STRONG ARGUMENT MADE THAT MITCHELL IS GUILTLESS OF CRIME

the Commission of the Land Office, in which he says, among other things, that "Said cases are now in the files awaiting consideration in due course of business, and when reached they will be taken up and passed upon without interruption," etc. "Would it be asking too much of you to ascertain from the Honorable Commissioner whether it would be possible to have these cases taken up out of their order immediately, for the reason that, as I have already explained to you, the estate of the late Governor Pillsbury, of Minnesota, is interested," etc. Now, what is that request? "Am I asking too much of you?" or "Would it be asking too much" to ask you to see the Commissioner of the General Land Office, and ascertain from him if these cases can not, under the special circumstances of the case, be taken up out of their order. So far, there is nothing shown done by either Mitchell or Tanner that would constitute an offense under this statute. Then, December 10, Senator Mitchell answers that other letter. Says, "Owing to the great howl now being made about land frauds, I do not think it is possible to get the cases you refer to taken out of their order. If you will have some persons interested in the lands, however, to make affidavit showing why they should be taken out of their order, I will see what can be done."

No Proof of His Visit.

So far, there is no proof that Senator Mitchell ever went before the Land Office and urged any action or did anything he had not a perfect right to do, simply along the line of making inquiry and reporting. Tanner again writes him, December 29, "Can't you get Hermann interested in the matter and insist on having these claims taken up and disposed of?" Then he writes him on the same date another letter, wherein he sets forth at length the reasons why he thinks the cases ought to be expedited, but nothing in there shows that Senator Mitchell went before the department and asked anything to be done; and the only testimony in this case that he did anything at all in regard to these cases in the Land Office—and you are trying him on the evidence in this case, and not on supposition as to what he may have done—is found in Senator Mitchell's letter of January 5, 1903, addressed to Binger Hermann, in which he says: "I sincerely hope you may feel justified, on the affidavits inclosed, in making these cases special and moving them along to speedy adjustment." I want you to note that language, gentlemen, because, so far as the testimony shows, that is all that Senator Mitchell ever did in the Land Department of the Government with respect to these lieu-land claims, which Tanner had taken into his charge on the 29th day of September, 1902. That is the last letter about them which shows that anything was done, and I want you to carefully consider the language of that letter, and see if you can find it in your judgments or in your hearts, to convict a man for performing services before the Land Department on so slight a suggestion as is therein contained. He don't ask him to do anything; he don't urge him to do anything; he doesn't appear and demand anything; all that the testimony shows he ever did with respect to these lieu-land selections covered by the contract between Tanner and Kribs of September 20, 1902, is to say to the Commissioner, "I sincerely hope you may feel justified in making these cases special." Was that the commission of a crime, or did it lay the foundation for a crime under this section of the statutes of the United States?

Fixes Dates for Consideration.

Now, gentlemen, I have been trying to eliminate as far as possible the consideration of all counts in this indictment not fairly covered by the evidence, for the reason that I think you ought, when you retire to your juryroom, to fully understand just exactly what the counts are in this indictment to which you must direct your most serious attention. I do it for another reason, and it is this: I will be very frank with you about it—I do it, because I insist under this indictment the first four counts relate to two transactions of the 13th of February, 1902, and of the 14th of June, 1902—all in the same early part of 1902—and on the fifth count of the indictment and the seventh count of the indictment, the latter of which I think I have taken away, so far as any serious consideration of it is concerned—the last charge relates to the employment of the 20th of September, 1902. Now, mark you, you are only to consider such Kribs matters as happened between the 13th day of February and the 20th day of September, 1902. What happened after that, and there are a number of letters, and there is some testimony from Tanner that they had under consideration other outside matters upon which Senator Mitchell is not being tried, but upon which I will talk to you presently; but Senator Mitchell, under this indictment was either guilty on the 20th day of September, 1902, or else he never was. That's the last date on which they charge the receipt of any money by Tanner and Mitchell, on which the allegations of this indictment are framed. Now, bear that in mind. There are a whole lot of letters here, several of them relating to other transactions which they introduce here for the alleged purpose of making this jury believe that Senator Mitchell knowingly and intentionally took the money under these Kribs counts, but unless Senator Mitchell was guilty on the 20th of September, 1902, he never was guilty afterwards and no matter what was brought to his attention after that date, it could have no bearing and no effect upon the condition of his mind up to and prior to the 20th day of September, because, gentlemen of the jury, as Judge Bennett so well argued to you, a man either commits a crime at the time he takes the money or else he never commits it.

His Chicken Comparison.

It is not a question of giving it back. If a man gets a chicken off a hen-roost, it is either larceny then, or it is an honest act; and if it isn't larnceny then, it can't be made larceny because he don't give back the chicken when his neighbor demands it. It is either a crime when he takes the chicken or it is never a crime. That would be especially true if he had eaten the chicken up and could not return it. So the receipt of the money by Mr. Mitchell was either an offense under this statute when he got the money, or it never was; it was criminal then, or else it was not; and no matter what he did, and what he said, and what he thought, or how he acted afterwards, he could not thereby make himself guilty of something that he was innocent of at the time the transaction took place. Therefore I am endeavoring to limit the consideration of the evidence under this indictment within these two dates, February 13th, to September 20th, 1902; what he did after that has no bearing at all on the question of his guilt or innocence, except, and I will be fair with you, except that you always have a right to draw inferences from the after-acts of men charged with crime, and you have the right to draw inferences from their after-acts upon one proposition, and one proposition alone, as to whether or not their acts are in the nature of a confession or an admission that what they had done before was with a guilty purpose and with a knowledge that they were committing an offense.

Going to the other counts of the indictment, I believe the court will charge you that this indictment charges Mr. Mitchell and that the proof so far as it goes, is to the effect that these payments of Kribs were made by checks to Tanner; the allegation in the indictment is that Mr. Mitchell received these checks; the proof is that Mr. Tanner received these checks. Tanner, when he received these checks, deposited them in the bank the same or the next day, and there is no testimony, gentlemen, no testimony which shows or tends to show that in any one instance Mitchell knew anything about the receipt of a check by Tanner until long after Tanner had taken it and deposited it in the bank. The proof is that as to every charge in this indictment as to the receipt of a check, that Tanner was in Portland and Mitchell was in Washington, and in the very nature of things, he could not know and he did not know that Tanner had made an agreement with Kribs or that a check had been given until at least some time after that transaction was passed.

Now, I leave it to you if that is not an absolute statement of the proof in this case, and of the truth.

Thurston Grows Sarcastic.

Then I think the court will charge you that if this prosecution, knowing the facts, had desired to charge Senator Mitchell with having received moneys later on, the proceeds of those checks, it would have, and it could have without the slightest difficulty, embodied in this indictment a charge setting up the facts, to wit, that Kribs paid a check; that the check was cashed at the bank; that the money from the check was put to the credit of Mitchell & Tanner; that Tanner drew out Mitchell's share and deposited that check to Mitchell. There was no trouble about making those allegations in this indictment, if such were the facts, and they knew them in the grand jury room. I do not charge to the District Attorney a failure to properly plead his case in this indictment. I understand he was aided in that respect by a most eminent and learned and accomplished representative of the department in Washington—Mr. Pagin, or Fagan, or some such name—who came out here, 3000 miles across the country, because the Government had discovered that he knew more about drawing indictments than any other man they had. I wonder how much the rest of them knew about drawing indictments, judging from Mr. Pagin's allegations in this indictment. No, Mr. Heney is not to blame; I will relieve him from that responsibility; but, gentlemen of the jury, it was the solemn duty of this Government, if they proposed to indict and convict Mr. Mitchell, to set up the facts; and I believe the court will charge you that unless they did set up the facts, the proof here is at variance with the allegations in this indictment. Mitchell would have been guilty of a violation of this statute if Tanner had received a check from Kribs, if Tanner had deposited that check in the bank to the credit of Mitchell & Tanner, if Tanner at the end of the month had drawn out half of that money by a check payable to himself and deposited that money to Mitchell's credit—Mitchell would have been guilty if, at the time Tanner deposited that money in the bank to his credit, he had knowledge that it was deposited there for some services rendered, or to be rendered, by him before a department of the Government of the United States. But that is not the charge in this indictment. And, as I said this morning, you cannot convict a man—you ought not to convict a man who is charged with stealing a horse, even if the truth shows he stole a cow. Let them indict on that. And so I say to them here, if you haven't charged the real transaction, don't ask this jury to violate its duty and its oath and convict this defendant on general principles, on proof not fitted to the allegations of this indictment; but go back to your grand jury room, get them in there, lock them in, and in the darkness do it all over again, and charge what you think the proof will substantiate.

The Bank Brought In.

Now, I think the court will charge you, because if I have read the decisions of the Supreme Court of the United States rightfully, that court has decided that when Tanner took a check from Kribs and deposited it in the bank here to his credit, he got on it, not money from Kribs, but that the transaction was a sale of that check to the bank—just as if Tanner had received a horse and had sold the horse to you—the money that went into the bank to the credit of Mitchell & Tanner was the money of the bank; the deposit of that check was a sale of that check to the bank. If Tanner had taken that check and followed it up to the bank on which it was given, and from the bank on which it was drawn had collected the money, he would have received the money of Kribs. But he did not. He deposited that check in the bank, and sold it to the bank, and it became the check of the bank. They could tear it up, the Supreme Court says, or throw it away, or anything. And the money that Tanner got on that check to the credit of his firm was the money of the bank; and that doesn't sustain any count in this indictment.

Now, I grant you, and I have been telling you in advance, that is purely technical; and yet, as I said earlier in the day, there is no such real thing as a technical defense, for the wisdom, and experience, and justice of the Anglo-Saxon race, in its development and its civilization, and its progress, has thrown these safeguards of the so-called technicalities of law around the lives and liberties of men.

Now, gentlemen of the jury, I have done with what might be called technical considerations. I might occupy a great deal of your time right here by asking you to remember that the law is so tender of the rights of men, so solicitous for human welfare, that it has provided, and most widely provided, that no man can be convicted by his fellow-countrymen unless every charge in the indictment is proven beyond a reasonable doubt; but you understand that that is the law. You know why it is the law. You know it is the safeguard of human rights and human liberty that it is the law; and I know that, if it were necessary in this case, as I believe it is not, you would carry that rule of law into your juryroom, and consider it and apply it conscientiously to the evidence in this case.

Gives His Opinion.

But, passing all those things, gentlemen of the jury—I may in my judgment be affected by my love and respect and admiration for this defendant, and you don't have to take my judgment; you are the judges—but I come here, for my part, and I say, for my part, I am not asking or demanding that this jury rest on so-called technical defenses, or on the question of a reasonable doubt; but I tell you, gentlemen, in my honest opinion, as I stand in the presence of the world, I don't believe that there is a single allegation in that indictment that is proven at all under the evidence in this case. I don't believe it. I can't believe it; and I have scrutinized this evidence from beginning to end.

Now, take it along broad lines, eliminating all these technical propositions I have made, and which I made because I believed it was my duty to make them—taking it along broad grounds, what is this charge? That Mitchell received money from Kribs, or checks, or whatever you please—consideration—for performing services before a department of the Government of the United States. The court will charge you that that necessarily implies that when he took this money he took it knowingly; that is, his taking that money was either innocent or guilty, dependent upon the question alone as to whether or not, when he took it, he knew that he was taking it for services rendered, or to be rendered before Binger Hermann, the Commissioner of the General Land Office. And along that line I want to talk to this jury.

Presumption of Innocence.

In the first place, the presumption of a man's innocence runs with every act he does. In a young man there may be no great presumption of innocence, because he may never have stood in the light of temptation and been compelled to act honestly or dishonestly. In the life of a middle-aged man, the presumption of innocence as to one particular act may be stronger from the fact that for many years he has been in a position where he might have done wrong if such had been his inclination, or had been in his heart; and in the case of an old man the presumption grows still stronger and stronger, until it acquires almost the irresistible force of an absolute truth, that a man whose whole life, lived as it has been in the shadow of what might have been temptations to weaker men—that a whole life of honesty in many affairs stands almost an irresistible presumption that the man could not, late in life, after passing through all these years, where temptations were undoubtedly around him, where he might have made thousands and millions, yes, and have made them in ways that most men call right and proper—the presumption is almost irresistible that a man who has lived 68 or 69 years of a public career, without the slightest suspicion attaching to him that he ever took a dollar in his whole life wrongfully—the presumption attaches that a man who has lived almost in poverty, being in a constant struggle to get along while performing his public duty—the presumption is almost irresistible that that man, late in his life, with his whole career behind him, and just sunset ahead—just sunset ahead—it is almost irresistible that that man could not, in the very nature of things, have committed a crime to secure to himself in an illegal manner a few hundred dollars. Gentlemen, to my mind, that is an irresistible presumption; and if I had nothing else to judge from, in the light of all this testimony, in the light of all that is charged, in the light of all that is said, to me John H. Mitchell's forty years of honest service to his country and his state, in the face of temptation—John H. Mitchell's career, in which no dollar of money has ever attached in all his life improperly acquired, would be enough, as a citizen of the United States, to create the presumption in my mind, almost irresistible in character, that John H. Mitchell could not, in his declining years, have fallen so low—have so denied his whole career—have so departed from the whole moral fiber of his honesty and honor, as to commit a crime in the taking of a few hundred dollars. I tell you, gentlemen, I want that presumption to go with you into the jury-room, for he is entitled to have it.

Oh, but they say, get right down to the fact that he took the money, and they really ask you, gentlemen of the jury, to be machines and not men.

I am glad that the law of civilization and of this great liberty-loving people has provided that a jury of men shall try men, and not a jury of machines. I am glad, and it is the safety of every man in this country, that in the jury-box shall be, not only the heads and the intellects, but the hearts of men, and that men shall try men; and when I say men on the jury, I mean men who are alive to every noble impulse of the human heart—who can realize human frailty, who are not perfect, who might not be able to stand at the final day before the judgment bar and expose all the secret workings and failures of their own lives without feeling very sadly about their own shortcomings. I am glad that men are to be tried by men—human men. Oh, gentlemen, when I am tried, if I ever am, I want the men who try me to be men; home men, good men. I want them to be men who come to the jury-box fresh from the tender embraces of loving wives, and I want them to come to the jury-box with the kisses of little children still trembling on their lips; and I want them to come with human hearts; I want them to come looking for the good, and not for the bad. I want them to come seeking out the theories under which they can decide that men have been honest and good, rather than to come looking for excuses to throw shame and punishment upon their fellow-men. And I want this jury, after you decide this case, to go out of the courtroom, not thinking or caring what a partisan press may say, or what prejudiced people in any community may say. I only ask of you one thing when you go out of this jury-box and return to your happy homes, that you can sit down there and take your children on your knees, or if you haven't any children young enough for that, you can put your arms around your wife and say, "Thank God! I had a chance—I had a chance to relieve an old man unjustly accused."

Tanner and the Checks.

On the 16th of October, 1901, Kribs made his first agreement with Tanner about lands. The District Attorney has said that he had other transactions with Tanner before, that Mitchell must have known about it. There was only one, of $50 for a case not connected with land matters in the department at all; nothing in that to challenge Mitchell's attention if he had looked the books over for a hundred years. The first deal with Kribs was by Tanner on the 16th of October, 1901. That transaction is not covered by this indictment, but I can see that it is important, and that you have a right to consider it for the purpose of determining whether or not, in regard to later transactions between Kribs and Tanner, Mr. Mitchell had knowledge that moneys were paid for the purpose of securing services to affect the decision of Binger Hermann in the Land Office of the United States. Gentlemen, Mitchell could not have been guilty then or afterwards under that statute, unless Tanner knew that he was receiving and had agreed to receive money for the performance of services in the department at Washington. Now that is just as plain as anything can be plain. Mitchell could not have been guilty in any of those transactions unless Tanner, when he took the check and made the arrangement, made it with reference to the performance of services before Binger Hermann in the Land Office of the United States. You will agree with me that this is self evident. Therefore, the first question that arises is, did Tanner, when he received these checks from Kribs, receive them under an agreement to perform services, either by himself or Mitchell, before Binger Hermann in the Land Office of the United States? Did Mr. Tanner, when he received these checks, receive them to cover services of Senator Mitchell? Take the first transaction on the 16th of October, 1901. We only have the testimony of the witnesses as to that transaction, Tanner and Kribs. Kribs says that he employed Tanner. I challenge the District Attorney's attention to any statements I make about the evidence. Kribs says he employed Tanner to look after these land matters. Stop right there a moment. What was to be done about them? Only to perfect them. There was not a thing to be done in the General Land Office of the United States by Tanner or anybody else, only to perfect the record and see that the proof was right so that they would go through, and if it was right, they would go through as a matter of course. There was nothing to be done in the General Land Office. It was the preparation of the cases and getting them ready, forwarding the proof; but Kribs says he employed Tanner, and after he had made his agreement with Tanner they both went into Mitchell's room, where Tanner introduced Kribs to Mitchell, whom he did not know at that time, and he said, "Mr. Kribs has just employed"—Who?—"me to look after his land matters." And three days later Kribs came back and saw Mitchell for a moment, and he said to him, "I have agreed to pay Mr. Tanner a thousand dollars in my land cases I have brought to him," and Mitchell says, "You must not talk to me anything about that, go and talk to Tanner." The District Attorney puts a criminal construction upon every innocent transaction and every innocent word that has been written through all these lines of proof. Mitchell says: "Go and talk your money matter with Tanner." Why? Because Kribs had told him, and Tanner had told him, that Tanner had been employed. And there is not a line or a word in Kribs' testimony that even raises an impression in the minds of honest men that at the time of Tanner's employment it was in Tanner's contemplation that Mitchell was joined with him in that matter of employment, or if he was it was not in the contemplation of Mr. Tanner that they were being employed for any service to be rendered in the department by Senator Mitchell. Gentlemen, if Tanner did not accept employment on behalf of Mitchell; if Tanner did not take that money under an agreement to cover Mitchell's services in the department; if it was not the understanding of Tanner that such was to be the case, how can you charge Mitchell with a guilty purpose or with knowingly taking money for the purpose of securing his influence in the department of the Government? You cannot do it. What does Tanner say? Tanner is the man we come to now. He has testified after all these things were over, when Mitchell came out here and Tanner met him up the road a ways, to the following conversation: "He (Mitchell) said what was Kribs going to do, whether they could get any information out of Kribs about the transactions that had been had with the firm or not; and I told him I did not know what course Mr. Kribs would pursue about it. And that led to a sort of argument between he and me as to whether there was anything in the transaction with Kribs that would affect him as a Senator. I was surprised when he intimated that there might be."

If Mitchell was guilty at all, he was guilty because Tanner made an agreement and took money for the performance of services before a department in violation of this statute. How did Tanner look at it? "I was surprised when he intimated that there might be. He (Mitchell) shook his head and seemed afraid of it, and of course I said, 'I don't see that there can be anything in that that would affect you.'" Tanner did the business; Tanner knew whether or not his agreement covered the services in the department; Tanner knew whether or not he was getting money with or without the knowledge of this man for services in the department. Tanner said to Mitchell, "I don't see that there can be anything in that that would affect you." What did he mean by that? He meant just what he has testified to, that he never made any agreement with Kribs for any money to cover services in the department by Mitchell or anybody else, or in violation of this statute. If Tanner did not make an arrangement of that kind; if Tanner did not receive the money for that purpose, his paying over half of it to Mitchell would not make Mitchell guilty of anything. If the money came into that firm as Tanner says it did, not covering services performed or to be performed in the department, it came in there as the honest and legitimate moneys of the firm in the division of which Mr. Mitchell was entitled to share, and unless Tanner took it for the purpose of covering service to be performed in the department, it was honest money in the treasury of the firm and went to Mitchell as such. If it was honest money when Tanner took it, it was honest money when it was divided. There was no period of time between its receipt by Tanner and its turning over to Mitchell when money that was innocent in itself became guilty in fact.

But further: "I said Kribs employed me and I did the work, and whatever assistance you rendered was the same as rendered any constituent who might call on you for assistance of that kind." Now that was not said after the indictment; that was not said in court. It was not a conversation that either of the men ever supposed would be repeated or used elsewhere; it was the honest expression of Tanner's judgment; it was the honest relation by Tanner to his partner in confidential conversation as to what the character of the transaction had been under which he received money from Kribs. He continues: "I did not, so far as I was then advised, consider that there could be any case against him (Mitchell)."

But that is not all. Mr. Tanner is put on the witness stand by the prosecution and offered to you as a witness worthy of your belief. The prosecution cannot, in the nature of things, discredit its own witness. It is bound by what its own witness testifies to. I am not going to say much in this case about Mr. Tanner. I feel sad and sorry for him. God pity any man who is hung up as he is under a plea of guilty to an indictment, who can be sentenced to one day's imprisonment or ten years, just as the District Attorney says, or who can go to prison or be pardoned, just as the District Attorney says. God pity the man that any prosecuting officer has clutched by the throat like that. I pity him; but with respect to almost everything in this case, I believe that Tanner testified like an honest man, and certainly it does not lie in the mouth of the prosecuting attorney to say that the testimony and the witness he himself offered are not to be believed by you. Bear in mind what I have said, and what you must realize, that Mitchell cannot be guilty under any circumstances unless Tanner made an agreement to take the money to cover services to be performed in the department at Washington and to be performed by Mitchell, because Tanner never pretended to render any services there. Mr. Bennett asked Tanner on the witness stand, as you heard him: "Q. At the time that you made this contract with Mr. Kribs did you charge Mr. Kribs or include in this thousand dollars anything for work which Senator Mitchell should do as Senator such as he would not do for any individual?" This question was objected to, and then Mr. Bennett asked him this:

No Charge for Mitchell's Services.

"Q. Was there anything included in that charge for services which Senator Mitchell might render in the departments at Washington? A. I did not so understand it." If Tanner did not so understand at the time he made the contract and took the money, how can this jury understand it that way at this late date to criminate this defendant? "Q. You did not so understand it? A. No. I did not. Q. You did not intend to charge Mr. Kribs anything for that, nor included that in that charge of a thousand dollars? A. No, sir; I did not. Q. And it was not so included? A. No, there was nothing included for any services that he rendered there." And that examination was followed up to show clearly and conclusively as to Kribs' matters that at the time Tanner made his agreement with him he employed Tanner; Tanner so understood it; Kribs so understood it; and that he did not include in that employment or in the compensation received, anything for services performed or to be performed in the department at Washington by Senator Mitchell; and, gentlemen of the jury, if you believe Tanner on that point, that transaction was as innocent a deal as ever was made, an absolutely innocent employment. If that money came into the firm treasury innocent and clean, it went to Mitchell innocent and clean. For it went in there for services to be performed in perfecting cases, to make the proof and all that, and do the outside work and give advice and get them to the department, covering a transaction that the firm was entitled to engage in—for Mitchell was entitled to receive half of all the money taken in by that firm that did not include work done in the department at Washington. Now, bear in mind, gentlemen, the statute does not cover preliminary work done in a case that is pending in the department; it does not cover work outside of the department, and this indictment charges that he was guilty because it was done to influence the decision of Binger Hermann. They have limited it, it does not charge anything that was done to get a case ready for the department, it does not charge anything that was done in sending evidence to the department, it does not charge anything that was done in asking the status of the case in the department. Tanner says the money he received from Kribs did not cover anything else. Tanner is their witness. Don't put him on the stand, holding him as you do, dependent as he is on the mercy of the District Attorney, and because he testifies to the truth as to the honesty and purity of that transaction with Kribs, don't ask the jury to disbelieve what he testifies to, and upon their disbelief to convict this defendant.

Did Mitchell Know?

Did Mitchell know or have good reason to know, when the partnership funds were divided at the end of any month, covered by the Kribs payments, that he was getting money that had been received from any source for services rendered or to be rendered in the department? Stop and think a little bit. They say, yes, he knew. What did he know? He knew Kribs had employed Tanner; Tanner had gotten money. What for? Kribs had a right to employ Tanner; Tanner had a right to take Kribs' money in an honest transaction. All I ask is that men shall judge transactions as they seem, without starting with the suspicion that there is something wrong, to hunt for some secret meaning beneath the surface of things. Suppose he knew Tanner took $100, $500, $1000, from Kribs; suppose he saw it entered in the book. What was there about that to advise him that it was taken for a dishonest purpose? Was there anything in any entry on those books that shows on the face of it that he had not made an honest arrangement with Kribs for services, not including anything done in the department at Washington? Was there anything about a single one of those entries in the book that you or any other man would look at? Ah, they say, Kribs employed Tanner; suspicious to employ Tanner; Tanner is the partner of Mitchell, Mitchell is Senator. Suspicious! If there is a man on this jury who sits here with a suspicious heart to begin with, he will find something wrong about all of these transactions. I don't believe there is such a man on this jury. I believe you will do whatever a fair-minded man ought to do; view every transaction as if it were an honest transaction and meant what it appeared to mean, until there is proof to the contrary. If Mitchell, on the 3d day of March, 1902, when he received his share of the first payment charged in this indictment, made on the 13th of February, 1902, had had the book of that firm right before him and this entry in it, and had read it a thousand times, what is there about it to charge him with knowledge or even suspicion that Tanner was taking money in it to cover services to be performed by Mitchell in the department? It was an entry that appeared honest on its face. But, gentlemen of the jury, that money was received by Mitchell on March 3, 1902, that first half of the first Kribs payment. He was either guilty then on that count, or else he never could be guilty afterwards. He was either guilty when he took that money, or when it was deposited to his credit with his knowledge, if he had knowledge, which he got when the monthly statement was sent to him, or else he never could be guilty. If, after he took that money he had found out at some later date that it had been received by Tanner to cover services that were unlawful under this statute, mark you, if he had not known it when he received it, but at a later date he found it out, it did not make him guilty of taking it with that guilty knowledge, because he was either innocent or guilty at the time he took the money. And if he found out afterwards that it had been taken in by Tanner for an unlawful purpose, that knowledge would not make him criminal, and the fact that he did not afterwards pay back the money would not make him guilty under this section of the statute. He was either guilty or innocent when he took the money. He had to have knowledge then or never, and the transaction there was closed. If a man comes to me and passes on me a counterfeit twenty-dollar gold piece, he is either guilty of a crime then or never. If he did not know the gold piece was counterfeit then, he was not guilty; if he did, he was. If he did not know it then, but found it out the next month, that did not make him guilty of passing counterfeit money on me. If he found it out the next month and did not come and pay me, take up his counterfeit piece, that did not make him guilty. It may have been his duty as a man, to come to me when he found it out and pay me the $20, but it did not make the passing of that counterfeit twenty-dollar gold piece a crime because he found out after he passed it that it was counterfeit.

So Mitchell—and I cannot repeat that too strongly or too often—was either guilty when he received the monthly division of funds, he either knew or he did not know, that that money was received for an unlawful purpose, and his guilt or innocence settled right there. He might be paid $10,000 under the statute today, and if he thought at the time that he was receiving it for a proper purpose, and should find out tomorrow that it had been paid to him for an improper purpose, that would not make him guilty under this statute. The moral responsibility might rest upon him to return the money; but whether he did or not would have no effect upon the question as to whether he had or had not committed a crime. But they say that that division of funds on the 3d day of March, 1902, covering the first $500 payment in February, 1902, Mitchell must have known all about. Why? Because about the 8th or 9th of June following, there was sent to him a copy of the book entries, mark you, from November to June. That is all it covered. On that whole transcript, from November to June, there was only one entry of the receipt of money from Kribs, $500 February 13. You saw that paper here, the number of pages and number of entries it contained. In that whole transcript there was only one entry of a payment by Kribs, $500 on February 13. Now, mark you, that covered a period of time from November 1 to June 1. That payment on the 16th of October did not appear on that copy of the books. Only one payment appeared, $500, and that under an entry which was perfectly innocent on its face, which meant just what it said, just what Tanner said it meant, which described the transaction exactly as Tanner said the transaction occurred, namely, that Kribs had employed him under a retainer to perform perfectly innocent services, not covering any service of Senator Mitchell. Mitchell might have seen that transcript or he might not. If he did, it was a perfectly innocent-looking entry and meant just what Tanner said it meant. It did not charge Mitchell with any knowledge in the slightest degree that Tanner had taken that money to cover any services performed in the department in violation of the law of the land. I do not believe, for my part, under this testimony, that Mitchell noticed or paid any attention to that entry. What did Robertson testify—he was there when that copy of the books came, and here is all the testimony there is about that: "I remember at the time of the Senator writing to Judge Tanner, shortly before that, for a copy of the entries in the book, and I remember that coming on. I remember the Senator dictating the acknowledgement which you have just shown me, and I remember seeing it lying on his desk and remember looking over it. Q. Did you ever see it there at any other time? A. I remember seeing it when he received it, and dictated the answer, and throwing it over on the desk, and I might have seen it other times." There isn't one word of testimony that Mitchell examined that copy of the books; he may have done so; if he did, he received nothing but information that appeared perfectly innocent; it did not tell him, and it could not have told him, because Tanner says it is not true that that money had been received to cover influence and work in the department at Washington. But I don't believe he saw it, receiving from 50 to 100 letters a day. I know Mitchell was the busiest man of any man in the United States Senate, the most faithful man to his correspondents, a man who burned the midnight oil later and was up earlier in the morning every day of the session of Congress than any other Senator that ever sat in the United States Senate; a man who never neglected to answer a communication from a constituent or to tramp around from department to department trying to get his constituents' requests recognized and acted upon favorably.

Did Not Know He Violated the Law.

Now, did Mitchell—and that is what you have got to say by your verdict—did Mitchell when he received his share of the money on the 3rd day of March, 1902, know that he was taking any money in that partnership division in violation of this statute of the United States? That is what you have got to answer, and you can answer it easily.

The next payment was $1000, on the 14th day of June, 1902. Bear in mind, gentlemen, that that was not included in his copy of the book that he received; his copy of the book covered the period from November 1, 1901, to June 1, 1902. That only covered the first $500 charged in the indictment. The next payment of Kribs to Tanner was $1000, on the 14th of June, and the copy of the book only came down to the 1st day of June, so of course that June payment did not appear in that copy. Tanner received it and put it to the credit of the firm on the 14th of June, and on the 2nd or 3rd of July he made the division and sent it to Mitchell, as you have seen, with the regular statement, upon which statement it appeared in no way, shape or manner as to where the money came from that was being divided. There is not a monthly statement which showed where a dollar of the money being divided came from. Therefore Mitchell not having been here on the 14th of June, necessarily knowing nothing of the agreement entered into between Kribs and Tanner at that time, did not know and could not know that Tanner had taken a thousand dollars from Kribs in land matters, and did not know, and could not know, when the money came to him, that it was given—if it had been given—for an unlawful purpose. Is not that a fair way to look at it? When Mitchell took that money on the 3rd of July, or took the credit and was notified of that fact, how could he in the nature of things have known that it was not money that he could properly divide with his partner, even if such were the case? If he did not know, is he guilty? Certainly not.

Then there is only one other transaction under this indictment that I care to refer to, and that was on the 20th of September, 1902, when Tanner again received $500 and on the 2nd or 3rd of October again made a division. Senator Mitchell was then in far-away Honolulu, or on his way back, at least, away from Portland. How he got information as to that division I do not know, but there positively is not a word of testimony from beginning to end to show that he knew on the 3rd or 4th of November, when that money was passed to his account, that it had been received for an unlawful purpose. Gentlemen, it was not received for an unlawful purpose. Neither Tanner nor Mitchell did one thing from beginning to end in the Kribs matter that was wrong or criminal or in violation of this statute of the United States. Mitchell could not have committed an offense under this statute unless Tanner was assisting and aiding him in doing it.

Restricts the Trial.

Now, they take occasion to introduce to the jury some other transactions with reference to land matters. You are not trying Senator Mitchell upon any of them; they are only introduced in the hope of showing to you some additional proof that Mitchell must have known that the Kribs transaction was covered by this section of the statute of the United States. I have neither the time nor the inclination to take up these other outside matters. If, under this proof, Mitchell did not know that he was receiving moneys for things done or to be done in violation of this statute—and he did not—and the proof so shows; if Tanner did not receive this money in the first instance for the purpose of covering unlawful services under that statute, then and in either of those cases, this case is at an end. And whether or not there may have been other land transactions; whether or not there may have been other moneys received, with probabilities more or less strong that the transaction was within the statute, they cannot possibly influence you in this case from a determination on the facts as they appear under this indictment.

Tanner told Mitchell on the 16th of October that Kribs had employed him; Tanner commenced writing Mitchell from that time on with relation to the Kribs matters, and almost every letter he wrote, especially of the first letters, he wrote about the Kribs matter, and I have all of them there, saying: "Mr. Kribs is my client. I am writing you in the interest of a client of mine. I am asking you to get information from the department for a client of mine."

What District Attorney Says.

The District Attorney says that Mitchell had gotten Tanner pretty well trained by that time to write that way. Was he justified in saying that? Tanner is his witness. Is there a word here that suggests the thought that Tanner had been trained by Mitchell to write anything but what he meant? Is there anything in this testimony, one word from any living witness or anything else, that shows that Tanner was seeking to disguise his own transaction in the method of his writing his letters to Mitchell? Not a word, and oh, how unjust and how unfair it is to ask this jury to believe, without a single bit of proof, that a man whom they use as a witness for the prosecution, began from the very beginning, under a secret arrangement with Mr. Mitchell, to disguise the correspondence and to write what he did not mean, and to express himself otherwise than was the real understanding between the parties. All I need say is that there is not a word of proof of it; there is not a suspicion here that Tanner ever wrote a letter which he did not write as he meant to write it. There is not a word of proof to show that he ever wrote a letter under any arrangement with Mitchell or anybody else to disguise any transaction that was occurring, for I tell you, gentlemen, that up to the time inquiries began in Portland, and daily bulletins went out through the newspapers in the country as to the investigation of these gigantic land steals, there was not anything connected with this transaction in the slightest degree which either Tanner or Kribs or Mitchell would have sought to disguise or conceal. They were acting in the open. Mitchell's every letter went on file in the Department of the Interior; it was there to damn him if it showed evidence of guilt. Every letter that was written appeared honest on its face among all those parties. There wasn't anything to disguise in the judgment of any of those men up to that time.

Land Frauds Investigation.

But about that time our Government and the Administration commenced investigating land frauds. I presume there have been lots of them all over the country. It was a very proper thing to begin investigating land frauds; it was a very proper thing for the Government to employ a distinguished and able attorney like Mr. Heney to come here and investigate Oregon land frauds. You said in your examination as jurors, that you read all the papers, and therefore you know that he was sent here to investigate land frauds. It was claimed that there were people here who were seeking to secure the magnificent timber lands of this state by a fraudulent process, by hiring entrymen to file claims under an arrangement to turn over the claims to the big fellow after he had proven up. No doubt there were many cases in which men thus employed were induced to perjure themselves, and made perjured affidavits and got their claims through in that way. Mr. Heney was sent here to investigate these gigantic land frauds. He got hold of the evidence of one gigantic land fraud, that is, if the grand jury that returned this indictment knew what he had put into this indictment. The grand jury got hold of one king of defrauders—if the grand jury knew what it put into this indictment. Bear in mind, there isn't a word of truth, there isn't a suggestion made by Mr. Heney, that Tanner or Mitchell ever supposed for an instant that there was any fraud in these entries; but Mr. Heney was here—that is, the Government was here—to investigate the alleged great land frauds in the State of Oregon. Was not that what they were here for? The grand jury says—you heard this yesterday—that this man Kribs had been engaged in this fraudulent effort to secure the timber lands of Oregon; they say that he induced numerous entrymen to make false affidavits to secure lands; that he was engaged in a vast scheme of public plunder against the United States and the people of Oregon in particular. Therefore, I take it for granted that the grand jury must have had enough proof before it that Kribs was the king of this fraudulent attempt to secure the timber lands of Oregon; it must have had proof of that when it wrote that charge into this indictment where it did not belong, where they say it did not belong. The grand jury found that testimony; it was proven to them, for they say that Frederick A. Kribs, by subornation of perjury, by the carrying on of a gigantic scheme of robbery, had secured 20,000 acres of the timber lands of the State of Oregon. Robber and thief, says the grand jury; that is what the Government was asking to have investigated, and that is the kind of men they were asking to have indicted and punished.

Why Was Kribs Not Indicted?

The grand jury that found that charge against Kribs did not indict him. They wrote Kribs' indictment in the indictment against Mitchell, and they let Kribs go free. Why? Gentlemen, I am not here to cast reflections upon anybody, but I am here to call a spade a spade, and a shovel a shovel. Why was not Kribs indicted by the grand jury that wrote his indictment into this indictment? And I want you to answer that. I want you to tell me if it is not true that this great Government investigation which was set on foot from Washington in the first instance, to unearth and punish the land thieves of Oregon, was in some way turned into an instrument directed solely and alone to the prosecution and conviction of this old man with his honors ripe upon him, for a mere technical infraction of a statute of the United States, in a comparatively small transaction? Somebody, responsible to the people of Oregon and the people of the United States—somebody told that grand jury, with the proof before it that Kribs had suborned perjury in a hundred cases, and had robbed this domain of 20,000 acres of your choicest timber lands—somebody told that grand jury to let Kribs go if he would be a witness against Mitchell. That is as clear and as certain as light is light, and needs no other or further proof. But the District Attorney says very suavely—that is, he intimates—that the whole Government of the United States is waiting with bated breath to hear that you have convicted Mitchell, not to hear that you have done right; not to hear that you have acquitted him; not to hear that you have passed on the evidence like honest men; but that the whole Government is just waiting to hear that you have convicted Mitchell.

Thurston Makes His Closing Plea.

And the impression is sought to be conveyed that the administration of the United States stands here in the person of the District Attorney and demands conviction at your hands, right or wrong; and an ingenious reference in that respect was made to Theodore Roosevelt, the President of the United States, for the purpose, and none other, of conveying to the minds of this jury the fact that Theodore Roosevelt was waiting with bated breath just to hear that old John H. Mitchell was convicted by a jury of his neighbors. On behalf of this administration and that grand man, Theodore Roosevelt, I resent that suggestion. Theodore Roosevelt, honest a man as was ever created in the image of God, as fair a man as ever lived on earth, does not wait anxiously for the conviction of anybody. All he asks is that every man against whom an indictment is brought shall be put face to face with a jury of his peers. He is not the man to hope for conviction; he is not hoping for the conviction of John H. Mitchell, a Senator of the United States. He is not that kind of man, and I have no doubt that that great heart of his will respond with satisfaction, yes, and with joy, when a jury of Oregon citizens have decided that John H. Mitchell is not guilty under the charges of this indictment. No, no, gentlemen; do not proceed with the consideration of this case under the theory that you are aiding the Government of the United States in the prosecution. The Government has nothing to demand from juries except that jurymen shall do as they swear they will do, faithfully try the issues between the state and the accused, and a true verdict render according to the evidence and the law. There is nobody behind this prosecution whose wishes ought to be considered by you in influencing your consideration of the testimony, not one.

Whereupon the court admonished the jury as usual and an adjournment was taken until 10:00 A. M., July 1, 1905.

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