,000,000.

Referring to the foregoing plan, we, the undersigned, each for himself and not for the other, in consideration of $1 to each of us in hand paid by William Nelson Cromwell, the receipt whereof is hereby acknowledged, and of our mutual subscriptions do hereby severally subscribe for, and do agree with said William Nelson Cromwell to purchase and from him to take—

One hundred dollars par value of the preferred capital stock, or, at his option, negotiable preferred-stock trust certificates for all or any part thereof; and two hundred dollars par value of the common capital stock, or, at his option, negotiable common-stock trust certificates for all or any part thereof, issued in respect of capital stock of the American corporation to be created under the foregoing plan,

For each $100 in money, to the amount set opposite our respective names, and to pay for the same upon the call of the said William Nelson Cromwell, provided such call be not made prior to February 1, 1900, and fifteen days' notice be given of such call.

Payment shall be made to ———— Trust Company, in the city of New York, and shall by it be paid over to the American company upon the order of Mr. Cromwell against the receipt of such trust company from him

for account of the subscribers of the stock or trust certificates purchased by them hereunder.

It is understood and agreed that this agreement shall not be binding unless subscriptions be made and allotted to the full amount of $5,000,000, and that owing to the special circumstances of the case, and in the interests of all, Mr. Cromwell shall have the right and power to reject or to reduce any subscription hereunder at any time before final allottment by him, and also that he may deliver certificates for the shares of such stock or trust certificates to any extent within the respective classes of preferred and commou stock or trust certificates that he may find desirable.

This agreement shall bind, and is for the benefit of the parties hereto and their respective executors, administrators, survivors and assigns, and may be executed in several parts or copies with the same force and effect as if all the subscription agreements were to be one part or one copy thereof.

Dated November 21, 1899.

Indianapolis News, August 29, 1908.

CROMWELL AND SHELDON FLAYED.

DEMOCRATIC TEXT-BOOK SHOWS UP RECORDS OF REPUBLICAN HAT PASSERS.

BACKED BY E. H. HARRIMAN.

TRUST REPRESENTATIVES KNOW WHERE TO GET THE MONEY—UPMAN AND PENROSE ALSO MAKE GOOD READING.

[Special to *The Indianapolis News.*]

CHICAGO, August 29.—The following statement was given out at Democratic headquarters today: "'Republican Guardians of Reform' is the subject of a chapter in the forthcoming Democratic campaign text-book, advance sheets of which were received today at Democratic headquarters from the publishers. This particular chapter is devoted to the personnel of the men whom Mr. Taft has selected to conduct his campaign, and who are his chief advisers in an executive, advisory and financial way. William Nelson Cromwell, the personal and legal representative of E. H. Harriman, and probably the most conspicuous trust lawyer in this country, is the central figure of these 'Republican Guardians of Reform.' The others who share honors with him in this chapter in the text-book are the nine members of the executive committee whom the Republican presidential candidate selected immediately following his nomination at the Chicago convention.

CROMWELL AND THE MANTLE.

"The story of how William Nelson Cromwell succeeded to the mantle of his employer, E. H. Harriman, an official 'fat fryer' for the Republican party in this presidential contest, is told in detail. It begins with a telegram Mr. Cromwell sent from New York to Judge Taft at Hot Springs, Va., in which the request was made that the selection of a treasurer of the Republican National Committee be deferred until the arrival of the New York trust promoter at the Virginia resort. This telegram is a matter of historic record, having been published generally in the press at the time. The following day the press associations chronicled the arrival of Mr. Cromwell at Hot Springs, according to schedule. He immediately went into executive session with presidential candidate Taft. For several days it had been the general understanding throughout the country that Congressman McKinley, of Illinois, was to be chosen treasurer of the Republican National Committee. As the result of William Nelson Cromwell's visit, the original slate was broken and his candidate, George R. Sheldon, was named as the treasurer of the national committee.

ONLY THE BEGINNING.

"This was only the beginning of the potent influence that William Nelson Cromwell has exercised in high-up Republican circles, following the adjourn-

ment of the Republican National Convention. After naming the treasurer of the Republican National Committee, Mr. Cromwell was made a member of the executive committee of nine, which has immediate direction of the campaign, and later a member of the advisory committee, which means that his services and talents will be utilized in every way possible by presidential candidate Taft.

THEIR TRUST CONNECTIONS.

"Both William Nelson Cromwell and George R. Sheldon are known to the public by reason of their numerous big trust connections. Their selection by Mr. Taft for important confidential positions in the conduct of his campaign can have only one significance. Their part will be to collect funds from the wealthy corporations and monopolies with which they are identified and associated. In the light of the letter sent out from Republican national headquarters in this city addressed to corporations, in which appeals are made for campaign contributions, it is not difficult to locate the reason that actuated the appointment of Republicans of the Cromwell and Sheldon type as 'hat passers' for the Republican party. The personnel of these 'Republican Guardians of Reform' becomes still more important when the failure of the Republican National Convention to enact a publicity law and the defeat of a publicity plank by an overwhelming majority in that convention is taken into consideration.

"The campaign text-book gives something of the personnel of the finance and executive committees with which Mr. Taft has surrounded himself in this campaign. Some of these 'Republican Guardians of Reform' are thus identified in the book for the benefit of the voting public.

GOING INTO DETAILS.

" 'William Nelson Cromwell, of New York, the great Wall street lawyer, attorney for the Panama Canal combine, Kuhn, Loeb & Co., the Harriman interests, the sugar trust, Standard Oil trust et al.

" 'George Rumsey Sheldon, of 2 Wall street, multi-millionaire and officer and director in more than twenty corporations.

" 'Frederick W. Upman, of Chicago, a millionaire several times over, member of the State Board of Review which passes upon the amount of taxes which corporations and large estates should pay in Illinois, and a director in several corporations.

" 'Charles F. Brooker, of Connecticut, millionaire, engaged in the banking and railway business, and vice-president of the New York, New Haven & Hartford Railroad Company, against which a government suit is now pending.

" 'Frank O. Lowden, of Illinois, multi-millionaire son-in-law of the late George M. Pullman, and now vice-president of and heavily interested in that widely known monopoly, the Pullman Palace Car Company.

" 'T. Coleman DuPont, of Delaware, best known as a member of the Du Pont Powder Company, controlling factor in the powder trust whose milking of the federal treasury in powder contracts has been thoroughly exposed in Congress and against which a suit is now pending, brought by the Department of Justice, for its dissolution.

LAST BUT NOT LEAST.

" 'And last, but by no means least, the great political reformer of Pennsylvania, Boies Penrose, the political heir of Boss Quay, and since the latter's death, boss of the corrupt political machine in Philadalphia and Pennsylvania, a machine which has not been equaled in political turpitude since the days of Boss Tweed in New York.

" 'Do these facts which can not be disputed, furnish some of the reasons why no publication of campaign subscriptions are to be made until after the election?' asked the compilers of the Democratic text-book.

"Messrs. Cromwell and Sheldon and their associates detailed above, whom Mr. Taft has selected to run the Republican campaign in a financial, executive and advisory capacity, have a list of trust connections probably unsurpassed by any other set of men of like number within the bounds of this country. They should be able to do equally as good work in a national way as is being done by Fred W. Upman in Chicago. Mr. Upman, who is the assistant treas-

urer of the Republican National Committee, is a member of the Board of Review, which passes upon the amount of taxes corporations and large estates shall pay in the city of Chicago and the State of Illinois. Mr. Upman has been busy during the past few days addressing letters to corporations whose property he will assess, in which he makes urgent appeals for campaign contributions to the Republican National Committee. Several copies of these letters which Mr. Upman addressed to Chicago corporations, at least one of which is a quasi public enterprise, are now in possession of officials at Democratic national headquarters."

Indianapolis News, September 26, 1908:

DEMOCRATS TO GO AFTER ROOSEVELT.

THEY ARE PLANNING TO MAKE THE PRESIDENT A LEADING ISSUE IN THE CAMPAIGN.

TO SPRAY HIM WITH OIL.

CROMWELL, UPMAN AND OTHERS WILL ALSO BE DRAGGED INTO THE SPOTLIGHT—HEARST STARTED IT.

[By E. I. Lewis, Staff Correspondent of *The Indianapolis News*.]

CHICAGO, September 26.—A firm conviction has stolen in on those at Republican and Democratic national headquarters that at last the campaign is open.

The wail set up by Republicans a week ago that General Apathy was being permitted to slumber himself to death is not heard today.

Instead there is a general belief that one of the bitterest and most personal campaigns that the country has ever experienced has opened and that platforms are to be lost sight of.

* * * * * * * * * * *

The personal assault campaign methods adopted by Hearst and Roosevelt are not to end with the counter assault on Roosevelt. Although the Republicans have begun to clean house by eliminating T. Coleman DuPont, of powder trust notoriety, from their campaign, this will not prevent the assault on the party for having a man of such unsavory reputation as one of the directors of its campaign.

CROMWELL IN SPOTLIGHT.

In this personal campaign William Nelson Cromwell is to be dragged again into the spotlight. He and the Republican party are going to be insistently asked, "Whose $50,000 was it that you contributed to the campaign fund? Yours or Harriman's?"

Cromwell's connection with the Standard Oil crowd, the sugar trust and Harriman, and his reputation as a "high-class fixer" all are to be dwelt on at length. Likewise are Democratic orators from Bryan down, to point out how this man, who is one of the directors of the Republican campaign, worked a magic wand and got $20,000,000 out of Congress for the old French Panama Canal Company. This was after engineers and congressional committees had reported favoring the Nicaraguan route. It is to be charged that it was all done on the basis of "a consideration."

Considerable attention is to be paid to how and why this representative of Harriman and trusts, dictated the election of George R. Sheldon, a Wall-street banker, for the treasurership of the national committee.

Chicago Daily News, October 6, 1908:
Indianapolis News, October 7, 1908:
Louisville Courier-Journal, October 7, 1908:

FRENCH BANKER TELLS OF U. S. PANAMA DEAL.

SAYS CANAL WAS BOUGHT BY C. P. TAFT AND OTHERS.

EFFORT TO HIDE DETAILS.

CHICAGO, October 7.—A special cable to the *Daily News*, from Paris, says: The agents of a French bank in Paris, who helped to conduct successfully the arrangements which led to the sale of the Panama Canal to the United States government, express surprise that the part played in the negotiations by a group of American financiers should be considered in any way to their dis credit. As one bank official said to the *Daily News* correspondent: "These gentlemen were engaged for many months in buying up the old Panama shares at the cheapest rate possible. When they had enough shares, or enough influence, to control the fate of the canal they managed to bring to a successful issue the pourparlers with the American government. This successful deal was really of the most commonplace description. It happens every day, and according to our views is in no way reprehensible. I am surprised to hear that the fact is not generally known in America."

THREE FINANCIERS NAMED.

Nevertheless the men in the institutions concerned have been close-mouthed regarding their role in the Panama sale. On several occasions political agents have been in Paris investigating reports that an American syndicate and not the French company really sold the canal to the United States, but they were unable to obtain the complete details. The last investigator was a certain Colonel Bacon, who grew weary over the obstacles placed in his way, but who returned with sufficient data, so it is said, to "make things hot" for the members of the syndicate concerned. These men, so the *Daily News* correspondent is informed by Panama Canal officials who came in contact with them here, were Charles P. Taft, William Nelson Cromwell and J. Pierpont Morgan, the last named being much in the background. There were several others whose names can not be given with certainty, but it is alleged that there is no mistake about the three names mentioned.

LAUGHS AT C. P. TAFT'S DENIAL.

When shown yesterday Mr. Taft's denial that he had anything to do with the matter, an eminent American lawyer here concerned in the old company's affairs, laughed frankly and said:

"They will have a hot time over this thing if it has been published as a campaign bomb. Agents of these men whose names I have given you, as well as of others whose identity I am not at liberty to disclose, quietly bought up for several months thousands of shares of the old Panama Canal company and many of the bonds of the new company all through the country. The small holders of canal paper hastened to take advantage of the 'free for nothing' gift so unaccountably laid at their doors, for the shares for many years had been considered practically worthless by thousands of peasants and other modest owners. In the meantime at home the government was being successfully worked by the syndicate, and especially by a Western member thereof. In reality the United States bought the canal from its own citizens instead of the French shareholders.

SHAREHOLDERS HELD BAG.

"The distinction was not here thought sufficiently important to require that attention be called to it, although I myself am inclined to think the United States could have made a better bargain—a far better bargain—by dealing directly with the French. This opinion has been disputed, but I am convinced of its truth."

M. Hutin, a prominent engineer of the old canal company and an opponent of the sale to the syndicate, said he thought the sum paid by the United States was sufficient, but that it never reached the shareholders of the old or new French companies, as the United States government naively thought it did.

Technically, however, added M. Hutin, the event was "merely a financial transaction which is not calculated in these days to excite criticism of an adverse nature either in France or America."

New Orleans Daily States, October 7, 1908:

AN AMAZING STORY.

When the coup d'etat was accomplished by which Panama became an independent republic there floated around startling rumors of corrupt scheming and jobbery in connection with the events then in progress. It was openly charged at the time that the revolt in Panama was brought about by secret agents under instructions from Washington, and that William Nelson Cromwell was the leading spirit in bringing about that result.

It will be remembered that when Engineer Wallace, who had been placed in charge of the work on the isthmus, resigned, both the President and Mr. Taft were prompt to give their version of the reason for Mr. Wallace's resignation and to denounce him with a severity that was both astonishing and unseemly. By thus discrediting him and placing a stigma upon his motives they destroyed the force of Mr. Wallace's defense of himself; for people regarded his complaints as having been inspired by the fact that he had been discharged because of his unworthiness.

Startling reports that are now in circulation concerning the transaction in connection with the transfer of the old Panama company to the United States have caused the records to be looked up and Wallace's testimony is invested with new significance. It will be remembered that Mr. Wallace complained of the dominancy of William Nelson Cromwell in the affairs of the Panama Canal; alleged that his sinister interference in matters greatly obstructed the progress of the work on the isthmus, and that he feared a scandal unless the influence of Cromwell should be removed.

He told also of his visit to Washington and his efforts to discuss important matters with Secretary Taft, and how he was continually hampered in these conferences by the presence of Cromwell, thereby showing the preponderating influence this man had acquired over the situation both in Panama and at Washington. When these things were told by Mr. Wallace in defending himself from the bitter attacks made upon him through the public press by Mr. Taft and the President they attracted but little serious attention for they were regarded as but the reckless efforts of a thoroughly discredited man to strike back.

If the reports that are now going the rounds are true, interest will be revived in the half-forgotten statements of Wallace in the press and before the Senate investigating committee at Washington. These stories are to the effect that William Nelson Cromwell, the notorious lobbyist and legislative and diplomatic broker; Douglas Robinson, the brother-in-law of President Roosevelt, and Charles P. Taft, brother of the Secretary of War in charge of the Panama Canal and presently the Republican candidate for the presidency, became interested in a scheme to buy up the worthless shares of the old Panama Canal and to unload them upon the government.

The agents of this syndicate, so the story goes, bought up these worthless shares from the original holders, many of whom were ignorant peasants, secured control of the moribund corporation and realized a fabulous profit by unloading on this government. It seems almost impossible that a story involving a scandal of such colossal proportions can be true. And yet it fits in so neatly with so many facts as we have seen them that the circumstantial evidence is most uncommonly strong.

It would, for instance, explain why the Panama route was selected when the Nicaragua route was practically the unanimous choice of the American people; it might explain frequent and contradictory reports of boards of engineers; it would furnish an answer to the question why Mr. Wallace seemed unable ever to see Mr. Taft except when William Nelson Cromwell was present; and it might suggest why the arch-corruptionist was protected by the Republican Senate Committee when he was under the gruelling cross-examination of the veteran Senator Morgan of Alabama. If the story be but half true it

is the most colossal scandal of the age, and will cover with eternal infamy every one who was in any way connected with it.

It remains to be seen whether or not it shall be verified, for it ought not to be very difficult to secure all the facts in the case now that the searchlight has been turned on the incident.

New Orleans Daily States, October 7, 1908:

THE PANAMA SCANDAL IS IN THE LIMELIGHT.

DEMOCRATIC NATIONAL COMMITTEE IS INVESTIGATING CERTAIN MATTERS CONNECTED WITH THE PURCHASE OF THE CANAL.

WHO COMPOSED THE AMERICAN SYNDICATE?

BROTHER OF W. H. TAFT INTERESTED IN THE SYNDICATE, AS WAS ALSO BROTHER-IN-LAW OF THE PRESIDENT.

THE SITUATION IN BROOKLYN.

The close relations which have existed between William Howard Taft and William Nelson Cromwell, together with the fact that the latter has for the last four years had the free run of the White House and War Department, has more than once aroused serious suspicion, and finally resulted in the *New York World* giving publicity to the fact that the Democratic National Committee is investigating certain matters connected with the purchase of the Panama Canal. It is charged that an American syndicate in which were interested Chas. P. Taft, brother of the Republican candidate for the presidency; William Nelson Cromwell and Douglas Robinson, brother-in-law of President Roosevelt, was formed and purchased the Panama Canal from the French government which they subsequently sold to the United States at an enormous profit. What is known as the Panama scandal is the political sensation of the day in New York, and in this conection the *World* says:

"The sensation of the day at Democratic and Republican headquarters was not so much a disputing of whether or not an American syndicate had bought the Panama Canal, but who composed this syndicate and what profit they reaped."

William Nelson Cromwell, who was counsel for Panama as well as for the French company, and who, it was reported at the time, cleared a matter of $1,000,000 or $2,000,000 for his expert work in making the sale, has declared that he never even saw Douglas Robinson, brother-in-law of the President. No member of the Taft family, he asserts, had the remotest connection with Panama Canal matters.

Following the statement of Norman E. Mack it was common talk yesterday at Democratic headquarters that the *World* had developed the most pertinent feature of the present campaign. It was said there that the Panama Canal exposure was being saved for a cataclysmic broadside to be delivered at the shank of the campaign.

It was deplored that the matter should have been given publicity through the complaint of W. J. Curtis to District Attorney Jerome. Cromwell, Jerome, Curtis and Col. Bacon were all reticent in discussing any details of the proposition laid before the district attorney's office.

Col. Bacon sent a letter to the press branding parts of his interview with the *World* reporter as a fabrication, although the statement of Chairman Mack indicates that the colonel was in indirect communication with the Democratic National Committee.

The committee has been dickering for some time to secure evidence on the queer doings behind the Panama Canal purchase. It was on the point of finding out the identity of the members when the World article scared everybody off. The committee does not believe that this syndicate made anything like $36,500,000, but it is convinced that perhaps $6,000,000 was cleared.

The *World* also recalls the fact that after Mr. John F. Wallace had resigned his position as chief engineer of the Panama Canal Commission, which act

caused him to be wrathfully denounced by the Roosevelt administration, he made the following statement to the Senate committee which was then engaged in an investigation of Panama affairs:

THOUGHT CROMWELL DANGEROUS.

"Part of my errand in coming home was to shake Cromwell off my shoulders. I did not think his connection with the work was desirable. Cromwell may be perfectly harmless, but he appeared to me to be a dangerous man.

"I thought about him as being the man who brought about the sale of the canal to the government, who brought about the revolution in Panama, who assisted the government of Panama in making its investments, who is carried on the diplomatic list of that government and who is interested in public utilities on the isthmus. I felt that a man mixed in so many things might have his mind perverted and at some time he might give the wrong advice and the result would be a scandal."

Mr. Wallace was asked by Senator Morgan what first caused him to regard Cromwell with suspicion. Mr. Wallace replied that he looked over the report of the Panama Railroad Company and discovered that its board of directors had declared a dividend of more than $100,000 in excess of what the road had earned, and afterward sold bonds for money with which to repair its ships and rolling stock.

"I then reached the final conclusion," said Mr. Wallace, "that a man who would thus advise the government is a dangerous man, and one having a tendency toward high finance."

In replying to other questions Mr. Wallace said he did not believe Mr. Cromwell could honestly and with safety to the government act as counsel for the government and the Panama Railroad Company, and at the same time present a claim against the government in behalf of the new Panama Canal Company. (The rest of the article related to political conditions in Brooklyn.)

Chicago Journal, October 8, 1909:

C. P. TAFT AND THE BIG CANAL.

The closest bond between the big financial interests and the Republican administration is William Nelson Cromwell of New York City. His services have been sought frequently in such matters as the pacification of Hayti and San Domingo, the soothing of President Castro, and the famous treaty with Panama, after the canal country had broken away from Colombia.

He it was who arranged the sale of the French Panama Canal Company to the government of the United States. At that time is was hinted that John Pierpont Morgan had a finger in the pie, and the final completion of the big deal occurred after a conference at sea on board the millionaire's yacht, Corsair, which is said to have included at least one statesman very close to the head of the government.

A cable dispatch from Paris now says that in France it was a matter of common knowledge that the United States, while nominally purchasing a French concern, was really paying the purchase price of the Panama Canal Company into the pockets of American capitalists who had quietly bought control of the stock. The French company had issued $260,000,000 of securities, which were largely held by poor people. Believing their holdings worthless, they sold for a song.

At first the French company, or its American owners, asked $101,000,000 for its rights. Later it dropped to $40,000,000. This was the price finally agreed on. An American lawyer residing in Paris says that Charles P. Taft was one of the men who profited by the sale of the Panama Canal to the United States.

If American capitalists mulcted the United States of twice the actual cost to them of the Panama Canal Company's rights; if the United States aided and abetted the revolution which separated Panama from Colombia and made Dr. Amador a president merely to enable a few favored financiers to make a huge profit; if the brother of William Howard Taft participated in this big steal, then the American public has a right to know it.

The Panama Canal is an undertaking of great value to the whole world, but it is not of half as much value to the United States as the proposed deep waterway from the lakes to the gulf, which both Mr. Taft and Mr. Bryan will advocate at the gathering of men from a score of states to secure the initiation of this great work.

The Panama plan ought to be a pointer. Let the delegates get together and form a company. Let the various states along the Mississippi grant it rights of various kinds. Let it load up with useless machinery and waste its money by every means possible. Then go into bankruptcy, sell out to Morgan, Taft, Cromwell and their friends at a price that will enable them to double their money by turning the enterprise over to the United States. And watch the dirt fly.

(FIRST COUNT OF THE INDICTMENT.)

Indianapolis News, October 8, 1909:

[By E. I. Lewis, Staff Correspondent of *The Indianapolis News*.]

CHICAGO, October 8.—Frank H. Hitchcock, chairman of the National Republican Committee, has not only shifted the brunt of the Republican campaign final attack to New York, in an effort to keep that State from going to Bryan, but he has also been making some changes around the Republican national headquarters.

THAT PANAMA CANAL DEAL.

The Cromwell-Morgan-C. P. Taft Panama Canal deal is going to be a big campaign issue before the fight is over and some ugly charges are likely to be made concerning the purchase of the Panama Canal route for $40,000,000.

Additional details of the deal are leaking out.

The old French company had issued $260,000,000 of securities, which were largely held by poor people. At first the French company, or its American owners, asked $101,000,000, but after it was found that all of the American expert engineers sent to the isthmus had reported in favor of the Nicaraguan Canal route, and that even the congressional junketing committee had reported in favor of it and against the Panama Canal route, Cromwell and his crowd dropped the price to $40,000,000, and managed to swing Congress.

But now the charge is going to be made, not necessarily by the Democratic party, but more especially and forcibly by those American papers that are unearthing immoralities, that this was but the first part of the deal.

The title could not, it is understood, be made clear. But this was accomplished, so the story goes, by the Panama Republic. President Roosevelt and W. H. Taft are "connected up" with this part of the history.

Among the papers that are already demanding more light on this whole affair is the *Chicago Journal*. Editorially it said last night: "If the American capitalists mulcted the United States of twice the actual cost to them of the Panama Canal Company's rights; if the United States aided and abetted the revolution which separated Panama from Colombia and made Dr. Amador a president merely to enable a few favored financiers to make a huge profit; if the brother of William Howard Taft participated in this big steal; then the American public has a right to know it."

The publication of the Paris cablegrams in the *Chicago News* this week in which the French bankers tell of this deal and say that Cromwell, Morgan and C. P. Taft bought up the property and then loaded it on to this country, has caused a great deal of comment among the politicians.

(FIRST COUNT OF THE INDICTMENT.)

Editorial—*Indianapolis News*, October 9, 1908:

THE PANAMA SCANDAL.

Recently an able and observant newspaper in the East remarked that the people were roused in this campaign on the subject of corruption as they had not been in years. They had come to feel that parties had been corrupt in

the means they used to get power, and that government administration had been corrupt in the interest of trusts and corporations. This gives point—for we believe it expresses a real feeling—to the charges that have been made as to the Panama Canal deal. What there is to know about that matter ought to be known at once, before this campaign ends. Lack of information is likely to be treated as in the nature of confession. The allegation—and it is not new—is that a syndicate of American capitalists got hold of the French canal and sold it to this country after there had been two reports in favor of the Nicaragua route. Mr. Cromwell (Harriman's lawyer and general trust promoter) is mentioned as one of the men in the deal. The old rumor was that he got a fee of $1,000,000 for inducing Congress to change its mind from Nicaragua to Panama. The other men mentioned as engineering the deal are J. P. Morgan and C. P. Taft. (The latter has denied that he had any part in it.) This, however, is not important. The thing that is important is: Was there a deal of this character?

There is another and graver allegation that, there being difficulty in making the title clear, President Roosevelt and Secretary of War Taft were in some way cognizant of the insurrection by which the Panama Republic was created. This the people will be loath to believe, and it will require very positive proof to make them believe. They will not be so slow to believe that there was a deal by which American capitalists made fortunes by buying the French canal and selling it to this government, especially in view of the sudden rejection of the Nicaragua route after it had been recommended by the commission of expert engineers. In the present temper of the public mind "trifles light as air are confirmation strong as proof from holy writ."

New Orleans Sunday States, October 11, 1908:

THE PANAMA CANAL DEAL.

It seems to be understood in the political circles of New York and Chicago that the Cromwell-Morgan-Taft Panama Canal deal promises to become a great issue before the campaign ends, and that some ugly facts will come to light regarding the purchase of the route from the French and its sale to this government for $40,000,000 as the details of the deal are beginning to leak out.

The old French company had issued $260,000,000 of securities which were largely held by poor people. At first the French company, or its American owners, asked $101,000,000, but after it was found that all of the American expert engineers sent to the isthmus had reported in favor of the Nicaraguan Canal route, and that even the congressional junketing committee had reported in favor of it and against the Panama Canal route, Cromwell and his crowd dropped the price to $40,000,000 and managed to swing Congress.

From all accounts the charge is going to be made, not necessarily by the Democratic party, but by the newspapers which have been exposing immoralities, that this was but the first part of the deal. The title to the canal could not be made clear, it is said, so to overcome this difficulty William Nelson Cromwell's fine Italian hand created the Panama insurrection and the Panama republic. It is with this part of the game that President Roosevelt and Mr. Taft, the Republican candidate, were connected, while the candidate's brother, Charles P. Taft, figures prominently in the deal by which the canal was sold to the United States at an enormous profit.

Among the papers that are already demanding more light on this whole affair is the *Chicago Journal*. Editorially it said: "If the American capitalists mulcted the United States of twice the actual cost to them of the Panama Canal Company's rights, if the United States aided and abetted the revolution which separated Panama from Colombia and made Dr. Amador a president merely to enable a few favored financiers to make a huge profit; if the brother of William Howard Taft participated in this big steal, then the American public has a right to know it."

The recent publication of the Paris cablegrams to the *New York Herald* shows that the French bankers are acquainted with the details of the Panama Canal matter, and their statements to the effect that it was engineered by Crom-

well, J. P. Morgan and Charles P. Taft, who loaded it on to this country, has caused quite a sensation among the managers of both political parties.

Chicago Inter Ocean, October 14, 1908:

IDENTITY OF THOSE WHO GOT $40,000,000 FOR CANAL HIDDEN.

SECRETS OF ALLEGED AMERICAN SYNDICATE, INCLUDING RELATIVES OF TAFT AND ROOSEVELT, ACCORDING TO REPORT, WIPED OUT IN PARIS JUNE 3.

TRACES ARE OBLITERATED ON EVE OF CHICAGO CONVENTION.

PANAMA COMPANY GOES INTO LIQUIDATION AND ARCHIVES ARE TURNED OVER TO UNITED STATES GOVERNMENT BY AGREEMENT.

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Special Cable Dispatch to the Inter Ocean:

PARIS, Oct. 13.—A careful investigation undertaken to learn definitely who got the $40,000,000 paid by the United States for the Panama Canal as the result of the sale negotiated by William Nelson Cromwell, of New York, with the Roosevelt administration, discloses some curious facts.

The report that an American syndicate, organized some time prior to the sale and including among its members Douglas Robinson, brother-in-law of President Roosevelt, and Charles P. Taft, brother of William H. Taft, the Republican candidate for President, had purchased a large amount of the securities of the Panama Canal Company when they were selling very low and made a huge profit out of their share of the $40,000,000 paid by the United States, is of interest in view of the disclosures as a result of the investigation undertaken.

In the first place, every source of official information as to the identity of those who got the $40,000,000 is not only closed, but wiped out, obliterated, as a result of an agreement between the United States government and the new Panama Canal Company.

The liquidation of the new Panama Canal Company, whose securities the American syndicate was supposed to hold, was suddenly concluded June 3, after going on for four years.

It will be recalled that June 3 was practically on the eve of the convention at Chicago which nominated Mr. Taft, although Mr. Taft was not actually nominated until June 18.

Immediately after the new Panama Canal Company finished its liquidation, on June 3, its office was closed, the books removed and all traces obliterated, and, under an agreement with the United States, all of its archives were handed over to that government. All the secrets of the company are therefore now in the possession of the Roosevelt administration.

LIQULDATORS WERE DIRECTORS.

The liquidators of the new Panama Canal Company were its directors, and, if, as reported, the company was controlled by the American syndicate, its directors would naturally not disclose any of its secrets which the syndicate members deemed best to keep from the public.

M. Le Marquis, liquidator of the old Panama Canal Company, was unable or unwilling to disclose anything concerning the personnel of the new Panama Canal Company, which, through Mr. Cromwell, effected the deal with the United States.

Indianapolis News, October 14, 1908:

PANAMA CANAL DEAL TO REMAIN A SECRET?

DETAILS OF CROMWELL BARGAIN MAY NEVER BE KNOWN.

AN ANTE-CONVENTION DEAL.

NEW YORK, October 14.—As a development of its effort to learn definitely just who got the $40,000,000 paid by the United States for the Panama Canal

by William Nelson Cromwell's bargain with the Roosevelt administration, the *New York World* today prints an interesting Paris cable.

Investigating the report that a syndicate, including Douglas Robinson, brother-in-law of the President, and Charles P. Taft, brother of the candidate, purchased Panama securities when they were low and sold them at enormous profit, the *World* says:

"In the first place, every source of official information as to the identity of those who got the $40,000,000 is not only closed, but wiped out, obliterated as the result of an agreement between the United States government and the Panama Canal Company. The liquidation of the new Panama Canal company, whose securities the American syndicate was supposed to hold, was suddenly concluded June 3, after going on for four years.

JUST BEFORE THE CONVENTION.

"It will be recalled that June 3 was practically on the eve of the convention of Chicago which nominated W. H. Taft for president, though Mr. Taft was not actually nominated until June 18.

"Immediately after the new Panama Canal company finished its liquidation on June 3, its office was closed, the books were removed and all traces obliterated, and under an agreement with the United States were handed over to that government.

"The liquidators of the new Panama Canal company were its directors, and, if as reported, the company was controlled by the American syndicate, its directors would naturally not disclose any of its secrets which the syndicate members deemed best to keep from the public.

"M. Le Marquis, liquidator of the old Panama Canal company, was unable or unwilling to disclose anything concerning the personnel of the new Panama Canal company, which, through Mr. Cromwell, effected the deal with the United States."

Chicago Journal, October 16, 1908:

OPEN THE CANAL RECORDS.

Charles P. Taft denies that he had at any time any connection with the Panama Canal deal, but the accusation keeps bobbing up every day in cable dispatches from Paris. Even the suspicion that the Panama deal was a source of profit to a syndicate of American financiers must injure the chances of Judge Taft and this matter ought to be cleared up at once.

A well-known London lawyer, thoroughly conversant with French practice, was employed to investigate in Paris. He details how the old De Lesseps Canal Company was purchased by the new company in 1894. The capitalization of the new company was equivalent to $13,000,000. Of this $12,000,000 was paid up in cash and the other million in stock went to the government of Colombia.

If the entire $12,000,000 in the treasury of the company was paid out to the De Lesseps company the new company made a profit of $28,000,000 when it sold out to the United States government for $40,000,000.

All the plans and records of the De Lesseps company and the new company were turned over to the United States government, and June 3, fifteen days before Judge Taft was nominated for President, the new company went out of business.

All the secrets of the canal deal are in Washington. It is unfair to Judge Taft to allow unjust suspicions of his brother to circulate at this particular time. The people of the United States own the Panama Canal. They have a right to full information. And unless Mr. Roosevelt furnishes it forthwith they can not be blamed if they draw conclusions accordingly and vote for publicity.

Rocky Mountain News (Denver), October 16, 1908:

$40,000,000 GRAB OF CHARLEY TAFT IS CONFIRMED.

INQUIRY SHOWS HE AND ROOSEVELT'S BROTHER-IN-LAW PAID THAT SUM.

PARIS, Oct. 15.—In an effort to solve the mystery of the identity of those who got the $40,000,000 paid by the United States government for the

Panama Canal the *World* retained one of the foremost English corporation lawyers to come here from London and conduct an investigation. He is a member of Parliament, a distinguished member of the Liberal party and thoroughly versed in the procedure of the French courts with which he has had long experience.

He has just rendered a statement of his findings which show that very little of the $40,000,000 went to Frenchmen, but most of it to a syndicate of Americans, including, it is said, Douglas Robinson, brother-in-law of President Roosevelt, and Charles P. Taft, brother of William H. Taft, who was Secretary of War in 1904, at the time of the sale of the canal to the United States.

According to this report the American syndicate, confident that William Nelson Cromwell, the New York lawyer and friend of President Roosevelt and Judge Taft, would be successful in selling the Panama Canal to the United States, bought up the securities of the canal company at a ridiculously low price compared with the sum paid by the United States government.

The report made by the *World's* lawyer makes clear the fact that full information of the identity of those who got the $40,000,000 is in possession of the Roosevelt administration in Washington, all records of the payments having been turned over to the United States government.

The New York World, October 17, 1908:

Indianapolis News, October 17, 1908:

WASHINGTON KNOWS WHO GOT CANAL MILLIONS.

ALL RECORDS HAVE DISAPPEARED IN PARIS.

CROMWELL ON THE INSIDE.

NEW YORK, October 17.—A cable dispatch from Paris to the *World* says:

In an effort to solve the mystery of the identity of those who got the $40,000,000 paid by the United States government for the Panama Canal, the *World* retained one of the foremost English corporation lawyers to come here from London and conduct an investigation. He is a member of Parliament, a distinguished member of the Liberal party and thoroughly versed in the procedure of the French courts, with which he has had long experience. He came here armed with exceptional credentials.

He has just rendered a statement of his findings, which is doubly interesting because of the report that very little of the $40,000,000 went to Frenchmen, but most of it to a syndicate of Americans, including, it is said, Douglas Robinson, brother-in-law of President Roosevelt, and Charles P. Taft, brother of William H. Taft, the candidate for President of the Republican party, and who was Secretary of War in 1904, at the time of the sale of the canal to the United States.

HAD FAITH IN CROMWELL.

According to this report the American syndicate, confident that William Nelson Cromwell, the New York lawyer and friend of President Roosevelt and Mr. Taft, would be successful in selling the Panama Canal to the United States, bought up the securities of the canal company at a ridiculously low price compared with the sum paid by the United States government. Though the form was gone through of sending the $40,000,000 here through the banking house of J. P. Morgan & Co., instead of French stockholders getting the money, it is believed that most of it was distributed to representatives of the American syndicate members.

The report made by the *World's* lawyer makes clear the fact that full information of the identity of those who got the $40,000,000 is in possession of the Roosevelt administration at Washington, all records of the payments having been turned over to the United States government.

COMPANY HAS VANISHED.

In his report the English lawyer retained by the *World* says:

"I have never known, in my lengthy experience of company matters, any public corporation, much less one of such vast importance, having so completely

disappeared and removed all traces of its existence as the new Panama Canal company.

"This company having purchased the assets of the Compagnie Universelle de Panama (the old or De Lesseps Panama Canal Company), brought off the deal with the American government. So thorough has been its obliteration that only the United States government can now give information respecting the new company's transactions and the identity of the individuals who created it to effectuate this deal, and who, for reasons best known to themselves, wiped it off the face of the earth when the deal was carried through.

"Under the terms of the agreement between the United States and the New Panama Canal Company the United States not only took over all the rights of that company on the Isthmus of Panama, but, to quote from the contract, 'the plans and archives at Paris.'

"M. Le Marquis, the official liquidator of the Compagnie Universelle de Panama, which sold its interest to the now vanished company, was seen, but in answer to inquiries said:

" 'I know nothing of the books or transactions of the New Panama Canal Company. I can give no information concerning them, nor do I know anybody who can.'

"Leading French lawyers were also consulted and they declared there was no machinery, legal or otherwise, by which its records could be brought to light.

MYSTERIOUS FROM THE OUTSET.

"A brief account of this company proves how mysterious is its history and how effectual were the precautions taken from its very inception to cover up its tracks.

"The new company, which acquired all the rights of the old company, was formed December 21, 1894, with a capital of 65,000,000 francs, divided into 650,000 shares. Of these 600,000 shares were subscribed for in cash and the remaining 50,000 shares, full paid, were given the Colombian government, of which the Panama isthmus was then a territorial part.

"This stock of the new company was originally registered, so transactions in it could be traced, but power was subsequently obtained to transform it into 'bearer' stock, which passed from hand to hand without any record being preserved.

"The only list available is of the original stockholders, lodged with the Tribunal of Commerce in Paris, but this is worthless as it fails to show the names of the owners of the stock at the time of the liquidation of the company and who actually received their proportions of the purchase money paid by the United States.

THE OPPORTUNE REVOLUTION.

"The extremely opportune Panama revolution relieved the new company of its obligations to Colombia, it being held that sovereignty having passed from Colombia, she was not entitled to compensation for property now possessed by another sovereign state—Panama.

"The money was duly paid over by the United States to the new company, but no record exists here of a single person who received the money or the proportions in which it was paid.

"The liquidation of the new company was finally closed on June 3 last, and the offices of the liquidators were shut. No one is there to give the slightest information concerning it, although questions are still arising necessitating information.

"The American ambassador here was entitled by the agreement to all the archives of the company for his government, and those archives should include a list of the persons who received the purchase money paid by the United States.

"It lies, therefore, in the hands of the Washington authorities to disclose the names of the persons who profited by this gigantic and most suspicious deal."

Chicago Inter Ocean, October 17, 1908:
Indianapolis News, October 17, 1908:

ALL TRACE OF DEAL LOST.

WASHINGTON OFFICIALS SAY NO CANAL PAPERS ARE ON FILE.

CHICAGO, October 17.—A Washington dispatch to the *Inter Ocean* says: If the solemn declarations of public officials who are in position to know every detail of the transaction involving the sale to the United States of the rights of the French Panama Canal Company are to be believed there are no papers on file with the federal government indicating to what individuals the lump sum of $40,000,000 may have gone.

Inquiry was made of every department of the government that would have knowledge of this transaction—the Department of Justice, the insular bureau of the War Department and the treasury. At the Department of Justice the statement was made that if any of the papers in that transaction had reached the department they would come there merely for verification of their legal form or an expression of legal opinion, and would be returned to whatever department had transmitted them. The specific statement was made that there were no files there.

NO PAPERS IN EXISTENCE.

At the insular bureau it was stated that no papers were in existence, or ever had been in existence, showing what individuals may have been interested in the funds of the French Canal company, or whether there had been any transfer of the interests of individuals to others. It also was said that the papers of the French company did not pass to the United States, but that the transaction involved only the delivery of the equipment and all the rights and privileges of the French company.

"The main thing which the United States was called upon to look out for," said a prominent official of the War Department, "was that the price fixed for the property purchased was within reason and not exorbitant and that the government obtained that for which it contracted and for which it paid.

"It was not the business of the United States government to investigate what individuals happened to own stock in the French company at the time of the sale, or at what price such stock came into the hands of the owners at the time of the purchase. The face valuation of the property, tangible and intangible, was obtained by painstaking investigation, and the money then paid, and there the obligations of this government ended.

NEVER HEARD OF DOCUMENTS.

"I have never heard of any paper or document that would indicate to what separate individuals this lump sum went, and there certainly is not and never has been such a paper on file with this government or submitted to it. That was a matter with which we had nothing to do. The affairs of the French company were wound up by the French courts, and those records, doubtless, are obtainable in France."

A similar statement was made at the Treasury Department, where the fiscal end of the transaction was conducted. The statement was made that the lump sum of $40,000,000 was paid out of the treasury in one check to the order of the banking house of J. Pierpont Morgan & Co., who produced the proper papers showing them to be the accredited fiscal agents of the French canal company and authorized to receive and receipt for the purchase price. This was done and the officials of the Treasury Department say the original check drawn to the order of this American banking firm is on file in the treasury archives.

"We paid over the money to the duly accredited persons and received the goods purchased," said the official in charge of this branch of the treasury. "What was done with the money afterward, or among whom it may have been divided, if divided at all, is a matter of no possible concern to the Treasury Department, and whatever may have been done with the funds after they were deposited with Morgan & Co. is a matter in which the government is not interested. There are certainly no papers on file here or anywhere else that would indicate the final disposition of that $40,000,000."

New Orleans Daily States, October 17, 1908:

COVERING THE PANAMA CANAL STEAL.

The *New York World* has been conducting an investigation in Paris in order to ascertain definitely the individuals who got the $40,000,000 paid by the United States for the Panama Canal as a result of the deal negotiated by the adroit William Nelson Cromwell with the Roosevelt administration. In the financial and political circles of New York it has been charged in a general way during the past two or three years that an American syndicate bought up the securities of the old Panama Canal Company when they were selling very low in Paris and made a huge profit when it sold the property to the United States.

It is said that included among the members of this syndicate was Douglas Robinson, brother-in-law of President Roosevelt, and Chas. P. Taft, brother of the Republican candidate for President. The investigation conducted by the representative of the *New York World* resulted in some rather interesting and suspicious disclosures. He was not long in discovering that every source of official information as to the identity of the syndicate members who got the $40,000,000 was not only closed, but completely wiped out as a result of an agreement between the United States government and the Panama Canal Company. The liquidation of the canal corporation whose securities had been purchased by the American syndicate was suddenly concluded on June 3 last, about two weeks before the nomination of Taft, though the work had been going on for four years.

The *World's* representative ascertained that immediately after the Panama Canal Company finished its liquidation its office was closed, the books spirited away, and under an agreement with the government of the United States all the archives of the company were placed in possssion of the Roosevelt administration. The liquidators of the canal company were its directors, and they refuse to disclose any of the secrets which the members of the American syndicate decided should be kept from the public, or the personnel of the purchasing syndicate. There is little reason to doubt that an enormous steal was involved in the canal deal with this government, but it seems that William Nelson Cromwell has been successful so far in covering his own tracks as well as those of the men associated with him.

The books of the Panama Canal Company were probably destroyed the moment its affairs were liquidated in order that they might tell no tales, but the chances are the particulars of the steal will leak out sooner or later. Whether the archives reported to be in the possession of the Roosevelt administration will throw any light on the matter is a question that should receive the serious consideration of Congress. If the Democrats elect a majority of the National House of Representatives in November they will have an opportunity to put the probe deep into the Panama scandal, and, perhaps, succeed in disclosing the greatest steal of the age.

Chicago Journal, October 19, 1908:

ROOSEVELT HIT IN CANAL DEAL.

PRESIDENT'S RELATIVE IGNORES CHARGE THAT HE AND CROMWELL AND TAFT'S BROTHER MADE MILLIONS.

PEOPLE DEMAND THE RECORDS.

EXECUTIVE ABLE TO PRODUCE OFFICIAL DOCUMENTS RELATING TO $40,000,000 PURCHASE OF FRENCH INTERESTS.

NEW YORK, Oct. 19.—While Charles P. Taft has positively denied any connection whatever with the Panama Canal deal, no such declaration has been forthcoming from Douglas Robinson, the brother-in-law of President Roosevelt, or from William Nelson Cromwell.

Cromwell is the most prominent corporation lawyer in New York, and it was through him that all the Panama negotiations were carried on. The

persistent rumors from Paris that Cromwell, Robinson and Taft were among those who made some $28,000,000 profit out of the sale of the old De Lesseps Canal Company to the United States have brought forth a strong disclaimer from Mr. Taft, but the other two have not denied that they shared in the profits of the big deal.

The most that Mr. Robinson and Mr. Cromwell will say in response to queries is that they do not care to discuss the matter. This backwardness is in such contrast to Mr. Taft's frank statement that public opinion here is against the big lawyer and the President's brother-in-law.

SUSPECT "BIG STEAL" WAS EFFECTED.

"If they were not guilty they'd say so" is the way the people look at it. The impression is gaining ground that the Panama Canal deal was a big steal, carefully planned and well carried through. In the guise of patriotism the affair was engineered to furnish millions of dollars of ill-gotten gains for a syndicate of financiers.

Patriotism paid, and paid well, in this instance.

The loud outcry that we must have the canal to enable us to move our warships quickly from one ocean to the other, and that it would greatly increase the trade of our coast cities by providing cheap transportation from one coast to the other was to conceal the real motive. The canal was all very well, and a much needed and magnificent undertaking, but in the enthusiasm to get hold of it lay the opportunity to rush through a deal that meant a fine fat profit.

PEOPLE DEMAND EXPLANATION.

It is perfectly clear that some one made a pile of money out of the transaction. Mr. Taft says he had nothing to do with it. Mr. Robinson and Mr. Cromwell are also accused of sharing in the profits at the expense of the United States. Instead of denying it they simply say, "Let's talk about the weather."

Now that doesn't satisfy the people. The entire records of the Panama deal are in Washington and easily accessible. If they are not opened to the public the public will naturally infer that the records contain things which Mr. Roosevelt is afraid to make public. W. H. Taft owes it to himself and to the Republican party to demand the opening of the records and give the facts publicity.

If a relative of Mr. Roosevelt has really shared in the profits of this deal he ought to be made to disgorge. There was no excuse for selling the canal to the United States at $40,000,000 when it could have been bought direct for less than one-third of that amount.

The Panama Canal Company, organized to take over the old De Lesseps company, was capitalized at 65,000,000 francs, or $13,000,000. Of this $12,000,000 was paid in cash and the other million was given to the government of Colombia in whose territory the canal district then lay.

RUSH TO LOCK UP RECORDS.

The price paid to the stockholders of the old De Lesseps company was evidently not in excess of $12,000,000, but the price paid by the United States to the New Panama Canal Company was $40,000,000. As soon as the money had been paid through the banking house of J. Pierpont Morgan to the new company the company went into liquidation, having fulfilled its manifest destiny. The liquidation proceedings dragged along for four years, until last June. Then, just fifteen days before W. H. Taft was nominated, the whole concern was hurriedly wound up, its offices closed and all its records, and all the archives and records of the old De Lesseps company were shipped to Washington and turned over to the United States government.

WANT ROBINSON TO DISGORGE.

Everybody is commenting on the reluctance displayed in opening the books and taking the people who put up the $40,000,000 into the confidence of the government to the extent of letting them know to whom that money was paid.

This policy of silence is influencing voters against Taft. The only way to set the matter right is for Mr. Roosevelt to order the records opened. Then if a relative of his has benefited by the deal at the unnecessary expense of the taxpayers he should be made to refund the money.

As it is now the whole Panama deal is a great scandal. If a Republican administration refuses to clear it up, thinking men are going to elect an administration that will give the people the truth.

Chicago Journal, October 19, 1908:

MR. ROOSEVELT SHOULD ACT.

This country is aware that somebody bought the stock of the defunct French Panama Canal Company for $12,000,000, or less, and sold it to the United States government for $40,000,000.

How much of that $28,000,000 went into the pockets of President Roosevelt's intimate friends, who promoted the deal, is not known to anybody outside the gang of speculators that reaped a rich harvest by playing on the patriotism of the American people.

Reports come from Europe that Charles P. Taft, a half-brother of the candidate for President, was one of the chief beneficiaries of the gigantic steal. Mr. Taft denied emphatically that he had anything to do with the transaction. In the absence of positive proof that he had the public should accept his denial.

There is one person, however, who has remained silent under the accusations brought against him in connection with the Panama swindle, and that person is Douglas Robinson, brother-in-law of President Roosevelt. That a member of the President's family should have been involved in that nasty mess is nothing short of a national scandal.

President Roosevelt should promptly scotch the Panama serpent by compelling the publication of the name of every person who profited by the steal. And if it should be found that any member of his family received any part of the swag the President should compel him to pay it into the conscience fund.

The honor of the Roosevelt family is involved in this malodorous deal, and nothing more important confronts the President between now and March 4, 1909, than to clear the family name of suspicion.

The position that posterity will accord Mr. Roosevelt in American history should it be proved that his brother-in-law, with the President's help, swindled the United States of millions in the Panama scheme, would be vastly different from the position Mr. Roosevelt occupies today.

Chicago Inter Ocean, October 19, 1908:

CANAL RECORDS FAIL TO SHOW RECIPIENTS.

EFFORTS TO LEARN WHO SHARED IN $40,000,000 PAID BY THE UNITED STATES FOR THE PROPERTY ARE FRUITLESS.

AMERICAN SYNDICATE NAMES STILL ARE KEPT SECRET.

GEORGE R. SHELDON, NOW TREASURER OF THE REPUBLICAN NATIONAL COMMITTEE, IS REPORTED TO HAVE BEEN ONE OF THE NUMBER.

Special Dispatch to the Inter Ocean:

NEW YORK, Oct. 18.—Efforts by the *New York World* to obtain from Government officials in Washington the records turned over by the New Panama Canal Company, showing who got the $40,000,000 paid by the United States for the canal, have so far been unavailing.

There are unofficial rumors that those portions of the records containing the names of the actual recipients of the $40,000,000 have been destroyed.

NAMES ARE CONCEALED.

If this is so it will be impossible to officially ascertain the names of the members of the American syndicate who are supposed to have bought up

securities of the canal company at very low prices from the French holders, confident that William Nelson Cromwell, because of his extraordinary influence with President Roosevelt and the then Secretary of War, William H. Taft, would succeed in unloading the canal on the United States at a fancy figure which would give the syndicate a huge profit.

It was stated today that an alleged member of the syndicate was George R. Sheldon, the banker, who is now treasurer of the Republican National Committee and collecting campaign funds in behalf of Mr. Taft.

The appointment of Mr. Sheldon as treasurer of the committee was dictated by William Nelson Cromwell, who sold the canal to the United States, and who is said to be the directing head behind the throne of the Taft campaign. Mr. Cromwell is E. H. Harriman's lawyer.

MERELY GOT FEE, HE SAYS.

Mr. Cromwell is on record before the Interoceanic Canal Committee of the United States Senate as having sworn he did not make a penny of profit out of the $40,000,000 sale outside of his fee as counsel for the French Panama Canal Company.

Search has failed to reveal any record of his having sworn that any American did not share in the $40,000,000 paid by this government, supposedly to the French holders of the French Canal Company.

According to information members of the American syndicate found it necessary to raise a fund of only $30,000,000 to get a substantial share of the securities of the French company.

(SECOND COUNT OF THE INDICTMENT.)

Editorial—*Indianapolis News*, October 20, 1908:

PANAMA SECRETS.

The *Chicago Journal* says that it is well known that "somebody bought the stock of the defunct French Panama Canal Company for $12,000,000 or less and sold it to the United States government for $40,000,000." And the Chicago paper declares further that it is "not now known to anybody outside the gang of speculators that reaped a rich harvest by playing on the patriotism of the American people how much of that $28,000,000 went into the pockets of President Roosevelt's intimate friends who promoted the deal." It has been said on what seems to be good authority that the government's check for $40,000,000 was paid to J. Pierpont Morgan. But no one knows how the sum was divided. Charles P. Taft has denied that he got any of the money. But he is the only person who has made a denial. We have seen no word from Douglas Robinson, a brother-in-law of the President. Yet he has, at least through rumor, been connected with the transaction.

We do not think, however, that any denial, no matter how vehemently it may be made, ought to be accepted as conclusive. For all the records are in the possession and under the control of the government. The appeal is to them. Mr. Cromwell, no doubt, knows who got the money. Possibly Mr. Morgan is not wholly ignorant of the details of the negotiation. As long as the facts are thus suppressed the people can not be blamed for suspecting the worst. They remember the close relation of our government to the inspired revolution in Panama which resulted in our getting control of the canal strip. They remember the sudden turning from the Nicaragua to the Panama route, and this in spite of the fact that the experts had recommended the Nicaragua route. These two events, beyond question, greatly increased the value of the stock of the Panama company. And now, when we hear that an American syndicate was the chief beneficiary of the change of plans and made-to-order revolution, the people naturally feel that they are entitled to an explanation.

When all the documents in a case are in the possession of men charged with or suspected of improper action, or in the possession of their friends, the duty of such men is, of course, perfectly clear. They must make the documents public. A failure or a refusal to do so is equivalent to something very like a confession. As we have said, mere denials will not serve when the men who make them refuse to produce the evidence which would support them, that evidence being in their possession. When men refuse to deny the case is, of

course, still stronger against them. All the papers and accounts of the French company passed to this government when it purchased the property. The facts can be had from the government and the government alone. We think the people are entitled to them, and before the election, too. Men who have in their possession evidence which would prove or disprove a certain allegation, and who refuse to produce it, can not complain if their refusal is construed as proof of their unwillingness to have the truth known. That is both sound morals and sound law. We know that the American government paid $40,000,000 for the property of the French company. To whom was that money paid? That is the question that must be answered. We think further that the American people, without distinction of party, ought to demand the facts in their completeness. They do not mean to accuse or even to suspect any one unjustly—do not, indeed, want to think evil of any one. But what are they to do in a case like this? They know that there is in existence an abundance of evidence to disprove all charges, and that that evidence has so far been withheld from them. Why is it withheld?

New York World, October 21, 1908:
Indianapolis News, October 21, 1908:

TAFT DISMISSED DAVIS; HE REPORTED CROMWELL.

THE WORLD PRINTS MORE CANAL ZONE HISTORY.

WAS OUSTED BY CABLEGRAM.

NEW YORK, October 21.—The *World* publishes the following: William Nelson Cromwell, counsel for E. H. Harriman, whose Southern Pacific and Union Pacific roads will lose heavily if an isthmian canal is ever built, and the lawyer who sold the French Panama Canal Company to the United States for $40,000,000 was, it is said, in his capacity of chief adviser on canal matters to President Roosevelt and Secretary of War Taft, responsible for the removal, under most humiliating conditions, of Gen. George W. Davis, member of the canal commission and first governor of the canal zone.

Governor Davis had rendered services of inestimable value to the country in the opinion of military experts during and following the Spanish war. He was first governor of Porto Rico when the island was taken from Spain, and worked out a thorough system of government there. He was also military and civil governor of the Philippines and out of the chaos there brought order and good government.

WORKED WONDERS IN PANAMA.

When General Davis reached the age limit and was retired from the army, so great was his genius as an executive and organizer that he was sent to the isthmus after the canal strip had been purchased from Panama to establish a system of law and government there. The only laws known there were those of Colombia from which the isthmus was wrested by the revolution manufactured by Cromwell so that he could make the $40,000,000 sale to the United States and give the clear title demanded by the Spooner act. With only chaos as a foundation General Davis worked out a civil government in the canal zone which is declared a marvel of perfection by Americans who studied it while it was under his direction. He wiped out yellow fever for one thing, and converted one of the pestholes of the earth into a sanitary, healthful place of residence.

DISMISSED FROM OFFICE.

Because in his official capacity of governor of the canal zone he discovered evidence of transactions on the part of William Nelson Cromwell which he believed unjustly deprived this government of large sums of money and made a report of his discoveries to his superiors at Washington he was removed from office.

Secretary of War Taft sent him a cablegram couched, it is said, in brutal language, summarily discharging him and, in the opinion of engineers who have worked on the canal, depriving the government of the services of the most valuable man ever connected with the huge enterprise.

No public word of complaint over his humiliating dismissal has ever been uttered by General Davis, but men who have talked privately with him declare he attributes his removal to the strange power wielded by Cromwell, the Harriman lawyer, over the then Secretary of War and President Roosevelt. Had he not felt it his duty to report his discoveries of seeming misconduct on the part of Mr. Cromwell, General Davis is convinced he would not have been dismissed, and a perfect record of life-long service to his country would not have been marred.

It has been charged that a syndicate of Americans made a huge profit out of the $40,000,000 sale engineered by Mr. Cromwell and put through with the aid of President Roosevelt and Secretary Taft. This syndicate of Americans, it is said, included among its members Douglas Robinson, brother-in-law of President Roosevelt; Charles P. Taft, financial backer of the presidential campaign of William H. Taft, his brother, and George R. Sheldon, whom Mr. Cromwell had Mr. Taft appoint as treasurer of the Republican National Committee, or collector of campaign funds.

CLEARED THIRTY MILLION IT IS SAID.

The American syndicate, confident that Mr. Cromwell would be able to sell the Panama Canal to the United States by reason of his great influence with President Roosevelt and Secretary Taft, bought up, it is said, at an infinitesimal price, the securities of the French Panama Canal Company, and, therefore, were the chief beneficiaries of the $40,000,000 paid for the property instead of the original French stockholders who had given De Lesseps $260,000,000 of their savings for the enterprise that French engineers found impossible. The profits of the American syndicate are said to have exceeded $30,000,000.

General Davis, as governor of the canal zone, had supervision over the Panama railroad, which was part of the property turned over to the United States as a result of the purchase. A majority of the stock of the Panama railroad was owned by the French Panama Canal Company, though the road was chartered under the laws of this State in 1849 and built across the isthmus to promote transportation between the Pacific coast and the East in the days of the gold discoveries.

Cromwell bought some stock in this railroad in 1893 and became its counsel. It was in that way he became first identified with Panama Canal affairs, and had worked himself into a commanding position when the New French Panama Canal company was organized and took over everything that the original De Lesseps company owned. He became counsel for the New Canal Company and conceived the scheme of selling it to the United States in the late nineties.

In going over the affairs of the Panama railroad General Davis discovered that after the United States had agreed to buy all of the property of the French Canal Company for $40,000,000, and while the title was being examined, William Nelson Cromwell and his fellow-directors and stockholders of the Panama railroad declared and paid to themselves a large dividend out of the funds of the company which had not been earned during the preceding year, and which, it is claimed, had been set aside for repairs on the road and the steamships it owned.

CLAIMED MONEY FOR GOVERNMENT.

General Davis held that this money morally, if not legally, belonged to the United States, as this government had at once to spend several hundred thousand dollars to make repairs which this fund should have defrayed. It was held, that the money being in the treasury of the company at the time the United States contracted for the purchase, it was as much the property of this government as the cars, locomotives and roadbed.

In a report he made to his fellow-members of the isthmian commission, General Davis devoted considerable attention to exposing what he regarded as questionable methods on the part of Cromwell in depleting the treasury of the Panama road after its sale to the United States had been agreed upon.

These adverse references to Cromwell in an official report which was to become a public document incensed the New York lawyer greatly it is said, and also brought Secretary Taft and President Roosevelt to his rescue. General Davis was arbitrarily ordered to eliminate from his report all of the offensive

references to Cromwell. He was told that what had happened prior to the actual acquisition of the canal properties by this government did not come within his scope, and that the matter did not belong in the report.

OBEYED SUPERIORS' ORDERS.

Obedient to the orders of his superiors the old soldier did as he was told and took out the references which had so offended Cromwell, and the mutilated report was placed on file. Then General Davis committed a great sin in the eyes of Cromwell, Taft and Roosevelt.

There is an army regulation which calls upon all officers to report to their superiors anything which comes under their observation, and which they believe should be known to the government. This rule applies to retired officers as well as those in active service.

Knowing this rule, General Davis, in his capacity as a retired officer, but still subject to army regulations, made a detailed report to the Secretary of War of the very matters which he had been compelled to cut out of his report to the isthmian commission. That report had to be received, but pains were taken to keep it from the public, and it was pigeonholed in the archives of the War Department.

(THIRD COUNT OF THE INDICTMENT.)

Editorial—*Indianapolis News*, October 23, 1908:

"SOONER OR LATER."

In speaking to the question of the Panama Canal deal on the topic of "opening the books," we said the truth ought to be known before the election. We have no idea that it will be. But we do have an idea that another thing that we said will come to pass, namely: "Sooner or later there will inevitably be an investigation of this whole canal affair." We have an abiding faith in that. As we set out, it is the people's business. The canal is their canal. The money that was paid in its name was their money. They have a clear right to know who got it and what was the value received. If we may quote ourselves:

"The question really is whether the people's government belongs to them or to those charged with its administration. Any man who, at any time or for any reason, wants to know anything in connection with the transaction of the government's business—excepting only certain diplomatic matters, and not many of them—has a right to the information. And that information can not be denied without raising the gravest suspicions—and naturally so."

We do not mean here to argue the question. We advert to it for the purpose of repeating the sentence, "Sooner or later there will inevitably be an investigation of this whole canal affair." And it will come in some degree by keeping alive that idea; by living with the notion that a clique of select manipulators can not—must not for the integrity of American government—be able to perpetrate a great international transaction that for all that is known of it reeks with deceit, sharp practice and graft. The idea that supposed servants of the people may be wrought upon by expert swindlers to stultify the public reports of committees of experts, and with a sleight of hand utterly undo all that was proposed, and put through a forty-million-dollar transaction in a dark corner, is one that we have faith to believe will not come to fruition.

We discount in this, too, the fact that the people at large, busy with earning a livelihood, soon forgets things. In that has consisted the prosperity of many a rogue. But this rascality was unusual. It involved a change of front on the part of the President and the Congress of the United States which was followed by a revolution in a friendly state that looked as if it had been necessary in order to confirm title. And all this came to pass after the whirlwind order and in the face of official program to the contrary.

So, we say, sooner or later this thing will inevitably come to pass if for no other reason than that there will certainly be some time a change in the public servants sent to take charge of the books. We know what happened here at home when a new man got into the county auditor's office and had a chance to open the books. There will be new hands in charge of the national books some time. Depend upon it, "sooner or later there will inevitably be an

investigation of this whole canal affair." The Credit Mobilier affair, the Whisky Ring thefts, the Star Route frauds, were all denied and all apparently hidden away. But they came to light. We hope that the *New York World*, which has been zealous and efficient in this canal deal, will persist. It may be short on evidence for a time, but it can be long on presentation and not weary in well doing. Some day we shall know who the thieves were that robbed the country.

Indianapolis News, October 23, 1908:

DEMOCRATIC NATIONAL HEADQUARTERS ANNOUNCEMENT.
SPOT LIGHT ON CANAL DEAL.

CONGRESSMAN RAINEY WILL OPERATE THE MACHINE IN THE HOUSE.

CHICAGO, October 23.—Representative Henry T. Rainey, of Illinois, has announced, through press headquarters at the Democratic National Committee, that he will, on the opening day of Congress, in December next, introduce a resolution calling for a congressional investigation of the Panama Canal purchase.

In discussing the matter Mr. Rainey said: "I am sorry the President's letter to Senator Knox did not take up the matter of the Panama Canal purchase. The President ought to be able to tell whether or not his brother-in-law and the brother of the Republican candidate for the presidency were interested in an American syndicate, which, it is said, succeeded in getting control of the securities of the Panama Canal Company, just before the Nicaragua route was abandoned and the Panama route adopted. The President ought to be in a position to know who the members of the American syndicate were. The country is entitled to know all about it and I intend to see that it is made public. As soon as Congress convenes in December I will introduce a resolution asking for the appointment of a special commission fully authorized to summon witnesses and require the production of books and papers, thoroughly to investigate the matter.

"A resolution of the character would be privileged. I expect to make it my principal business in Congress to see that this matter is thoroughly investigated."

Editorial—*Indianapolis News*, October 24, 1908:

If there was no scandal in connection with the purchase of the Panama Canal from the French company publication of all the facts will show this. But the manifold rumors will not be laid by impenetrable silence. Already the public mind has been unpleasantly affected. For the people know that the government has all the facts in its possession, and knows that up to the present time it has refused to put them before the people. It knows that Mr. Robinson, the President's brother-in-law, whose name is unpleasantly connected with the transaction, has said nothing. Mr. Cromwell knows all about it. The President himself can not be in ignorance. Undoubtedly Mr. Morgan is thoroughly informed regarding the affair. No one outside of official and canal circles has any knowledge of the subject. Those who are suspected, therefore, have it entirely within their power to vindicate themselves. Knowing this the people can not help wondering why they are so slow in taking what seems to be an entirely natural step; why they fail or refuse to give the whole story of the transaction. Silence can only have the effect of still further strengthening the suspicion that now haunts many minds.

Morning World Herald (Omaha), October 24, 1908:

SHELDON IN THE DEAL? A SURPRISING REPORT.

REPUBLICAN CAMPAIGN TREASURER MIXED UP WITH THE PANAMA CANAL PURCHASE.

MORGAN'S MAN—CROMWELL'S SUGGESTION WENT WITH MR. TAFT—RECORDS GONE.

NEW YORK, Oct. 23.—The *World* says:

"Efforts to obtain from government officials in Washington the records turned over by the new Panama Canal Company showing who got the $40,000,-

000 paid by the United States for the canal have so far been unavailing. There are unofficial rumors that those portions of the records containing the names of the actual recipients of the $40,000,000 have been destroyed.

"If this is so it will be impossible to officially ascertain the names of the members of the American syndicate who are supposed to have bought up the securities of the canal company at very low prices from the French holders, confident that William Nelson Cromwell, because of his extraordinary influence with President Roosevelt and the then Secretary of War, William H. Taft, would succeed in unloading the canal on the United States at a fancy figure which would give the syndicate a huge profit.

"It was stated today that an alleged member of the syndicate was George R. Sheldon, the banker of 2 Wall street, who is treasurer of the Republican National Committee, and is collecting campaign funds in behalf of Mr. Taft.

"The appointment of Mr. Sheldon as treasurer of the committee was dictated by William Nelson Cromwell, who sold th ecanal to the United States, and who is the directing head behind the throne of the Taft campaign.

"Mr. Cromwell is E. H. Harriman's lawyer. Mr. Taft had selected Representative McKinley as his campaign treasurer, and when Mr. Cromwell learned of this he telegraphed Mr. Taft, who was then at Hot Springs, to withhold the appointment until he could see him. Mr. Cromwell reached Hot Springs the next day, and the same day Mr. Sheldon's appointment as treasurer of the Republican National Committee was announced.

"Mr. Cromwell and Mr. Sheldon are directors in some of the same corporations. Mr. Sheldon is the representative of J. Pierpont Morgan in several corporations, and is regarded as a Morgan man in the Wall street district.

"Mr. Cromwell is on record before the Interoceanic Canal Committee of the United States Senate as having sworn he did not make a penny of profit out of the $40,000,000 sale outside of his fee as counsel for the French Panama Canal Company.

"Search has failed to reveal any record of his having sworn that Americans did not share in the $40,000,000 paid by this government supposedly to the French holders of the French Canal Company."

Rocky Mountain News (Denver), October 24, 1908:

NOISOME PANAMA SCANDAL.

If Mr. Roosevelt were as anxious to rebuke sin as he is to have the credit for doing so he might find some excellent material in the history of the Panama Canal to date, and the way the United States government on the one hand and the holders of the French securities on the other were buncoed by a syndicate composed in part of Charles P. Taft, brother of Prince William; Douglas Robinson, brother-in-law of the President, and George R. Sheldon, campaign collector for the g. o. p. in the present campaign. Here are the facts as they appear up to date, and there have been no frenzied cries of denial from Oyster Bay.

The whole country wanted, and for years past has wanted, a canal through the thin part of the continent somewhere. Nineteen people out of twenty favored the Nicaragua route.

You may remember how sudden was the change from Nicaragua to Panama. You may remember that the engineers and naval men opposed that change, and that they were overruled by the influence of the late Mark Hanna. No one ever imagined that Hanna worked overtime for nothing, but now it appears that he was not working alone.

He had helpers. The French company had failed to build the Panama Canal, but it had done a lot of work there. When the Panama route was decided upon the United States had to buy out the rights of the French company. A whole world of oratory was wasted in Congress and the magazines telling the sad tale of the small French investor, and how the great and wealthy government of the United States ought to be generous. The great and wealthy government was generous. It paid $40,000,000 for the rights, properties and all other possessions of the Panama Canal Company.

And of this sum $3,500,000 reached the actual French investors. The rest was absorbed by the syndicate named above. And Mr. Charles P. Taft is now using a good bit of his share of the plunder to elect his brother President of the United States. Mr. Charles P. Taft is said to be a good business man, and *The News* believes the saying true. For:

If he could make a "killing" of this size when his brother was a mere, unimportant secretary of war, what could he do when his brother was President?

It might be worth while for Mr. Roosevelt to write another letter and solve that little sum in mathematics.

Editorial—*Indianapolis News*, October 26, 1908:

THE CANAL DEAL.

It has been several weeks since we began to have rumors of crookedness in connection with the purchase by this government of the property of the French Panama Canal company. Yet we have had no word from the administration on the subject, though it knows all about it and has the records of the transaction in its possession. Mr. Charles P. Taft, half-brother of the Republican presidential candidate, has denied that he got any of the money. But nothing whatever has been heard from Mr. Robinson, brother-in-law of the President, who is suspected of being a member of the syndicate which is supposed to have received $40,000,000 for the property for which it paid only $12,000,000. It is known that all the records of the old company were turned over to the United States government, June 3 last, just on the eve of the nomination of Mr. Taft. It occurs to us that the *Springfield Republican* takes a very queer view of this matter. It says:

"When the campaign is over, and no partisan use of the facts is possible, it would be gratifying if the United States government would throw what light it could upon the much-discussed question of the identity of the persons who received the $40,000,000 that was paid to the French company for its rights and property in the Panama Canal enterprise."

This is a sort of petition to the throne asking for information on a subject which is really one of vital importance in the campaign now in progress. "At the proper time," the *Republican* says, "the mystery should be cleared up." Now is the proper time. If the people knew positively that the Panama revolution was financed in order to bull the canal securities in the possession of American citizens, if this same influence had anything to do with bringing about the sudden change from the Nicaragua to the Panama route, and if it is true that a brother of the Republican candidate and a brother-in-law of the President were owners of the securities of the French company which were sold to this government, it is quite likely that the people would be influenced in their political action in this campaign. If the facts are as they have been suspected by some to be, there is no reason why a "partisan use" should not be made of them. The *Springfield Republican* says that it would be "gratifying" if the government would tell us all about it after the election. We say that it is necessary that it tell us all about it before the election.

Chicago Journal, October 27, 1908:

Indianapolis News, October 28, 1908:

PUBLICITY FOR PANAMA.

All the secrets of the canal deal are in Washington. The people of the United States own the Panama Canal. They have a right to full information, and unless Mr. Roosevelt furnishes it forthwith they can not be blamed if they draw conclusions accordingly and vote for publicity.

Morning World Herald (Omaha), October 28, 1908:

THE NEW YORK WORLD CHARGES.

The *New York World*, a great and responsible newspaper of the highest standing, within the last week has made sensational charges against the

Republican candidates and the Republican administration. These charges are of the highest importance. The *World* has made a record as an exposer of graft and corruption in high places. It was largely due to its efforts, and the charges it made, that the big insurance scandals were uncovered. The charges it makes now are equally specific and even more startling.

The *World* charges that through the agency of William Nelson Cromwell, now legal adviser to the Republican National Committee, Standard Oil, E. H. Harriman and the sugar trust, a $5,000,000 syndicate was formed to purchase the property of the De Lesseps company in the Panama Canal. It charges that Mr. Taft's brother and President Roosevelt's brother-in-law were members of that syndicate. The government then paid, through J. P. Morgan & Co., $40,000,000 for this same property. The *World* charges that all records of the transaction have been destroyed or hidden, and that all efforts to uncover them in Paris and Washington have failed. There is no public record to be found showing to whom Morgan's great banking house paid that $40,000,000.

The *World* charges that while Mr. Taft was governor of the Philippines the railroad contract for the island of Luzon, the greatest of the group, and the seat of Manila, the capital, was let by jobbery, without competitive bidding, to a British syndicate represented by Henry W. Taft, the brother of the governor, and by Elihu Root and Wayne MacVeagh. Mr. MacVeagh is the Chicago capitalist who has recently repeated his quadrennial performance of "coming out against Bryan."

The *World* charges that James Schoolcraft Sherman, while a member of the House Committee on Rules, entered into a vast deal for the plundering of public lands in New Mexico. It charges him with attempting to perpetrate thereby colossal frauds. It charges that when the deal had to be abandoned as "too dangerous," Sherman secured the passage through the House of a bill selling to himself, and his associates in the combine, a vast amount of public lands at $3 an acre that were worth $8 an acre. This transaction was uncovered in the Senate by Senator Patterson, of Colorado, and the bill was there defeated.

These are, in brief, the charges made by the *World*, perhaps the greatest newspaper in the United States, and backed by evidence which the *World* presents.

Of Cromwell himself the *World* writes editorially as follows:

"He is next to President Roosevelt, the chief manager of Mr. Taft's campaign. He attended the Republican national convention at Chicago with George W. Perkins, Chairman Gary of the steel trust, and President Paul Morton of the Equitable. After the convention, when Mr. Taft, at Hot Springs, was considering the appointment of Congressman McKinley as treasurer of the committee, Mr. Cromwell telegraphed him to wait until he got there, and named George R. Sheldon, whose syndicate Mr. Cromwell had represented in the shipbuilding suits.

"Before Mr. Taft went to his Oyster Bay conference with President Roosevelt Mr. Cromwell went over the letter of acceptance with him at the Hotel Manhattan, and on his return from Oyster Bay Mr. Cromwell reviewed the Roosevelt corrections and changes. He is reported to have contributed $50,000 to the campaign fund, but denies it. He is a member of the advisory committee. He is the channel through which President Roosevelt is now working to bring the campaign fund up to the Hanna-Cortelyou standards."

And the *World* asks finally the pertinent question: "Is William Nelson Cromwell another of My Policies which Mr. Taft will inherit?"

(FOURTH COUNT OF THE INDICTMENT.)

Editorial—*Indianapolis News*, October 29, 1908:

THE PANAMA CANAL DEAL.

In discussing the Panama Canal matter we said a few days ago that if it were shown that the records had been destroyed since they came into the possession of the government that would be tantamount to confession. There is another thing that will be tantamount to confession—namely, silence. The election is now only four days off. The rumors of corruption in this matter have been afloat for weeks. The administration has been challenged over and

over again to speak on the subject—to give the country the facts. It has wholly refused to do so thus far. The time is short and there is need for prompt action. Why the issue should not frankly and bravely have been met when it was first presented we do not know, unless it was impossible to meet it satisfactorily. It has been charged that an American syndicate bought up the securities of the old French company for a mere trifle and sold them to the government for $40,000,000, making a profit of at least $28,000,000. This has never been denied by any one, and we suppose no one now questions the truth of the charge. This of itself is a serious thing. If the property was worth only $12,000,000 there was no reason why the government should have paid $40,000,000 for it. The administration is responsible for this way of doing business.

The question is as to the membership of the syndicate. Rumors have connected Charles P. Taft, a brother of the candidate, with it. He has denied the charge, but he brings no evidence to support his denial, though the evidence is wholly in the control of his personal and political friends. Mr. Douglas Robinson, a brother-in-law of the President, has also been mentioned as a member of the syndicate. He has not even denied the charge, and no one has denied it for him. It was made weeks ago, and is still, four days before the election, unanswered. Cromwell, who was Taft's adviser when he was Secretary of War, does not deign to give us any information—Cromwell, who got Sheldon appointed treasurer of the Taft committee. J. Pierpont Morgan has nothing to say, though the $40,000,000 check is said to have been made out to him. We do not suppose that the President is ignorant of what happened, but, though he has had a great deal to say on many subjects, he is silent on this subject. Indeed, the whole transaction is covered with a pall of silence. And yet the whole story is of record in Washington, and thus is absolutely at the disposal of the men with whose names rumor has been busy. We know how hard it is to have an investigation that would really investigate when the executive department is in the hands of those whose conduct is to be investigated. The people have not forgotten the persistent but futile efforts of the late Senator Morgan to get the truth out of this same man Cromwell in connection with other phases of this same question. We saw what a hard time Lilley had when he tried to prove, before a congressional committee, his charges of corruption against certain congressmen. And men can not but wonder whether the President really wants to have this business cleared up. The people have a right to the facts. The good names of the men involved demand that they have the widest publicity. Why not tell the truth, and tell it now?

(FIFTH COUNT OF THE INDICTMENT.)

Editorial—*Indianapolis News*, November 2, 1909:

THE PANAMA MATTER.

The campaign is over, and the people will have to vote tomorrow without any official knowledge concerning the Panama Canal deal. It has been charged that the United States bought from American citizens for $40,000,000 property that cost those citizens only $12,000,000. Mr. Taft was Secretary of War at the time the negotiation was closed. There is no doubt that the government paid $40,000,000 for the property. But who got the money? We are not to know. The administration and Mr. Taft do not think it right that the people should know. The President's brother-in-law is involved in the scandal, but he has nothing to say. The candidate's brother has been charged with being a member of the syndicate. He has, it is true, denied it. But he refuses to appeal to the evidence, all of which is in the possession of the administration, and wholly inaccessible to outsiders. For weeks this scandal has been before the people. The records are in Washington, and they are public records. But the people are not to see them—till after the election, if then.

(SIXTH COUNT OF THE INDICTMENT.)

Editorial—*Indianapolis News*, November 17, 1908:

DEPARTMENTAL SECRECY.

That we are to be subject to some inconveniences in electing to the presidency a member of the present administration is already sufficiently clear.

No one imagines, for instance, that the country will get the truth as to the $28,000,000 canal deal. It was charged openly during the campaign that $28,000,000 of the $40,000,000 given for the rights and property of the French company was paid to certain American citizens who bought up the old securities. The charge was never denied, except in so far as Charles P. Taft denied that he got any of the money. But even he carefully refrained from appealing to the records, all of which are in the departments at Washington. Douglas Robinson, a brother-in-law of the President, whose name was mentioned in connection with the scandal, maintained a strict silence. No word was heard from William Nelson Cromwell, who was intimately related both to the canal deal and also to Mr. Taft when he was Secretary of War. Mr. Cromwell has refused to throw any light on the subject. That some one got the money is practically certain. Who got it the country is not likely to know, unless, perchance Congress is able to drag the facts to light.

In *The News* of yesterday was printed a Washington dispatch to the *New York Sun* in which it was said that the whole story of the relations of the President and the late Secretary Hitchcock to the granting of a franchise to the Prairie Oil and Gas Company of Oklahoma, a subsidiary company of the Standard, was buried in the Department of Justice, a fact which is taken to indicate that Mr. Hitchcock intended to proceed criminally against certain men in high place. It is believed that the President overruled Mr. Hitchcock in this matter, and that the action was taken solely on the direction of the President and over the protest of the Secretary of the Interior, Mr. Hitchcock. The *Sun* says that the application of certain politicians of national prominence for a pipeline, which had been so stoutly resisted by Hitchcock, "came along at the time when Mr. Roosevelt was seeking nomination and election to the presidency." It was in the campaign of 1904 that the Standard Oil Company was solicited to make a big contribution to the Republican campaign fund.

A little later, namely, in March, 1904, Congress passed a bill directing the Secretary of the Interior to make regulations for permits for pipelines, but these were too rigid to suit the oil people, and then it was that Governor Higgins, of New York, wrote a letter to the President in the interest of D. N. Barnsdall, Pittsburg agent of the Standard, asking the President to order Mr. Hitchcock to grant the permit. This the President, so the *Sun* says, did, and Mr. Hitchcock very reluctantly yielded. Now we quote from the *Sun's* story:

"A few months later Mr. Hitchcock printed a volume of the private hearings held before his department on applications for pipeline permits. In the document he gave a copy of Governor Higgins's letter. When the volume appeared it created some excitement. It was during the Hughes-Hearst gubernatorial campaign. The President was indignant at Mr. Hitchcock for giving out the Higgins letter, declaring that it was the property of the President himself. He ordered the copies of Secretary Hitchcock's printed document to be called in and shipped to Oyster Bay, where Mr. Roosevelt was then staying. There was some excitement over the order, and agents from the Interior Department were busy visiting newspaper bureaus and law offices in Washington in quest of the objectionable document. No copies of it can now be had. The Standard Oil contribution of $100,000 to the Republican national campaign fund was paid in 1904, just after the President had overruled Secretary Hitchcock and granted the Standard's application for a pipeline."

We do not know why the Higgins letter should have been regarded as the President's personal property, as it was an official communication and the basis for official action. Nor can we understand why any newspaper or combination of newspapers should have surrendered the document. But pursuing the inquiry still further we find that the regulations made by Mr. Hitchcock in December, 1906, following the favors shown to the Standard by the President, were more drastic still—so obstinate was this brave and sturdy man. In the congressional campaign of that year Mr. Roosevelt again, according to the *Sun*, promised a western senator, who had a grievance against Mr. Hitchcock, that the secretary should be removed the day after the election. Then follows this:

"On Wednesday, the day after election, the President issued a bulletin from the White House in which he virtually fulfilled his promise to the western

senator by announcing the forthcoming retirement of Mr. Hitchcock, but explaining that the secretary was going out of his own volition and much against the President's wishes. The regulations of December, 1906, were promulgated on the eve of Secretary Hitchcock's retirement from office. The Standard Oil Company defied the Interior Department and refused to apply for permits under the regulations of 1906. The company announced that it was acting upon the advice of its counsel in refusing to avow itself a common carrier as required by the Hitchcock regulations of 1906. In April, 1908, Secretary Garfield sent for President O'Neill, of the Prairie Oil and Gas Company, and agreed to waive the common carrier requirement of the regulations of 1906 to which the Standard Oil Company objected."

Here, as in the canal case, the people are justified in believing the worst. For the records are in the control of the accused men. A man of national reputation is quoted by the *Sun* as saying: "Yes, the report is there, but President Roosevelt dare not let its contents be known." Perhaps Congress can find a way to get at the truth. These two matters should be made the subject of a thorough congressional investigation, an investigation in which former Secretary Hitchcock should be the leading witness. Really is it any wonder that Mr. Rockefeller supported Mr. Taft? Is it any wonder that the Standard thought it wise to give, through its officers, $100,000 to Theodore Roosevelt's campaign fund? It is well that the people should realize that the departments at Washington belong to them, that their records are public records. This business of smothering things has gone quite too far. It is high time to turn on the light. At least we ought to know who got the canal money, and just what was the arrangement made by the President with the Standard, and what were the objections of Mr. Hitchcock to it.

Indianapolis News, December 7, 1908:

TO PROBE PURCHASE OF PANAMA CANAL.

REPRESENTATIVE RAINEY OFFERS RESOLUTION IN HOUSE CALLING FOR INVESTIGATION.

WISHES COMMITTEE NAMED.

DESIRES TO KNOW WHAT WAS DONE WITH ALL THE $40,000,000 PAID FOR THE PROPERTY.

THE INDIANAPOLIS NEWS BUREAU,
44 Wyatt Building.

WASHINGTON, December 7.—Representative Henry A. Rainey, of Illinois, introduced in the House this afternoon a resolution calling for the appointment of a committee of five to investigate the purchase of the Panama Canal property. The resolution follows:

"Resolved, That a committee of five members of the House be appointed by the Speaker to investigate the purchase by the United States of the Panama Canal property with the view of ascertaining how much of the forty million dollars which appears on record to have been paid to the French company was really paid to said company or for stock or holdings of said company, or to the French government for said company; and with a view also of ascertaining how much of said sum, if any, was directly or indirectly paid to American citizens or to American syndicates, and with a view of ascertaining whether any member of either branch of the Congress of the United States in an official capacity profited directly or indirectly by said transaction.

POWER TO MAKE RECOMMENDATIONS.

"Provided, the said committee shall have the power to send for persons and papers and to examine messages and also to employ a stenographer and a clerk. Said committee shall report the result of its investigation to the House with such recommendations as it may deem proper; provided, further, the expenses incurred hereunder shall be paid out of the contingent fund of the House on vouchers approved by the chairman."

Mr. Rainey said: "Toward the close of the national campaign I was selected by the National Democratic Committee to introduce a resolution to investigate the Panama Canal purchase and to press the same in the House of Repre-

sentatives. I expect to speak to the resolution before the Christmas holidays."

Possibly the canal committee of the Senate may decide to investigate the purchase of the canal property. The Democratic members of the committee have the question under consideration.

A CAMPAIGN CHARGE.

During the recent campaign it was charged in newspaper articles that the President's brother-in-law, Douglas Robinson, of New York, and Charles P. Taft, of Cincinnati, brother of the President-elect, had profited by the transaction. It was this charge and newspaper comment thereon which provoked the letter from President Roosevelt to William Dudley Foulke, of Indiana, denying the statements and saying that all the papers in the matter were open to the public.

Indianapolis News, December 7, 1909:

ROOSEVELT BITTER IN SCORING EDITORS.

PRESIDENT ACCUSES THE INDIANAPOLIS NEWS AND NEW YORK SUN OF MENDACITY.

WRITES LETTER TO FOULKE.

SAYS PANAMA CANAL ARTICLES WERE BASED ON UNTRUTHS—STATEMENTS FROM THE EDITORS.

HOT SPRINGS, Va., December 7.—The following correspondence passing between President Roosevelt and William Dudley Foulke has been made public by the latter:

"HOT SPRINGS, VA., November 29.

"The President:

"Sir—*The Indianapolis News*, not only during the campaign, but even after its close, has been repeatedly and continually making serious charges against your administration, as well as against Mr. Taft, in connection with the Panama Canal purchase, as for example, the following:

THE PANAMA MATTER.

" 'The campaign is over and the people will have to vote tomorrow without any official knowledge concerning the Panama Canal deal.

" 'It is charged that the United States bought from American citizens for $40,000,000 property that cost those citizens only $12,000,000. Mr. Taft was Secretary of War at the time the negotiation was closed. There is no doubt that the government paid $40,000,000 for the property. But who got the money? We are not to know. The administration and Mr. Taft do not think it right that the people should know.

" 'The President's brother-in-law is involved in the scandal, but he has nothing to say. The candidate's brother has been charged with being a member of the syndicate. He has, it is true, denied it, but he refuses to appeal to the evidence, all of which is in the possession of the administration and wholly inaccessible to outsiders.

" 'For weeks this scandal has been before the people. The records are in Washington and they are public records. But the people are not to see them—till after the election, if then.'

"Even after the election this has been continued, it being said that Mr. Taft's weakness in Indiana, where he ran many thousands ahead of any other Republican candidate, was due in a great measure to this alleged scandal.

"What are the facts in regard to it? Where are these inaccessible records? When did they come into the possession of the government, and what do they contain? If the statements of *The News* are true, our people ought to know it, if not true, they ought to have some just means of estimating what credit should be given in other matters to a journal which thus disseminates falsehoods.

Yours,

"WILLIAM DUDLEY FOULKE."

THE PRESIDENT'S REPLY.

"WHITE HOUSE,
"Washington, D. C., December 4.

"My Dear Mr. Foulke—I have received your letter of the 29th ultimo, and have read it in connection with your previous letters inclosing quotations from *The Indianapolis News*, a paper edited by Mr. Delavan Smith.

"As Mr. Smith certainly knows that all the statements he made were false, both as to this Panama matter and as to the other matters of which you inclose me clippings, and inasmuch, therefore, as the exposure of the falsity will not affect his future statements, I am not very clear what good will result from such exposure.

"But, inasmuch as you evidently earnestly desire some answer to be made, and inasmuch as you say that some reputable people appear to believe the falsehoods of *The News* and Mr. Smith, and inasmuch as you seem to think that his falsehoods as regards the Panama matter are the most prominent, I will answer them.

NOT ONE DESTROYED.

"*The News* states in one of its issues that probably some of the documents dealing with the matter have been destroyed. This is false. Not one has been destroyed.

"It states that the last documents were sent over in June of this year, the object of this particular falsehood being apparently to connect the matter in some way with the nomination of Mr. Taft. As a matter of fact the last papers that we have received of any kind were sent over to us in May of 1904, and they have been accessible to every human being who cared to look at them ever since, and are accessible now.

"Any reputable man, within or without Congress, Republican or Democrat, has now and always has had the opportunity to examine any of these documents.

"You quote *The News* as stating that 'the people have not official knowledge concerning the Panama Canal deal.'

"The fact is that the people have had the most minute official knowledge; that every important step in the transaction and every important document have been made public in communications to Congress and through the daily press, and the whole matter has been thrashed over in all its details again and again and again.

SAYS THE STATEMENT IS FALSE.

"*The News* gives currency to the charge that 'the United States bought from American citizens for $40,000,000 property that cost these citizens only $12,000,000.' The statement is false. The United States did not pay a cent of the $40,000,000 to any American citizen. *The News* says that there is no doubt that the government paid $40,000,000 for the property and continues: 'But who got the money? We are not to know. The administration and Mr. Taft do not think it right that the people should know.'

"Really this is so ludicrous as to make one feel a little impatient at having to answer it. The fact has been officially published again and again that the government paid $40,000,000 and that it paid this $40,000,000 direct to the French government, getting the receipt of the liquidator appointed by the French government to receive the same.

"The United States government has not the slightest knowledge as to the particular individuals among whom the French government distributed the sum. This was the business of the French government. The mere supposition that any American received from the French government a 'rake off' is too absurd to be discussed.

"It is an abominable falsehood and it is a slander, not against the American government, but against the French government.

"HAS NOTHING TO SAY."

"*The News* continues saying that 'the President's brother-in-law is involved in the scandal, but he has nothing to say.'

"The President's brother-in-law was involved in no scandal. Mr. Delavan Smith and the other people who repeated this falsehood lied about the Presi-

dent's brother-in-law; but why the fact that Mr. Smith lied should be held to involve Mr. Robinson in a 'scandal' is difficult to understand.

"The scandal affects no one but Mr. Smith, and his conduct has been not merely scandalous, but infamous. Mr. Robinson had not the slightest connection of any kind, sort or description at any time or under any circumstances with the Panama matter. Neither did Mr. Charles Taft.

"*The News* says that Mr. Taft was a member of the 'syndicate.' So far as I know, there was no syndicate. There certainly was no syndicate in the United States that to my knowledge had any dealings with the government, directly or indirectly; and inasmuch as there was no syndicate, Mr. Taft naturally could not belong to it.

"*The News* demands that Mr. Taft 'appeal to the evidence,' by which it means what it calls 'the records'—that is, the mass of papers which are stored in the War Department, save such as, because of their technical character and their usefulness in the current work of the canal, it has been found advisable to send to the isthmus.

AVAILABLE TO "ANY REPUTABLE MAN."

"All of these documents that possessed any importance as illustrating any feature of the transaction have already been made public. There remains a great mass of documents of little or no importance which the administration is entirely willing to have published, but which, because of their mass and pointlessness, nobody has ever cared to publish.

"Any reputable man can have full access to these documents. If you or Mr. Swift, or Mr. Booth Tarkington, or Mr. George Ade—in short, if any reputable man will come on here he shall have free access to the documents and can look over everything for himself.

"Congress can have them all printed if it wishes, but no congressman has ever, so far, intimated any desire that this should be done; I suppose because to print such a mass of documents would be a great expense, and moreover, an entirely useless expense, unless, which is not the case, there was some object in printing them.

"Now, my dear Mr. Foulke, I have answered in detail your questions and the statements of *The News*. You are quite welcome to print my answer, but I must frankly add that I don't think any good will come from doing so.

EDITORS ACCUSED.

"Mr. Delavan Smith is a conspicuous offender against the laws of honesty and truthfulness, but he does not stand alone. He occupies, for instance, the same evil eminence with such men as Mr. Laffan, of the *New York Sun*, editorials of whose paper you or others have from time to time called to my attention, just as you have called to my attention these editorials of *The Indianapolis News*.

"I never see an editorial in any one of these or similar papers unless, for some reason, it is sent to me by you or by some one else, and of the editorials thus sent me there is hardly one which does not contain some wilful and deliberate perversion of the truth. For example, I have just made public the following statement concerning a tissue of utterly false statements which appeared in Mr. Laffan's paper, the *Sun*.

A FORMER STATEMENT.

"As the *New York Sun* story entitled 'Roosevelt and Prairie Oil' has seemed to deceive a number of people, the following statement was made public about it:

"'As soon as the story was brought to President Roosevelt's attention he not only called for reports concerning the statements from the Department of Justice and the Department of the Interior, but also communicated with former Secretary Hitchcock so as to be sure that the President's recollection was not at fault.

"'The story is false in every particular from beginning to end. Not only is there no such report in the Department of Justice and never has been, but no such report was ever made.

"'In granting the franchise of the Prairie Oil and Gas Company the President simply approved the recommendations of Secretary Hitchcock, submitted to him precisely as all other recommendations were submitted. Moreover, in every case referring to the granting of franchises or the adoption of regulations as regards oil and gas franchises in Oklahoma and the Indian Territory, the President approved the recommendation with the exception of one small unimportant grant to a Delaware Indian, to whom the Delaware Indians, in recognition of the eight years of service to the tribe, had voted in council a fee of $50,000 which he had declined to accept, and who was given twice the usual amount of land. The statement about the alleged promise to a western senator is as ridiculous a falsehood as the rest of the story.'

"EVERY FORM OF MENDACITY."

"The fact is that these particular newspapers habitually and continually, and as a matter of business, practice every form of mendacity known to man from the suppression of the truth and the suggestion of the false to the lie direct.

"Those who write, or procure others to write, these articles are engaged in the practice of mendacity for hire; and surely there can be no lower form of gaining a livelihood. Whether they are paid by outsiders to say what is false or whether their profit comes from the circulation of the falsehoods is a matter of small consequence.

"It is utterly impossible to answer all of these falsehoods. When any given falsehood is exposed they simply repeat it and circulate another. If they were mistaken in the facts, if they possessed in their make-up any shred of honesty, it would be worth while to set them right. But there is no question at all as to any 'mistake' or 'misunderstanding' on their part. They state what they know to be untrue, or could, by the slightest inquiry, find out to be untrue.

"THEIR OWN FALSEHOODS."

"I doubt if they themselves remember their own falsehoods for more than a very brief period; and I doubt still more whether anybody else does.

"Under these circumstances it seems hardly worth while to single out for special mention one or two given falsehoods or one particular paper, the moral standard of which is as low as, but no lower, than that of certain other papers.

"Of course, now and then I am willing to denounce a given falsehood, as, for instance, as regards this case of *The Indianapolis News*, or the case I have quoted of the *New York Sun*, simply because it appears that some worthy people are misled or puzzled by the direct shamelessness of the untruth. But, ordinarily, I do not and can not pay heed to these falsehoods. If I did I would not be able to do my work.

"My plan has been to go ahead, to do the work and let these people and those like them yell, and then to trust with abiding confidence to the good sense of the American people in the assurance that the yells will die out, the falsehoods be forgotten and the work remain.

LEFT MATTER TO FOULKE.

"Therefore, so far as I am concerned, I would rather make no answer whatever in this case. But I have much confidence in your judgment, and if you feel that these men ought to be exposed you are welcome to publish this letter.

"There is no higher and more honorable calling than that of the men connected with an upright, fearless and truthful newspaper; no calling in which a man can render greater services to his fellow countrymen.

"The best and ablest editors and writers in the daily press render a service to the community which can hardly be paralleled by the service rendered by the best and ablest men in public life or the men in business.

"But the converse of this proposition is also true. The most corrupt financiers, the most corrupt politicians are no greater menace to the country than the newspaper men of the type I have above discussed. Whether they belong to the yellow press or to the purchased press, whatever may be the stimulating cause of their slanderous mendacity, and whatever the cloak it

may wear, matters but little. In any event they represent one of the potent forces for evil in the community. Yours very truly, THEODORE ROOSEVELT.

"William Dudley Foulke, Richmond, Ind."

Indianapolis News, December 7, 1908:

NO PERSONAL MOTIVE.

DELAVAN SMITH'S STATEMENT REGARDING THE PRESIDENT'S LETTER.

[By Associated Press.]

CLEVELAND, December 7.—Delavan Smith, of *The Indianapolis News*, left Chicago at 2:30 o'clock yesterday for New York. He was shown a copy of the letter of President Roosevelt when on the train and made the following reply:

"The President's comments on the Panama editorial are based on statements made by a prominent New York paper, not the *New York Sun*, which *The Indianapolis News* printed at the same time with many other papers, giving full credit to the source from which they obtained it.

"In making the editorial comment to which the President takes exception the editor of *The News* credited its information to the New York paper making the charge and distinctly disclaiming any responsibility for its accuracy.

"This editorial was published in the ordinary course of the daily routine of the editorial department at a time when I was absent from Indianapolis, and, therefore, could not have been inspired by any personal motive.

"During the campaign information reached me that Mr. Foulke had in his possession a letter of the nature of the one now made public, and I was further informed that it was left by the President to Mr. Foulke's judgment whether the letter should be used in the campaign. When this information reached me I at once telephoned Mr. Foulke, extending to him the use of the columns of *The News* for this purpose, but he did not see fit to avail himself of the opportunity during the campaign.

"So much for the personal criticism of me by the President. *The News* will deal editorially with the President's explanation in due time."

Indianapolis News, December 7, 1908:

W. M. LAFFAN'S REPLY.

NEW YORK SUN EDITOR SAYS PRESIDENT IS GUILTY OF QUESTIONABLE ACTS.

[By Associated Press.]

NEW YORK, December 7.—William M. Laffan, editor of the *New York Sun*, replies to President Roosevelt's letter as follows:

"The editor of the *Sun* presents his compliments to Mr. Roosevelt and acknowledges his active sensibility in respect of the attention which Mr. Roosevelt has been good enough to pay him in his letter to the Hon. William Dudley Foulke, of Indiana.

"Notwithstanding the directness of his challenge, the editor of the *Sun* declines a controversy with Mr. Roosevelt. He is by no means indifferent to the implied compliment descernible in Mr. Roosevelt's tirade, but Mr. Roosevelt has shown in his frequent collisions with various persons of distinction that he has an overwhelming advantage over any respectable antagonist in his (Mr. Roosevelt's) complete freedom from any sense of personal obligation in respect of the truth.

"The editor of the *Sun* is fully alive to the extremity of the inconvenience which attaches to a personal controversy with a man who has shown himself capable of suppression and perversion of individual correspondence, an act which, in ordinary life, would, in the cognizance of any club or association of self-respecting gentlemen, entail his prompt expulsion.

"In saying these things we can not disguise our chagrin and humiliation that the person who is addressed is also the President of the United States.

"It is curious that Mr. Foulke is a preferred repository of these confidences of the President. It was to him that Mr. Roosevelt wrote his memorable letter

denying that he was using the federal patronage to aid Mr. Taft's candidacy, a letter which at once took its place among the most valued incunabula of veracity."

Editorial—*Indianapolis News*, December 7, 1908:

THE NEWS AND THE CANAL DEAL.

Disregarding the President's abuse, and disclaiming any desire or ambition to compete with him in the language of invective, we nevertheless feel that it is both our right and our duty to give the facts of our course in relation to the Panama Canal charges. In the first place, it is remarkable that the criticisms of *The News*, which were based largely on the statements of the *New York World*, criticisms which were made over and over again during the campaign, were utterly ignored till today. The only man who paid any attention to them was Mr. Charles P. Taft, who did deny that he was in any way related to the affair. We had no word from the President or Mr. Taft. The other men, such as Cromwell and Morgan, who were believed to have full information in regard to the business, said nothing. But now, after the campaign is over, the President rushes into print (through his familiar) and says, with his usual virulence and violence, that *The News* is a liar.

Now what are the facts? The first is that *The News* is far from being the only paper that ventured to suggest that the silence of all concerned only served to strengthen the suspicion, which was very generally held, that all was not right. The *New York World* was the original authority. The *Chicago Journal* was quite as vigorous as was this paper in its comments. Unless our memory is at fault the *Louisville Courier-Journal* was not wholly unimpressed by the charges. The charges were indeed repeated over and over again, and toward the close of the campaign we, as did others, drew what seemed to be the necessary and inevitable conclusion, that silence was practically tantamount to confession. But now we have the President's denial, which is not made till it is too late for any votes to be affected or influenced by a discussion of the subject. And what does his denial amount to? He only says that the money was not paid to any syndicate or any American citizens, but to the French government. He does not know to whom that government paid the money. The President says:

"The fact has been officially published again and again that the government paid $40,000,000, and that it paid this $40,000,000 direct to the French government, getting the receipt of the liquidator appointed by the French government to receive the same. The United States has not the slightest knowledge as to the particular individuals among whom the French government distributed the sum. This was the business of the French government. The mere supposition that any American received from the French government a 'rake off' is too absurd to be discussed. It is an abominable falsehood, and it is a slander, not against the American government, but against the French government."

The President, in one breath, says that it is absurd to suppose that any Americans got a rake off, and in another, that neither he nor the government knows to whom the French government paid the money! If neither the President nor our government knows who got the money the President can not know but that some American citizens got some of it. This is the sort of denial that the country is asked to accept! The French government could pay the money only to the men holding the securities of the old Panama company. That is what it did. The President says that he does not know who those men were. And yet, possessing no knowledge on the subject, he denies—absolutely, as he confesses, without knowledge—that any of this money found its way into American pockets! Again it is to be remembered that a prominent Frenchman, closely connected with the business, practically admitted that some Americans got the money, and said that he could see nothing wrong in it. From all of which we conclude that the subject is more than ever one into which Congress should inquire.

But the President says that no records were turned over to the government early in June last, and that the last records that came into possession of this government were received in May, 1904. But this charge was made

by those who investigated the affair, and they said that they were unable to get access to the final records, which were turned over to our government when the transaction was finally closed in June of the present year. Our offense consisted solely in accepting this statement as true. It was made on responsible authority, and has never been denied till today. If there is anything "scandalous" or "infamous" in this the scandal and infamy do not attach to *The News*. Even the denial made by the President in behalf of his brother-in-law would have been more impressive had it come from that gentleman himself. As illustrating the President's peculiar method of dealing with matters of this kind, we may refer to his reiteration in this remarkable letter of his denial of the charge of the *New York Sun* in regard to his granting a franchise to a Standard Oil Company in Oklahoma. He prints his denial, but has not one word to say of the *Sun's* reiteration of the charge. Yet this reiteration was made by the *Sun* in its issue of November 26, or five days before the President dated his letter.

The News took the only course that could have been taken by a paper whose policy it is to print the news and to tell the truth about it. The charges were publicly made by a responsible paper—made many times during the campaign, and no attention whatever was paid to them by the President or the men (except Charles P. Taft) said to be involved. And even now the President openly admits that he has no evidence in his possession, has no knowledge on which it is possible to base a denial. He does not know who got the money, and yet he says positively that no American got any of it.

The News had not the slightest desire to misrepresent the facts nor to make unwarranted inferences. It had no purpose or motive but to serve the best interests of the people by publishing what it believed to be pertinent and timely information relating to a matter of public importance. It repeatedly expressed surprise that all the men (except Charles P. Taft) whose names were mentioned in connection with the charges continued to ignore them. On a review of all the circumstances, as they presented themselves at the time, we confess that we are unable to see what other course *The News* could consistently have pursued. As for the President's characteristic personal attack on Mr. Delavan Smith, one of the owners of *The News*, that is a question in which the public can have no legitimate interest. But the canal question is a public question. It is one into which Congress should inquire.

(SEVENTH COUNT OF THE INDICTMENT.)

New York World, December 8, 1908:
Indianapolis News, December 8. 1908:

NEW YORK WORLD STANDS BY CHARGE.

SAYS ROOSEVELT'S DENIAL OF PANAMA CANAL LOOT STORY IS UNTRUE.

UPHOLDS INDIANAPOLIS NEWS.

CALLS ON CONGRESS TO FIND OUT WHO GOT THE $40,000,000 APPROPRIATED FOR THE FRENCH COMPANY.

NEW YORK, December 8.—The *New York World*, to which Delavan Smith, editor of *The Indianapolis News*, referred in his reply to President Roosevelt's attack on him, as the authority for the article on the Panama Canal which appeared in his paper and called forth the President's letter, says today:

"In view of President Roosevelt's deliberate misstatements of fact in his scandalous personal attack upon Mr. Delavan Smith of *The Indianapolis News*, the *World* calls on the Congress of the United States to make immediately a full and impartial investigation of the entire Panama Canal scandal.

"The investigation of 1906 by the Senate committee of the interocean canals was blocked by the refusal of William Nelson Cromwell to answer the most pertinent questions of Senator Morgan, of Alabama. Since that time nothing has been done because after Senator Morgan's death there was no successor to carry on his great work of revealing the truth about Panama corruption.

QUESTION PUT BY THE NEWS.

"*The Indianapolis News* said in the editorial for which Mr. Roosevelt assails Mr. Smith:

"'It has been charged that the United States bought from American citizens for $40,000,000 property that cost those citizens only $12,000,000. There is no doubt that the government paid $40,000,000 for the property. But who got the money?'

"President Roosevelt's reply to this most proper question is, for the most part, a string of abusive and defamatory epithets. But he also makes the following statements as truthful information to the American people:

"'The United States did not pay a cent of the $40,000,000 to any American citizen. The government paid the $40,000,000 direct to the French government, getting the receipt of the liquidator appointed by the French government to receive the same.

"'The United States government has not the slightest knowledge as to the particular individuals among whom the French government distributed the same.

"'So far as I know, there was no syndicate; there certainly was no syndicate in the United States that to my knowledge had any dealings with the government directly or indirectly.'

SAYS PRESIDENT'S STATEMENT IS UNTRUE.

"To the best of the *World's* knowledge and belief each and all of these statements made by Mr. Roosevelt and quoted above are untrue, and Mr. Roosevelt must have known they were untrue when he made them.

"As to the detailed distribution of the Panama loot only one man knows it all. And that man is William Nelson Cromwell. The two men who were most in Mr. Cromwell's confidence are Theodore Roosevelt, President of the United States, and Elihu Root, former Secretary of War and now Secretary of State. It was they who aided Mr. Cromwell in consummating the Panama revolution; arranged the terms of the purchase of the Panama Canal; made the agreement to pay $40,000,000 for the canal properties, and an additional $10,000,000 for a manufactured Panama republic, every penny of both of which sums was paid by check on the United States Treasury to J. P. Morgan & Co.—not to the French government as Mr. Roosevelt says, but to J. P. Morgan & Co.

ACCEPTS ROOSEVELT'S CHALLENGE.

"The natural query of *The Indianapolis News* as to 'who got the money?' was based on the *World's* historical summary of Mr. Cromwell's connection with the Panama Canal. The inquiry was originally the *World's* and the *World* accepts Mr. Roosevelt's challenge. If Congress can have all the documents in the case, as Mr. Roosevelt says, let Congress make a complete investigation of the Panama Canal affair, and in particular of William Nelson Cromwell's relations with the French company, with Panama and with the government of the United States. Let Congress officially answer this question: 'Who got the money?'

"The old French company, organized by Ferdinand de Lesseps in 1879, failed in 1889, years before Mr. Cromwell's relations with President Roosevelt began. As Mr. Cromwell testified before the Senate committee on February 26, 1906, 'we never had any connection with the so-called De Lesseps company. Neither did the United States government conduct negotiations with the old French Panama Canal Company.'

CONTRACT READ BY SENATOR MORGAN.

"What Mr. Cromwell did represent was the New Panama Canal Company, the American Panama Canal Company and the $5,000,000 syndicate which he formed to finance the new companies. After Mr. Cromwell had testified, 'I do not recall any contract,' Senator Morgan produced a contract reading (Panama Canal hearing, Volume 2, page 146): 'Mr. William Nelson Cromwell is exclusively empowered under the formal agreement with the board of directors of the Compagnie Nouvelle du Canal de Panama (New Panama Canal Company of France) to effect with an American syndicate the Americanization of the Panama Canal Company on the following basis.'

"The basis on which Mr. Cromwell was 'exclusively empowered' in this contract was that an American Panama Canal Company with a capitalization of $60,000,000 preferred and $45,000,000 common should be organized to take over the Panama Canal concessions and all other property belonging to the New French Panama Canal Company, which had bought the same from the old De Lesseps company. This company was incorporated in New Jersey with dummy directors. There was also incorporated in New Jersey, with dummy directors, the Interoceanic Canal Company.

THE SYNDICATE AGREEMENT.

"Senator Morgan unearthed a copy of the $5,000,000 syndicate agreement, which provided that the subscribers should contract with William Nelson Cromwell to pay in $5,000,000 in cash and to take their several allotments in the enterprise.

"Five million dollars was more than ample to buy the majority of the old Panama stock. As the *World* said on October 25:

" 'Mr. Cromwell applied to the canal situation the methods of American high finance, by which a syndicate takes over the property of a bankrupt concern, then creates a holding company and recapitalization, keeping the majority control in a syndicate trusteeship.'

"Following that, to quote from Mr. Cromwell's testimony: 'In May, 1904, I, representing the New Panama Canal, and Judges Day and Russell, representing Attorney-General Knox, consummated the transfer and sale to the United States.'

ROOSEVELT'S MISSTATEMENTS.

"Mr. Roosevelt says 'the government paid this $40,000,000 direct to the French government.'

"Mr. Cromwell testified that the United States paid the money to J. P. Morgan & Co.

"Mr. Roosevelt says 'the French government distributed the sum.'

"Mr. Cromwell testified as to how he distributed it.

"Mr. Roosevelt talks of 'getting the receipt of the liquidator appointed by the French government to receive the same.'

"Mr. Cromwell testified: 'Of the $40,000,000 thus paid by the United States government, $25,000,000 was paid to the liquidator of the old Panama Canal Company under and in pursuance of an agreement entered into between the liquidator and the new company. Of the balance of $15,000,000 paid to the New Panama Canal company, $12,000,000 have already been distributed among its stockholders and the remainder is now being held awaiting final distribution and payment.'

TESTIMONY TAKEN BY THE SENATE.

"What follows is further eloquent testimony taken by the Senate committee:

" 'Senator Taliaferro—There is $3,000,000?'

" 'Mr. Cromwell—Three million; yes, sir.'

" 'Senator Taliaferro—Who holds that money?'

" 'Mr. Cromwell—The New Panama Canal Company in its treasury!'

"And yet Mr. Roosevelt says that 'the United States government has not the slightest knowledge' as to the distribution of the $40,000,000, and that 'this was the business of the French government.'

"As to Mr. Roosevelt's statement that 'there was no syndicate,' he could have read the 'syndicate subscription agreement' on page 1150, volume 2, of the testimony before the committee on interoceanic canals—if he had cared for the truth.

SENOR DUQUE'S TESTIMONY.

"That the United States government was not dealing with 'the French government' or 'the liquidator appointed by the French government,' or with Colombia, or with Panama, or with any one else except William Nelson Cromwell and his associates, is made still more plain by the description of Senor J. Gabriel Duque as to the Panama revolution, and as to the manner in which Mr. Cromwell got $10,000,000 additional from the United States treasury. Senor Duque said:

"'Mr. Cromwell made the revolution. He offered to make me president of the new republic and to see me through if I would raise a small force of men and declare a secession from Colombia. He made promises that we should have the help of his government. It was accomplished by a liberal use of money. We bought this general and that one, paying $3,000 to $4,000 per general. The Colombian officers were all paid off and the Colombian general who was sent to stop the revolution was also bought off.'

WHO COMPOSED THE COMPANY?

"Then Mr. Cromwell, having been elected by the Panama Republic as general counsel, and he and J. Pierpont Morgan having been appointed a 'fiscal commission,' negotiated with President Roosevelt, by which the United States paid $10,000,000 more to 'the fiscal commission,' for Mr. Cromwell's Panama Republic. Of this money, three-quarters is still under the control of the 'fiscal commission.'

"Why did the United States pay $40,000,000 for a bankrupt property whose control could undoubtedly have been bought in the open market for less than $4,000,000?

"Who were the Panama Canal Company?

"Who bought up the obligations of the old Panama Canal company for a few cents on the dollar?

WHO GOT THE $15,000,000?

"Among whom was divided the $15,000,000 paid to the New Panama Canal company?

"Whether Douglas Robinson, who is Mr. Roosevelt's brother-in-law, or any of Mr. Taft's brothers associated himself with Mr. Cromwell in Panama exploitation, or shared in these profits, is incidental to the main issue of letting in the light.

"Whether they did or did not, whether all the profits went into Nelson Cromwell's hands, or whatever became of them, the fact that Theodore Roosevelt, as President of the United States, issued a public statement about such an important matter, full of flagrant untruths, reeking with misstatements, challenging line by line the testimony of his associate, Cromwell, and the official record makes it imperative that full publicity come at once through the authority and by the action of Congress."

Indianapolis News, December 8, 1908:

JOSIAH QUINCY'S STATEMENT.

WHY THE DEMOCRATIC NATIONAL COMMITTEE DID NOT USE THE STORY.

CINCINNATI, December 8.—A dispatch to the *Enquirer* from Boston says that a statement that the Democratic campaign committee seriously considered the advisability of publishing as campaign literature the Panama Canal steal story for which *The Indianapolis News* was "liarized" by President Roosevelt, was made public here last night by Josiah Quincy, a member of Chairman Mack's advisory committee. Mr. Quincy told the details surrounding the offer of the story, of its consideration by the committee and of the final decision not to publish it. "Although," Mr. Quincy quickly added, "proof—alleged proof, perhaps I had better say—came with the story, and it was not for this reason that we decided not to acquire the matter."

The story, with the alleged proof and with all of the facts, was offered to Chairman Mack in New York by a number of New York men who, apparently, had collaborated in collecting the facts and corroborating them. One of these men was Col. Alexander S. Bacon, who, according to the statement he made to the committee, was not acting on his own responsibility, but had been called into the matter by several prominent New York business men who had asked him to go to Paris and investigate certain facts and corroborate certain statements. He did this, he said, and assured himself of the truth of the story.

Several of the leading Democratic leaders had been communicated with before the Chicago convention, but all formal negotiations were delayed until Mr. Mack was selected as national chairman. Then the matter was taken up

with him. Mr. Mack took it up with the full advisory committee, for they realized the importance of the story, and it was decided to refer the whole matter to a subcommittee of three composed of Josiah Quincy, of Massachusetts; former Mayor McGuire, of Syracuse, N. Y., and Senator Culberson.

MR. QUINCY'S VERSION.

"We thoroughly investigated this story," said Mr. Quincy tonight.

"I may say that we had it under consideration for several weeks, and studied it from every angle before we decided that it was a matter that, at that time, was not of any political use to the committee, and we recommended that it be not used.

"I am not personally sure whereof I speak now, but it is my impression that we were to pay nothing for the story. It seems probable that the man who offered it was a person whose loyalty caused him to aid the party all possible.

"You may say, also, that it was not out of consideration for the feelings of the administration in Washington any more than it was lack of proof—alleged proof, mind you, for I want not to join the Ananias club—that kept us from using the matter.

"It was simply a matter of political exigencies. I do not care to go into the exact reason for this. It may have been because we did not think it would accomplish the purpose for which it was submitted, and, on the other hand, it may have been other things.

"Personally, I want to say one other thing. One with half an eye can readily see that the statements made by certain persons that the entire $40,000,000, the price of the canal, was sent to France are true. There is no doubt but it was sent, but, on the other hand, you can see that does not mean that any of that amount did not come back to Wall street in the shape of drafts after it reached France."

Mr. Quincy is one of the most prominent lawyers of New England. He is closely connected with the Shawmut National Bank, which is the New England agent for the Rockefeller banks of New York, so Mr. Quincy may know whereof he speaks, relative to drafts.

Indianapolis News, December 8, 1908:

PROPOSED INVESTIGATION.

DEMOCRATIC LEADERS IN CONGRESS ARE CONSIDERING THE MATTER.

[Special to *The Indianapolis News*.]

WASHINGTON, December 8.—The Democratic leaders in Congress will decide within a day or two whether they will ask for an investigation of the purchase of the Panama Canal property. Informal conferences on the proposed inquiry were held today. In view of the fact that a part of the transaction took place in France, the Democratic senators feel that any thorough investigation would require the co-operation of the French government. Whether this co-operation could probably be obtained is one of the questions now being looked into. The Senate committee on oceanic canals is now empowered, under the Gorman resolution of a previous session, to proceed with an investigation without any action on the part of the Senate.

Cincinnati Times Star, December 8, 1908:
Indianapolis News, December 8, 1908:

CHARLES P. TAFT'S VIEW.

SAYS PANAMA ARTICLE WAS PRINTED SOLELY FOR POLITICAL REASONS.

CINCINNATI, December 8.—The *Cincinnati Times-Star*, of which Charles P. Taft is editor and proprietor, today published the following reply to the articles on the Panama Canal which appeared in *The Indianapolis News* and *New York World:*

"The *New York World*, the paper which was responsible for most of the talk about the 'Panama Scandal' during the recent campaign, says, this morning: 'Whether Douglas Robinson, who is Mr. Roosevelt's brother-in-law, or any of Mr. Taft's brothers associated himself with Mr. Cromwell in Panama exploita-

tion, or shared in these profits, is incidental to the main issue of letting in the light.'

"This statement is intentionally misleading. The Panama story was used in the campaign for political reasons solely. The one thing that gave it its political value in the eyes of those who used it was the fact that the story, as printed, carried the names of a brother of the Republican candidate for the presidency and of a brother-in-law of the President. The inference was plain enough. It was that Theodore Roosevelt and William H. Taft had used their influence as high officials of the United States government to help near relatives in looting the treasury at Washington. That was the meat of the story. If the names of Douglas Robinson and Charles P. Taft had not been included in it, flimsy and absurd as it was, the lying yarn would never have been used by the *World*, *The Indianapolis News* and other papers which, for one reason or another, wanted to defeat Mr. Taft and discredit Mr. Roosevelt.

"The *World* is trying to dodge the issue. It wants to be relieved of the responsibility of trying to drag the names of Mr. Robinson and Mr. Taft into its made-to-order mess of scandal and slime.

"Both the *World* and *The Indianapolis News* are crying, 'Let in the light.' We thoroughly agree with them. But after a little time has passed, after the most desperate efforts of the cornered *World* and *News* have produced all the evidence they can, an apology will be in order from those newspapers.

"In the meantime, Mr. Taft reserves the right to take legal steps, which possibly have been made more desirable by the events and insinuations of the last forty-eight hours."

Editorial—*Indianapolis News*, December 10, 1908:

WHO GOT THE MONEY?

The question in the Panama Canal case is not so much to whom the money was immediately paid, but who got it? This is a question which the President confesses his inability to answer, though he says that it is absurd to suppose that any Americans got a "rake off." Yet the *World* shows that Cromwell organized a new Panama Canal Company which took over the property of the old company and entered into relations with both this government and the holders of the stock of the old company. Though the President says there was no "syndicate," it was shown by the late Senator Morgan, who conducted the examination on the part of the Senate committee, that there was such a syndicate, and that its members contracted with Cromwell to pay in $5,000,000 in cash and to take their several allotments in the enterprise. And here is what Cromwell said as to the disposition of the money received from the United States as quoted by the *World:*

"Of the $40,000,000 thus paid by the United States government, $25,000,000 was paid to the liquidator of the old Panama Canal Company under and in pursuance of an agreement entered into between the liquidator and the new company. Of the balance of $15,000,000 paid to the New Panama Canal Company $12,000,000 have already been distributed among its stockholders, and the remainder is now being held awaiting final distribution and payment."

This $3,000,000 was then held in the treasury of the New Panama Canal Company, the one organized by Cromwell, incorporated under the laws of New Jersey for the purpose of acquiring the property of the old company, which was to be sold to the government. The question thus is: Who were the stockholders in this Cromwell company? If there were any Americans in it then Americans did get a large share of the purchase money. For Cromwell admits that the company got $15,000,000 of the $40,000,000 paid by the government. It is known that Cromwell arranged the whole business; that he was the most conspicuous man in the negotiations; that he was the organizer of the company that dealt with the government. The question thus seems to be, not whether certain Americans were in on the divide, but who those Americans are. There is further testimony to the existence of an American syndicate, testimony that is set out by the *World*. For Senator Morgan produced a contract which read as follows:

"Mr. William Nelson Cromwell is exclusively empowered under the formal agreement with the board of directors of the Compagnie Nouvelle du Canal de

Panama (New Panama Canal Company of France) to effect with an American syndicate the Americanization of the Panama Canal Company on the following basis."

Not stopping to discuss the "basis," we only say that there was not only a syndicate, but an American syndicate. So the question is, "What Americans got the money?" That some of them did get some of it we take as proved.

Indianapolis News, December 10, 1908:

CROMWELL WAS THE SOLE NEGOTIATOR.

REPRESENTED THE FRENCH COMPANY IN SALE OF PANAMA CANAL COMPANY.

KNOWS ABOUT THE SCANDAL.

YET REFUSED TO SHED LIGHT ON IT WHEN QUESTIONED BY THE SENATE COMMITTEE.

THE INDIANAPOLIS NEWS BUREAU,
44 Wyatt Building.

WASHINGTON, December 10.—The Senate committee on interoceanic canals has made one effort to get at the facts relating to the Panama Canal deal. In the fall of 1905 there was much talk here at the capital about the advisability of having an investigation. In a message dated January 8, 1906, President Roosevelt said:

"The zeal, intelligent and efficient public service of the Isthmian Canal Commission and its subordinates are noteworthy. I want the fullest, most exhaustive and most searching investigation of any acts of theirs, and if any one of them is shown ever to have done wrong his punishment shall be exemplary."

On receipt of that message the Senate adopted a broad and specific resolution instructing the committee on interoceanic canals to conduct an investigation. Among the witnesses called was William Nelson Cromwell, of New York. Mr. Cromwell testified (see questions 51 to 54) that he was the sole negotiator representing the canal company in the sale of its property to the United States in 1904, and that his contract included the prior negotiations which were conducted in 1902.

CROMWELL DECLINED TO ANSWER.

Acting on the advice of the President of the United States, that there be "the fullest, most exhaustive and searching investigation" of the whole canal affair, members of the Senate committee sought to get all the facts from Mr. Cromwell when he was called to the stand. But Mr. Cromwell declined to answer the pertinent questions put to him. He took refuge behind his alleged privileges as a lawyer and so the investigation shed little light on the subject.

Here is the verbatim report of Senator Morgan's final attempt to obtain information from the man who conducted the sale of the French property to the United States, and who also held employment with the United States:

SENATOR MORGAN: Mr. Cromwell, I have been designated by the committee to repeat to you the questions which you have hitherto refused to answer; and before doing so I will ask the clerk to read to you the resolution under which we are now proceeding:

CROMWELL BEGGED TO BE EXCUSED.

The clerk read as follows:

"Resolved, by this committee, That the witness, William Nelson Cromwell, be required to answer questions propounded to him as set forth in the record of the proceedings of the committee which he has refused to answer, unless the committee shall excuse him from answering any specific question."

SENATOR MORGAN: On page 1142 of the Record the following statement appears:

"Senator Morgan—What was the first work that you did in America for the Panama Canal Company?

"Mr. Cromwell—I must beg to be excused, senator, from the pursuit of that subject as that is a professional confidence.

"Senator Morgan—Is the fact that you had lawsuits, or gave advice, or anything of that sort a professional secret?

"Mr. Cromwell—In respect of the business of the Panama Canal Company our relations are professional and confidential, and I must beg to be excused from relating their business."

The question is: "What was the first work that you did in America for the Panama Canal Company?" What is your answer?

SENATOR HOPKINS: Where is the materiality of that question? It has to be material to the subject matter that we are considering.

SENATOR MORGAN: I understand that the committee have passed upon that question. In requiring the witness to answer they have passed upon the question of materiality. What is your answer, Mr. Cromwell?

FALLS BACK ON PROFESSIONAL DUTY.

Mr. CROMWELL: With all respect to the committee, I must decline to answer the question, as such answer would be a violation of my professional duty. My knowledge and information about the matter was derived in the course of my professional employment, and solely because of such employment. The answer would oblige me to disclose information affecting the interests of my client derived from professional employment, and would compel me to disclose its private business affairs. The answer would disclose private business matters which are not within the power of the committee to investigate. In declining to answer I wish again to state that I do so with the profoundest respect for the committee. As you know, and as is shown by the record of the committee, to which I beg leave to refer, I have been repeatedly examined and have answered innumerable questions. So far as concerns the affairs of the Panama Railroad Company, I have felt that the interests of no private clients were involved, and I have answered most fully and exhaustively. I have not refused to disclose information relevant to the inquiry which the committee has been authorized to make, in so far as it does not involve the disclosure of private business matters.

SENATOR MORGAN: So you refuse to answer the question?

Mr. CROMWELL: For the reasons I have stated, senator; yes, sir.

AGAIN DECLINES TO ANSWER.

SENATOR MORGAN: On page 1143 the following statement appears:

"Senator Morgan—What was the principal work that you first did for the Panama Canal Company in America?

"Mr. Cromwell—I do not recall what I did at any time in their affairs, and if I did I should not feel at liberty to state their business."

What is your answer to that? What was the principal work that you first did for the Panama Canal Company in America?

Mr. CROMWELL: I make the same reply, sir, with the same explanation.

SENATOR MORGAN: On the same page of the record, I believe it is, the following statement occurs:

"Senator Morgan—Did you conduct any business for them in America?

"Mr. Cromwell—I beg to be excused from a reply to that."

Mr. CROMWELL: I make the same reply, sir, with the same explanation.

BEGS TO BE EXCUSED AGAIN.

The CHAIRMAN: Please proceed with your questions then, Senator Morgan.

SENATOR MORGAN: Very well.

The next question that you declined to answer is as follows (page 1143):

"Senator Morgan—Did you conduct any business for them in America?

"Mr. Cromwell—I beg to be excused from a reply to that."

Do you still refuse to answer that question?

Mr. CROMWELL: I make the same reply, senator, with the same explanation as that which I gave in connection with my answer to your first question this morning.

SENATOR MORGAN: You refuse to answer the question?

Mr. CROMWELL: For the same reason; yes, sir.

SENATOR MORGAN: The next is (page 1143):

"Senator Morgan—What was your salary as general counsel of that company?

"Mr. Cromwell—I beg to be excused from reply."

Do you refuse to reply?

Mr. CROMWELL: I have answered the question. The context shows that I have already made reply upon that question.

SENATOR MORGAN: You refuse to reply?

MAKES THE SAME REPLY.

Mr. CROMWELL: Further than I have, yes, sir; in the record of the case, for the same reason and with the same explanation that I have already given in answer to your first question.

SENATOR MORGAN (reading from the same page):

"Senator Morgan—You do not propose to tell anything about what you did or what you received from that company?

"Mr. Cromwell—I do not consider myself at liberty to discuss the professional relations of a client."

Did you mean thereby to refuse to tell?

Mr. CROMWELL: I make the same reply, sir, with the same explanation.

SENATOR MORGAN: Make your reply to that.

Mr. CROMWELL: Yes, sir; the same reply.

SENATOR MORGAN: You refuse to tell, and you still refuse to tell?

Mr. CROMWELL: I make the same reply that I did in the first instance.

SENATOR MORGAN: No, no. Answer my question directly. You did refuse and you still refuse to reply to that question?

Mr. CROMWELL: I decline to answer for the reasons already given in respect to my first answer, and with the explanations accompanying it.

"I BEG TO BE EXCUSED."

Senator Morgan again (reading from same page):

"Senator Morgan—You have mentioned already that you received $200,000 from them, and that it was in installments, not annually exactly, but as you called for them. You have mentioned that fact. Was that a professional confidence?

"Mr. Cromwell—I have mentioned it, sir, out of good nature, perhaps.

"Senator Morgan—Was that in payment for work that you did in the United States?

"Mr. Cromwell—I beg to be excused from replying. My service was general and broad, and covered trips to Europe and—"

Did you intend to refuse to answer that question—"Was that payment for work that you did in the United States?"—was that your intention to refuse to answer that question?

Mr. CROMWELL: I have already answered, sir, as fully—

SENATOR MORGAN: That will not do any more. You must answer these questions, and not say: "I have already answered."

Mr. CROMWELL: I decline to answer other than I have already answered.

SENATOR MORGAN: You refuse to answer that question?

Mr. CROMWELL: I do, sir, with the explanation and statement I have already made in connection with the first answer.

FOR PROFESSIONAL SERVICES.

SENATOR MORGAN (reading from the same page):

"Senator Morgan—Were they paying you for your personal influence upon the United States or the people of the United States and the Congress of the United States, or were they paying you for professional services?

"Mr. Cromwell—For professional services.

"Senator Morgan—Exclusively?

"Mr. Cromwell—Yes, sir.

"Senator Morgan—And, although you stated that you received $200,000 from them, you decline to state any business that you did for them at all?

"Mr. Cromwell—I do.

"Senator Morgan—And you cover that under a professionel confidence?

"Mr. Cromwell—I do, and also because I think this committee has no power to go into such subjects, but that I do not pass upon."

NO CHANGE IN HIS ANSWER.

The question was, "Were they paying you for your personal influence upon the United States or the people of the United States and the Congress of the United States, or were they paying you for professional services?" What is your answer to that?

Mr. CROMWELL: My answer is now as it was then.

SENATOR MORGAN: Exclusively for professional services?

Mr. CROMWELL: Yes, sir.

SENATOR MORGAN: The next question is (page 1143):

"Senator Morgan—And, although you stated that you received $200,000 from them, you decline to state any business you did for them at all?

"Mr. Cromwell—I do."

SENATOR MORGAN: Do you still refuse?

Mr. CROMWELL: Yes, sir; for the same reason and with the same explanation.

SENATOR MORGAN: Referring to page 1143 of the record, I read:

"Senator Morgan—Was your business in anywise connected with the lobbying of measures of the Panama Railroad Company through Congress?

"Mr. Cromwell—No, sir.

"Snator Morgan—Or advocating them before committees of Congress?

ONE QUESTION ANSWERED IN PART.

"Mr. Cromwell—I have appeared before committees of Congress.

"Senator Morgan—At the instance of that company?

"Mr. Cromwell—Yes, sir; as counsel for the company.

"Senator Morgan—That is one thing that we have got anyway. Were you paid for that? Have you been, to any extent, and what?

"Mr. Cromwell—I can not differentiate, senator, and I must decline to go further into that subject. I have rendered no bill for individual services.

"Senator Morgan—I did not suppose that you had rendered any bill and I did not ask you if you had. I asked whether or not you had been paid for the service in whole or in part?

"Mr. Cromwell—I decline to proceed further into the discussion of that topic."

Do you still decline to make answers upon the questions that were then propounded to you as I have read them?

Mr. CROMWELL: I do, sir; and for the same reason and with the same explanation that I stated in answer so fully to the first question that you propounded to me this morning.

"A PROFESSIONAL CONFIDENCE."

SENATOR MORGAN (reading from page 1145 of the record):

"Senator Morgan—What arguments or propositions or offers did you make as the counsel of the Panama Canal Company to other persons besides those you addressed to the President of the United States, to the Secretary of State and to the chairman of the committee on inter-state and foreign commerce of the House?

"Mr. Cromwell—I decline to answer on the ground that it is a professional confidence."

Do you still decline on that ground?

Mr. CROMWELL: Yes, sir.

SENATOR MORGAN: You refuse to answer?

Mr. CROMWELL: Yes, sir, for the same reason and with the same explanation.

SENATOR MORGAN: You still refuse?

Mr. CROMWELL: Yes, sir.

SENATOR MORGAN (reading from page 1146):

"Senator Morgan—Do you decline to answer in explanation of what you have stated in those written communications?

"Mr. Cromwell—I do.

"Senator Morgan—You do?

"Mr Cromwell—Yes, sir.

"I WILL NOT" EXPLAIN.

"Senator Morgan—You will give no explanation of them?

"Mr. Cromwell—I will not."

Do you still refuse to give any explanation of them?

Mr. CROMWELL: I do, sir, for the same reasons and with the same explanation that I have already given.

SENATOR MORGAN (reading from the same page):

"Senator Morgan—You seem disposed to treat the subject with contempt. I do not understand that. You had a contract with the Panama Canal Company which bears date November 21, 1899. Do you recall that contract?

"Mr. Cromwell—What contract?

"Senator Morgan—The contract made with the canal company on November 21, 1899.

"Mr. Cromwell—I do not recall any contract, senator.

"Senator Morgan—Do you recall any power of attorney or authorization that they gave to you of that date?

"Mr. Cromwell—I do not recall it by its date; no, sir. There may have been some instrument that passed at that time, but the date does not identify it to me.

"Senator Morgan—I will read the first part of it to you to see whether you recall it (reading):

"'Mr. William Nelson Cromwell is exclusively empowered under the formal agreement with the board of directors of the Compagnie Nouvelle du Canal de Panama (New Panama Canal Company of France) to effect with an American syndicate the Americanization of the Panama Canal Company under the following basis'

"Do you recall that?

"A PROFESSIONAL SECRET."

"Mr. Cromwell—I recall that there was a proposal of that kind.

"Senator Morgan—That was not made with you as general counsel, was it?

"Mr. Cromwell—Yes, sir.

"Senator Morgan—Is that a professional secret?

"Mr. Cromwell—Yes, sir."

TESTIMONY OF WILLIAM NELSON CROMWELL, READ AT THE HEARING BY MR. WINTER.

Senator MORGAN (showing witness written plan for Americanization of Panama Canal, p. 282 *ante*): Did you prepare that paper?

Mr. CROMWELL: I decline to answer.

Q.: On what ground?

A.: On the ground that it is a professional communication.

Q.: I will read this first paragraph again: "Mr. William Nelson Cromwell is exclusively empowered under the formal agreement with the board of directors of the Compagnie Nouvelle du Canal de Panama (New Panama Canal Company, of France) to effect with an American syndicate, the Amerizanization of the Panama Canal Company, under the following basis."

A.: *That was a fruitless suggestion of the company, which came to naught, and under which I acted as their counsel solely.* For that reason I decline to enter into a discussion of it any more than I would any other affair of theirs.

Q.: You put it upon the ground that it was a professional arrangement with that company

A.: Yes, sir.

Q.: Well, if so, why do you stipulate in this proposition that William Nelson Cromwell shall receive the fees that were coming in consequence of any legal services?

A.: *It does not say so.*

Q.: Well, what does it say, then? I will see.

The CHAIRMAN: Is that paper signed? I did not hear any signatures read. Are there any signatures attached to that paper?

Senator MORGAN: No, sir; there are no signatures to it, and none needed, when a party swears that he executed such a contract.

Mr. CROMWELL: *It is not a contract; it is an abortive project. Nothing was ever done under it.*

Senator KITTREDGE: Senator Morgan, have you asked the one question that you desired to ask before answering the question that I suggested?

Senator MORGAN: I have read that to him, and he has made a statement in regard to it. Have you a copy of the "agreement with the board of directors of the New Panama Canal Company to effect with an American syndicate the Americanization of the Panama Canal Company upon the following basis"? Have you a copy of that agreement?

Mr. CROMWELL: I beg to be excused from pursuing that subject, because it involves confidential and professional relations. I do not wish to be impolite, and I do not wish to be constantly making the statement that may seem a little harsh; but I say, once and for all, that all these matters are confidential.

Q.: Did you obtain an act of incorporation in New York or New Jersey for the purpose of carrying this agreement into effect?

A.: I decline to answer, for the same reason.

Q.: Mr. Cromwell, yesterday in speaking of a paper that is in the record, concluding on page 1150 of this testimony, you say of that paper: "It is not a contract. It is a power of attorney to me, as general counsel of the company, written in my name, to accompany broad plans which the board of directors considered. It never matured into anything. It never was consummated, either by subscription or by assent, and it is obsolete and an impracticable thing—proved so to be. It has no life or force of being, did not exist, and never has existed, and is as dead as a door-nail." Was it ever signed?

A.: I will make, Senator, the same reply I have heretofore.

Q.: What is that?

A.: That the whole subject is covered by the seal of professional confidence.

Q.: How long would that professional lockjaw last—from the time you were first employed down to this date?

A.: It exists now.

Q.: When did it begin?

A.: It began with my employment, and continues now.

Q.: When was that? When was the employment?

A.: When was my employment by the New Panama Canal Company?

Q.: Yes, sir.

A.: In 1896.

Q.: And this in 1906. You apply that cloture to all questions asked of you in regard to all of your transactions from that time to this in connection with that company, do you?

A.: I do, sir.

Q.: Yes, and you refuse to state anything that you have done in connection with their business from 1896 down to 1906?

A.: I refuse to state.

(By direction, the stenographer read aloud the last question.)

A.: I will reply to specific questions, Senator; I cannot reply to general questions.

Q.: I understood you to say broadly that you would not answer any question that was connected with the business that you were engaged in for the Isthmian Canal Company.

A.: You mean for the New Panama Canal Company?

Q.: I mean for the New Panama Canal Company, or in that connection. You do?

A.: I do so state.

Q.: That seems to be broad enough. I do not see how it could be any broader. Now, was all the business that you transacted in connection with that company from that date—1896 to 1906—professional?

A.: Yes, sir.

Q.: Was this contract you made with them professional?

A.: That is not a contract.

Q.: What is it?

A.: It speaks for itself.

Q.: What do you call it?

A.: I do not choose to call it anything.

Q.: You have called it something. You called it an abortion yesterday, did you not?

A.: I did not.

Q.: Well, the record states that you did.

A.: The record states that you stated so. I did not. I said it was "abortive."

Q.: "Abortive"—oh, yes; we change to the adjective phrase.

A.: You used the phrase; I did not.

Q.: In what sense do you use that word "abortive"?

A.: I do not care to make any further explanation of it, Senator.

Q.: Do you use it to show that it was never executed—I mean that the papers were never signed?

A.: I do not care to make any further explanation of it.

Q.: Or do you use it to show that it was never carried out?

A.: I make the same reply.

Q.: What efforts did you make to carry it out?

A.: I make the same reply.

Q.: To whom did you submit it for the purpose of carrying it into effect?

A.: I make the same reply.

Q.: What person not connected in any way with the Panama Canal did you submit that to in order to carry it into effect—to get them to co-operate with you in your effort?

A.: I make the same reply, Senator.

Q.: It is called a plan for the "Americanization" of the canal. What does that mean? What is the meaning of the word "Americanization"?

A.: I have no explanation to make, Senator.

Q.: Do you know?

A.: I have no explanation to make, sir.

Q.: Do you know?

A.: I have no explanation to make. If I have any knowledge, it is knowledge acquired in my professional capacity.

Q.: Have you any knowledge——

A.: I have no knowledge.

Q. (continuing): in regard to that subject—why it should be called a plan for the Americanization of the canal?

A.: Whatever knowledge I have acquired upon that subject I have acquired in a professional capacity.

Q.: Did you not originate that phrase yourself?

A.: Whatever duty I performed in the subject was done in a professional capacity.

Q.: Did you not project the plan of Americanizing the canal through that syndicate agreement?

A.: I decline to answer for the same reason.

Q.: What was done by any other person, within your knowledge, not connected with the canal company, to carry that contract into effect?

A.: I make the same reply.

Q.: To whom did you distribute copies of that contract and project for the purpose of getting them to assist in it by subscriptions?

A.: I make the same reply.

Q.: Did you submit it to anybody?

A.: I make the same reply.

Q.: What was your purpose in projecting and attempting to execute that contract?

A.: I make the same reply.

Q.: You got a corporation created in New Jersey, did you not?

A.: I make the same reply.

Q.: You are a subscribing witness to that act of incorporation?

A.: I make the same reply, sir.

Q.: Did you prepare it?

A.: I make the same reply, sir.

Q.: The records of the government in New Jersey show that you obtained that corporation, and that you are a subscribing witness to it. Why did you

not object to making that communication to the world at that time, if it was professional?

A.: I make the same reply, sir.

Q.: Having made it, why do you object to testifying in regard to it?

A.: I make the same reply, sir.

Q.: You are not shutting out any information by these facts that I know of. Mr. Cromwell, did you have any part in any conference with Bunau-Varilla, or in any conference with Mr. Hay, or in any conference with any of the authorities of the Republic of Panama, in negotiating the treaty called the Hay-Varilla treaty?

A.: I make the same reply.

Q.: What is that reply?

A.: That all my service in every respect was as counsel of the New Panama Canal Company and covered by the obligation of professional confidence.

SENATOR MORGAN: Was that the same broad, philanthropic or patriotic sentiment that caused you to take out that charter?

Mr. CROMWELL: Senator, I have declined to answer so often that I think I had better get a phonograph to repeat it to you.

Q.: If you will be good enough to remember that you are under oath and a witness—

A.: I remember both, sir.

Q. (continuing): and answer the questions we will get along better.

A.: I remember both, sir; and I repeat the answer again.

Q.: What is the answer?

A.: That I decline to answer on the ground that it is a privileged communication.

Q.: Why was it privileged?

A.: That is my answer, sir.

Q.: Why was it privileged? State how and why.

A.: I have already answered, sir, and I shall answer no further.

Q.: You have not answered that question. It has never been put to you before. How and why is that a privileged matter or question?

A.: Because it arises in the course of my employment as general counsel of the New Panama Canal Company.

Q.: And you refuse, therefore, to acknowledge or to state anything about your being a subscribing witness to that incorporation charter which is printed in the laws of New Jersey?

A.: I decline for the same reason.

Q.: Who was your correspondent down there?

A.: I had nothing to do with that subject.

Q.: Who was your correspondent down there?

A.: I must beg to be excused if you are going to go into the matter of my professional relations to the canal company.

Q.: Your professional relations appear and disappear so rapidly that I never know when I am touching on them. (Laughter.)

A.: You are a good lawyer and you ought to know without being told.

Q.: I am not as good a lawyer as it requires to ascertain when a man's professional obligations bounce up and stop the ship, and then again when they sink out of sight as he wants to progress with his voyage. I cannot understand that. I am not that sort of a lawyer.

A.: You are so many sorts of a lawyer that I should think you would be equal to any such emergency.

Q.: Do you recall that letter?

A.: That is a part of the professional service which I have performed to the Panama Canal Company and I beg to be excused from interrogations concerning it.

Q.: We cannot excuse you; at least, I cannot. I will ask you the question, Do you remember the letter?

A.: I beg to be excused from any interrogation regarding any business—

Q.: You cannot exactly put a gag in the mouth of a senator at this committee table and refuse him permission to ask you a question. I ask you the

question and I ask you to answer. (By request the stenographer read the pending question as follows: "Do you remember the letter?")

A.: The letter speaks for itself. It is a matter of public record. I have no comment to make upon it.

Q.: Do you remember it?

A.: I do.

Q.: From what sources did you get that very important information contained in those letters?

A.: I respectfully beg to be excused from any statement or discussion of the affairs of my clients.

Q.: Did that letter contain the truth as you understood it?

A.: I respectfully beg to be excused from a discussion of the affairs of my clients.

Q.: I did not ask if it contained falsehood. Do you want to be excused from telling the truth about it?

A.: I beg to be excused from a discussion of the affairs of my clients.

Q.: You decline to say whether that letter contains the truth as you understood it?

A.: I decline to be drawn into a discussion of the affairs of my clients.

Q.: You have already spoken of that concession. That has been mentioned here in your testimony this morning.

A.: That is a part of the record titles of the Panama Canal Company and part of the records of the government of the United States, and I very properly referred to it.

Q.: Having made the disclosure of your knowledge of the fact that that concession was then under negotiation and what was given for it, and so forth, I ask you, on the basis of that disclosure, to explain to this committee fully the whole transaction.

A.: The statement which I have made to you is no disclosure. The statement I have made to you concerning the extension is a matter of record in the opinion of the Attorney-General and upon file in the archives of the government of the United States passing the title of the New Panama Canal Company.

Q.: If so, give your recollection of what those records contain.

A.: The information I have given you this morning is based upon the opinions which have been passed by the Attorney-General, and which are a part of the archives of this government. They are not confidential communications, and for that reason, and for that reason alone, have I stated them to you.

Q.: Will you state your recollection of what those records contain?

A.: The opinion of the Attorney-General?

Q.: As you have given it there and as you have given it here, and as it is recorded and as you have sworn to it. As you have refused to state what you know, I want to know if you refuse to state what you recollect of the contents of those records?

A.: Senator, I respectfully decline to be drawn into a discussion involving confidential relations.

Q.: I am not attempting, nor have I any privilege of discussing anything with you. It is my duty as an officer of the government of the United States and as a member of the Senate, and as a member of this committee, to ask you questions to bring out information material to the inquiry in this matter, and not to discuss it. I ask you the questions to get the information that you evidently have, and I ask you whether you will disclose it?

A.: I repeat my answer, sir.

Q.: There was a telegram mentioned in this letter as having been sent by you to Mr. Hay, Secretary of State: "I beg leave to confirm the telegram which I sent you at 10:45 this morning, as per inclosure." What was that telegram?

A.: I respectfully beg to be excused for the same reason.

Q.: Well, there was an inclosure in that letter, was there not?

A.: I repeat my answer.

Q.: You refuse to answer?

A.: I do.
Q.: Did you write that letter?
A.: I did.
Q.: And there was an inclosure in it?
A.: I decline to state.
Q.: Will you give the substance of that inclosure?
A.: I decline to answer.
Q.: You refuse to answer.
A.: I do refuse to answer.
Q.: Yes. I do not propose to stop this—

A.: Whatever was inclosed is a matter of public record and you can get it at the State department.

Q.: It might not suit the convenience of the committee to get the public records in this matter, and as you know it, why can you not state it?

A.: I am under the obligations of professional duty as you are under certain obligations which you consider.

Q.: Is it true, Mr. Cromwell, that you are under a professional obligation to refuse to state the contents of this letter or of the telegram inclosed in it?

A.: It is.
Q.: Is that true?
A.: It is, and you ought to know it, as a lawyer.

Q.: You did not know that a war was about to break out? Did you know what the quarrel was between the President of Colombia and the Panama Canal Company at that time?

A.: I respectfully decline to answer.

Q.: Had the Panama Canal Company then made an overture or a request of the Colombian government for this concession from October 31, 1904, to October 31, 1910?

A.: I respectfully decline to answer.

Q.: Was that subject pending before the government of Colombia at the time of the date of this letter?

A.: I respectfully decline to answer.
Q.: You refuse to answer?
A.: I do.
Q.: You put that on the ground of professional confidence?
A.: I do.
Q.: You know the fact whether it was or not?
A.: I do not say whether I knew the fact or not.
Q.: What is that?
A.: I have not said that I knew the fact.
Q.: Well, do you know the fact?
A.: I decline to answer.

Q.: Who submitted that agreement with the Panama Canal Company to the Congress of Colombia?

A.: I respectfully decline to answer.
Q.: It was submitted?
A.: You stated so.
Q.: What do you say about it?
A.: I decline to answer.
Q.: But you have already informed Mr. Hay that it was submitted?
A.: The record speaks for itself, senator.
Q.: Is that your letter?
A.: It is.
Q.: You wrote it?
A.: I did.
Q.: It is true?

A.: Well, senator, you ought to have the courtesy, if you have not the judgment, to know that I would not write a letter that was not true.

Q.: It is not that point at all. I want to know whether you stated at that time what you knew to be a fact?

A.: I decline to be drawn into a discussion of my relations to my clients.

(By request the stenographer repeated the pending question.)

A.: I repeat that I decline to be drawn into a discussion of business involving my clients.

Q.: You refuse to answer that question?

A.: I do, sir, for the same reason.

NEXT DAY'S PROCEEDINGS.

Q.: On yesterday, Mr. Cromwell, I read you a letter from Mr. Bonnardel, president of the board of directors, dated the 18th of November, 1898, which has gone into the record. Previously there had been incorporated in the record your letter signed "William Nelson Cromwell, counsel New Panama Company," addressed to Mr. Hay, Secretary of State, upon which I desire to ask you some questions. You declined on yesterday to state what was the inclosure in that letter. Do you still decline?

A.: The letter speaks for itself, senator. I decline to make further comment on it.

Q.: That inclosure was a part of the letter?

A.: The letter speaks for itself and I decline to make further comment upon it.

Q.: Was that inclosure a part of that letter?

A.: The letter speaks for itself, and I must beg to be excused from further explanation.

Q.: Do you remember the contents of that inclosure?

A.: The letter speaks for itself.

Q.: No; the letter does not speak about your memory.

A.: I respectfully decline to go into the discussion of either the letter, its contents, or any inclosures.

Q.: You decline then to state whether you recollect the contents of that inclosure?

A.: I do, sir, for the reason that it is a part of my professional duty.

Q.: To do what—to conceal everything that comes into your hands?

A.: It is a part of my professional duty to observe the confidences of my client in the professional work in which I am engaged.

Q. Did you observe the confidence of your client in communicating that paper to the Secretary of State?

A.: It speaks for itself; it is a matter of public record.

Q.: Well, but did you?

A.: It speaks for itself; it is a matter of public record.

Q.: Mr. Cromwell, you may think that you are concealing the truth by these refusals, but you are not.

A.: I do not think anything of the kind, nor do I think that you are conducting your examination properly.

Q.: What decision of the government of Panama is it that is included in the statement that I will read to you: "Upon my return I learned through Director-General Hutin, who had preceded me to New York, that the measure which has just been acted on by one branch only of the Colombian Congress was a bill to authorize the executive to negotiate the terms of and to conclude a further prorogation of six years from 1904 for the completion of the canal under a communication which the company had addressed to the government in the form of which I inclose you a translation." What was the action of the Colombian Congress to which you referred?

A.: For the reasons stated I respectfully decline to answer.

Q.: You inclosed a translation, did you, of that order—that action?

A.: The letter speaks for itself, senator. It is on the files of the State Department. You can get it, if you want it, with any inclosures.

Q.: I want your recollection of it, Mr. Cromwell.

A.: There is no secrecy about it.

Q.: I want your recollection of it. State it.

A.: I decline to discuss the subject for the reasons I have stated.

Q.: You decline then to state what was the translation that you sent to Mr. Hay of the paper referred to?

A.: I do. The public records will give you the information if you want it.

Q.: Do you not know that the Congress of Colombia rejected and refused to ratify the proposition made to it by the Panama Canal Company at that

time for a prorogation or prolongation of the concession from October 31, 1904, to October 31, 1910?

A.: I decline to state for the reason given.

Q.: Do you not know that personally?

A.: I decline to state for the reason given, sir.

Q.: Is all your knowledge—your personal, outside knowledge that you acquired as any other citizen—at the bidding of your company?

A.: I decline to answer further than I have answered.

Q. (reading): "You will note that the company specifically stated to the government that the prorogation was not a matter of absolute necessity, but was desirable in the interests of commerce and navigation to enable an even deeper cut to be made and which would reduce the number of locks to four, but which reduction would, of course, require more time than the plan adopted." What do you mean by a cut there?

A.: I decline to discuss the subject for the reason I have stated.

Q.: You propose then to be merely recalcitrant?

A.: Well, you made the statement.

Q.: If the confidence existed, so that you cannot now reveal it to the committee of the Senate, why did it not exist at the time that you revealed it to the Secretary of State?

A.: Senator, my answer is complete, and should be convincing to you that any reference by way of explanation or exposition of any correspondence that I have had is professional. The fact of the correspondence is official, is true; it is on the record; you can get it. There you should get it.

Q.: You further say to Mr. Hay: "You will note that the bill proposed to confer power upon the executive, and this happened to arise under extraordinary political conditions in Bogota." What were they?

A.: I decline to state for the reasons I have mentioned.

Q.: Are extraordinary political conditions in Bogota part of your professional confidences with your company?

A.: Any information I acquired is within the scope of that duty.

Q.: So that if the Panama Canal Company had employed you to do any work that was contrary to the welfare and interests of the United States you would feel that you would be obliged to conceal it?

A.: I decline to answer such hypothetical and impertinent questions.

Q.: Hypothetical and impertinent, both?

A.: Both.

Q.: Well I have to submit to your very unusual and indecent interruptions because the committee seems to be disposed to compel me to.

A.: It is no more unusual or indecent than yours.

Q.: I will read that entire paragraph again so as to get the precise language of it (reading): "You will note that this bill proposes to confer power upon the executive, and this happened to arise under extraordinary political conditions in Bogota. As you have probably been advised, through official channels, a serious difference has recently been existing between the House of Representatives of Colombia and the President, the House having passed formal resolutions declaring the office of President vacant and refusing to recognize the qualification of the President before the Supreme Court." Did you get that statement that you made to Mr. Hay as a professional confidence from the New Panama Canal Company?

A.: It is embraced, sir, within the scope of my professional duty.

Q.: You revealed it to Mr. Hay; you decline to reveal it again to the committee?

A.: It is revealed in the letter, senator.

Q.: Very good. Do you decline to state now, as a fact within your knowledge at that time, that the House had refused to recognize the qualification of the President before the Supreme Court and that they had declared his office vacant?

A.: I decline to make further discussion of the letter, senator, because the letter explains itself.

Q.: Is that a professional confidence that you shall not make a further explanation of this letter?

A.: Yes, sir.

Q.: It is?
A.: It is.
Q.: You swear to that?
A.: I do.
Q.: In what part of your duties as attorney was that professional confidence provided for?
A.: Within the general scope of my professional duties, sir.
Q.: What was that?
A.: I can describe it no more particularly than that.
Q. (reading): "We, therefore, construe the action of the House of Representatives as only a part of the strife between the House and the President, and not a declaration of the policy of the nation or the Congress in respect of the Panama Canal, and as not evidencing hostility to the company itself." On what basis did you make that construction?
A.: I have to repeat my former answer, senator.
Q.: You do not have to do it unless you want to swear to it.
A.: I beg your pardon. I mean I do repeat my former answer.
Q.: And you, therefore, decline to inform the committee the basis of fact upon which you made that statement to Mr. Hay?
A.: I do, sir, respectfully, for the reasons given.
Q. (reading): "Our company has not the least apprehension regarding any prorogation of its concessions it may consider necessary in the future." What removed your apprehensions in regard to the prorogation of its concessions?
A.: I make the same reply, senator.
Q.: If the Panama Canal Company has, through its secretary, Mr. Lamprê—you know Mr. Lamprê, do you?
A.: Yes, sir.
Q. (continuing): If that company has, through Mr. Lamprê, uncovered this whole subject in his deposition before this committee on a previous occasion, do you still feel bound to withhold all information you possess in regard to the same subject?
A.: I do, senator.
Q.: Well, I will read that to you, or I will get my friend on the right here to read it because I am in quite a poor condition of health this morning. Just read it right along, question and answer, right through.
(Senator Taliaferro, as requested, thereupon read as follows:)
"The examination of Mr. Lamprê then went on as follows:
"The Chairman.—Now, Mr. Lamprê, that letter to the President of the United States does not contain any proposition?
"M. Lampre.—No, not at that time; no sir.
"Q.: Why was it written?
"A.: Because, to my recollection, it was contemplated at the time that something ought to be done in the way of a reorganization of the company. It appeared at the time that the Nicaragua concession was under discussion; that the rivalry of such a canal might be a great danger to the Panama Canal, and we thought at the time, as far as I can remember—it is rather old, it is three years old—we thought at the time that we had to lay the whole subject before the President in order to ascertain and to see under what conditions we might, if necessary, Americanize our corporation and build the canal in partnership with the American interests. That is my recollection."
Senator Morgan: One minute. You observe that the words "Americanize the corporation" are there. Was that paper that we read to you the other day containing a statement of what had taken place by the Panama Canal Company in regard to the Americanization of the canal the result of the action spoken of there?
Mr. Cromwell: I do not know, senator.
Q.: You have no information on that subject?
A.: No, sir.
Q.: Although the paper handed to you recites it?
A.: It recites a different subject, sir.

Q.: Sir?

A.: It recites a different subject at a different time.

Q.: A different subject at a different time?

A.: Yes, sir.

Q.: Read on, if you please.

(Senator Taliaferro, as requested, read from the testimony of M. Lamprê of the French Panama Company.)

SENATOR MORGAN: Do you know anything at all of the transaction mentioned by Mr. Lamprê in his testimony?

Mr. CROMWELL: Of what transaction, senator?

Q.: That which has just been read.

A.: The word "transaction" that you employ is a little uncertain to me, that is all.

Q.: Well, do you know anything of the matter contained in the statement of Mr. Lamprê which has just been read?

A.: As it is involved in the general scope of my professional duty I must beg to be excused from further explanation.

Q.: Here then, Mr. Cromwell, is the secretary of the company under oath before this committee disclosing these facts. Do you pretend to have a professional confidence with that company that prevents you from making a statement in regard to those facts?

A.: The secretary had no such obligation. He was the secretary of the company and disclosed the facts as he had a right to do and did do. That does not affect my duty.

Q.: The secretary then you state had the right to disclose them because he was not under a professional obligation?

A.: Yes, sir.

Q.: You were not the counsel of the Panama Canal Company in France as you have stated here under oath two or three times?

A.: I was not their general counsel in France, although when I visited there almost annually I advised them in my professional capacity, of course.

Q.: Not being the counsel of the company in France, and this disclosure having been made on oath by the secretary of the company, do you still insist that your professional relations to the Panama company compel you to refuse to make any statement in regard to the statement Mr. Lamprê has made before this committee, and which has just been read in your hearing?

A.: I do, senator, because my relations are entirely distinct from those of Mr. Lampre.

Q.: What is the distinction?

A.: He is the secretary of the company, an officer of the company, and gave his testimony fully. My relation is entirely different, sir.

Q.: Mr. Lamprê states here in respect of why this letter was written: "Because, to my recollection, it was contemplated at the time that something ought to be done in the way of reorganization of the company. It appears at the time that the Nicaragua concession was under discussion; that the rivalry of such a canal might be a great danger to the Panama Canal, and we thought at the time, as far as I can remember—it is rather old, it is three years ago—we thought at the time that we had to lay the whole subject before the President in order to ascertain and to see under what conditions we might, if necessary, Americanize our corporation and build the canal in partnership with the American interests." Do you know, as a matter of fact contained in the records of the Panama Canal Company in Paris, that a resolution was entered into by them to carry into effect this project of the Americanization of the canal?

A.: Whatever information I have upon the subject, senator, is comprised within the scope of my professional duty.

Q.: Are the records and your knowledge of the records in Paris a matter of professional secrecy?

A.: A matter of professional secrecy.

Q.: Confidence?

A.: Yes, sir.

Q.: Did you not know, and do you not now know, that that company

came to the resolution that that canal was to be Americanized if practicable?

A.: I repeat my answer, senator.

Q.: Do you contradict anything that Mr. Lampre has stated in his sworn testimony before this committee?

A.: I am not at liberty to speak about it, sir.

Q.: The plan that Mr. Lampre has revealed here was to take the canal out of the reach of Colombia, Americanize it and make it an American institution. Do you know of any plan or project on the part of the canal company to carry that into effect?

A.: I beg to be excused, senator, for the reasons I have stated.

Q.: Excused from what?

A.: From discussion of the subject.

(By request the stenographer read aloud the pending question as follows: "The plan that Mr. Lampre revealed here was to take the canal out of the reach of Colombia, Americanize it and make it an American institution. Do you know of any plan or project on the part of the canal company to carry that into effect?")

Q.: What is your answer?

A.: My answer is the same—that my professional relations would prohibit me from discussion of it, senator.

Q.: I will ask you whether that paper that was read in your hearing the other day, and that has gone into the record of the committee, the record of this examination, which recited the fact that you had been exclusively intrusted with the execution of the plan for the Americanization of the canal—whether that instrument just prepared, and prepared by you, was intended to execute that order of the canal company?

A.: I decline to answer for the same reasons, sir.

Q.: Have you any knowledge on the subject?

A.: I decline to state, sir, for the same reason.

Q.: You decline to state whether you have any knowledge on the subject?

A.: Yes, sir; I mean I decline to discuss the subject which involves my clients' relations.

Q.: Did you not prepare that paper under a contract with the French company—the Panama Canal Company—with you individually, giving you the exclusive right to control that subject in the United States? And did you not submit it to different persons in the United States?

A.: I have already answered that question the other day, and I beg leave to repeat it, sir, with the greatest respect to yourself.

(By direction the stenographer read aloud the pending question, as follows: "That contract confers upon Wm. Nelson Cromwell exclusive privileges and large remuneration for carrying a plan into effect. Was that the same plan of which Lampre was speaking?")

A.: I beg to be excused from a discussion of the subject which involves—

Q.: Well I cannot excuse you. Do you refuse?

A.: I do refuse, senator, for the reasons stated.

Q.: A while ago, in your testimony, you spoke about this same matter to which I have just referred and said that what Lampre was speaking of referred to a different matter from this paper of yours about the Americanization of the canal. What different matter was it?

A.: My impression was that that related to the proposal that had been made to the committee on rivers and harbors of the House of Representatives in which it was proposed to Americanize the company.

Q.: What proposition was that? Who made that proposition?

A.: That was made by the New Panama Canal Company, through its president and myself.

Q.: Were you present at the time?

A.: Yes, sir.

Q.: Did you assist in it?

A.: Yes, sir.

Q.: That was a plan for the Americanization of the canal?

A.: Yes, sir. That was a proposal of a plan. It is on record.

Q.: You proposed that to the committee of the House?

A.: Yes, sir; it is in the record.

Q.: In what did that differ from this plan I have called your attention to and have recited in the record?

A.: I cannot, senator, enter into a description and definition of the differences, because that of itself involves the relations to my clients, that is all. I referred to the naked fact that such a proposal was made.

Q.: The difference between the two plans involves the confidential relations between you and your clients?

A.: Yes, sir, it does.

Q.: How can we determine that unless you state what the differences were? This committee will shield you if you are entitled to protection.

A.: I can answer no more definitely, senator. I am trying to aid you all I can within the scope of my duties.

Q.: I was trying to refresh your memory by reading Lampre's deposition. You state that the plan that he refers to here was not the plan that you had been questioned about before?

A.: I frankly am not distinct in my memory about the two subjects.

Q.: I am trying to refresh it by bringing the paper to you and reading it to you, and you refused to make any statement about that paper at all?

A.: Yes, sir.

Q.: Is that the paper in regard to which you refused to make a statement?

A.: Yes, sir.

Q.: So there was a paper about which you refused to make a statement. Now what was that paper?

A.: The paper you have already presented, senator.

Q.: The paper that I presented here and carried into the record?

A.: Yes, sir.

Q.: So you admit then that there was such a paper?

A.: I do not admit the paper in the sense of an admission.

Q.: Well why do you state it then—just because you cannot get out of it?

A.: Because it is a fact; just because you have mentioned it, and I am referring to the topic to which you allude.

Q.: Well I will assume, on the facts you have stated, that there were two papers, and that Mr. Lampre has described one of them in a sense, to a certain extent, and that the other, so far as you are concerned, has received no identification or description. Now I want you, from the best of your recollection, to describe that other paper which Mr. Lampre did not describe.

A.: I respectfully decline, senator, for the reasons I have stated.

Q.: You will not answer that question?

A.: For the reasons I have stated, sir.

Q.: You refuse to answer the question?

A.: For the reasons I have stated, I do refuse, senator.

* * * * * * * * *

Q.: Mr. Cromwell, when we last had the pleasure of your company here for examination we had gotten down to the date of 1898, and were referring to a letter written by you on December 21, 1898, addressed to Mr. Hay, in which you say (reading): "It is the opinion of the government executives and of ourselves that power to give such extension is already in the government by the terms of the original concession, but the formality of ratification will be requested in due course, and of its being granted we have not the remotest apprehension. You will thus see that my confidence in the attitude of Colombia, as indicated in my last note, has been fully and quickly confirmed." What does that relate to?

A.: It speaks for itself, senator. I have already answered upon that subject.

Q.: That is not an answer to my question, Mr. Cromwell. I ask you, upon your personal knowledge and oath, what does that relate to?

A.: I repeat that it speaks for itself, and refers to the proposal for the extension of the concession of the Panama Canal.

Q.: Which concession?

A.: The concession of the company; the extension of the original concession of 1878.

Q.: That was the extension from 1904 to 1910?

A.: The one which was subsequently granted in April, 1900.

Q.: Extending from 1904 to 1910?

A.: Yes, sir.

Q.: You had knowledge of that transaction?

A.: I had such knowledge as I have indicated in the letter.

Q.: No more?

A.: I had more.

Q.: What is it?

A.: It is confidential.

Q.: You refuse to state it?

A.: I do.

Q.: You refuse then to make any statement in regard to your knowledge of the transaction referred to in that letter?

A.: I do.

Q.: You gave the transaction to Mr. Hay. Did you explain to him also further in oral conversation with him anything about it?

A.: I decline to make further explanation than I have, sir.

Q.: Do you decline to answer that question?

A.: I do, sir.

Q.: Well do you decline on the ground that you were the counsel of the Panama Canal Company?

A.: I do, and also upon the ground that it is not germane to the inquiry of this committee.

Q.: Well, its being germane I do not think it a question that a witness has a right to decide. You put it upon both grounds?

A.: I do.

Q.: Do you put it on the ground that you were also counsel of the Panama Railroad Company?

A.: I do not.

Q.: You do not? Well we will go back to that then. You do not consider that, as counsel of the Panama Railroad Company, you are under any obligation to withhold any facts from the United States government that you received from that company as counsel?

A.: I do not care to answer such a question. When you put me a question I will answer it.

Q.: Well that is the question I put to you.

A.: When you put a pertinent question to me I will answer it—not hypothetical questions.

Q.: Probably. Mr. Cromwell, you overrate either your capacity or your standing if you think you have the right to decide upon the pertinency of any question that is asked you at this board.

A.: I think I must decide whether it is pertinent. Upon my responsibility I must decide. You may decide upon your responsibility.

Q.: You do decide that it is not pertinent?

A.: Upon my responsibility I do so decide.

Q.: You decide that it is not pertinent?

A.: Yes, sir.

Q.: And that is one of the reasons you have for not answering it?

A.: It is.

Q.: You have no reason such as that there is some obligation resting on you as counsel of the Panama Railroad Company that prohibits you from answering?

A.: I again state, senator, that I will not reply to hypothetical questions. If you will be good enough to address me a question which is pertinent I shall be glad to give you my conclusions upon it.

Q.: As the counsel of the Panama Canal Company, do you refuse to answer any question that you believe is covered by the protection of your clients against your making any disclosures?

A.: The question you present is hypothetical and I decline to answer hypothetical questions.

Q.: Turn back in that letter and repeat that remark "as you negotiated," etc. What was that? (reading): "As you negotiated the sale of the property of the New Panama Canal Company to the government and have been general counsel"—is that a fact; did you do that?

A.: I assisted in the negotiation.

Q.: Did you do it by yourself?

A.: Yes, sir.

Q.: In what capacity?

A.: As general counsel of the Panama Canal Company.

Q.: That was the sale, now of the property of the Panama Canal Company, of every kind and character, to the United States that you negotiated?

A.: It was the sale as the offer of the canal company describes; a sale of the totality of the property on the Isthmus.

Q.: The totality?

A.: Yes, sir.

Q.: I never did know what totality meant, unless it meant it all. Did it mean anything less than all?

A.: The totality of its property on the Isthmus, which comprised its physical properties there, and I construed it liberally to mean also the shares of the Panama Railroad Company, although it did not describe the shares.

Q.: How about the concessions?

A.: It included the concessions.

Q.: All of them?

A.: All of them.

Q.: From Colombia to Panama?

A.: All the then-existing concessions from Colombia to Panama.

Q.: And all that had passed from Colombia to Panama by the resurrection—or insurrection—

A.: Resurrection is just the word, senator.

Q.: I do not know what word to use precisely in—

A.: I think resurrection is a very apt word.

Q.: The "transformation." I will put it that way.

A.: Inspiration.

Q.: Well it included all that?

A.: The offer of the canal company, sir, was dated January 9-11, 1902, at which time Colombia was sovereign of the Isthmus.

Q.: Was that the contract that you speak of now, in 1902, that was made with the United States?

A.: The offer of the canal company to the United States dated January 9-11, 1902.

Q.: But that is not the one under which we took the property?

A.: It was in pursuance of that that we took the property.

Q.: How in pursuance of it?

A.: In consummation of it.

Q.: In consummation?

A.: Yes.

Q.: Then that offer of 1902 and the later offer were parts of the same transaction, and the one was in consummation of the other?

A.: Yes, sir.

Q.: That is the fact?

A.: Yes, sir. May I proceed now?

Q.: Not exactly just yet. Now, Mr. Cromwell, you negotiated that one of 1902 also?

A.: No, sir.

Q.: You had no part in that?

A.: No. That offer originated in Paris.

Q.: I did not ask you where it originated. I want to know whether you had any part in the negotiation?

A.: I must respectfully decline to discuss the affairs of the canal company when I get into the field of negotiations.

Q.: We have come to another pitfall in which you take cover in the midst of a statement, in the midst of a sentence.

A.: We come to the principle of law and of privilege to which I have referred.

Q.: We will test that privilege somewhere or other that will have some authority to it.

A.: I hope so, senator. Then you will learn more law than you know now.

Q.: I want to know, Mr. Cromwell, and I will ask you the question again. Did you participate in that negotiation of the proposition, the offer and the contract, which I believe was not finally closed at that time between the New Panama Canal Company and the United States?

A.: I respectfully decline to enter into a discussion—

Q.: You already stated that you did it.

A.: I decline to enter into a discussion of it.

Q.: I am not discussing anything with you. I am asking you questions.

A.: I refuse to answer, sir.

Q.: You refuse to answer?

A.: Yes, sir.

Q.: Very good. Whatever you did—you state that you did something—did you do that as the employed counsel of the Panama Canal Company?

A.: I have already answered that question many times.

Q.: Will you please answer it again?

A.: I do by refusing.

Q.: Were you acting in any sense in your own right?

A.: I again decline to answer.

Q.: You refuse to state whether you had any interest in the transaction personally?

A.: I refuse to discuss it any further than I have.

Q.: You are not discussing it. I am asking you a question and I want an answer.

A.: I make the same answer.

Q.: What is the same answer?

A.: That I refuse to reply.

TESTIMONY OF WILLIAM NELSON CROMWELL, READ BY MR. McNAMARA.

Mr McNamara (reading): What were your authorities?

Answer: I had no authority of that description.

Q.: Of what description was your authority?

A.: Advisory.

Q.: Advisory to whom?

Mr. Cromwell: The company at Paris.

Senator Morgan: In respect of what matters?

Mr. Cromwell: Any matters that might happen in which they were interested.

Q.: All matters?

A.: All matters of that character, yes sir.

Q.: Was any letter of instructions given to you defining your powers?

A.: No, sir.

Q.: In what way were they made so comprehensive without any special deposition?

A.: By the frequent conferences which I had with them and the reports I would make to them and the instructions they would give me.

Q.: Was there any attorney or agent of the Panama Canal Company operating or doing business in Colombia that had any right to control you in regard to this matter?

A.: No, sir.

Q.: Your powers were then supreme over any agent of the canal company that might go there?

A.: I did not say that. There was no occasion to have any supremacy because I had no occasion to do anything there.

Q.: You had no occasion to do anything at all?

A.: Nothing that required the exercise of any powers.

Q.: State what your duties were in Colombia.

A.: I had no specific duties.

Q.: State the scope of your duties.

A.: Watchfulness over the general situation and the general attitude of Colombia.

Q.: Only watchfulness?

A.: Yes, sir.

Q.: And report to the company?

A.: I would form my own judgment upon it.

Q.: And what else? Was that all the power you had?

A.: In Colombia?

Q.: Yes.

A.: Yes, sir, that was the extent of my power.

Q.: You had no power then to conduct any operations or negotiations with the government of Colombia that were binding upon the canal company?

A.: Do you mean in Colombia or here?

Q.: I mean there, in Colombia.

A.: No, sir.

Q.: Did you have any powers to be operated and executed up here in respect of Colombia of the sort I have been mentioning?

A.: The only subject with which we had any connection with Colombia was in regard to the sending from Colombia of its permission for a transfer of the canal to the United States. The concession, you remember, Senator, prohibited the transfer to any foreign government without the permission of Colombia.

Q.: That was all that you had to deal with?

A.: It was prohibited, and my effort was to secure that consent.

Q.: I wish you would be careful to recollect about that and then state again, after recollection, whether that was all the power that you had down there.

Q.: Down where?

A.: In Colombia. That all the power you had down there was in dealing with the question of the transfer of the canal to the United States.

Q.: I think that is the only subject, Senator.

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SENATOR MORGAN: What payments were made under those orders?

Mr. CROMWELL: Senator, in order that you may not draw any wrong inference, I shall state to you, although it is no business, I think, of the public or in connection with this inquiry—

Q.: Or of the government?

A.: In connection with this inquiry.

Q.: This is the inquiry of the government.

A.: The total payments made by the Panama Canal Company to me do not exceed the sum of $200,000 during the period of my service.

Q.: Is that all of the money that you have received out of the forty millions of dollars that the United States have paid to the Panama company for its property?

A.: That is all I have received to date. I have not rendered my final bill.

Q.: It has not yet been presented?

A.: I have not yet presented my final bill.

Q.: When will your service terminate?

A.: So far as the transfer of the canal is concerned it terminated shortly after that transfer.

Q.: I do not ask you about that. I ask when your service for that canal company will terminate?

A.: When it will terminate?

Q.: Yes.

A.: I cannot tell when it will terminate.

Q.: When will your fee or commission, or whatever it may be, fall due?

A.: Whenever I choose to present it.

Q.: Where is the money to pay it?

A.: In the treasury of the company in Paris.

Q.: It remains there yet?

A.: It does; every dollar of it.

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SENATOR MORGAN: I ask you if you have an engagement from the company to pay you money?

Mr. CROMWELL: The obligation that comes from the performance of the services, certainly.

Q.: Have you any contract?

A.: No, sir.

Q.: Any agreement?

A.: No, sir.

Q.: Any understanding?

A.: Except that the bill will be paid.

Q.: Yes. No sum stipulated?

A.: No, sir.

Q.: No sum settled?

A.: No sum settled; no sum suggested.

Q.: And you have been physically too busy to go there?

A.: I have, and I do not care as much about it as you seem to care about it.

Q.: Well, I think that the country cares a good deal about it.

A.: You may monopolize the opinion of the country, but I do not think you do.

Q.: I am not monopolizing it. I am trying to represent it. Now, as you have already stated that you received some sums and that Mr. Farnham received some sums from this corporation or company, state what sums those were and when they were received.

A.: I decline to state the details of the professional compensations paid me, Senator. I have given you the gross sum and I consider that really far beyond the proprieties of the case, either for you to interrogate or for myself even to disclose.

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To the second question which you have asked me I wish to give an explicit answer; and as I see you have prepared it in writing very carefully, I will ask the stenographer to please divide it into single parts, piece by piece, that I may answer it piece by piece completely.

(After the reading of the question by the stenographer.)

MR. CROMWELL: I have not received one dollar of the forty millions from the new Panama Canal company My final bill in that regard I will present in due course as any other professional bill, and it will be substantial. It will be paid; of that I have no concern.

I have not received from the government of Panama a single penny for any purpose whatever.

I have not received or obtained benefit, directly or indirectly, in the remotest manner that human ingenuity could describe to the extent of a single farthing from any syndicate, combination, organization, or party soever, in connection with the sale of the Panama Canal.

I was never interested in the securities of the New Panama Canal Company, nor in the securities of the old Panama Canal Company. I never owned a dollar in either, and never had a pecuniary interest of the remotest character in either, and, consequently, I never had a single dollar of benefit therefrom.

My whole relation to the Panama Canal affair is that of counsel practicing his profession purely as a lawyer, and having no pecuniary interest in any one of the relations, direct or indirect, surrounding the Panama Canal.

My sole compensation, or that of my firm rather, has been the stipend paid by the Panama Railroad Company as its general counsel, which place we had occupied for ten years preceding the transfer to the United States, and which we were requested to continue during the past two years.

(By request the stenographer read aloud the foregoing answer of the witness.)

SENATOR KNOX: Does that question include Mr. Farnham?

Mr. CROMWELL: Thank you. I was going to come to that. In the answer which I have made, and which I have made deliberately and with all the

explictness that it is possible, by intendment as well as by expression to convey, I include Mr. Roger L. Farnham, an attache of my office, whose sole return and compensation has been that upon the salary roll of my office—a salary of, I think, about $3,500 per year.

SENATOR KNOX: Will you let me ask a question there, Senator Morgan?

SENATOR MORGAN: Yes, certainly.

Q.: I want to get this perfectly clear in my own mind, Mr. Cromwell.

A.: Yes, sir.

Q.: Do I understand it to be your intention to have us understand that speaking for yourself, your firm—

A.: For my firm.

Q (continuing): The employes of your firm—

A.: And all the agents—

Q.: Now just let me put this in my own way, please.

A.: Excuse me!

SENATOR KNOX (continuing): That the only compensation you have received or expect to receive or have contracted to receive has been from the New Panama Canal Company for professional services rendered to that company in the sale of its property to the United States, and such salary as is attached to the position of counsel for the Panama Railroad, which has been paid by the government since it has taken over the property?

A.: Absolutely, correctly, solely, completely and truly.

SENATOR MORGAN: Does that include all your expectations in regard to future compensation from all these sources that you speak of—all these employments?

Mr. CROMWELL: I have told you, senator, that I have yet to render an account to the Panama Canal Company.

Q.: I do not speak of that. I speak of the other matters that you have mentioned in your answer.

A.: Absolutely, yes, sir.

Q.: It includes all your expectations?

A.: Absolutely.

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SENATOR MORGAN: You have mentioned the fact that you have received from the Panama Canal Company various sums of money at different times antecedent to the sale of this property by the Panama Canal Company to the United States.

Mr. CROMWELL: Yes, sir.

Q.: And now you decline to mention or to state the sums you have received and that Farnham has received?

A.: I have stated to you that in gross it does not exceed $200,000, and I think Mr. Farnham's salary has been about $3,000 or $3,500, and that is all.

Q.: Now then you have received as much as $200,000?

A.: As little as $200,000, you mean.

Q.: Well, as little, if you please to put it that way. I look up to such sums, I do not look down on them. You have received that little, as you put it, and Farnham has received, during the same time, certain sums only from you?

A.: Only from my firm; solely from my firm.

Q.: He has received nothing at all, as I understand now, from the canal company?

A.: Oh, no; no, sir; just solely from my office. He is a regular attache of my office as twenty other people are.

Q.: But Farnham has had no dealings with the canal company?

A.: None, none.

Q.: And has received nothing from it?

A.: Nothing.

Q.: So that the entire sum, the little sum of $200,000, that has come into your hands from them has passed through your own hands?

A.: It has.

Q.: Did you receive that for professional services?

A.: Yes, sir.

Q.: Paid on account?

A.: Yes, sir, paid on account.
Q.: In what dividends or instalments did you receive it?
A.: Oh, an average of about ten or fifteen thousand dollars a year.
Q.: A small matter of ten or fifteen thousand dollars a year?
A.: Yes, sir.

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SENATOR MORGAN: Have you a copy of the "agreement with the board of directors of the New Panama Canal Company to effect with an American syndicate, the Americanization of the Panama Canal Company upon the following basis?"

Have you a copy of that agreement?

Mr. CROMWELL: I beg to be excused from pursuing that subject because it involves confidential and professional relations. I do not wish to be impolite, and I do not wish to be constantly making the statement that may seem a little harsh, but I say, once and for all, that all these matters are confidential.

Q.: You are at perfect liberty to make any statement that you want to about me or to me. You need not be afraid that you will hurt my feelings or that you need consult them in this matter.

A.: I would not. In the first place, I have too much respect for you, and in the second place, there is no reason for it. I simply say that I want you to understand that I am not, in my declinations, at all meaning to be harsh in any reply that I make, but that once and for all we might as well understand it, that I regard all my relations to the Panama Canal Company as confidential, and that it would be improper for me to discuss their affairs in any relation. Any lawyer in the land would say so.

Q.: All your relations.

A.: I have stated to the committee, I think, and I have tried at least, with extreme frankness, even to the very verge, perhaps beyond the verge, of professional duty in that regard to assist you, to enlighten you upon anything that would help the committee, but all the resurrection of the past which these topics allude to serves no purpose.

Q.: This paper has been read to you in your hearing and is subject to your inspection here in this committee room. Can you point out any feature in it or any statement in it that has any reference to your employment as counsel?

A.: I state the fact that whatever significance it had at the time—although now a dead affair—whatever significance it had at the time, it was to me in my relation as counsel of the Panama Canal Company.

SENATOR MORGAN: Did you have a preference as a stockholder of the Panama Railway Company?

Mr. CROMWELL: I do not recollect whether I had any preference or not.

Q.: You really do not recall whether you had any preference or not? There is nobody who can answer that question but you.

A.: Well I should think, senator, that my inclinations were in favor of the sale to the United States.

Q.: I should think so myself.

A.: Although I had very grave doubts of the wisdom of the canal company disposing of its property.

Q.: So it was a question debated, but your preference was in favor of disposing of it to the United States?

A.: Yes, sir, I should think so, upon the whole.

Q.: Was that for the protection of your personal interest or just for the general glory of the situation?

A.: The personal interests you must see, senator, were absolutely insignificant.

Q.: Well, I know. Matters of insignificance are still legal matters oftentimes. Did your preference have any reference at all to what should become of you as a stockholder of these twenty-four or thirty-four shares, or whatever you had?

A.: Certainly not.

Q.: If that had been all the property you had in the world it would have involved your entire estate, would it not?

A.: Oh, well, Senator—

Q.: But, being a rich man, you could afford to neglect the situation. Was that it?

A.: I do not suppose you expect a serious answer.

Q.: I really think I am very much in earnest, sir. I want to get at the fact whether your preference was based just upon some idea of the magnitude of the situation and your controlling it, or whether it was based upon your interest in that stock.

A.: The interest in the stock had not the least influence upon my judgment or preference.

Q.: You stood above that?

A.: Certainly.

Q.: Now you may go ahead with your statement.

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