Chapter LXVI.

PROCEDURE OF THE SENATE IN IMPEACHMENT.

2069. Unless otherwise ordered, the Senate, sitting for an impeachment trial, begins its proceedings at 12 m. daily.

The Presiding Officer of the Senate announces the hour for sitting in an impeachment trial and the Presiding Officer on the trial directs proclamation to be made and the trial to proceed.

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[1] As to administration of the oath, see, also, Blount's trial (sec. 2303 of this volume), Peck's (secs. 2369, 2375), Humphreys's (sec. 2389), Johnson's (sec. 2422), Belknap's (sec. 2450), Swayne's (sec. 2477).

[2] See, also, sections 2065–2067, 2082–2089.

The president pro tempore presides during absence of the Vice-President. Sections 2309, 2337, 2394.

Medium for putting questions to witnesses and motions to the Senate. Section 2176.

Rulings of, as to evidence. Sections 2193, 2195, 2208.

Does not decide as to attachment of witnesses. Section 2152.

Calls counsel to order for improper utterances. Sections 2140, 2169.

Calls respondent to order. Section 2349.

Admonishes managers and counsel not to delay. Section 2151.

[3] A majority vote only is required on incidental questions. Section 2059.

As to the vote of the Chief Justice when presiding. Sections 2057, 2067.

Debate as to admission of evidence. Sections 2196–2202.

[4] Parliamentary law, as to. Section 2027.

Constitution requires two-thirds vote. Section 2055.

Debate on the question. Section 2094.

Where a plea of guilty might be entered. Section 2127.

Process of judgment in various cases: Blount's (sec. 2318), Pickering's (secs. 2339, 2340), Chase's (sec. 2363), Humphreys's (secs. 2396), Johnson's (secs. 2437–2440), Belknap's (sec. 2466), Swayne's (sec. 2485).

[5] The rules continue from Congress to Congress. Section 2372. Adoption of, at various times. Sections 2389, 2314.

An adjournment of the Senate sitting for an impeachment trial does not operate as an adjournment of the Senate.

Immediately upon the adjournment of the Senate sitting for an impeachment trial the ordinary business is resumed.

Present form and history of Rule XII of the Senate sitting for impeachment trials.

Rule XII of the "rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

> The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be (unless otherwise ordered) 12 o'clock m., and when the hour for such thing [sitting?] shall arrive, the Presiding Officer of the Senate shall so announce, and thereupon the Presiding Officer upon such trial shall cause proclamation to be made, and the business of the trial shall proceed. The adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate; but on such adjournment the Senate shall resume the consideration of its legislative and executive business.

This rule was first drafted by the committee appointed in 18681 to revise the rules preparatory to the trial of President Johnson. In the House, on March 2, the original form was modified by eliminating the words "high court of impeachment" wherever found and substituting the words "the trial." The form adopted in 1868 is identical with the present form, except that the word "thing" appears instead of "sitting.'"

2070. At 12.30 p. m. of the day appointed for an impeachment trial the Senate suspends ordinary business and the Secretary notifies the House of Representatives that the Senate is ready to proceed.

Present form and history of Rule XI of the Senate sitting for impeachments.

Rule XI of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

> At 12.30 o'clock afternoon of the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of ____ ____, in the Senate Chamber, which chamber is prepared with accommodations for the reception of the House of Representatives.

This is the form reported and agreed to in the revision of 1868.[3] It was formed by uniting portions of rules 11 and 12, which had been framed in 1805[4] at the time of the trial of Judge Chase.

2071. The hour of meeting of the Senate sitting for an impeachment trial being fixed, a motion to adjourn to a different hour is not in order.— On March 30, 1868,[5] in the Senate, sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. John Sherman moved an adjournment.

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[1] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, pp. 1534, 1602.

[2] Apparently a misprint.

[3] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1534.

[4] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[5] Second session Fortieth Congress, Globe Supplement, p. 53.

Mr. Charles Sumner, of Massachusetts, suggested that the adjournment be to 10 o'clock on the morrow.

The Chief Justice[1] said:

The hour of meeting is fixed by the rule, and the motion of the Senator from Massachusetts is not in order.

2072. In the Johnson trial the Chief Justice held that the motion to adjourn took precedence of a motion to fix the day to which the Senate should adjourn.—On April 3, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. George F. Edmunds, of Vermont, moved that the Senate adjourn.

Mr. William Pitt Fessenden, of Maine, moved that when the court should adjourn, it adjourn to meet on Monday next.

Mr. Edmunds made the point of order that the motion to adjourn took precedence.

The Chief Justice[1] said:

The Chair is of opinion that the motion to adjourn takes precedence of every other motion if it is not withdrawn.

2073. In the Senate sitting for an impeachment trial no debate is in order pending a question of adjournment.—On Saturday, April 4, 1868,[3] in the Senate, sitting for the impeachment trial of Andrew Johnson, President of the United States, a motion was made that when the Senate, sitting as a court of impeachment, should adjourn, it should be to meet on Thursday, April 9.

Debate having arisen, the Chief Justice[1] said:

The Chief Justice is of opinion that, pending the question of adjournment, no debate is in order from any quarter. It is a question exclusively for the Senate. Senators, you who are in favor of the adjournment of the Senate sitting as a court of impeachment until Thursday next will, as your names are called, answer "yea;" those of the contrary opinion, "nay."

And there appeared yeas 37, nays 10. So the motion was agreed to.

2074. The motion to adjourn to a certain time has been admitted in the Senate sitting for an impeachment trial.—On June 1, 1876,[4] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George G. Wright, a Senator from Iowa, proposed this inquiry:

Mr. President, I wish to inquire whether it would be in order now to move to adjourn to a day certain, or whether the order should be properly that when the Senate sitting as a court of impeachment adjourns, it be to a definite time?

The President pro tempore[5] said:

It would be in order to move to adjourn to a certain time.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Second session Fortieth Congress, Globe Supplement, pp. 110, 111.

[3] Second session Fortieth Congress, Globe Supplement, p. 121.

[4] First session Forty-fourth Congress, Record of trial, p. 161.

[5] T. W. Ferry, of Michigan, President pro tempore

2075. The Senate sits for an impeachment trial with open doors, but may deliberate on its decisions in secret.

Present form and history of Rule XIX of the Senate sitting in impeachment trials.

Rule XIX of the "Rules of procedure and practice for the Senate when sitting in impeachment trials," is as follows:

> At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

The first clause of this rule is in the form adopted in 1805,[1] for the trial of judge Chase. The second clause, setting forth a contingency in which the doors may be closed, was added in the revision of 1868,[2] preparatory to the trial of President Johnson.

On July 31, 1876,[3] when the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, was about to proceed to judgment, Mr. Hannibal Hamlin, a Senator from Maine, proposed to amend the rule by striking off the qualifying clause, so that the proceedings should be held in open session. But the Senate by a vote of yeas 23, nays 32, declined to consider the proposition.

2076. If the Senate fail to sit in an impeachment trial on the day or hour fixed, it may fix a time for resuming the trial.

Present form and history of Rule XXV of the Senate sitting for impeachment trials.

Rule XXV of the "rules of procedure and practice for the Senate when sitting in impeachment trials," is as follows:

> If the Senate shall at any time fail to sit for the consideration of articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming such consideration.

This rule was adopted in 1868,[4] preparatory to the proceedings for the trial of President Johnson.

2077. An order for postponement of an impeachment trial was held in order after the organization of the Senate for the trial.—On March 23, 1868,[5] in the Senate as organized for the trial of President Johnson, the Chief Justice of the United States presiding, Mr. Garrett Davis, a member of the Senate from Kentucky, proposed a preamble and order, reciting that the seats of Senators from several States were vacant, and declaring that the trial should be postponed until the Senators from those States should be permitted to take their seats.

Mr. Timothy O. Howe, of Wisconsin, a Senator, objected that the proposition was not in order.

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[1] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[2] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 814: Globe, p. 1568.

[3] First session Forty-fourth Congress, Record of trial, p. 341.

[4] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 252: Globe, p. 1503.

[5] Second session Fortieth Congress. Globe supplement, p. 12.

The Chief Justice,[1] said:

The motion comes before the Senate in the shape of an order submitted by a Member of the Senate and of the court of impeachment. The twenty-third rule requires that "all the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of rule seven." The seventh rule requires the Presiding Officer of the Senate to "submit to the Senate, without a division, all questions of evidence and incidental questions; but the same shall on the demand of one-fifth of the Members present, be decided by yeas and nays." By amendment this rule has been applied to orders and decisions proposed by a Member of the Senate under the twenty-third rule. The Chair rules therefore that the motion of the Senator from Kentucky is in order.

Thereupon the proposition was entertained.

2078. When informed that managers are to present articles of impeachment, the Senate, by rule, requires its Secretary to inform the House of its readiness to receive the managers.

Present form and history of Senate Rule I as to impeachments.

Rule I, of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," [2] is as follows:

Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person and are directed to carry articles of impeachment to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to such notice.

This rule, with two immaterial verbal changes, is in the form adopted for the trial of Judge Chase in 1804.[3] It merely put in form of a permanent rule the practice followed in the trials of Senator Blount and Judge Pickering. In 1868,[4] for the trial of Andrew Johnson, President of the United States, the rule received slight verbal changes, and was adopted in the form above, except the last two words, which read "said notice," instead of "such notice."

2079. Articles of impeachment being presented, the Senate is required by its rule to proceed to prompt consideration thereof.

Before consideration of articles of impeachment, the Presiding Officer is required by rule to administer the oath to the Senators present, and later to others as they may appear.

The Senate, in its rules, has refrained from prescribing an oath for the Chief Justice when he presides at an impeachment trial.

The Senate is required by rule to continue in session from day to day, Sundays excepted, during impeachment trials, unless otherwise ordered.

In 1868 the Senate eliminated from its rules all mention of itself as a "high court of impeachment."

Present form and history of Rule III of the Senate for impeachment cases.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] See Senate Manual, p. 171.

[3] Senate Journal, pages 509, 510, second session Eighth Congress.

[4] Second session Fortieth Congress, Journal, pp. 248, 811; Globe, p. 1521; Senate Report No. 59.

Rule III, of the "Rules of procedure and practice of the Senate when sitting on impeachment trials," is as follows:

Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation or, sooner if ordered by the Senate, proceed to the consideration of such articles, and shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the Senate) until final judgment shall be rendered, and so much longer as may, in its judgment, be needful. Before proceeding to the consideration of the articles of impeachment, the Presiding Officer shall administer the oath hereinafter provided to the Members of the Senate then present and to the other Members of the Senate as they shall appear, whose duty it shall be to take the same.

This rule, which formulated the practice of previous trials, dates from 1868,[1] when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a series of rules for the proceedings incident to the impeachment of President Johnson. This rule was reported in form as follows:

III. Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation, or sooner if so ordered by the Senate, resolve itself into a high court of impeachment for proceeding thereon. A quorum of the Senate shall constitute a quorum of the court, and it shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the court) until final judgment shall be rendered, and so much longer as it may, in its judgment, be needful. Immediately upon the Senate resolving itself into such high court of impeachment the Secretary of the Senate shall administer to the Presiding Officer (unless he shall be the Chief Justice) the oath required by the Constitution of the United States in such cases, and in the form hereinafter prescribed, and thereupon the Presiding Officer shall administer such oath to the Members of the Senate then present, and to the other Members of the Senate as they shall appear, whose duty it shall be to take the same.

The wording of this language, with its references to the "high court of impeachment" and the quorum thereof, gave rise to a discussion[2] as to the constitutional status of the Senate in such procedure; and resulted in amendment[3] striking out those words, and bringing the rule in this respect to its present form. Another question arose over a proposition to strike out the words providing for administering the oath to the Presiding Officer. Mr. Charles R. Buckalew, of Pennsylvania, said:

I think the Presiding Officer of the court of impeachment should be under oath, but it should be an oath different from that taken by the Members who try the case. In the rule, as reported to us, it was contemplated that the same oath should be administered to him that was administered to the Members of the Senate. I believe in former impeachment trials the Presiding Officer was sworn. There may be some difficulty about our prescribing an oath for the Presiding Officer. I think it very clear that by an act of Congress the form of an oath to be taken by the Presiding Officer might be provided, and that it would be binding. It seems an anomaly that we should have a Presiding Officer sitting here and not under any legal obligation or any moral obligation such as in oath would impose. I agree that the amendment already made excepting him from the operation of the general form of oath provided for Members of the Senate is eminently just and proper; and his exception becomes indispensable after the decision which has been made by the Senate on several occasions, withdrawing him altogether from any interference with our proceedings except on questions of order. I suppose, Mr. President, we have the same power to prescribe an oath for the Presiding Officer of the Senate that we have to prescribe an oath for the Members of the Senate, if, indeed, there be any authority to bind him by such an obligation.

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[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Globe, p. 1521 et seq.

[3] Globe, pp. 1602, 1603.

Mr. Stephen C. Pomeroy, of Kansas, said:

The Chief Justice of the United States is under oath. When he entered upon the discharge of his functions as Chief Justice, he took an oath to discharge all the duties that were incumbent upon him as such officer; and this duty is placed upon him by the Constitution of the United States, and was embraced in his oath to discharge his duties as Chief Justice of the United States; and any further oath than that I think would be unnecessary.

* * * I beg leave to say to the Senator from Pennsylvania that the reason why Senators have to be sworn, in addition to their usual oath as Senators, is that it is provided for by the Constitution, which says that "When sitting for that purpose they shall be on oath or affirmation;" and goes on, "When the President of the United States is tried, the Chief Justice shall preside," but it does not say that the Chief Justice shall be sworn. In the same sentence in which the Constitution provides that the Senate shall be sworn when sitting to try an impeachment, it says that the Chief Justice shall preside, and, of course, in the absence of any requirement of a special oath, we are to understand that he is sworn to the discharge of his duties, and this duty among the rest, when he took his oath of office. I believe that is all the oath required of him.

The amendment was agreed to, bringing the latter portion of the rule into the form now existing.

2080. Form of oath to be administered to Senators sitting in impeachment trials.

The Senate declined to require that the Chief Justice be sworn when about to preside at an impeachment trial.

Present form and history of Senate Rule XXIV as to impeachments.

Rule XXIV of the "Rules of procedure and practice of the Senate when sitting in impeachment trials" provides:

FORM OF OATH TO BE ADMINISTERED TO THE MEMBERS OF THE SENATE SITTING IN THE TRIAL OF IMPEACHMENTS.

"I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of ——— ———, now pending, I will do impartial justice according to the Constitution and laws: So help me God."

This is the form agreed to in 1868.[1]

As originally reported the form of oath for Members of the Senate had this heading:

Form of oath to be administered to the Presiding Officer and Members of the Senate.

Mr. Charles D. Drake, of Missouri, raised the point[2] that the Constitution did not require the Presiding Officer to be sworn, but only the Senators. Some discussion arose over this question. Mr. Charles R. Buckalew, of Pennsylvania, thought the Presiding Officer should be sworn.

Mr. Stephen C. Pomeroy, of Kansas, said that the Chief Justice was already sworn to perform his duties, and this was part of his duties as Chief Justice.

The Senate, without division, agreed to an amendment striking out the words "Presiding Officer and" from the heading.

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[1] Second session Fortieth Congress, Senate Report No. 59, Senate Journal, pp. 244–246; Globe, pp. 1590–1593.

[2] Globe, p. 1603.

2081. In 1876 the Senate doubted its authority to empower its Presiding Officer to administer to Senators the oath required for an impeachment trial.

In the Belknap trial the oath to Senators was administered by the Chief Justice until by law authority was conferred on the Presiding Officer of the Senate.

On April 5, 1876,[1] in the Senate pending proceedings for the impeachment of William W. Belknap, Secretary of War, Mr. George F. Edmunds, of Vermont, said:

I wish to ask the attention of the Senate to a matter which I, after consultation with as many Senators as I could find, think it necessary to bring to the notice of the Senate respecting the matter of the impeachment to-day. The third rule of the Senate in regard to impeachments provides that on this day at one o'clock—

"The Presiding Officer shall administer the oath hereinafter provided to the Members of the Senate then present, and to the other Members of the Senate as they shall appear, whose duty it shall be to take the same."

But on examination we are unable to find any statute of the United States which authorizes the President of the Senate or the Presiding Officer to administer this oath. It stands upon the rule alone. The language of the statute about the authority of the Presiding Officer is that, when Senators appear to take their seats upon an election to this body, the Presiding Officer shall swear them in, and any Senator may administer a similar oath to the Vice-President, the President of the Senate, when he appears; and there the statute stops except in respect of witnesses who are by law to be sworn by the President of the Senate.

In this state of difficulty and in the very grave doubt, at least, that in the minds of all the gentlemen whom I have been able to consult there is about this being a constitutional compliance with that requirement which obliges us to be under oath (which, of course, implies a legal and binding oath), we have thought it best for this occasion, until provision can be made by law, to submit to the Senate a proposition that the Chief Justice of the United States be invited to attend at one o'clock to-day to administer these oaths, there being no question about his authority to do so. Therefore, Mr. President, I ask unanimous consent that this portion of Rule 3 which I have read, respecting the administration of the oath by the Presiding Officer, shall be suspended for this day; and if that be unanimously agreed to, as of course it requires unanimous consent to suspend this rule, I shall then offer an order which will accomplish the next step in the matter.

In accordance with this suggestion the rule was suspended, and the order referred to by Mr. Edmunds was submitted and agreed to.

To remedy this difficulty a bill was prepared, passed both Houses, and was approved by the President on April 18, 1876.[2] This empowers the Presiding Officer of the Senate for the time being to administer all oaths or affirmations that are or may be required by the Constitution or by law to be taken by any Senator, officer of the Senate, witness, or other person, in respect to any matter within the jurisdiction of the Senate. Also the Secretary and Chief Clerk of the Senate are respectively empowered to administer any oath or affirmation required by law, or by the rules or orders of the Senate to be taken by any officer of the Senate, or by any witness produced before it.

In accordance with this law the President pro tempore, on April 27,[3] administered the oath required of Senators sitting for impeachment trials, to Mr. Bainbridge Wadleigh, of New Hampshire.

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[1] First session Forty-fourth Congress, Senate Journal, p. 394; Record. p. 2212.

[2] 19 Stat. L., p. 34.

[3] Senate Journal, p. 915; Record of trial, p. 8.

2082. When the President of the United States is impeached the Chief Justice of the Supreme Court presides.

When the Chief Justice is to preside at an impeachment trial the Presiding Officer of the Senate is required by rule to give him notice of time and place and request his attendance.

The Senate by rule have implied that the Chief Justice attends and presides only after the articles of impeachment have been presented.

In 1868 the Senate eliminated from its rules all mention of itself as a "high court of impeachment."

Present form and history of Rule IV of the Senate sitting for impeachment trials.

Rule IV of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," provides:

> When the President of the United States or the Vice-President of the United States, upon whom the powers and duties of the office of President shall have devolved, shall be impeached, the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend; and the said Chief Justice shall preside over the Senate during the consideration of said articles and upon the trial of the person impeached therein.

The discussion of the constitutional status of the Senate in impeachment proceedings, incident to the adoption of rules in 1868, resulted in the present form of the rule. The committee having the subject of rules under consideration at that time, reported [1] it as a new rule in form as follows:

> IV. The Presiding Officer of the Senate shall be the presiding officer of the high court of impeachment, except when the President of the United States, or the Vice-President of the United States upon whom the powers and duties of the office of President shall have devolved, shall be impeached, in which case the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside, notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the organization of the high court of impeachment as aforesaid, with a request to attend, and he shall preside over said court until its final adjournment.

On March 2,[2] after the debate as to the use of the words "high court of impeachment," amendments were offered by Mr. Orris S. Ferry, of Connecticut, and agreed to, which brought the rule to its present form. The debate on this rule showed the understanding to be that the Chief Justice should not be notified to attend and preside until after the articles of impeachment had been presented.

2083. In impeachments the Presiding Officer of the Senate is empowered by rule to make and issue, by himself or by the Secretary, authorized orders, writs, precepts, and regulations.

Present form and history of Rule V of the Senate sitting for impeachment trials.

Rule V of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," provides:

> The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

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[1] Second session Fortieth Congress, Senate Reports, p. 59.

[2] Senate Journal, p. 812 Globe. pp. 1602. 1603.

This rule dates from 1868, when it was reported [1] in nearly its present form by the committee having in charge the rules to be adopted in view of the impeachment of President Johnson. It was changed to its present form by substituting the word "Senate" for "Court" in two places, in accordance with conclusions arrived at after discussion as to the constitutional status of the Senate.[2]

2084. The preparations in the Senate Chamber for an impeachment trial are directed by the Presiding Officer of the Senate.

During an impeachment trial the Presiding Officer on the trial directs all forms not otherwise specially provided for.

The Presiding Officer on an impeachment trial may make preliminary rulings on questions of evidence and incidental questions or may submit such questions to the Senate at once.

The preliminary rulings of the Presiding Officer on an impeachment trial stand as the judgments of the Senate, unless some Senator requires a vote.

On questions of evidence and incidental questions arising during an impeachment trial the voting is without division unless the yeas and nays are demanded by one-fifth.

Discussion of the propriety of the Presiding Officer on an impeachment making a preliminary decision on questions of evidence.

Discussions of the functions of the Chief Justice in decisions as to evidence in an impeachment trial.

In the Johnson trial Chief Justice Chase held that the managers might not appeal from a decision of the Presiding Officer as to evidence.

Present form and history of Rule VII of the Senate sitting for impeachment trials.

Rule VII of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," is as follows:

> The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the Presiding Officer on the trial shall direct all the forms of proceedings while the Senate is sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the Presiding Officer on the trial may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may at his option, in the first instance, submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the Members present, when the same shall be taken.

The first sentence of the rule is the substance of Rule VII, adopted in 1805,[3] at the time of the trial of Judge Chase. In 1868, at the time of the proceedings for the impeachment of President Johnson, the committee of which Mr. Jacob M. Howard, of Michigan, was chairman, reported [4] it in substantially its present form. In the first draft the word "court" was generally used instead of "Senate;" but in

[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Senate Journal, pp. 230, 812; Globe, pp. 1526, 1602.

[3] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[4] Second session Fortieth Congress, Senate Report No. 59.

accordance with a general principle established at that time that phraseology was changed.[1] Also the draft reported from the committee did not contain the last sentence of the present form.

On March 2,[2] while the report was under debate, Mr. Charles D. Drake, of Missouri, moved to strike out these words:

> And the Presiding Officer of the court may rule all questions of evidence and incidental questions, which rulings shall stand as the judgment of the court, unless some member of the court shall ask that a formal vote be taken thereon, in which case it shall be submitted to the court for decision; or he may, at his option, in the first instance, submit any such question to a vote of the members of the court,

and insert in lieu thereof:

> The Presiding Officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions, but the same shall, on the demand of one-fifth of the Members present, be decided by yeas and nays.

The words to be inserted were suggested by Mr. Jacob M. Howard, of Michigan.

A long debate resulted on this motion.

Mr. Drake explained his reasons:

> The Constitution simply, says that when the President of the United States is tried the Chief Justice shall preside. In that position he has just exactly the same powers and functions that the Vice-President would have in any other case of impeachment, and no more. Now, sir, any man in the country, whether a lawyer or not, may, in the course of events, come to fill the position of Vice-President of the United States. Suppose that a man who had never been a lawyer, never made law his study, and did not know anything at all about the complex rules of evidence in the courts of justice were to be elevated to the Vice-Presidency, and the Senate should consist, as it does now, of a large majority of those who have made the law their study during a large portion of their lives, and he should be set up in the chair as the Presiding Officer of that body to decide questions of law. I will venture to say that the Senate would regard it as quite preposterous.
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> Now, sir, why should we set the Chief Justice there to decide these questions? We can not do it, in my opinion, without a violation of the spirit of the Constitution, which does not entitle him to any more prerogatives as the Presiding Officer of the court than the Vice-President would have in other cases.
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> But, sir, there is a very grave objection to this. Even taking the distinguished Chief Justice of the United States, so justly distinguished for his great mind and his great knowledge of the law, it is not proper, it is not judicious, it is not for the purposes of justice expedient that the Senate, sitting as a court of impeachment, should ever be brought to the point of overruling a decision made by the Chief Justice of the United States sitting in the chair as the Presiding Officer of the court. It is not proper that the judgment of the Senate upon questions of law, which it must ultimately decide, if a single Senator demands its decision, should be warped, or if not warped, in any degree affected by the previous announcement of an opinion upon that question by so high a judicial officer as the Chief Justice.
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> Sir, it might be that, on some future occasion, when a President of the United States should be impeached again, the Chief Justice might be a very strong opponent of his, or a very strong advocate of his, and that his decisions might be influenced one way or the other by the personal considerations or the political considerations which bound him to the President or made him the President's opponent. Under these circumstances, it is not wise or judicious, in my opinion, that we should lay down a rule, not only for this trial but for all other trials, which might bring the Chief Justice, sitting as our Presiding Officer, in continual conflict with the Senate. Let the Senate decide its own questions of law. Let it not, by simple acquiescence, put the Chief Justice there to decide these questions of law. Let them come up to the work themselves and pronounce their own decision, without the necessity of appealing from his decision, and being brought into antagonism with him.

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[1] Globe, pp. 1602, 1603; Journal, pp. 247, 248, 812.

[2] Senate Journal, pp. 247, 248; Globe, pp. 1595–1602.

Mr. John Sherman, of Ohio, opposed this view on the ground that the trial would be unnecessarily prolonged were the preliminary decision taken from the Presiding Officer. That was the function of every presiding officer, and he considered that "a departure from the ordinary customs and courtesies extended to presiding officers, especially in a case where the Presiding Officer was made so by the Constitution of the United States," would be a very remarkable circumstance.

Mr. George H. Williams, of Oregon, argued elaborately in the same line:

I say that the Senators alone do not constitute a perfect Senate, but the Vice-President of the United States is a part of the Senate, and has certain functions to perform as a part of the Senate, and his right to vote as an officer of the Senate is recognized under certain circumstances. When the Senators are equally divided, he has a right to vote, for the language is:

"The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided."

That is, unless the Senators be equally divided he shall have no vote; but, if they are equally divided, then he is to have a vote. Certainly he could have no vote under any circumstances unless he did, for certain purposes at any rate, constitute a part of the Senate. Then the Constitution provides that—

"The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice-President or when he shall exercise the office of President of the United States."

Then it says:

"The Senate shall have the sole power to try all impeachments."

Does that mean solely and exclusively; that the Senators shall have the sole power to try all impeachments; or does it mean that the Senate as an organized body, constituted under the provisions of the Constitution, shall try an impeachment? I say that it means that the Senate, with the Vice-President of the United States presiding, and the Constitution contemplates that he is to participate in the trial of every impeachment, except where the President of the United States is upon trial.

"When sitting for that purpose they shall be on oath or affirmation."

Does that mean that the Senators alone shall be upon oath or affirmation, or does it mean that the Senate, that all the constituent Members of the Senate who participate in the trial, shall be upon oath or affirmation?

"When the President of the United States is tried, the Chief Justice shall preside."

Now, sir, I understand the Constitution to make the Chief Justice of the United States a part of the Senate when it is engaged in trying an impeachment against the President of the United States. I do not undertake to say that he possesses the power to vote like a Senator; I will not make that declaration at this time; but he is a part of the Senate, and I maintain that the Senate, by its rules, may confer upon him such powers as it sees proper in the proceedings of the trial. He is not to be treated, when the Constitution requires him to come here and preside over this body, as a stranger and an interloper, because, under the Constitution, he has as much right to be here as any Member of this body. It is as much his duty to be here as it is the duty of any Member of this body to be here; and if he is here under the Constitution, he is here for certain purposes and must necessarily possess the powers of a presiding officer. Why should there be evinced a kind of jealousy, as it seems to me, on the part of the Senate, lest if the Chief Justice comes in here be may assume to exercise powers which do not belong to him? Are we to assume that position, and hence refuse to give to him those rights and powers and privileges which the Constitution contemplates he should have?

It seems to me that there is a perfect propriety, when the Constitution compels him to come here and preside upon the trial of the President, in allowing him, in the first instance, to decide in that court as he would in the other court where he presides as Chief Justice.

Mr. Thomas A. Hendricks, of Indiana, while not holding that the Chief Justice might vote, considered it eminently proper that he should exercise a preliminary decision:

In the first place, he is an eminent judge, because of his position. Is he not competent, in all probability, to correctly and safely decide the questions that are likely to arise during the progress of

the trial? In his office as Chief Justice he participates in the greatest decisions that are made in any court in the world, and as a judge of one of the circuits he presides over the controversies incident to life and property. Shall he not be heard to express in the first place for the Senate a judgment, and if not agreeable, the Senate shall say it is not agreeable? What harm can come of it? It brings the question directly before the body, promptly, conveniently, safely, prudently, in my opinion.

But if he is not to participate that far, to say the least of it, in the business of the body, why has the Constitution been so careful to have him here? Certainly for the purpose merely of presiding and seeing that good order is preserved in the body the Constitution would not be so careful that he should preside. Some power, it is presumed, is to be exercised by him. The Constitution presumes that and what power? To decide questions as they arise in the progress of the case, as questions ordinarily are decided, though subject, of course, to the superior will of the Senate.

Mr. Roscoe Conkling, of New York, who took the view advanced by Mr. Drake, cited precedents:

We may gain information at this point from the practice and precedents under the British constitution. "The House of Lords," called at times "the court of the King in Parliament," was, like the Senate, an entirety; an ascertained, defined body. There was a presiding officer at all times, and his existence and ministration was derived from the constitution as much as from our Constitution proceeds the existence of a presiding officer here. This presiding officer was sometimes a member of the House of Lords—taken from the body to preside in it, as our Presiding Officer for several sessions has been taken from the Members of the Senate. Sometimes the presiding officer in the Lords was made a member of the body contemporaneously with his installment as presiding officer—not having been a peer before, he was ennobled at the time and thus became a member. Sometimes not being a peer, and therefore not a member of the Lords, he presided without a peerage being conferred, and thus he was presiding officer, with all the prerogatives appurtenant to the presiding chair, but still was not a member of the body. By turning to the powers accorded to the Lord Chancellor as presiding officer, and to the duties and prerogatives of the lord high steward of England in the trial of impeachments, we may be able to measure the force of the expression, "When the President of the United States is tried, the Chief Justice shall preside." A distinction has been made between the right to vote and to decide of the lord high steward between a trial before the Lords in Parliament—that is to say before the House of Lords at large and a trial before a commission of the peers. It has been insisted that the lord steward never participated in the decision if the trial was before a chosen number of the peers, but that he did take part in judgment and decision when the trial was before the House of Lords in full. Lord Campbell, in his Lives of the Chancellors, refers to this distinction; so does May in his Law of Parliament. But the journal of the House of Lords affords no reason to believe that such a difference of practice in the two tribunals was observed. On the contrary, the question whether the lord steward had or had not a vote or a voice in giving judgment seems to have hinged entirely upon his being merely a presiding officer or being also a member of the House of Lords itself. In virtue of his place as presiding officer he seems in no case to have participated in voting or determining the cause. His right and power and designation to preside seems never to have been supposed to carry with it any permission or obligation to join in deciding questions submitted to the tribunal. In many instances the lord high steward did vote, however, in trials of impeachment, but always in virtue of his being a member of the House, independent of the fact that he was also its presiding officer.

To substantiate this I refer, first, to the cause of the Earl of Ferrers, brought to the bar in 1760. The cause is reported at length by Sir Michael Foster, one of the judges of the court of king's bench. The earl having been convicted, the House propounded to the judges two questions, one of which went to the power of the presiding officer and of the House without the presiding officer. The judges answered the questions after deliberation, in writing, and the reasoning appears in Foster's Crown Law at page 138 and onward. I read from page 143. Having discussed some matters incident to a trial of a peer before a commission of peers he proceeds:

"But in a trial of a peer in full Parliament, or, to speak with legal precision, before the King in Parliament, of a capital offense, whether upon impeachment or indictment, the case is quite otherwise. Every peer present at the trial (and every temporal peer hath a right to be present in every part of the proceeding) voteth upon every question of law and fact, and the question is carried by the major

vote, the high steward himself voting merely as a peer and member of that court in common with the rest of the peers, and in no other right,

"It hath indeed been usual, and very expedient it is in point of order and regularity, and for the solemnity of the proceeding, to appoint an officer for presiding during the time of the trial and until judgment, and to give him the style and title of steward of England. But this maketh no sort of alteration in the constitution of the court. It is the same court founded in immemorial usage, in the law and custom of Parliament, whether such appointment be made or not.

"It acteth in its judicial capacity in every order made touching the time and place of the trial, the postponing the trial from time to time upon petition according to the nature and circumstance of the case, the allowance or nonallowance of counsel to the prisoner, and other matters relative to the trial, and all this before an high steward hath been appointed: and so little was it apprehended in some cases which I shall mention presently, that the existence of the court depended on the appointment of an high steward, that the court itself directed in what manner and by what form of words he should be appointed. It hath likewise received and recorded the prisoner's confession, which amounteth to a conviction, before the appointment of an high steward, and hath allowed to prisoners the benefit of acts of general pardon, where they appeared entitled to it, as well without the appointment of an high steward as after his commission dissolved."

On the next page, referring to the case of the Earl of Danby, he states certain proceedings between the two Houses of Parliament, and remarks—

"That the Lords' committees said 'The High Steward is but Speaker pro tempore, and giveth his vote as well as the other Lords.'"

And upon this appears the following entry:

"In the Commons' Journal of the 15th of May it standeth thus: Their lordships farther declared to the committee that a Lord High Steward was made hac vice only, that notwithstanding the making of a Lord High Steward the court remained the same and was not thereby altered, but still remained the court of peers in Parliament; that the Lord High Steward was but as a speaker or chairman for the more orderly proceeding at the trials."

This the Commons wished entered on the Lords' Journal.

On page 147, speaking of the law as laid down by the Lords, Sir Michael says:

"The letter of the resolution, it is admitted, goeth no farther, but this is easily accounted for. A proceeding by impeachment was the subject-matter of the conference, and the Commons had no pretense to interpose any other. But what say the Lords? The High Steward is but as a speaker or chairman pro tempore for the more orderly proceeding at the trials; the appointment of him doth not alter the nature of the court, which still remaineth the court of the peers in Parliament. From these premises they draw the conclusion I have mentioned. Are not these premises equally true in the case of a proceeding upon indictment? They undoubtedly are."

This case and the authorities referred to in stating it seem to make it clear that the immemorial understanding in England has been that the officer whose duty it is to preside at trials of impeachment has definite functions, convenient and conducive to order, and the dispatch of business, and that the duty to vote or to decide is not among his duties or his powers. The fact of his presiding or of his being authorized or commissioned to preside, according to these cases, carries with it no right to act as a trier or a member. The same doctrine will be found in Sharswood's Blackstone, at pages 261 and 262 of the second volume. Lord Campbell, in the third volume of his Lives of the Chancellors, page 557, refers to the case of Lord Dellamere, tried in 1686 for complicity with Monmouth. Jeffries was Lord High Steward and seems to have conducted himself with all the brutality to have been expected of him. He began by a harangue to the culprit, urging him, in the presence of the king, to confess. Dellamere interposed to inquire if he was to be one of his judges, to which the Lord High Steward replied, "No, my Lord; I am judge of the court, but I am none of your triers." This trial was not before the House of Lords, but before a commission of peers, and in so far it is not a literal precedent. Here are other cases of antiquity and of note, more or less instructive, cases in which the presiding officer voted, not apparently sui juris, but by reason of his peerage.

In the trial of Lord Lovat, impeached by the Commons for high treason in 1746:

"The Lord High Steward, by a list, called every peer by his name, beginning with the lowest baron, and asked them, "If Simon, Lord Lovat, was guilty of the high treason whereof he stands impeached or not guilty?"

"And thereupon every Lord, standing up uncovered, answered: 'Guilty, upon my honor,'[1] laying his right hand upon his breast.

Which done, the Lord High Steward, standing uncovered at the chair, as he did when he put the question to the other Lords, declared his opinion to the same effect and in the same manner." (27 Lords' Journals, p. 76.)

In the trial of the Earl of Oxford and of Earl Mortimer, impeached in 1717:

"The Lord High Steward stated the question before agreed on, and asked every Lord present severally, 'Whether content or not content?'

"And they all answering in the affirmative, as did the Lord High Steward declare his opinion also:

"The Lord High Steward declared that Robert, Earl of Oxford and Earl Mortimer, was, by the unanimous vote of all the Lords present, acquitted of the articles of impeachment exhibited against him by the House of Commons for high treason and other high crimes and misdemeanors, and of all things therein contained." * * * "And then the Lord High Steward stood up uncovered; and, declaring 'that there was nothing more to be done by virtue of the present commission,' broke the staff and pronounced the commission of Lord High Steward dissolved." (20 Lords' Journals, p. 525.)

The same form was observed in the case of Earls Derwentwater et al, impeached for high treason, in 1715.

In Viscount Melville's trial on an impeachment, in 1806, according to the Journal of the House of Lords—

"The Lord Chancellor having asked every Lord present, beginning with the junior baron, 'What says your lordship on this first article?' and the Lords having severally answered thereto, and the Lord Chancellor having declared his opinion also, the said several other questions were in like manner stated, and each Lord was severally asked in manner aforesaid touching the same. And the Lords 'having severally answered to the same, and the Lord Chancellor having declared his opinion also on each of the said questions, the Lord Chancellor declared that the answer of a majority of the Lords to each of the said questions, respectively, was 'not guilty.'"

Here are cases decided by the Lords without the vote or voice of the presiding officer—cases in which there was a presiding officer with every right as such, but without any participation in the decisions made.

In the case of Lord Chancellor Bacon, in 1621—

"The House (of Lords) being resumed, and the Lord Chief Justice returned to his place, it was put to the question whether the Lord Viscount St. Albans (Lord Chancellor) shall be suspended from all his titles of nobility during his life or no? and it was agreed per plures that he should not be suspended thereof." (40 Lords' Journals, p. 302.)

In Sacheverell's case, impeached in 1709—

"Then his lordship put the question, beginning at the junior baron first, as follows: 'Is Doctor Henry Sacheverell guilty of high crimes and misdemeanors, charged upon him by the impeachment of the House of Commons?'

"And having asked every Lord present, and they having declared guilty or not guilty,

"His lordship having cast up the votes, declared him guilty." (Ibid.)

In the case of the Earl of Macclesfield, in 1725—

"It was agreed that the question to be put to each Lord, severally, shall be, 'Is Thomas, Earl of Macclesfield, guilty of high crimes and misdemeanors charged on him by the impeachment of the House of Commons, or not guilty?'

"And every Lord present shall declare his opinion, 'guilty or not guilty, upon his honor', laying his right hand upon his breast.

"When the Lord Chief Justice, Speaker of this House, directed the Gentleman Usher of the Black Rod to bring thither the Earl of Macclesfield, who, after low obeisances made, kneeled until the said Lord Chief Justice acquainted him he might rise. (Judgment pronounced. Record of mode of obtaining the votes of the Lords on each resolution is, 'The question was put thereupon; and it was resolved in the affirmative.'") (Ibid.)

Mr. President, there may be arguments on this point which these precedents do not answer, but, it seems to me, they confront the view presented by the Senator from Oregon. The Lord Chancellor and the Lord High Steward of England, by the British constitution, were invested with the prerogatives

and powers of presiding officers. Their attributes were more potential, their sway was greater, the examples of their supremacy were more copious, than the genius of our Constitution would tolerate, And if we ascertain the full measure in the less liberal days of British monarchy of what a presiding officer might do, surrounded by peers and commissioned by the King, we shall not fall short at least of the intention of those who adopted the language to which the Senator referred. The framers of our Constitution were profoundly learned in the practice and the meaning of British law, and the word "preside," when used by them, may well be supposed not to have been selected to convey a greater meaning than had been attached to it in the great struggles of privilege and power from which they had derived the philosophy of government.

The amendment proposed by Mr. Drake was agreed to, yeas 21, nays 7.

On March 31, 1868,[1] at the outset of the trial, on the objection of Mr. Henry Stanbery, counsel for the President, to certain testimony, the Chief Justice ruled that the testimony was competent.

Mr. Charles D. Drake, of Missouri, a Senator, at once objected that the question of the competency of evidence should be determined by the Senate and not by the Presiding Officer.

The Chief Justice[2] thereupon said:

The Chief Justice states to the Senate that in his judgment it is his duty to decide upon questions of evidence in the first instance, and that if any Senator desires that the question shall then be submitted to the Senate it is his duty to submit it. So far as he is aware that has been the usual course of practice in trials of persons impeached in the House of Lords and in the Senate of the United States.

Thereupon Mr. Manager Benjamin F. Butler, seconded by Messrs. John A. Bingham and George S. Boutwell, urged on behalf of the House of Representatives, (*a*) that the Chief Justice might not make such preliminary decision, and (*b*) that such decision having been made by the Chief Justice the managers as well as any Senator might call for a decision of the Senate. In presenting their views the managers quoted at length from English precedents.

The Chief Justice, stating his position more fully, said:

The Chief Justice will state the rule which he conceives to be applicable once more. In this body he is the Presiding Officer; he is so in virtue of his high office under the Constitution. He is Chief Justice of the United States, and therefore, when the President of the United States is tried by the Senate, it is his duty to preside in that body; and, as he understands, he is therefore the President of the Senate sitting as a court of impeachment. The rule of the Senate which applies to this question is the seventh rule, which declares that "the Presiding Officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions." He is not required by that rule so to submit those questions in the first instance; but for the dispatch of business, as is usual in the Supreme Court, he expresses his opinion in the first instance. If the Senate, who constitute the court, or any Member of it, desires the opinion of the Senate to be taken, it is his duty then to ask for the opinion of the court.

Mr. Manager Butler having asked whether the right to ask the opinion of the Senate would extend to a manager, the Chief Justice replied:

The Chief Justice thinks not. It must be by the action of the court or a member of it.

The Senate having retired for consultation, Mr. John B. Henderson, of Missouri, proposed an amendment to Rule VII which in effect struck out all after the first sentence of the present draft of the rule and inserted what is now the

[1] Second session Fortieth Congress, Globe Supplement, pp. 59–63; Senate Journal, pp. 867–870.

[2] Salmon P. Chase, of Ohio, Chief Justice.

second sentence. This amendment was agreed to, yeas 31, nays 19, after the Senate had by a vote of yeas 20, nays 30, disagreed to the following declaration proposed by Mr. Drake:

It is the judgment of the Senate that under the Constitution the Chief Justice presiding over the Senate in the pending trial has no privilege of ruling questions of law arising thereon, but that all such questions should be submitted to a decision by the Senate alone.

The last sentence of the rule relating to method of voting was not included by the above proceedings, and on April 1, 1868,[1] when a vote was about to be taken on a question of evidence, Mr. Drake insisted that, under Rule XXIII, and in the absence of a provision in Rule VII, the vote should be taken by yeas and nays.

But the Chief Justice decided:

Upon the question of order raised by the Senator from Missouri, the Chair is of opinion that he may submit this question to the Senate without having the yeas and nays taken, unless the yeas and nays are demanded by one-fifth of the Members present.

On April 2, 1868,[2] Mr. Drake proposed the following addition to the rule:

Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the Members present or requested by the Presiding Officer, when the same shall be taken.

When the proposition came up for action on the next day, on motion of Mr. George F. Edmunds, of Vermont, the words "or requested by the Presiding Officer" were stricken out, and then the amendment as amended was agreed to without division.

Thus the rule attained its present form.

2085. The Presiding Officer during an impeachment trial sometimes rules preliminarily on evidence and cautions or interrogates witnesses.— In the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore[3] of the Senate presided. On questions arising over the admissibility of testimony he usually submitted the questions directly to the Senate for decision, without expressing a preliminary judgment.[4] In five instances, on questions wherein the principles had already been passed on by the Senate, he ruled.[5] In two cases he ruled on questions not already determined by the Senate, but announced that if counsel requested he would submit the matter.[6]

2086. On February 13, 1805,[7] in the high court of impeachment, during the trial of the case of the United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, John Basset, was testifying, when the following occurred:

THE WITNESS. The court considered me a good juror, and I was sworn accordingly. After the trial had been gone through, the jury retired to their room. I informed the jury that I thought we should have the book read through.

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[1] Globe Supplement, p. 70.

[2] Journal, pp. 874, 878; Globe Supplement, pp. 77, 92.

[3] T. W. Ferry, of Michigan, President pro tempore.

[4] First session Forty-fourth Congress, Record of Trial, pp. 189, 192, 195, 205, 208, 219, etc.

[5] Pages 192, 211, 221, 222, 224.

[6] Pages 236, 256.

[7] Second session Eighth Congress, Annals, p. 222.

The President [1] here stopped the witness, and informed him that it was useless waste of time to relate what took place in the room of the jury.

The witness, however, continuing the statement he had previously begun, the President desired him to go on, if it were necessary for the purpose of connecting the testimony he had to give; but to pass over what occurred among the jury as briefly as possible.

2087. On April 1, 1868 [2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, while Mr. Manager Butler was examining a witness, the Chief Justice,[3] who was presiding, interposed and asked a question of the witness.

Also again, on April 2,[4] the Chief Justice interrogated William E. Chandler, a witness.

2088. An instance wherein a President pro tempore presiding at an impeachment trial declined to entertain an appeal from his decision on a point of order.

Rigid enforcement of the rule that decisions of the Senate sitting for an impeachment trial shall be without debate.

On June 26, 1862,[5] in the high court of impeachment, during the trial of the cause of the United States *v.* West H. Humphreys, a question arose as to the form in which the court should pronounce judgment, and debate was going on, when Mr. Garrett Davis, of Kentucky, was called to order by Mr. Benjamin F. Wade, of Ohio, who insisted that the rule that "all decisions shall be had by ayes and noes and without debate," should be enforced.

The President pro tempore [6] said:

The rule is very explicit, leaves no room for doubt that these questions are to be decided without debate.[7]

Mr. Davis then proposed an appeal from the decision.

The President pro tempore declined to entertain the appeal.

The President pro tempore did not explain this decision, but when Mr. John P. Hale, of New Hampshire, questioned it, Mr. O. H. Browning, of Illinois, said:

I think an appeal can not be taken from the judgment of the presiding officer of a court.

2089. The Senate elected a presiding o1ficer for the Swayne trial, and gave him the powers of the President of the Senate for signing orders, writs, etc.—On January 24, 1905,[8] the President pro tempore (William P. Frye, of Maine) in the Senate sitting in legislative session, requested that he be relieved of the duty of presiding at the impeachment trial of Judge Charles Swayne. Thereupon the Senate chose Mr. Orville H. Platt, of Connecticut, as presiding officer for the trial.

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[1] Aaron Burr, of New York, Vice-President and President of the Senate.

[2] Second session Forty-first Congress, Globe Supplement, p. 72.

[3] Salmon P. Chase, of Ohio, Chief Justice.

[4] Globe Supplement, p. 89.

[5] Second session Thirty-seventh Congress, Globe, p. 2953.

[6] Solomon Foote, of Vermont, President pro tempore.

[7] See Rule XIV as framed for trial of Judge Chase. The language of the entire rule suggests a question as to this interpretation. The present Rule XXIII modifies this rule materially.

[8] Third session Fifty-eighth Congress, Record, pp. 1289, 1291.

On the same day Mr. John C. Spooner, of Wisconsin, chairman of the Committee on Rules, made a statement as follows:

Mr. President, the rules of the Senate governing the sessions of the Senate when it is sitting in the trial of impeachments seems to draw a distinction between the Presiding Officer of the Senate and the presiding officer on the trial. Rule V provides:

"The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules, or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide."

The forms of summonses and subpoenas are all signed by the Presiding Officer of the Senate. In order to remove all possible question as to who shall sign the mandates of the Senate, including subpoenas, I offer the regulation which I send to the desk. * * *

The Constitution invests each House with the power, without limit, to make its own rules of procedure. Under the Constitution the function of trying impeachment cases devolves upon the Senate, and the provision of the Constitution must be construed as authorizing the Senate to make the rules which it may deem necessary for the proper discharge of all of the duties and functions devolved upon it by the Constitution. The Senate has, I think, within its power and with perfect propriety under the circumstances, appointed a Senator to preside, using the language of the rule to be, "the presiding officer on the trial." That clearly vests in him the functions, as I think, of passing upon the admissibility of evidence and upon the various questions which may arise in the course of the trial.

This question is one which must be determined at once, for a summons is to be issued to Judge Swayne to appear, and it is important, of course, that there shall be no doubt that the officer signing the summons has the power to do so.

Mr. Spooner offered the following resolution, which was agreed to by the Senate:

Resolved, That the presiding officer on the trial of the impeachment of Charles Swayne, judge of the United States in and for the northern district of Florida, be, and is hereby, authorized to sign all orders, mandates, writs, and precepts authorized by the rules of procedure and practice in the Senate when sitting on impeachment trials and by the Senate.

2090. The Secretary of the Senate records proceedings in impeachments as he records legislative proceedings.

The proceedings of an impeachment trial are reported like the legislative proceedings.

Present form and history of Rule XIII of the Senate sitting for impeachments.

Rule XIII of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

The Secretary of the Senate shall record the proceedings in cases of impeachment as in the case of legislative proceedings, and the same shall be reported in the same manner as the legislative proceedings of the Senate.

This rule was framed in 1868,[1] preparatory to the impeachment of President Johnson.

2091. In an impeachment trial all preliminary or interlocutory questions and all motions are argued not over an hour on a side.

The Senate, by order, may extend the time for the argument of motions and interlocutory questions in impeachment trials.

In arguing interlocutory questions in impeachment trials the opening and closing belong to the side making the motion or objection.

[1] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1568.

The Senate declined to sanction unlimited argument on interlocutory questions in impeachment trials.

The rule limiting the time of arguments on interlocutory questions in impeachment trials does not limit the number of persons speaking.

Present form and history of Rule XX of the Senate sitting for the trial of an impeachment.

Rule XX of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

> All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time.

This rule dates from 1868, when the rules were revised preparatory to the trial of President Johnson. The committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported [1] the rule in this form:

> XX. All preliminary or interlocutory questions and all motions shall be argued by one person only on each side, and for not exceeding one hour on each side, unless the court shall, by order, extend the time.

This rule was debated at great length and amended to its present form on March 2.[2] It was first objected by Mr. Charles D. Drake, of Missouri, that there should be a provision giving the opening and closing to the one making the motion or objection, and also dividing the time. Mr. Roscoe Conkling, however, answered this satisfactorily by saying that the committee had considered the question, and concluded that the provisions would be unnecessary, since it was habitual for the counsel making the motion or raising the objection to yield after taking a portion of his time, and then conclude after his opponent. The committee conceived that this would be the practice under this rule.

Mr. Frederick T. Frelinghuysen, of New Jersey, moved an amendment striking out the provision limiting the argument to one person on each side, which was agreed to without division. A motion by Mr. Frelinghuysen to change the time limit from one to two hours was disagreed to, yeas 20, nays 24, and a third amendment proposed by him, to add at the end the words "before the argument commences," was disagreed to—yeas 10, nays 33.

Mr. James W. Grimes, of Iowa, proposed to strike out the rule altogether, as contrary to the Senate's practice of unlimited debate, and as an innovation on the practice of all preceding impeachment trials. It was argued that interlocutory questions might be of the greatest importance, and that the argument thus limited might be one on which the result hinged. On the other hand, it was urged that impeachment trials, notably in England, were often prolonged, and that the Senate should provide against this at the outset. The motion to strike out was disagreed to—yeas 19, nays 23.

So the rule was left in its present form.

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[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Senate Journal, pp. 241, 242, 814; Globe, pp. 1568–1580.

2092. On April 1, 1868,[1] during the trial of President Johnson, a question arose, and the Chief Justice [2] said:

Senators, the Chair will state the question to the Senate. The twentieth rule provides that—

"All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time."

The twenty-first rule provides:

"The case on each side shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives."

On looking at these two rules together, the Chief Justice was under the impression that it was intended by the twentieth rule to limit the time, and not limit the persons; whereas, by the twenty-first rule, it was intended to limit the number of persons and leave the time unlimited; and he has acted upon that construction. He will now, with the leave of the Senate, submit to them the question: Does the twentieth rule limit the time without respect to the number of persons? Upon that question the Chair will take the sense of the Senate.

The question being put, it was decided in the affirmative nem. con.

The Chief Justice then said:

The Senate decides that the limitation of one hour has reference to the whole number of persons to speak on each side, and not to each person severally; and will apply the rule as thus construed.

2093. On April 27, 1876,[3] during the proceedings in the trial of W. W. Belknap, late Secretary of War, the counsel for the respondent moved a postponement of the further hearing of the case until the first Monday of the next December, and for the discussion of this motion Mr. Matt H. Carpenter, of counsel for the respondent, asked that the Senate make an order temporarily modifying the rule, so as to admit of two hours on a side. This request was granted by the Senate by a vote of yeas 48, nays 13, an order to that effect being offered and acted on at the same sitting.

2094. In impeachment trials all orders and decisions of the Senate, with certain specified exceptions, are by the yeas and nays.

During impeachment trials in the Senate the yeas and nays on adjournment are procured by one-fifth and not by rule.

The orders and decisions of the Senate in impeachment cases are without debate, unless in secret session.

Debate in secret session of the Senate sitting on impeachment trials is limited by rule.

On the decision of the final question in an impeachment case, debate in secret session of the Senate is limited to fifteen minutes to each Senator.

Present form and history of Rule XXIII of the Senate sitting for impeachment trials.

Rule XXIII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" provides:

All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no Member shall speak more than once on one question,

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[1] Globe Supplement, p. 70.

[2] Salmon P. Chase, of Ohio, Chief Justice.

[3] First session Forty-fourth Congress, Senate Journal, p. 921; Record of trial, p. 10,

and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present. The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not to the final question on each article of impeachment.

This rule dates from 1868,[1] when a committee reported a revision in preparation for the trial of President Johnson. The rule was debated on March 2[2] and was amended in matters of detail, so it stood practically in its present form as far as the last sentence, which had not at that time been added.

On March 13,[3] in the Senate as organized for the trial, Mr. Roscoe Conkling, of New York, arose and said:

To correct a clerical error in the rules or a mistake of the types which has introduced a repugnance into the rules, I offer the following resolution by direction of the committee which reported the rules:

"*Ordered,* That the twenty-third rule, respecting proceedings on trial of impeachments, be amended by inserting after the word 'debate' the words 'subject, however, to the operation of rule seven.'"

If thus amended the rule will read:

"All orders and decisions shall be made and had by yeas and nays, which shall be entered on the record and without debate, subject, however, to the operation of rule seven, except when the doors shall be closed, etc."

The whole object is to commit to the Presiding Officer the option to submit a question without the call of the yeas and nays, unless they be demanded. That was the intention originally, but the qualifying words were dropped out in the print.

The order was agreed to without division.

The last sentence of the rule, "the fifteen minutes herein allowed," etc., was added on March 7, 1868, on motion of Mr. Charles Drake, of Missouri, immediately before the Senate proceeded to pronounce judgment in the case of President Johnson.[4]

On July 31, 1876,[5] when the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, was about to proceed to judgment, Mr. Hannibal Hamlin, a Senator from Maine, proposed an amendment which would have stricken out the words "except when the doors shall be closed for deliberation." This amendment was proposed in connection with one to Rule XIX, which would have abolished secret sessions in impeachment trials. The Senate, by a vote of yeas 23, nays 32, declined to consider either amendment.

2095. In the Senate, sitting for impeachment trials, the doors may be closed for consultation on motion put and carried.—On February 16, 1905,[6] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, a question arose as to the admissibility of certain evidence, and Mr. Joseph W. Bailey, a Senator from Texas, moved that the doors be closed for deliberation, or, in case the motion should be otherwise, that the Senate retire to its conference chamber.

A question arose as to the interpretation of the rule, and the Presiding Officer said:

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[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Senate Journal, pp. 243, 244, 814; Globe, pp. 1588. 1589, 1602.

[3] Senate Journal, pp. 824, 825, Globe Supplement, p. 6.

[4] Senate Journal, p. 937; Globe Supplement, p. 408.

[5] First session Forty-fourth Congress, Record of trial, p. 341.

[6] Third session Fifty-eighth Congress, Record, p. 2720.

The rule is as follows:

"All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no Member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate."

The Presiding Officer is of the opinion that the consent of the Senate applies to the time during which a Senator may speak upon a question, and not to the question whether the Senate may proceed in the Senate Chamber as a court without closing the doors.

Mr. Bailey thereupon asked unanimous consent that the doors be closed. There being objection, he made a motion.

The Presiding Officer said:

The Presiding Officer will submit the motion to the Senate. Will the Senate order the doors to be closed for the purpose of deliberating upon the question?

There appeared yeas 53, nays 18. So the doors were closed.

2096. Secret sessions of the Senate to discuss incidental questions arising during an impeachment trial.—On May 14, 1876,[1] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, the doors were closed and the galleries cleared, while deliberation was going on as to the question of the jurisdiction of the Senate to try a civil officer who had resigned and whose resignation had been accepted. And the Senate continued to deliberate with closed doors until the decision of the question, on May 29.

2097. On July 19, 1876,[2] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, it was ordered that the floor and galleries be cleared, and that the doors be closed. The session thereupon was held in secret, while determination was reached as to certain propositions relating to the time of beginning the taking of testimony, to the filing of a paper presented by counsel for respondent, and to the propriety of continuing the trial at a time when the House of Representatives was not in session.

2098. On the final question whether an impeachment is sustained, the yeas and nays are taken on each article separately.

If an impeachment is not sustained by a two-thirds vote on any article a judgment of acquittal shall be entered.

If the respondent be convicted by a two-thirds vote on any article of impeachment the Senate shall pronounce judgment.

A certified copy of the judgment in an impeachment case is deposited with the Secretary of State.

Discussion as to whether or not the Chief Justice, presiding at an impeachment trial, is entitled to vote.

The reasons for eliminating from the Senate rules for impeachment trials the words "high court."

Present form and history of Rule XXII of the Senate sitting for impeachment trials.

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[1] First session Forty-fourth Congress, Senate Journal, pp. 933–947; Record of trial, pp. 72–77.

[2] First session Forty-fourth Congress, Journal of Senate, p. 954; Record of trial, p. 172.

Rule XXII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the Members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the Members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

This rule was framed in 1868,[1] when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a revision of the rules in view of the approaching trial of President Johnson. As reported the rule was as follows:

XXII. If the impeachment shall not be sustained by the votes of two-thirds of the Members of said high court of impeachment present and voting a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted by the votes of two-thirds of the Members of such court present the court, by its Presiding Officer, shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

On motion of Mr. Frederick T. Frelinghuysen, of New Jersey, and without division, an amendment was inserted[2] at the beginning, in the following words:

On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately and;

Then Mr. Lot M. Morrill, of Maine, proposed an amendment[3] so changing the first clause of the rule that it would read:

On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately, and if the impeachment shall not be sustained by the votes of two-thirds of the Senators present a judgment of acquittal shall be entered.

This proposition, by substituting the words "Senators" for "high court of impeachment," brought up the question as to whether or not the Chief Justice would have a vote. Mr. John Sherman, of Ohio, said:

Now, if a Presiding Officer is elected by the Senate, either on account of the sickness or absence or inability of the Vice-President to preside, he would undoubtedly have a right to vote. The Presiding Officer would undoubtedly have a right to vote, because he is not only a Senator having a personal right to his seat as a Senator, but he is a representative of a State, and that State would have a right to vote; and his mere election as Presiding Officer would not disfranchise him from voting.

Under these circumstances, when the President is to be tried, the Constitution declares, the Senate still having the sole power to try all impeachments, that the Chief Justice shall preside over that tribunal. What does that mean? That he shall be here simply as a figurehead? No, sir. In every case where a man is made the presiding officer of any tribunal, of any convention, of any political body, it necessarily implies the right to vote, unless that implication is excluded by the instrument itself. There is no doubt whatever but that the Vice-President of the United States could vote every day in our proceedings but for one thing; and that is, that the Constitution carefully excludes him from the right to vote except in case of a tie. But who doubts that but for that single clause of the Constitution which declares that the Vice-President of the United States shall not vote except in case of a tie he could do it? Suppose the clause read "the Vice-President of the United States shall be President of the Senate;" suppose it stopped there; would not the Vice-President have a right to vote? The very implication drawn from

[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Senate Journal, p. 243; Globe, p. 1585.

[3] Senate Journal, p. 243; Globe, pp. 1585–1587.

the fact that he is the Presiding Officer of the Senate would give him a vote; but it goes on and says, "but shall have no vote unless they be equally divided." The very fact that this language was used to exclude him from the right to vote shows that in the absence of that language he would have the right to vote.

And, sir, when the Chief Justice is substituted in the place of the Presiding Officer of this body, without any exclusion from the right to vote, without any exception made as against him, he is made a member of this court, to participate in the proceedings of this court; and it does seem to me, in the absence of all other precedents of exclusion or constitutional provision, he would have a right to vote. I do not know that the Chief Justice would take the same view of it or desire to vote, but it does seem to me that the Constitution, by substituting this high officer here as the Presiding Officer of this body, did not intend to make him a mere instrument or medium to put a question to the body, but intended to make him a part of the tribunal or court to try the case.

Mr. Howard, of Michigan, said:

The amendment of the Senator from Maine adopts, in effect, the language of the Constitution itself, as I understand it; and so far I think it entirely proper to be adopted. I must, however, now and at all times, so far as I can see my way, repel the idea that the Chief Justice is a member of the so-called court of impeachment, or has any right to vote during the deliberations of that court, or upon any question arising during the trial. I do not propose to go into it further now, although I see the gravity of the question, and have for some time been entirely sensible of it.

I will say, however, before I take my seat, that if we regard the analogies presented to us in the constitutional history of England, the same result which I claim to be the truth here will be arrived at. The House of Lords sit as a high court of impeachment. They are presided over when thus sitting either by the Lord Chancellor or the Lord High Steward; and the precedents are numerous and clear that the Lord Chancellor, although thus presiding, or the Lord Steward thus presiding, has no vote in the House of Lords in virtue of his presidency of the body; but if he be a peer he has, in right of his peerage, the right to vote; but it is put upon that ground, and that ground only. As president of the body he has no right even to decide questions where the body is equally divided.

Mr. Roscoe Conkling, of New York, referred to the important question raised and suggested that, to avoid that question, the amendment be modified so as to read "members present" "instead of "Senators present." That would be the very Language of the Constitution.

Mr. Morrill finally yielded to that request and the modified amendment was agreed to without division.

A little later the Senate recurred to Rule VII again, and after discussion of the powers of the Chief Justice in presiding, determined upon such amendment of that and other rules as to eliminate the words "high court of impeachment" wherever they occurred, the object evidently being to remove all idea that the Chief Justice had any other function than to preside.[1] In fact, the Chief Justice did vote on an occasion when the vote of the Senate was a tie,[2] on March 31, but did not vote in the final judgment.[3]

Mr. Peter G. Van Winkle, of West Virginia, then proposed[4] an amendment to the second clause so it should read as follows:

But if the person accused in such articles of impeachment shall be convicted by the votes of two-thirds of the members of such court present, the court shall proceed to ascertain what judgment shall be rendered in the case, which judgment, being rendered, shall be pronounced by the Presiding Officer, etc.

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[1] See Proceedings on Rule VII and on functions of the Senate sitting for the trial. Section 2094 of this volume.

[2] Senate Journal, pp. 868, 869.

[3] Senate Journal, pp. 939–951.

[4] Senate Journal, p. 243; Globe, p. 1587.

This was in view of the fact that the Constitution does not say that the punishment shall necessarily extend to disqualification to hold office. Mr. George F. Edmunds, of Vermont, suggested that the same result could be attained by striking out the words "of such court" and "by its Presiding Officer." Mr. VanWinkle accepted the amendment, which was agreed to without division.

Mr. George H. Williams, of Oregon, next proposed to insert after the words "impeachment shall not" the words "upon any of the articles be presented," and after the word "convicted" the words "upon any of said articles." [1]

The object of this amendment was to make it certain that a conviction on one article, as on one count of an indictment, should be sufficient for judgment, after the analogy of the criminal law. The amendment was agreed to without division.

So the rule received its present form.

2099. In 1804 the Senate, sitting as a high court of impeachment, considered and adopted rules for the trial.—On December 10, 1804,[2] the stSenate, sitting as a high court of impeachment, took into consideration the report of the committee appointed on November 30 to prepare and report proper rules of proceedings, to be observed by the Senate in cases of impeachments.

This report consisted of a series of rules, prescribing forms and methods of procedure. On this day the high court agreed to a portion of the rules, and then postponed the consideration of the remainder.

On December 24 the high court resumed consideration of the report, and agreed to the remaining portion.

In the meanwhile, on December 14, action had been taken in accordance with the rules agreed to on December 10.

2100. Where the special rules for impeachment trials are silent, the general rules of the Senate are regarded as applicable.

At the Johnson trial the Chief Justice felt constrained to submit to the Senate for decision a question of order affecting the organization.

At the Johnson trial the Chief Justice ruled that one point of order might not be made while another was pending.

The Chief Justice ruled in the Johnson trial that debate must be confined to the pending question.

Rule XXIII, prohibiting debate in open Senate sitting for an impeachment trial, was held by the Chief Justice not to apply to a question arising during organization.

Instance of an appeal from the decision of the Chief Justice on a question of order arising during the Johnson trial.

In the Johnson trial the Chief Justice ruled that a proposed rule or order should lie over for one day.

On March 6, 1868,[3] while the Senate was organizing for the trial of Andrew Johnson, President of the United States, after the Chief Justice had taken the chair as presiding officer, and while the oath was being administered to the Senators, an

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[1] Senate Journal, p. 243 , Globe, pp. 1587, 1588.

[2] Second session, Eighth Congress, Senate Impeachment Journal pp. 510, 511.

[3] Second session Fortieth Congress, Senate Journal, pp. 810, 811; Globe, pp. 1696, 1697, 1698, 1700.

objection was made to the competency of Mr. Benjamin F. Wade, of Ohio, to take the oath.

Discussion having arisen, Mr. Jacob M. Howard, of Michigan, submitted a question of order.

The Chief Justice [1] said:

The Senator from Connecticut is called to order. The Senator from Michigan has submitted a point of order for the consideration of the body. During the proceedings for the organization of the Senate for the trial of an impeachment of the President the Chair regards the general rules of the Senate as applicable and that the Senate must determine for itself every question which arises, unless the Chair is permitted to determine it. In a case of this sort affecting so nearly the organization of this body the Chair feels himself constrained to submit the question of order to the Senate. Will the Senator from Michigan state his point of order in writing?

While the point of order raised by Mr. Howard was being reduced to writing at the desk, Mr. James Dixon, of Connecticut, submitted as a point of order whether a question of order such as was pending could be raised.

The Chief Justice said: [2]

A point of order is already pending, and a second point of order can not be made until that is disposed of.

Mr. Howard's question was then submitted in writing, as follows:

That the objection raised to administering the oath to Mr. Wade is out of order, and that the motion of the Senator from Maryland, to postpone the administering of the oath to Mr. Wade until other Senators are sworn, is also out of order under the rules adopted by the Senate on the 2d of March, instant, and under the Constitution of the United States.

The Chief Justice announced that this question was open to debate.

Mr. Dixon having proceeded in debate, was discussing the competency of Mr. Wade to participate in the trial, when Mr. John Sherman, of Ohio, called him to order for not confining himself to the question under consideration.

Thereupon the Chief Justice held:

The Senator from Ohio makes the point of order that the Senator from Connecticut, in discussing the pending question of order, must confine himself strictly to that question, and not discuss the main question before the Senate. In that point of order the Chair conceives that the Senator from Ohio is correct, and that the Senator from Connecticut must confine himself strictly to the discussion of the point of order before the House.

Mr. Dixon having proceeded, was again called to order by Mr. Howard, who objected that no debate was in order under Rule XXIII of "the rules of procedure and practice in the Senate when sitting on impeachment trials." This rule he quoted as follows:

All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, except when the doors shall be closed for deliberation, and in that case no Member shall speak, etc.

The Chief Justice overruled the point of order, saying:

The twenty-third rule is a rule for the proceeding of the Senate when organized for the trial of an impeachment. It is not yet organized; and in the opinion of the Chair the twenty-third rule does not apply at present.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Globe, p. 1697.

Mr. Charles D. Drake, of Missouri, having appealed, the Chief Justice put the question:

As many Senators as are of opinion that the decision of the Chair shall stand as the judgment of the Senate will, when their names are called, answer "yea;" as many as are of the contrary opinion will answer "nay."

And there were yeas 24, nays 20; so the decision of the Chief Justice was sustained.

2101. On April 11, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, the Chief Justice,[2] in ruling on a question of order said:

The Chief Justice in conducting the business of the court adopts for his general guidance the rules of the Senate sitting in legislative session as far as they are applicable. That is the ground of his decision.

2102. On April 14, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Charles Sumner, of Massachusetts, proposed the following:

Ordered, In answer to the motion of the managers, that under the rule limiting the argument to two on a side unless otherwise ordered, such other managers and counsel as choose may print and file arguments at any time before the argument of the closing manager.

Objection being made to the immediate consideration of the order, and Mr. Sumner having demanded its consideration, the Chief Justice [1] said:

The Chief Justice stated on Saturday that in conducting the business of the court he applied, as far as they were applicable, the general rules of the Senate. This has been done upon several occasions, and when objection has been made orders have been laid over to the next day for consideration.

2103. In the Johnson trial the Chief Justice admitted a motion to lay a pending proposition on the table.—On April 13, 1868,[4] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, an order relating to the final arguments in the trial, was under consideration.

Mr. George H. Williams, of Oregon, moved that the resolution lie on the table.

Mr. Charles D. Drake, of Missouri, said:

I raise a question of order, Mr. President, that in this Senate sitting for the trial of an impeachment there is no authority for moving to lay any proposition on the table. We must come to a direct vote, I think, one way or the other.

The Chief Justice [1] said:

The Chief Justice can not undertake to limit the Senate in respect to its mode of disposing of a question; and as the Senator from Oregon [Mr. Williams] announced his purpose to test the sense of the Senate in regard to whether they will alter the rule at all the Chief Justice conceives his motion to be in order.

2104. Instance wherein a Senator sitting in an impeachment trial was excused from voting on an incidental question.—On May 15, 1876,[5] in the

[1] Second session Fortieth Congress, Globe Supplement, p. 147.

[2] Salmon P. Chase, of Ohio, Chief Justice.

[3] Second session Fortieth Congress, Senate Journal, p. 896; Globe Supplement, p. 174.

[4] Second session Fortieth Congress, Globe Supplement, p. 162.

[5] First session Fortieth Congress, Senate Journal, p. 933; Record of trial, pp. 72, 73.

Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question arose as to the sufficiency of the pleadings. After the arguments had been concluded, but before the Senate had rendered a decision, Mr. James L. Alcorn, a Senator from Mississippi, attended and took the oath prescribed for Senators sitting in impeachment trials.

Having taken the oath, Mr. Alcorn rose and stated that he had been unavoidably absent from the sessions of the Senate sitting for the trial of impeachment heretofore held, and for that reason he asked to be excused from voting upon the question now under consideration presented by the pleadings.

Thereupon Mr. John Sherman moved that Mr. Alcorn, for the reasons stated, be excused from voting on the question as presented by the pleadings and now before the Senate.

The motion was agreed to.

2105. Instances of a call for a quorum in the Senate sitting for an impeachment trial.

The Presiding Officer of the Senate sitting in an impeachment trial directed the counting of the Senate to ascertain the presence of a quorum.

On April 22, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, during the argument of Mr. Manager George S. Boutwell, the attendance after a recess was so scanty that Mr. John Sherman, of Ohio, moved a call of the Senate under the then existing Rule 16 of the Senate. The motion was carried and the roll was called.

2106. On May 4, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Aaron A. Sargent, of California, commented on the fact that less than a quorum were present, and moved a call of the Senate.

And thereupon the roll was called.

2107. On June 16, 1876,[3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, of Vermont, suggested that there was no quorum present, and asked the President pro tempore to ascertain.

The President pro tempore [4] said:

The Secretary will count the Senate.

The Chief Clerk having counted the Senators present, the President pro tempore announced that the Senators present did not constitute a quorum.

Thereupon, on motion of Mr. Edmunds, the Sergeant-at-Arms was directed to request the attendance of absentees.

This having failed to secure sufficient attendance, the Senate thereupon adjourned.

2108. Instances of temporary suspensions of the sitting of the Senate in an impeachment trial.—On July 10, 1876,[5] in the Senate sitting for the

[1] Second session Fortieth Congress, Senate Journal, p. 921; Globe Supplement, p. 274.

[2] First session Forty-fourth Congress, Record of trial, p. 31.

[3] First session Forty-fourth Congress, Senate Journal, p. 952; Record of trial, p. 171.

[4] T. W. Ferry, of Michigan, President pro tempore.

[5] First session Forty-fourth Congress, Record of trial, p. 230.

impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore [1] said:

The Chair is informed that there is a message to be submitted from the House of Representatives. If there be no objection the proceedings of the trial will be temporarily suspended for that purpose.

A message was received from the House of Representatives.

After which, the President pro tempore said:

The Senate resumes its session sitting for the trial of the impeachment.

Later another message was received in the same way.[2]

2109. On July 19, 1876,[3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. William Windom, a Senator from Minnesota, asked that the proceedings might be suspended in order that he might make a report from the committee of conference on the sundry civil bill.

The President pro tempore [4] said:

If there be no objection proceedings will be suspended for that purpose.

After some time spent in legislative session, the Senate resumed the trial of the impeachment of William W. Belknap.

2110. Admission to the Senate galleries during the Johnson trial was regulated by tickets.

The Senators occupied their usual seats during the Johnson trial.

On March 4, 1868,[5] Mr. Henry B. Anthony, of Rhode Island, during the proceedings preliminary to the trial of President Andrew Johnson, proposed the following:

Ordered, That during the trial of the impeachment now pending no person besides those who now have the privilege of the floor shall be admitted to the galleries, or to that portion of the Capitol set apart for the use of the Senate and its officers, except upon tickets to be issued by the Sergeant-at-Arms. Such tickets shall be numbered, and shall be good only for the day on which they are dated. The number of tickets issued shall not exceed the number of persons who can be comfortably seated in the galleries, leaving the steps and passages entirely free. The portion of the gallery set apart for the diplomatic corps shall be exclusively appropriated to it, and tickets of admission thereto shall be issued to the foreign legations. Four tickets shall be issued to each Senator, 2 tickets to each Member of the House of Representatives, 2 tickets to the Chief Justice and to each justice of the Supreme Court of the United States, 2 tickets to the chief justice and to each justice of the supreme court of the District of Columbia, and 2 tickets to the chief justice and to each judge of the Court of Claims. Sixty tickets shall be issued by the Presiding Officer to the reporters for the press, and the remaining tickets shall be distributed under his direction.

The Sergeant-at-Arms, under the direction of the Presiding Officer of the Senate, shall carry out these regulations, and, with the approbation of the Committee on Contingent Expenses, shall be authorized to employ such additional force as may be necessary for the preservation of order.

On March 6 [6] this proposition was referred to the select committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, and which had in charge the forms of procedure and arrangements for the trial.

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[1] T. W. Ferry, of Michigan, President pro tempore.

[2] Record of trial, p. 234.

[3] First session Forty-fourth Congress, Record of trial, p. 282.

[4] T. W. Ferry, of Michigan, President pro tempore.

[5] Second session Fortieth Congress, Senate Journal, pp. 258, 259; Globe, p. 1649.

[6] Senate Journal, p. 277; Globe, pp. 1701, 1702.

On March 10[1] Mr. Howard reported the order with amendment. There was considerable debate as to the propriety of making any rule, the argument being that the public should not be excluded. On the other hand it was urged that order and decorum during the trial were of great importance, and that there should be arrangements which would secure an audience disposed to preserve order.

Another question that was discussed at length was the provision for seating Senators. At the Humphries trial the Senators had occupied benches placed at the right and left of the presiding officer. Senators who had sat during those proceedings objected to such arrangement as uncomfortable and also as inconvenient because of difficulty in hearing. It was pointed out that the attendance of Members of the House was not likely to be large, as already in the preliminary proceedings not over fifty had attended at any one time. Finally, on motion of Mr. Anthony, an amendment was agreed to providing that the Senators should occupy their usual seats during the trial. The order as amended was agreed to as follows:

That during the trial of the impeachment now pending no persons besides those who have the privilege of the floor and clerks of the standing committees of the Senate shall be admitted to that portion of the Capitol set apart for the use of the Senate and its officers, except upon tickets to be issued by the Sergeant-at-Arms.

The number of tickets shall not exceed 1,000.

Tickets shall be numbered and dated, and be good only for the day on which they are dated.

The portion of the gallery set apart for the diplomatic corps shall be exclusively appropriated to it, and 40 tickets of admission thereto shall be issued to the Baron Gerolt for the foreign legations.

Four tickets shall be issued to each Senator, 4 tickets each to the Chief Justice of the United States and the Speaker of the House of Representatives, 2 tickets to each Member of the House of Representatives, 2 tickets each to the associate justices of the Supreme Court of the United States, 2 tickets each to the chief justice and associate justices of the supreme court of the District of Columbia, 2 tickets to the chief justice and each judge of the Court of Claims, 2 tickets to each Cabinet officer, 2 tickets to the General commanding the Army, 20 tickets to the Private Secretary of the President of the United States, for the use of the President, and 60 tickets shall be issued by the President pro tempore of the Senate to the reporters of the press. The residue of the tickets to be issued shall be distributed among the Members of the Senate in proportion to the representation of their respective States in the House of Representatives, and the seats now occupied by the Senators shall be reserved for them.

On March 24,[2] during the trial, Mr. John Sherman, of Ohio, proposed the following:

Ordered, That after to-morrow the order of the 15th of March ultimo, relative to admission to the gallery, be suspended until further order, and that the Sergeant-at-Arms of the Senate shall take special care that order shall be observed in the galleries during the trial of the impeachment now pending, and he is hereby authorized to arrest and bring before the Senate any person who violates the orders of the Senate, and he shall take effective measures to secure admission to the diplomatic gallery, the ladies' gallery, and the reporters' gallery to those only who are entitled to admission thereto under the rules.

On April 2[3] the resolution was debated briefly. Mr. Sherman intimated that the audiences had not been very orderly, and that the people who would attend with open galleries would do as well.

On April 4[4] the proposition was debated, principally as to the conduct of the

[1] Senate Journal, p. 288; Globe, pp. 1775–1782.

[2] Senate Journal, p. 336; Globe, p. 2078.

[3] Senate Journal, p. 364; Globe, p. 2233.

[4] Senate Journal, p. 366; Globe, pp. 2237, 2238.

audiences, but was not acted on and apparently did not come before the Senate again.

On May 5[1] a proposition to give seats in the gallery to the members of the United States Medical Association was discouraged in debate, and did not come to a vote, it being urged that they could seek admission by tickets in the usual way.

2111. According to the best considered practice, the Senate sitting for an impeachment trial does not obtain the use of Senate archives without an order made in legislative session.—On April 4, 1868,[2] in the Senate sitting as a court of impeachment for the trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of the production of testimony on behalf of the House of Representatives, asked that the Executive Journal of the Senate for a certain date might be produced, and he asked that the Senate direct its production.

Mr. John Sherman, of Ohio, a Senator, moved that the Journal be furnished.

The motion was agreed to.

2112. On April 15, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Benjamin R. Curtis, of counsel for the respondent, moved for an order on the proper officer of the Senate to furnish a statement of the dates of the beginning and end of each session of the Senate.

The Chief Justice[4] said:

> The Chief Justice is of opinion that that is an application which can only be addressed to the Senate in legislative session. If the court desire it, he will vacate the chair in order that the President pro tempore may take it.

Very soon thereafter, on motion of Mr. Reverdy Johnson, of Maryland, "the Senate sitting for the trial of the President upon articles of impeachment adjourned to 12 o'clock m. to-morrow."

Thereupon the President pro tempore resumed the Chair, and in the course of legislative business, on motion of Mr. Johnson, it was:

> *Ordered,* That the Secretary of the Senate be directed to furnish to the counsel for the President a statement of the beginning and end of each executive and legislative session from 1789 to 1868.

2113. During the trial of President Johnson the Senate voted to receive resolutions of a State constitutional convention on the subject of the impeachment.—On March 25, 1868,[5] while proceedings for the impeachment of President Johnson were going on before the Senate, the President pro tempore[6] laid before the Senate resolutions adopted by the constitutional convention of North Carolina, returning thanks for the vigilance with which the House and Senate had proceeded in the matter of impeachment.

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[1] Globe, p. 2362.

[2] Second session Fortieth Congress, Globe Supplement, p. 119.

[3] Second session Fortieth Congress, Senate Journal, pp. 383, 901; Globe Supplement, p. 194.

[4] Salmon P. Chase, of Ohio, Chief Justice.

[5] Second session Fortieth Congress, Senate Journal, p. 337; Globe, p. 2084.

[6] Benj. F. Wade, of Ohio, President pro tempore.

Mr. Willard Saulsbury, of Delaware, said:

I object, Mr. President, to the reception of that paper, and for this reason: It purports to be addressed to the Senate of the United States, and the Members of the Senate of the United States compose the court of impeachment, and any communication addressed to the Members of that court upon the pending subject is improper to be entertained by the Senate, the Senate composing that court, as being an attempt to exercise an influence upon the minds of the judges.

The President pro tempore put the question on the reception of the resolutions, and the Senate voted to receive them.

The resolutions were then laid on the table.

2114. In the Swayne trial a Senator who had not heard the evidence was excused from voting on the question of guilt.—On February 27, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, as the vote was about to be taken on the first article, Mr. P. C. Knox, of Pennsylvania, said:

Mr. President, having been prevented by illness from attending the sessions of the Senate sitting in this impeachment trial at which the testimony was produced, and also having been prevented by the effects of the illness from reading the testimony, I ask that the Senate may excuse me from voting upon this and all subsequent roll calls taken to ascertain the judgment of the Senate upon the charges against the respondent.

The Presiding Officer said:

Senators, you have heard the request of the Senator from Pennsylvania [Mr. Knox]. Those who would excuse him from voting will say "aye;" opposed, "no." [Putting the question.] The "ayes" have it. The Senator from Pennsylvania is excused.

2115. The expenses of the Senate in the Swayne trial was defrayed from the Treasury.—On January 24, 1905.[1] the Senate, in legislative session, agreed to this resolution:

Resolved, etc., That there be appropriated from any money in the Treasury not otherwise appropriated the sum of $40,000, or so much thereof as may be necessary, to defray the expenses of the Senate in the impeachment trial of Charles Swayne.

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[1] Third session Fifty-eighth Congress, Senate Record, p. 3468.

[2] Third session Fifty-eighth Congress, Record, p. 1289; 33 Stat. L., p. 1280.