

UNITED STATES *v.* TOD.

Circuit Court, S. D. Ohio, W. D. November, 1885.

1. "INFAMOUS" CRIMES—CRIMINAL INFORMATION.

Offenses punishable by imprisonment for more than one year may, upon conviction thereof, subject the defendant to an "infamous" punishment, and cannot be prosecuted by criminal information.

2. SAME—PENSION FRAUDS.

The offenses created by sections 4746, 5418, and 5479 can be prosecuted only by indictment.

Demurrer to Criminal Information.

J. C. Harper, for demurrer.

Henry Hooper, Asst. U. S. Atty., *contra*.

SAGE, J., (*orally*.) The defendant is charged in a criminal information with violating sections 4746, 5418, and 5479, Rev. St. He demurs on the ground that the offenses are "infamous," and can be prosecuted only by indictment or presentment of a grand jury. The counts under sections 5418, 5479, are clearly within *Ex parte Wilson*, 114 U. S. 417, S. C. 5 Sup. Ct. Rep. 93.5, as those sections in terms authorize imprisonment at hard labor. Section 4746 authorizes a sentence of "imprisonment for a term not exceeding three years." 816 Under section 5541, if the sentence be for a period longer than one year, it may be executed in a penitentiary, and, under section 5539, subject to the discipline and treatment applied to prisoners under sentence by the state courts. Prisoners in the Ohio penitentiary are, by law, kept at hard labor. A sentence by this court to imprisonment in the Ohio penitentiary is therefore in effect a sentence to imprisonment at hard labor. See *Ex parte Karstendick*, 93 U. S. 396, and *Ex parte Geary*, 2 Biss. 485. The criterion laid down in *Ex parte Wilson* is "whether the crime is one for which the statutes authorize the court

to award an infamous punishment, not whether the punishment ultimately awarded is infamous. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon trial except on the accusation of a grand jury." 114 U. S. 426, and 5 Sup. Ct. Eep. 939.

As the crime charged in the counts under section 4746 would, upon conviction, authorize a sentence to the penitentiary, and in fact subject the accused to a term at hard labor, it is infamous, and cannot be prosecuted by information. Demurrer sustained.

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