Chapter LXIX.

RULES OF EVIDENCE IN AN IMPEACHMENT TRIAL.

2218. After discussion of English precedents, the Senate ruled decisively in the Peck trial that the strict rules of evidence in force in the courts should be applied.

Witnesses in an impeachment trial are required to state facts and not opinions.

Decision as to the limits within which expert testimony may be admitted in an impeachment trial.

On January 7, 1831,[2] in the high court of impeachment during the trial of the case of The United States *v.* James H. Peck, a witness, Robert Walsh, was examined on behalf of the respondent, and Mr. William Wirt, counsel for the respondent, asked this question:

> When you read the strictures signed "A Citizen," did they strike you as misrepresenting the opinion of the court in a manner calculated to awaken the contempt and indignation of the people of Missouri, and to impair the confidence of the suitors in that court in the intelligence and integrity of the tribunal?

Judge Peck was impeached for punishing for contempt the author of a letter signed "A Citizen" and published in a St. Louis paper, criticising an opinion delivered by Judge Peck in the case of Goulard's heirs.

[1] Under parliamentary law the Lords are governed by the legal rules of evidence. Section 2155 of this volume.

Legal rules of evidence insisted on in trial of Humphreys. Section 2395.

As to necessity of proof of intent to secure judgment for the fact. Sections 2381, 2382.

[2] Second session Twenty-first Congress, Senate Impeachment Journal, p. 331; Report of the trial of James E. Peck, pp. 229–239.

Mr. Henry R. Storrs, of New York, one of the managers for the House of Representatives, objected to this question, on the ground that the witness was asked for an opinion instead of a fact. The question for the court to settle in this trial was this: Did the strictures misrepresent the opinion? That was a question which must be decided on facts. The witness was now asked his conclusion, but was that an evidence of fact?

Mr. Jonathan Meredith, counsel for the respondent, argued that the question at issue involved a knowledge of the obscure and intricate subject of Spanish titles and the application of Spanish laws in Louisiana Territory. The witness, from his familiarity with those subjects, was able to assist the court in forming its opinion. The managers had denied that professional knowledge was needed to show whether or not one paper misrepresented another; but Mr. Meredith held that in this case the court of impeachment could not be presumed to possess the requisite knowledge to enable it to form a correct judgment, unassisted by the opinions and conclusions of others. Therefore the proposed testimony was competent. Furthermore, the intention of the respondent in punishing the author of the strictures was a question of importance, and the proposed testimony would be pertinent to that branch of the discussion.

Mr. William Wirt, also counsel for respondent, elaborated the points outlined by his associate, but before doing so made remarks on the law of evidence as applied to impeachments:

> In the well-known case of Warren Hastings, which occupied England so long, a most able and masterly protest was entered by Mr. Burke and the managers on the part of the House of Commons against the application of the rigid rules of evidence which governed the practice of the courts of law. It was contended before that tribunal that instead of the strict and iron rules of a law court, the field was broad and liberal, and to be controlled by no rule but the Lex et consuetudo Parliamenti. The protest is extended, very learned, and rests on numerous authorities; and if this court could have an opportunity to review it, they would not feel the least hesitation as to the fact that they are not to be trammeled and hemmed in by the rigid rules of evidence. I find that in the remarks of the Federalist respecting the high court of impeachment erected by the Constitution of this country, the writer lays it down as a conceded point that the strictness which prevails in the ordinary criminal courts does not apply here, nor is it required that the article of impeachment should be drawn up with all the rigid precision of an indictment. The proceedings in this highest court are to be more liberal and free, and nearer substantially to the course pursued by courts conversant with the civil than the criminal law. Mr. Rawle has the same idea. And the question would be, if the original view could now be before this court, whether this tribunal, which is not an appellate court on all questions of law, and is not, therefore, conversant with the strict rules of law, but whose whole jurisdiction has respect to impeachments alone, should or should not open itself to all lights which can be brought to bear on this decision, and whether more injustice would not accrue from narrowing the apertures through which light is to be received, than from opening them in all directions from whence a single ray can touch them.

In reply, Mr. James Buchanan, of Pennsylvania, chairman of the managers, argued at length in support of the objection, saying in the course of his remarks:

> This question in four lines embraces the very essence of the respondent's defense—the very question to be decided by the court, and asks the witness to substitute his opinion for the judgment of the tribunal. I ask, Is there a court in the United States, however inferior its grade, which, on the trial of am indictment for a libel, would not, without an argument, overrule the opinion of a witness as to whether the matter charged to be libellous was or was not a libel, and what would be its effect on the

public mind? Does it not strike everyone at the first blush that no such court could be found in any portion of this country?

The gentleman who last addressed the court has argued the question with very great ingenuity, and has presented a variety of topics introductory to the new doctrine which he has advanced concerning the law of evidence. He at first contended (though he afterwards waived the point) that the rules of evidence, by which all other courts of the United States are bound, ought not to be applied in their strictness to this high court of impeachment; and to sustain this proposition, he cited the celebrated protest of Mr. Burke upon the trial of Warren Hastings. But the gentleman seems to have forgotten that in that far-famed trial this very question was fairly made and decided; and it was held that the House of Lords, when sitting as a high court of impeachment, was bound by the same rules of evidence which regulated the proceedings of the most inferior courts of the kingdom. The whole trial of Judge Chase proceeded upon the same principle.

But even without such a precedent, could there be a reasonable doubt upon this question? What, sir? Against whom is it that this tremendous power of impeachment is invoked? Is it not against high state criminals? Men of standing and influence and character? And when the House of Representatives bring a culprit of this description to trial, are they to be told that in crimes affecting the whole nation, and which, in their consequences, may bring ruin upon the people, that the accused shall enjoy rights and privileges and immunities which are denied to any ordinary citizen, when arraigned before the most inferior court in the land? We deny the existence of any power, even in this high court, to dispense with the rules of evidence. When the House of Representatives become accusers, it is their right to have these rules administered here as they are administered by the Supreme Court and the other tribunals of the country.

There is another point of view in which the doctrine for which we contend will appear peculiarly proper and necessary. Will not the proceedings upon this trial be regarded as a precedent? And if this court shall decide questions of evidence against the law of the land will not such decisions bring the law of evidence into doubt and confusion throughout the United States?

The gentleman has also invoked the Federalist to his aid; and what does it say? Does it declare that on the trial of impeachments there is to be a departure from the established rules of proceeding, and that testimony is to be admitted here which ought to be rejected in a court of law? By no means. It merely recognizes the principle of the English law, that "in the delineation of the offense" in the form of the article of impeachment the same rigid exactness is not required which is necessary in framing an indictment. There is not the least intimation that this court, in the progress of the trial, ought to depart from the ordinary rules of evidence.

In further argument Mr. Storrs said:

I confess I feel alarmed to hear it gravely urged here that an impeachment is to be governed by other rules than the well-known and long-established rules of evidence. Rules of evidence are as much a part of the law of the land as any other part of it, and they constitute the security of every man. A more dangerous principle could not be broached, or a more alarming principle established than that, in the trial of an impeachment, the ordinary rules of evidence are to be relaxed; and I was, I confess, surprised that the respondent should seek to unsettle a principle the overturning of which might easily lead to the most unjust and oppressive proceedings. If this is to be done in favor of the respondent, will it be done in favor of him alone, or may not State favorites be shielded or State victims be destroyed by the same process?

On the question, "Shall this interrogatory be put to the witness?" there appeared yeas 7, nays 35.

Again, on January 10,[1] the same witness being under examination, Mr. Meredith asked this question, which on objection was excluded by a vote of yeas 1, nays 39:

Do you think that the publication signed "A Citizen" was calculated to incense the claimants against the court, and to impair, in their minds, their confidence and respect for the court?

[1] Journal, p. 332; Report of trial, p. 239.

2219. In the Johnson trial the Senate declined to agree to a declaration modifying the strictness of the ordinary rules of evidence.—On April 16, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Charles Sumner, of Massachusetts, proposed the following as a declaration of opinion to be adopted as an answer to the constantly recurring questions on the admissibility of testimony:

Considering the character of this proceeding, that it is a trial of impeachment before the Senate of the United States, and not a proceeding by indictment in an inferior court;

Considering that Senators are, from beginning to end, judges of law as well as fact, and that they are judges from whom there is no appeal;

Considering that the reasons for the exclusion of evidence on an ordinary trial where the judge responds to the law and the jury to the fact are not applicable to such a proceeding;

Considering that, according to parliamentary usage, which is the guide in all such cases, there is on trials of impeachment a certain latitude of inquiry and a freedom from technicality;

And considering, finally, that already in the course of this trial there have been differences of opinion as to the admissibility of evidence;

Therefore, in order to remove all such differences and to hasten the dispatch of business, it is deemed advisable that all evidence offered on either side not trivial or obviously irrelevant in nature shall be received without objection, it being understood that the same when admitted shall be open to question and comparison at the bar in order to determine its competency and value, and shall be carefully sifted and weighted by Senators in the final judgment.

Mr. John Conness, of California, moved that the paper lie on the table, and the question being taken, there appeared yeas 33, nays 11. So the paper was laid on the table.

2220. In an impeachment trial testimony that can be construed as fairly within the purport of the articles is admitted.—On April 2, 1868 ,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Charles A. Tinker was called and sworn as a witness on behalf of the managers, to prove the following dispatches:

MONTGOMERY, ALA.,
January 17, 1867.

Legislature in session. Efforts making to reconsider vote on constitutional amendment. Report from Washington says it is probable an enabling act will pass. We do not know what to believe. I find nothing here.

LEWIS E. PARSONS,
Exchange Hotel.

His Excellency ANDREW JOHNSON, *President.*

UNITED STATES MILITARY TELEGRAPH,
EXECUTIVE OFFICE, WASHINGTON, D. C.,
January 17, 1867.

What possible good can be obtained by reconsidering the constitutional amendment? I know of none in the present posture of affairs; and I do not believe the people of the whole country will sustain any set of individuals in attempts to change the whole character of our Government by enabling acts or otherwise. I believe, on the contrary, that they will eventually uphold all who have patriotism and courage to stand by the Constitution and who place their confidence in the people. There should be no faltering on the part of those who are honest in their determination to sustain the several coordinate departments of the Government in accordance with its original design.

ANDREW JOHNSON.

HON. LEWIS E. PARSONS, *Montgomery, Ala.*

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[1] Second session Fortieth Congress, Senate Journal, p. 902; Globe Supplement, p. 195.

[2] Second session Fortieth Congress, Senate Journal p. 877; Globe supplement, pp. 90–92.

Mr. Butler stated that he introduced this evidence under the tenth and eleventh articles of impeachment to show how President Johnson had endeavored to oppose the reconstruction legislation of Congress, of which the defeated amendment referred to in the dispatches was a part. Lewis E. Parsons was provisional governor of Alabama, and a man of influence.

The counsel for the President objected to the evidence because it did not refer to acts charged in the articles of impeachment. The tenth article referred to the President's speeches, and not to telegrams; and the eleventh charged him with trying to remove Secretary of War Stanton, and with trying to prevent the execution of the reconstruction laws. Mr. William M. Evarts, of counsel for the President, said:

"Designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the Government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted."

That is the entire purview of the intent. Now, the only acts charged as done with this intent are the delivery of a speech at the Executive Mansion in August, 1866, and two speeches, one at St. Louis and the other at Cleveland, in September, 1866. The article concludes that by means of these utterances—

"Said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit and was then and there guilty of a high misdemeanor in office."

That is the gravamen of the crime; that he brought the presidential office into scandal by these speeches made with this intent. Senators will judge from the reading of this telegram, dated in January, 1867, whether that supports the principal charge or intent of his derogating from the credit of Congress or bringing the presidential office into discredit.

The eleventh article has for its substantive charge nothing but the making of the speech of the 18th of August, 1866, saying that by that speech he declared and affirmed—

"In substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same, but, on the contrary, was a Congress of only part of the States, thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and, also, thereby denying, and intending to deny, the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States; and in pursuance of said declaration"—

That is, in pursuance of the speech made at the Executive Mansion on the 18th of August, 1866—

"The said Andrew Johnson, President of the United States, afterwards, to wit, on the 21st day of February, A. D. 1868, at the city of Washington, in the District of Columbia, did, unlawfully, and in disregard of the requirement of the Constitution that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled, "An act regulating the tenure of certain civil offices,' passed March 2, 1867"—

Which was after the date of this dispatch—

"By unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War."

The court will consider whether this dispatch touches that subject.

"And also by further unlawfully devising and contriving, and attempting to devise and contrive, means, then and there, to prevent the execution of an act entitled 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes,' approved March

2, 1867; and also to prevent the execution of an act entitled 'An act to provide for the more efficient government of the rebel States,' passed March 2, 1867."

Also, after the date of this dispatch. It is under one or the other of these two articles that this dispatch is, in its date and in its substance, supposed to be relevant.

Mr. Evarts concluded by contending that there was nothing in the telegram that showed the President guilty of crime or misdemeanor in opposing legislation of Congress or in doing anything mentioned in the articles.

Mr. Manager George S. Boutwell specifically cited the concluding words of the eleventh article, wherein the President was charged with "attempting to devise and contrive, means then and there * * * to prevent the execution of an act" known as the reconstruction act. The adoption of the constitutional amendment was part of the reconstruction system, and the telegram to Governor Parsons was an act hostile to reconstruction.

The question being taken, the Senate decided, yeas 27, nays 17, that the evidence should be admitted.

2221. In the Johnson trial the Senate held inadmissible as evidence of an intent specified in the articles an act not specified in the articles.—On April 2, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, William E. Chandler, formerly Assistant Secretary of the Treasury, was called by the managers and sworn. The question "Do you know Edmund Cooper?", asked by Mr. Manager Benjamin F. Butler, caused Mr. Henry Stanbery, of counsel for the President, to ask what was the object of eliciting testimony concerning Mr. Cooper. After discussion, Mr. Butler offered the following in writing:

We offer to prove that after the President had determined on the removal of Mr. Stanton, Secretary of War, in spite of the action of the Senate, there being no vacancy in the office of Assistant Secretary of the Treasury, the President unlawfully appointed his friend and theretofore private secretary, Edmund Cooper, to that position as one of the means by which he intended to defeat the tenure-of-civil-office act and other laws of Congress.

Mr. Manager Butler further stated that the proof was offered under the eighth and eleventh articles of impeachment.

Objecting to the testimony offered, Mr. William M. Evarts, of counsel for the President, quoted the eighth article's charge against the President:

"With intent unlawfully to control the disbursement of the moneys appropriated for the military service and for the Department of War, on the 21st day of February, in the year of our Lord 1868, did unlawfully and contrary to the provisions of an act entitled 'An act regulating the tenure of certain civil offices,' passed March 2, 1868, and in violation of the Constitution of the United States, there being no vacancy in the office of Secretary for the Department of War, and with intent to violate and disregard the act aforesaid, then and there issue and deliver to one Lorenzo Thomas a letter of authority in writing, in substance as follows; that is to say:"

Having quoted the article, Mr. Evarts continued:

Now, you propose to prove under that, that there being no vacancy in the office of Assistant Secretary of the Treasury, he proposed to appoint his private secretary, Edmund Cooper, Assistant Secretary of the Treasury. That is the idea, is it, under the eighth article? We object to this as not admissible under the eighth article. As by reference it will be perceived it charges nothing but an

[1] Second session Fortieth Congress, Senate Journal, pp. 875, 876; Globe Supplement, pp. 86–89.

intent to violate the civil-tenure act, and no mode of violating that except, in the want of a vacancy in the War Department, the appointment of General Thomas contrary to that act.

As for the eleventh article, the honorable court will remember that in our answer we stated that there was in that article no such description, designation of ways or means, or attempt at ways and means, whereby we could answer definitely; and the only allegations there are, that in pursuance of a speech that the President made on the 18th of August, 1866, he—

"Afterwards, to wit, on the 21st day of February, A. D. 1868, at the city of Washington, in the District of Columbia, did unlawfully, and in disregard of the requirement of the Constitution that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled 'An act regulating the tenure of certain civil offices,' passed March 2, 1867, by unlawfully devising and contriving and attempting to devise and contrive means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension theretofore made by said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War; and also by further unlawfully devising and contriving and attempting to devise and contrive means, then and there, to prevent the execution of an act entitled 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes,' approved March 2, 1867; and also to prevent the execution of an act entitled 'An act to provide for the more efficient government of the rebel States,' passed March 2, 1867, whereby," etc.

The only allegation here as to time and principal action, in reference to which all these unnamed and undescribed ways and means were used, is that on the 21st of February, 1868, at the city of Washington, he did unlawfully and in disregard of the Constitution attempt to prevent the execution of the civil tenure-of-office act by unlawfully devising and contriving and attempting to devise and contrive means by which he should prevent Edwin M. Stanton from resuming his place in the War Department. And now proof is offered here, substantively, of efforts in November, 1867, to appoint, in the want of a vacancy in the office of Assistant Secretary of the Treasury, Mr. Edmund Cooper. We object to that evidence.

Mr. Butler urged that the appointment of Cooper was one of the means whereby the President sought to so arrange in the Treasury Department that General Thomas's requisitions from the War Department should be honored.

Mr. John A. Bingham, of the managers, also urged that the appointment of Cooper was intended as a means of illegally drawing money from the Treasury on requisitions of an illegal acting Secretary of War. Mr. Bingham further said on the question of evidence:

We consider the law to be well settled and accepted everywhere in this country and England today that where an intent is the subject-matter of inquiry in a criminal prosecution, other and independent acts on the part of the accused, looking to the same result, are admissible in evidence for the purpose of establishing that fact. And we go further than that. We undertake to say, upon very high and commanding authority, not to be challenged here or elsewhere, that it is settled that such other and independent acts showing the purpose to bring about the same general result, although at the time of the inquiry the subject-matter of a separate indictment, are nevertheless admissible. I doubt not that it will occur to the recollection of honorable Senators that among other cases illustrative of the rule which I have just cited it has been stated in the books—the cases have been ruled first and then incorporated into books of standard authorities—that where a party, for example, was charged with shooting with intent to kill a person named, it was competent, in order to show the malice, the malicious intent of the act, to show that at another time and place he laid poison. A party is charged with passing a counterfeit note; it is competent, in order to prove the scienter, to show that he was in possession of other counterfeit notes of a different denomination; and the rule, as stated in the books, is that what is competent to prove the scienter, as a general principle, is competent to prove the intent.

Before deciding the question several Senators propounded questions tending to show whether or not an Assistant Secretary of the Treasury could, in defiance of his chief, the Secretary of the Treasury, or without a special designation from

him, or after his removal, honor requisitions for money from the Treasury. The responses of witnesses and the reading of the law did not make plain that the Assistant Secretary would have the power, and rather suggested that he would not have it.

The question being taken as to the admissibility of the evidence, the yeas were 22, the nays 27. So the evidence was not admitted.

2222. In the Johnson trial the Senate declined to admit evidence of a fact bearing on the question of intent, no issue having been accepted in the pleadings on this point.

The Senate refused, in the Johnson trial, to admit as evidence in mitigation testimony held otherwise inadmissible.

Instances in the Johnson trial wherein the decisions of the Chief Justice on questions of evidence were overruled.

Instances wherein Senators propounded questions to counsel during arguments as to admissibility of evidence.

On April 17, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gideon Welles, Secretary of the Navy, was sworn and examined as a witness on behalf of the respondent. Mr. Welles testified that he was present at a Cabinet meeting on Friday, February 26, 1867, and thereupon Mr. William M. Evarts, of counsel for the respondent, submitted the following offer of proof:

> We offer to prove that the President, at a meeting of the Cabinet while the bill was before the President for his approval, laid before the Cabinet the tenure-of-civil-office bill for their consideration and advice to the President respecting his approval of the bill; and thereupon the members of the Cabinet then present gave their advice to the President that the bill was unconstitutional and should be returned to Congress with his objections, and that the duty of preparing a message, setting forth the objection to the constitutionality of the bill, was devolved on Mr. Seward and Mr. Stanton; to be followed by proof as to what was done by the President and Cabinet up to the time of sending in the message.

Mr. Manager Benjamin F. Butler at once objected to the admission of the proposed testimony.

The arguments on this question of evidence were made principally on April 18.

Mr. Manager James F. Wilson, in arguing against the admissibility of the testimony, pointed out that the House of Representatives had, in their replication, made no issue on the question whether or not the President had been advised by his Cabinet that the tenure-of-office act was unconstitutional. Whether the President was so advised or not they held to be immaterial to this case, and hence objected to the testimony on that point as irrelevant.

Mr. Manager Wilson continued:

> The respondent is arraigned for a violation of and a refusal to execute the law. He offers to prove that his Cabinet advised him that a certain bill presented for his approval was in violation of the Constitution; that he accepted their advice and vetoed the bill; and upon that, and such additional advice as they may have given him, claims the right to resist and defy the provisions of the bill, notwithstanding its enactment into a law by two-thirds of both Houses over his objections. In other words, he claims, substantially, that he may determine for himself what laws he will obey and execute, and

[1] Second session Fortieth Congress, Senate Journal, pp. 909–911; Globe supplement, pp. 225–231.

what laws he will disregard and refuse to enforce. In support of this claim he offers the testimony which, for the time being, is excluded by the objection now under discussion. If I am correct in this, then I was not mistaken when I asserted that this objection confronts one of the most important questions involved in this case. It may be said that this testimony is offered merely to disprove the intent alleged and charged in the articles; but it goes beyond this and reaches the main question, as will clearly appear to the mind of anyone who will read with care the answer to the first article. The testimony is improper for any purpose and in every view of the case.

Mr. Manager Wilson next proceeded to examine the constitutional provisions relating to the executive power, and the punishment of impeachment, and then said:

The executive power was created to enforce the will of the nation; the will of the nation appears in its laws; the two Houses of Congress are intrusted with the power to enact laws, the objections of the Executive to the contrary notwithstanding; laws thus enacted, as well as those which receive the executive sanction, are the voice of the people. If the person clothed for the time being with the executive power—the only power which can give effect to the people's will—refuses or neglects to enforce the legislative decrees of the nation, or willfully violates the same, what constituent elements of governmental power could be more properly charged with the right to present and the means to try and remove the contumacious Executive than those intrusted with the power to enact the laws of the people, guided by the checks and balances to which I have directed the attention of the Senate? What other constituent parts of the Government could so well understand and adjudge of a perverse and criminal refusal to obey, or a willful declination to execute, the national will, than those joining in its expression? There can be but one answer to these questions. The provisions of the Constitution are wise and just beyond the power of disputation in leaving the entire subject of the responsibility of the Executive to faithfully execute his office and enforce the laws to the charge, trial, and judgment of the two several branches of the legislative department, regardless of the opinions of Cabinet officers or of the decisions of the judicial department. The respondent has placed himself within this power of impeachment by trampling on the constitutional duty of the Executive and violating the penal laws of the land.

After contrasting the constitutions of the United States and England, the manager quoted an opinion given by Attorney-General Black, dated November 20, 1860, wherein it was stated that "to the Chief Executive Magistrate of the Union is confided the solemn duty of seeing the laws faithfully executed," and proceeded:

A departure from this view of the character of the executive power, and from the nature of the duty and obligation resting upon the officer charged therewith, would surround this nation with perils of the most fearful proportions. Such a departure would not only justify the respondent in his refusal to obey and execute the law, but also approve his usurpation of the judicial power when he resolved that he would not observe the legislative will, because, in his judgment, it did not conform to the provisions of the Constitution of the United States touching the subjects embraced in the articles of impeachment on which he is now being tried at your bar. Concede this to him, and when and where may we look for the end? To what result shall we arrive? Will it not naturally and inevitably lead to a consolidation of the several powers of the Government in the executive department? And would this be the end? Would it not rather be but the beginning? If the President may defy and usurp the powers of the legislative and judicial departments of the Government, as his caprices or the advice of his Cabinet may incline him, why may not his subordinates, each for himself, and touching his own sphere of action, determine how far the directions of his superior accord with the Constitution of the United States, and reject and refuse to obey all that come short of the standard erected by his judgment?

In conclusion, Mr. Manager Wilson said:

Concede to the President immunity through the advice of his Cabinet officers and you reverse, by your decision, the theory of our Constitution.

Mr. Benjamin R. Curtis, of counsel for the respondent, in arguing, said that he should not consume time to reply to those matters which seemed to touch the merits of the case. This was simply a question as to the admissibility of proofs. Continuing, Mr. Curtis said:

The honorable manager has read a portion of the answer of the President, and has stated that the House of Representatives has taken no issue upon that part of the answer. As to that, and as to the effect of that admission by the honorable manager, I shall have a word or two to say presently. But the honorable manager has not told you that the House of Representatives, when the honorable managers brought to your bar these articles, did not intend to assert and prove the allegations in them which are matters of fact. One of these allegations, Mr. Chief Justice, as you will find by reference to the first article and to the second article and to the third article, is that the President of the United States in removing Mr. Stanton and in appointing General Thomas intentionally violated the Constitution of the United States; that he did these acts with the intention of violating the Constitution of the United States. Instead of saying, "it is wholly immaterial what intention the President had; it is wholly immaterial whether he honestly believed that this act of Congress was unconstitutional; it is wholly immaterial whether he believed that he was acting in accordance with his oath of office, to preserve, protect, and defend the Constitution when he did this act"—instead of averring that, they aver that he acted with an intention to violate the Constitution of the United States.

Now, when we introduce evidence here, or offer to introduce evidence here, bearing on this intent, evidence that before forming any opinion upon this subject he resorted to proper advice to enable him to form a correct one, and that when he did form and fix opinions on this subject it was under the influence of this proper advice, and that consequently when he did this act, whether it was lawful or unlawful, it was not done with the intention to violate the Constitution—when we offer evidence of that character, the honorable manager gets up here and argues an hour by the clock that it is wholly immaterial what his intention was, what his opinion was, what advice he had received and in conformity with which he acted in this matter.

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I therefore say that when the question of his intention comes to be considered by the Senate, when the question arises in their minds whether the President honestly believed that this was an unconstitutional law, when the particular emergency arose, when if he carried out or obeyed that law he must quit one of the powers which be believed were conferred upon him by the Constitution, and not be able to carry on one of the departments of the Government in the manner the public interests required—when that question arises for the consideration of the Senate, then they ought to have before them the fact that he acted by the advice of the usual and proper advisers; that he resorted to the best means within his reach to form a safe opinion upon this subject, and that, therefore, it is a fair conclusion that when he did form that opinion it was an honest and fixed opinion which he felt he must carry out in practice if the proper occasion should arise. It is in this point of view, and this point of view only, that we offer this evidence.

In the course of the discussion Mr. Jacob M. Howard, a Senator from Michigan, had proposed this inquiry:

Do the counsel for the accused not consider that the validity of the tenure of office bill was purely a question of law, to be determined on this trial by the Senate; and, if so, do they claim that the opinion of Cabinet officers touching that question is competent evidence by which the judgment of the Senate ought to be influenced?

To this Mr. Curtis answered:

The constitutional validity of any bill is, of course, a question of law which depends upon a comparison of the provisions of the bill with the law enacted by the people for the government of their agents. It depends upon whether those agents have transcended the authority which the people gave them, and that comparison of the Constitution with the law is, in the sense that was intended undoubtedly by the honorable Senator, a question of law.

The next branch of the question is "whether that question is to be determined on this trial by the Senate."

That is a question I can not answer. That is a question that can be determined only by the Senate themselves. If the Senate should find that Mr. Stanton's case was not within this law, then no such question arises, then there is no question in this particular case of a conflict between the law and the Constitution. If the Senate should find that these articles have so charged the President that it is necessary for the Senate to believe that there was some act of turpitude on his part connected with this matter, some mala fides, some bad intent, and that he did honestly believe, as he states in his answer, that this was an unconstitutional law, that an occasion had arisen when he must act accordingly under his oath of office, then it is immaterial whether this was a constitutional or unconstitutional law; be it the one or be it the other, be it true or false that the President has committed a legal offense by an infraction of the law, he has not committed the impeachable offense with which he is charged by the House of Representatives. And, therefore, we must advance beyond these two questions before we reach the third branch of the question which the honorable Senator from Michigan propounds, whether the question of the constitutionality of this law must be determined on this trial by the Senate. In the view of the President's counsel there is no necessity for the Senate to determine that question. The residue of the inquiry is:

"Do the counsel claim that the opinion of the Cabinet officers touching that question"—

That is, the constitutionality of the law—

"is competent evidence by which the judgment of the Senate might be influenced?"

Certainly not. We do not put them on the stand as experts on questions of constitutional law. The judges will determine that out of their own breasts. We put them on the stand as advisers of the President to state what advice, in point of fact, they gave him, with a view to show that he was guilty of no improper intent to violate the Constitution.

Mr. Curtis next read a question propounded by Mr. Reverdy Johnson, a Senator from Maryland:

"Do the counsel for the President understand that the managers deny the statement made by the President in his message of December 12, 1867, to the Senate, as given in evidence by the managers at page 45 of the official report of the trial that the members of the Cabinet gave him"—

That is, the President—

"the opinion there stated as to the tenure of office act; and is the evidence offered to corroborate that statement, or for what other object is it offered?"

To this Mr. Curtis replied:

We now understand, from what the honorable manager has said this morning, that the House of Representatives has taken no issue on that part of our answer; that the honorable managers do not understand that they have traversed or denied that part of our answer. We did also understand before this question was proposed to us that the honorable managers had themselves put in evidence the message of the President of the 12th of December, 1867, to the Senate, in which he states that he was advised by the members of the Cabinet unanimously, including Mr. Stanton, that this law would be unconstitutional if enacted. They have put that in evidence themselves.

Nevertheless, Senators, this is an affair, as you perceive, of the utmost gravity in any possible aspect of it; and we did not feel at liberty to avoid or abstain from the offering of the members of the President's Cabinet that they might state to you, under the sanction of their oaths, what advice was given. I suppose all that the managers would be prepared to admit might be—certainly they have made no broader admission—that the President said these things in a message to the Senate; but from the experience we have had thus far in this trial we thought it not impossible that the managers, or some one of them speaking in behalf of himself and the others, might say that the President had told a falsehood, and we wish, therefore, to place ourselves right before the Senate on this subject. We desire to examine these gentlemen to show what passed on this subject, and we wish to do it for the purposes I have stated.

Mr. George H. Williams, a Senator from Oregon, proposed this question:

Is the advice given to the President by his Cabinet with a view of preparing a veto message pertinent to prove the right of the President to disregard the law after it was passed over his veto?

To this Mr. Curtis replied:

It is not of itself sufficient; it is not enough that the President received such advice; he must show that an occasion arose for him to act upon it which in the judgment of the Senate was such an occasion that you could not impute to him wrong intention in acting. But the first step is to show that he honestly believed that this was an unconstitutional law. Whether he should treat it as such in a particular instance is a matter depending upon his own personal responsibility without advice. That is the answer which I suppose is consistent with the views we have of this case.

The arguments being closed, the Chief Justice [1] said:

Senators, the question now before the Senate, as the Chief Justice conceives, respects not the weight but the admissibility of the evidence offered. To determine that question it is necessary to see what is charged in the articles of impeachment. The first article charges that on the 21st day of February, 1868, the President issued an order for the removal of Mr. Stanton from the office of Secretary of War; that this order was made unlawfully, and that it was made with intent to violate the tenure of office act and in violation of the Constitution of the United States. The same charge in substance is repeated in the articles which relate to the appointment of Mr. Thomas, which was necessarily connected with the transaction. The intent, then, is the subject to which much of the evidence on both sides has been directed; and the Chief Justice conceives that this testimony is admissible for the purpose of showing the intent with which the President has acted in this transaction. He will submit the question to the Senate if any Senator desires it.

The question being taken, there appeared yeas 20, nays 29. So the evidence was decided to be inadmissible.

Immediately thereafter [2] a question asked of the same witness by Mr. Evarts was challenged, thereby bringing from the counsel for the respondent this offer:

We offer to prove that at the meetings of the Cabinet at which Mr. Stanton was present, held while the tenure of office bill was before the President for approval, the advice of the Cabinet in regard to the same was asked by the President and given by the Cabinet; and thereupon the question whether Mr. Stanton and the other Secretaries who had received their appointment from Mr. Lincoln were within the restrictions upon the President's power of removal from office created by said act was considered, and the opinion expressed that the Secretaries appointed by Mr. Lincoln were not within such restrictions.

Mr. Manager Butler objected that this question related to the construction of a law, while the other related to its constitutionality; and that both questions fell under the same principle.

After argument, the Chief Justice said:

The Chief Justice is of opinion that this testimony is proper to be taken into consideration by the Senate sitting as a court of impeachment; but he is unable to determine what extent the Senate is disposed to give to its previous ruling, or how far they consider that ruling applicable to the present question.

The question being submitted to the Senate, it was decided, yeas 22, nays 26, that the evidence was inadmissible.

Very soon thereafter [3] another question asked of the same witness was objected to, whereat the counsel for the respondent presented this offer:

We offer to prove that at the Cabinet meetings between the passage of the tenure of civil office bill and the order of the 21st of February, 1868, for the removal of Mr. Stanton upon occasions when the condition of the public service was affected by the operation of that bill came up for the consideration

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

[2] Senate Journal, pp. 911, 912; Globe supplement, pp. 230, 231.

[3] Senate Journal, p. 912; Globe supplement, p. 233.

and advice of the Cabinet, it was considered by the President and Cabinet that a proper regard to the public service made it desirable that upon some proper case a judicial determination on the constitutionality of the law should be obtained.

To this Mr. Manager Butler objected:

Mr. President and Senators, we, of the managers, object, and we should like to have this question determined in the minds of the Senators upon this principle. We understand here that the determination of the Senate is, that Cabinet discussions, of whatever nature, shall not be put in as a shield to the President. That I understand, for one, to be the broad principle upon which this class of questions stand and upon which the Senate has voted; and, therefore, these attempts to get around it, to get in by detail and at retail—if I may use that expression—evidence which in its wholesale character can not be admitted, are simply tiring out and wearing out the patience of the Senate. I should like to have it settled, once for all, if it can be, whether the Cabinet consultations upon any subject are to be a shield.

In reply, Mr. Evarts argued:

By decisive determinations upon certain questions of evidence arising in this cause you have decided that, at least, what in point of time is so near to this action of the President as may fairly import to show that in his action he was governed by a desire to raise a question for judicial determination shall be admitted. About that there can be no question that the record will confirm my statement. Now, my present inquiry is to show that within this period, thus extensively and comprehensively named for the present, in his official duty and in his consultations concerning his official duty with the heads of Departments, it became apparent that the operation of this law raised embarrassments in the public service and rendered it important as a practical matter that there should be a determination concerning the constitutionality of the law, and that it was desirable that upon a proper case such a determination should be had.

Mr. John B. Henderson, a Senator from Missouri, proposed this question to the managers:

If the President shall be convicted, he must be removed from office.

If his guilt should be so great as to demand such punishment, he may be disqualified to hold and enjoy any office under the United States.

Is not the evidence now offered competent to go before the court in mitigation?

To this Mr. Manager Butler replied that usually evidence in mitigation should be submitted after verdict and before judgment. Therefore, he said:

There is an appreciable time in this tribunal, as in all others, between a verdict of guilty and the act of judgment; and if any such evidence can be given at all, it must, in my judgment, be given at that time. It certainly can not be given for any other purpose.

The Chief Justice having submitted the question of admissibility to the Senate there appeared yeas 19, nays 30. So the evidence was not admitted.

Immediately thereupon [1] Mr. Evarts asked of the same witness this question:

Was there, within the period embraced in the inquiry in the last question, and at any discussions or deliberations of the Cabinet concerning the operation of the tenure of civil office act and the requirements of the public service in regard to the same, any suggestion or intimation whatever touching or looking to the vacation of any office by force or getting possession of the same by force?

To this Mr. Manager Butler objected as wholly immaterial and excluded under the principles of the last ruling. He said, in response to a question by the Chief Justice, that it was not worthwhile to object to the question as leading.

The Chief Justice having submitted the question of admissibility to the Senate, there appeared yeas 18, nays 26. So the question was excluded.

[1] Senate Journal, p. 913; Globe Supplement, p. 234.

2223. Evidence that from the nature of the charge was immaterial was ruled out during the Swayne trial, although respondent's answer had seemed to lay a foundation for it.—On February 14, 1905,[1] in the Senate sitting for the trial of Judge Charles Swayne, a witness, Elza T. Davis, was under examination, when Mr. Porter J. McCumber, a Senator from North Dakota, said:

Mr. President, I want to direct the attention of the Presiding Officer to a matter in the way of an inquiry for information. I understand that the pleadings of this case do make an issuable fact possibly of the question of inconvenience; but what I wish to ask the Chair is this: When the law itself provides that it shall be unlawful for a judge to reside outside of his district, with no question whatever of convenience or inconvenience, whether the time of the Senate could properly be taken up upon an issue which, to my mind, is in no wise involved in the case. I call the Chair's attention to the law, which is very specific.

"Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

If the question, it seems to me, Mr. President, of convenience or inconvenience is a question at all, it is precluded by the statute itself, which presumes that it will be convenient, or more convenient, if the judge resides there, or less convenient if he does not.

I do not know how many witnesses the managers on the part of the House may have on this subject, but it seems to me that the Chair, sitting as a judge, would necessarily have to rule that all this matter was wholly immaterial. The simple question is, Was he or was he not a resident? And I submit to the Chair whether it should be gone into, and, if so, the limit that should be allowed, taking the position myself that under the statute it can not be an issuable fact.

I may say to the Chair that we might take up a week on this subject, and then every Senator and attorney might concur in the opinion that the question of convenience or inconvenience would not affect it in the least.

Mr. Manager James B. Perkins, of New York, said:

Mr. President, if I may make a suggestion to the Presiding Officer in reference to the suggestion made by the Senator from North Dakota, I will say that the suggestion just made entirely corresponds with what I suggested yesterday, when I asked a somewhat similar question of one of the witnesses. It is the view of the managers, as it is of the Senator, that this evidence is immaterial. The statute says, as the Senator has properly stated, that if the judge does not reside within his district it shall be a high misdemeanor, and whether convenience or inconvenience resulted is, in our judgment, wholly immaterial.

However, in the answer of the respondent, it is alleged that in his belief his absence from his district caused no inconvenience to suitors. To meet that, not knowing what the views of the Senate might be; not knowing but that someone might say, "Ah, well, this judge was absent, but it did no harm, and there was no inconvenience and no suitors suffered," we thought it might be well to offer some evidence on this subject.

But we are entirely content to take the ruling of the Chair that the evidence is immaterial and to offer no more of it, although we have other witnesses whom we could call. As the Senator has suggested, this is a branch on which indefinite evidence might be given if we saw fit to subpoena a sufficient number of lawyers.

Mr. John M. Thurston, of counsel for respondent, said:

Mr. President, counsel for the respondent fully agree with the position stated by the Senator from North Dakota [Mr. McCumber] and also the position as acquiesced in by the managers. We do not believe this testimony is material or relevant. We did, however, in framing our answer have in mind the fact that before the committee of the House great stress had apparently been laid in the examination of witnesses upon testimony which they claimed tended to show that Judge Swayne's temporary absences from Florida had caused inconvenience to suitors and attorneys. Therefore we thought we

[1] Third session Fifty-eighth Congress, Record, pp. 2532, 2533.

were compelled to meet what had appeared in a previous investigation to be, in the theory of the managers, material. We do not believe it is.

We believe that the question of fact before the court is this, and only this: Did Judge Swayne have a residence in the district for which he was appointed? And that question of fact is in no wise changed or modified by reason of any further situation which may involve the convenience or the inconvenience of suitors or of attorneys.

After further argument the Presiding Officer [1] said:

Unless some Senator desires to have the matter submitted to the Senate, the Presiding Officer thinks that this testimony has some bearing upon the question of residence; that so far as the question of inconvenience is concerned, that is not material to the issue.

And later, during cross-examination of the witness, the Presiding Officer said:

The Presiding Officer does not think that the evidence in relation to the inconvenience of this witness by reason of the absence of Judge Swayne from Florida or Pensacola is material or even admissible, but that so much of his testimony as proves the fact that the judge was absent from Florida at Guyencourt, Del., at certain times is admissible for what it is worth.

2224. A question being raised in the Swayne trial that certain evidence was immaterial, the pleadings were examined to determine whether or not the issue involved was raised.—On February 10, 1905,[2] in the Senate sitting for the trial of Judge Charles Swayne, Mr. Marlin E. Olmsted, of Pennsylvania, one of the managers, called Payne W. Chase, a witness, to prove the charge that the respondent had made false certificates of expenses.

Mr. Joseph W. Bailey, a Senator from Texas, said:

Mr. President, I may be mistaken as to the pleadings, but my understanding is that there is no issue as to the receipt and expenditure as alleged by the House, and that at most all that remains for the Senate to do is to determine the effect of the respondent having drawn the maximum allowance, and to determine, upon the state of the pleadings—it being alleged that he drew the money and did not expend it—what the law in that case is.

If I am right about that, I suggest that the calling of witnesses upon this charge, which involves the question of expense and receipt, would be a useless consumption of the time of the Senate.

Mr. Olmsted replied that an examination of the pleadings would show that the proposed testimony was necessary.

The Presiding Officer[1] said:

A cursory examination of the pleadings leads the Presiding Officer to the conclusion that there is no direct admission in the answer of the respondent that the expenses were actually less than the sum charged, and it seems that evidence may be introduced to show that they were less.

2225. A certified paper, bearing only indirectly on a question at issue, was ruled out in the Swayne trial.—On February 23, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, offered testimony in the following words:

Mr. President, on behalf of the respondent, I make the offer of a certified copy of the proceedings of the meeting of the board of county commissioners of Leon County, Fla., December 10, 1904. It is the board which was spoken of by a witness yesterday—Milton Jackson. I have presented the paper to the learned chairman of the managers, and would ask if there is any objection to it. * * * It is that the county commissioners of Leon County, Fla., in which is situated the city of Tallahassee, adopted

[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, pp. 2240, 2241.

[3] Third session Fifty-eighth Congress, Record, p. 3145.

a resolution at that time extending to Judge Swayne as the judge of the northern district of Florida, having to make a residence within his district, an invitation to reside in the city of Tallahassee. That evidence is before the court. The matter was brought to the attention of a witness (who has been examined here) by the Judge, who told him, the witness testified, that he would not live in Tallahassee because he had taken his residence in Pensacola. It is a fact and a circumstance connected with the act of residence.

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

We object to it as irrelevant, incompetent, and tending to throw no light on the subject-matter under discussion.

The Presiding Officer [1] said:

This paper is a certified copy of the action of the board of county commissioners, held in Tallahassee, being an invitation sent to Judge Swayne to make his permanent home in Tallahassee. The Presiding Officer does not see how it is evidence in this case. If any Senator desires, he will submit the question to the Senate. [A pause.] It is not admitted.

2226. In impeachment trials the rule that the best evidence procurable should be presented has been followed.

It was decided in the Belknap trial that a witness might not be examined as to the contents of an existing letter without the letter itself being submitted.

Instance wherein the President pro tempore ruled on evidence during an impeachment trial.

On April 4, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Robert S. Chew, chief clerk of the State Department, was sworn as a witness on behalf of the House of Representatives, and examined by Mr. Manager Benjamin F. Butler as to the practice of making temporary appointments of assistant secretaries of Departments to perform the duties of their chiefs in the absence of the latter. The witness testified that the appointments in such cases were made by the President, or by his order. Mr. Butler then asked:

Did the letter of authority in most of these cases * * * proceed from the head of the Department or from the President?

Mr. William M. Evarts, of counsel for the President, objected that the letter of authority showed from whom it came, and was the best evidence on that point.

In the discussion which followed, the counsel for the President intimated that they did not object if the question was intended to elicit a reply as to whose manual possession the paper came from. But if it was intended to ascertain who signed the paper, then the paper itself would be the best evidence.

Mr. Butler reduced the question to writing as follows:

Question. State whether any of the letters of authority which you have mentioned came from the Secretary of State or from what other officer?

The Chief Justice [3] thereupon made an inquiry which led to this colloquy:

The CHIEF JUSTICE. "Came from the Secretary of State." Do I understand you to mean signed by him?

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Second session Fortieth Congress, Globe supplement, p. 118.

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

Mr. Manager BUTLER. I am not anxious upon that part of it, sir. I am content with the question as it stands.

The CHIEF JUSTICE. The Chief Justice conceives that the question in the form in which it is put is not objectionable, but—

Mr. Manager BUTLER. I will put it, then, with the leave of the Chief Justice.

The CHIEF JUSTICE. The Chief Justice was about to proceed to say that if it is intended to ask the question whether these documents of which a list is furnished were signed by the Secretary, then he thinks it is clearly incompetent without producing them.

Mr. Manager BUTLER. Under favor, Mr. President, I have no list of these documents; none has been furnished.

The CHIEF JUSTICE. Does not the question relate to the list which has been furnished?

Mr. Manager BUTLER. It relates to the people whose names have been put upon the list; but I have no list of the documents at all. I have only a list of the facts that such appointments were made, but I have no list of the letters, whether they came from the President or from the Secretary or from anybody else.

The CHIEF JUSTICE. In the form in which the question is put the Chief Justice thinks it is not objectionable. If any Senator desires to have the question taken by the Senate, he will put it to the Senate. [To the managers, no Senator speaking.] You can put the question in the form proposed.

Mr. Manager BUTLER (to the witness). State whether any of the letters of authority which you have mentioned came from the Secretary of State, or from what other officer.

Mr. CURTIS. I understand the witness is not to answer by whom they were sent.

Mr. Manager BUTLER. I believe I have this witness.

The CHIEF JUSTICE. The Chief Justice will instruct the witness. [To the witness.] You are not to answer at present by whom these documents were signed. You may say from whom they came.

2227. On July 10, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, counsel for the respondent. The witness testified that he had proposed in a letter to Mr. James A. Garfield, a Member of the House of Representatives, to give information as to post traders, and as a result had been subpoenaed before the Military Committee in 1872. He also testified as to writing letters to the Secretary of War, General Belknap. Then Mr. Carpenter asked:

Q. Do you recollect writing a long letter to General Belknap dated September 12, 1875?

Witness replied that he did.

Thereupon Mr. Carpenter proposed to ask:

Do you recollect using these words, or substantially these words, in that letter to General Belknap, namely: "I was summoned to Washington to give evidence upon staff organization of the French and German armies. After finishing upon these subjects I was questioned upon the subject of post traders. I at first remonstrated, on the ground that I had not reported the matter to you" (that is, the Secretary), "because I believed the Commissary Department would defeat any action in that direction?"

Mr. Manager John A. McMahon objected, saying:

You have no right to cross-examine him in regard to the contents of a letter without submitting it to him. * * * If you say it is a memorandum of a letter that was destroyed, no matter; but if you claim to have the letter you can not cross-examine him on it without putting it in his hand.

We make objection, Mr. President and Senators, to the witness being asked any question as to the contents of a letter which the counsel apparently holds in his hand. If he does not have it, the objection at any rate goes to the point that it having been addressed to the defendant, the counsel must first show it to have been destroyed.

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[1] First session Forty-fourth Congress, Senate Journal, p. 970; Record of trial, pp. 231–233.

The question being submitted, the Senate, without division, excluded the question.

Thereupon Mr. Carpenter said:

Mr. President, if the Senate will pardon me just a moment, I did not state the ground of the question, because I thought it was apparent. The witness has just sworn to a totally different state of facts; that he came here on subpoena and was examined on this matter in obedience to the subpoena. On cross-examination we got from him the fact that he wrote a letter to General Garfield from his post. Now, here is a letter, or at least I am inquiring of him now if he did not write to General Belknap, on the 12th of September, 1875, a totally different account of that transaction. * * * Senators will recollect that this witness testified here that he gave testimony before the House Military Committee, because he thought if he conferred directly with the Secretary of War he would not pay any attention to it. He then swears he did write a letter and sent it through the regular military channels, communicating everything to General Belknap that he swore to before the committee. In this letter, of which I now question him, he writes, as we claim and offer to prove by him, that he did not report the matter to the Secretary for the reason that he knew the Commissary Department would not permit it to be done.

Mr. George F. Edmunds, a Senator from Vermont, said: "The letter will show," to which Mr. Carpenter replied: "The letter I do not propose to give in evidence."

Objection being made to this debate, Mr. John H. Mitchell, a Senator from Oregon, moved to reconsider the vote whereby the evidence had been excluded.

Thereupon Mr. Montgomery Blair, of counsel for the respondent, argued:

It seems to me that the ruling of the Senate is made upon a rare misconception of the question submitted by my colleague in this case. Here is a witness upon the stand who testifies that he wrote a certain letter to the Secretary of War, semiofficial or official, he does not know which, communicating facts in relation to abuses prevailing at these trading posts in the Indian country, and that the reason why he did not go to the Secretary of War rather than go before the Military Committee to testify about these abuses was that he had written such a letter and that it had received no attention. Now, we want to ask him—and it is perfectly competent; no lawyer I think will deny the competency of it—whether he had not stated to another person on another occasion directly the contrary of that, stating the person and the time, leaving us the liberty of calling in that person, of calling for that letter, and showing that he is here stultifying himself and falsifying himself. * * * I said that I believed every lawyer in this body would recognize the principle that it was perfectly competent to ask a witness whether or not he had on a different occasion given a different account of the same subject than that he now offers. * * * I have not investigated the subject fully; but it seems to me perfectly plain that a party may be called upon to say whether he had not at a different time to a different person made a different statement; and this letter falls entirely within the common practice of showing that a witness had made on a different occasion a different statement in regard to the same subject-matter.

Mr. Manager McMahon said:

I think the Senate will discover that a while ago when I interrupted the witness when the contents of a letter were stated to him, I was right in regard to the law. I read now from an elementary book, Greenleaf on Evidence:

"§ 463. A similar principle prevails in cross-examining a witness as to the contents of a letter or other paper written by him. The counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked him whether he wrote that letter, and his admitting that he wrote it. For the contents of every written paper, according to the ordinary and well-established rules of evidence, are to be proved by the paper itself, and by that alone, if it is in existence."

That is very simple; and I was right a while ago, notwithstanding the overpowering weight of the gentlemen on the other side.

The Senate, without division, disagreed to the motion to reconsider.

2228. On July 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Nelson H. Davis, Inspector-General of the Army, was examined as a witness on behalf of the respondent, and was asked this question by Mr. Matt. H. Carpenter, of counsel for the respondent:

Q. Were you instructed by General Belknap as Secretary of War at any time to investigate into the standing and character of Durfee & Peck?

Durfee had been partner of one Evans, who was alleged to have been corruptly appointed post trader at Fort Sill by the respondent, and Mr. Carpenter explained the purpose of the question:

Mr. Durfee was Evans's partner, and Mr. Evans informed the Secretary of War of that fact. The Secretary of War had his suspicion that Durfee & Peck or Durfee himself was not the proper man to be appointed, and we propose to show that he ordered this witness to proceed there and inquire into the matter; that he did inquire into it, not at that particular post, but as to these men, and it was in consequence of that that Mr. Evans, who, it was understood, would go into company with Durfee if he was appointed, was not at that time appointed. Afterwards he did not form that partnership, and he was appointed without objection.

Mr. Manager McMahon objected to the question, saying that it was first desirable to know whether the instructions were written or verbal.

Thereupon Mr. Carpenter waived the question, and asked of witness:

Did you investigate?

Mr. Manager McMahon objected on the ground that the matter was all of record, and hence that the record would be the best evidence.

The question being submitted to the Senate, the journal and record of trial show that the objection was overruled without division, but no record of an answer by the witness appears, and Mr. Carpenter at once proceeded to another matter, as if the question had been excluded.

2229. On July 12, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Maj. Gen. John Pope was examined as a witness on behalf of the respondent, and testified as to applications on the part of the post trader at Fort Sill for permits to sell liquor. The witness described the usual way in which such permits were forwarded to the War Department, and then Mr. Matt. H. Carpenter, of counsel for the respondent, asked:

Do you know any instance while General Belknap was Secretary of War, in which he overruled recommendations of the officers through whose hands the application had come?

Mr. Manager John A. McMahon objected, saying:

It seems to me, Mr. President, that the record ought to settle that question. Everything goes officially through the departments and the action of the Secretary of War upon it, favorable or unfavorable, ought to be proved by the record and not by the mere recollection of a witness who has had so many other transactions.

The question being submitted to the Senate, the objection was sustained without objection.

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[1] First session Forty-fourth Congress, Senate Journal, p. 976; Record of trial, p. 258.

[2] First session Forty-fourth Congress, Record of trial, p. 256.

Very soon after Mr. Carpenter asked, and the witness began to answer, as follows:

Q. Do you recollect any applications in regard to licenses for selling liquor at Fort Sill while General Belknap was Secretary of War?—A. I remember an application, simply because I had occasion to look it up recently, that the officers at Fort Sill——

Mr. Manager McMahon said:

We object to this. The witness himself discloses the fact that he remembers it because he has recently seen the official documents. Now, I say that the official documents must be produced.

The President pro tempore [1] said:

The manager took exception that the record should be produced, and on the prior ruling of the Senate the Chair ruled that the objection was well taken. If the counsel prefers, the Chair will submit the question to the Senate.

No request was made that the question be submitted, and the examination proceeded: [2]

Q. (By Mr. Carpenter.) Do you know anything of the extension of the reservation about Fort Sill, and when it took place?—A. Fort Sill was a post established at the time I took command of the department. My predecessor in command, General Schofield, was written to from the War Department, I think, directing him to take some steps to have the reservation extended and properly surveyed——

Mr. Manager McMahon objected, saying:

I am obliged again to say that all these are matters of record. The gentleman has a client who understands all about getting copies of them, who is thoroughly informed, and we must certainly object to having oral testimony as to what is matter of record.

The Senate, without division, sustained the objection.

In relation to these decisions, Mr. Carpenter said:

General Pope is very anxious to get away from here and get back to his post, and we are willing to accommodate in every way to reach that result; but if the managers are to pursue the present captious course of objection and require these documents to be produced, they have got to be looked up in the Department, and General Pope will have to stay and swear in view of them; and after Mr. Evans arrives we shall then want him also in regard to two or three points that we can not inquire of now. * * * What I have spoken of now are these very matters that were covered by the questions that you objected we must get the records here to show. General Pope knows just as much about the matter without looking through forty pages as he will after he does that; but still the Senate has sustained the objection; and if you insist on it General Pope must remain. That is all.

Mr. Manager McMahon said:

We certainly must try the case according to the rules of evidence. We want to see the records themselves.

2230. In the Swayne trial hearsay testimony introduced to show inconvenience to litigants from respondent's conduct was ruled out.

Instance during the Swayne trial, wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 13, 1905,[3] in the Senate sitting for the trial of Judge Charles Swayne, John S. Beard was sworn and examined.

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

[2] Senate Journal, pp. 975, 976.

[3] Third session Fifty-eighth Congress, Record, p. 2467.

Mr. Manager James B. Perkins, of New York, asked:

Have you ever heard complaints made by counsel of inconvenience in their practice by reason of the absence of Judge Swayne from Florida?

Mr. John M. Thurston, of counsel for respondent, objected, saying:

We object to asking for hearsay testimony. If there are any such cases, the attorneys themselves are within call, and the honorable manager is asking this witness to state nothing more than what some other attorney may have said.

Mr. Manager Perkins said:

Well, Mr. President, how else can the matter of common reputation be proven? The answer of Judge Swayne it seems to us is immaterial. The law requires that he shall live in the district, and if he was not a resident it was a high misdemeanor. But in his answer it is alleged by way of palliation that he does not think inconvenience resulted to the bar. That we can only meet by evidence of this character.

The Presiding Officer [1] said:

The Presiding Officer will submit this question to the Senate. The manager asks the witness, having first inquired who were the lawyers who did most of the business before the district court, if this witness had heard them complain of inconvenience growing out of the absence of Judge Swayne. Objection is made. The Presiding Officer will submit that question to the Senate. Senators who think the question is a proper one will say "aye" [putting the question]; contrary, "no." In the opinion of the Chair the "noes" have it. The objection is sustained.

2231. Testimony as to what was said by the agent or coconspirator of respondent in regard to carrying out respondent's order, the said order being a ground of the impeachment, was admitted.

Instance wherein the Chief Justice ruled on the admissibility of evidence during the Johnson trial.

On March 31, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Walter A. Burleigh, Delegate in Congress from Dakota Territory, was sworn, and the examination was begun by Mr. Manager Benjamin F. Butler. Mr. Burleigh testified that he had known Lorenzo Thomas, Adjutant-General of the Army, for several years, and that he had called on General Thomas at his house on the evening of February 21 last, and had a conversation with him.

Thereupon Mr. Manager Butler asked a question which, on the succeeding day, was reduced to writing as follows:

You said yesterday, in answer to my question, that you had a conversation with Gen. Lorenzo Thomas on the evening of the 21st of February last. State if he said anything as to the means by which he intended to obtain, or was directed by the President to obtain, possession of the War Department? If so, state all he said as nearly as you can.

Mr. Henry Stanbery, of counsel for the President, objected to the question. In making his objection, Mr. Stanbery first reviewed the orders issued by the President to Mr. Secretary Stanton and to General Thomas, and continues:

Now, what proof has yet been made under the first eight articles? The proof is simply, so far as this question is concerned, the production in evidence of the orders themselves. There they are to speak for themselves. As yet we have not had one particle of proof of what was said by the President, either

[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Second session Fortieth Congress, Senate Journal, pp. 867, 872–873; Globe supplement, pp. 59, 63–71.

before or after he gave those orders or at the time that he gave those orders—not one word. The only foundation now laid for the introduction of this testimony is the production of the orders themselves. The attempt made here is, by the declarations of General Thomas, to show with what intent the President issued those orders; not by producing him here to testify what the President told him, but without having him sworn at all, to bind the President by his declarations not made under oath; made without the possibility of cross-examination or contradiction by the President himself; made as though they are made by the authority of the President.

Now, Senators, what foundation is laid to show such authority, given by the President to General Thomas, to speak for him as to his intent, or even as to General Thomas's intent, which is quite another question. You must find the foundation in the orders themselves, for as yet you have no other place to look for it. Now, what are these orders? That issued to General Thomas is the most material one; but, that I may take the whole, I will read also that issued and directed to Mr. Stanton himself. He says to Mr. Stanton, by his order of February 21, 1868:

"SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon receipt of this communication.

"You will transfer to Brevet Maj. Gen. Lorenzo Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge."

So much for that. Then the order to General Thomas of the same day is:

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"To Brevet Maj. Gen. LORENZO THOMAS,

"Adjutant-General U. S. Army, Washington, D. C."

There they are; they speak for themselves; orders made by the President to two of his subordinates; an order directing one of them to vacate his office and to transfer the books and public property in his possession to another party, and the order to that other party to take possession of the office, receive a transfer of the books, and act as Secretary of War ad interim. Gentlemen, does that make them conspirators? Is that proof of a conspiracy or tending to have a conspiracy? Does that make General Thomas an agent of the President in such a sense as that the President is to be bound by everything he says and everything he does even within the scope of his agency?

Mr. Stanbery argued at length to show that General Thomas was an officer of the Government performing his duty under order of a superior officer, and in no sense an agent. Furthermore, he argued that no foundation had been laid for the introduction of such testimony.

Mr. Manager Benjamin F. Butler, replying, gave a brief résumé of the actions of the President in relation to Secretary of War Stanton:

He had come to the conclusion to violate the law and take possession of the War Office; he had come to the conclusion to do that against the law and in violation of the law; he had sent for Thomas, and Thomas had agreed with him to do that by some means if the President would give him the order, and thus we have the agreement between two minds to do an unlawful act; and that, I believe, is the definition of a conspiracy all over the world.

Let me restate this. You have the determination on the part of the President to do what had been declared to be, and is, an unlawful act; you have Thomas consenting; and you have therefore an agreement of two minds to do an unlawful act: and that makes a conspiracy, so far as I understand the law of conspiracy. So that upon that conspiracy we should rest this evidence under article seven, which alleges that—

"Andrew Johnson * * * did unlawfully conspire with one Lorenzo Thomas, with intent unlawfully to seize, take, and possess the property of the United States in the Department of War in the custody and charge of Edwin M. Stanton."

And also under article five, which alleges a like unlawful conspiracy not alleging that intent.

Then there is another ground upon which this evidence is admissible, and that is upon the ground of principal and agent. Let us, if you please, examine that ground for a few moments. The President claims by his answer here that every Secretary, every Attorney-General, every executive officer of this Government exists by his will, upon his breath only; that they are all his servants only, and are responsible to him alone, not to the Senate or Congress or either branch of Congress; and he may remove them for such cause as he chooses; he appoints them for such cause as he chooses; and he claims this right to be illimitable and uncontrollable, and he says in his message to you of December 12, 1867, that if any one of his Secretaries had said to him that he would not agree with him upon the unconstitutionality of the act of March 2, 1867, he would have turned him out at once.

Mr. Butler cited as authorities Roscoe's Criminal Evidence (2 Carrington and Payne, p. 232), United States *v.* Goding (12 Wheaton, pp. 469, 470), and Greenleaf on Evidence.

These arguments as outlined were further amplified by Mr. Benjamin R. Curtis, of counsel for the President, and by Mr. Manager John A. Bingham.

And the question being put to the Senate, it was decided, yeas 39, nays 11, that the question proposed by Mr. Manager Butler should be put to the witness.

2232. On March 31, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, was sworn and examined as to a certain visit which he made to the house of Gen. Lorenzo Thomas, of the Army.

The witness having testified that he saw General Thomas at the time of that visit, Mr. Manager Benjamin F. Butler asked:

Had you a conversation with him?

Mr. Henry Stanbery, of counsel for the President, asked the object of the question, to which Mr. Butler replied:

The object is to show the intent and purpose with which General Thomas went to the War Department on the morning of the 22d of February; that he went with the intent and purpose of taking possession by force; that he alleged that intent and purpose; that in consequence of that allegation Mr. Burleigh invited General Moorhead and went up to the War Office. The conversation which I expect to prove is this: After the President of the United States had appointed General Thomas and given him directions to take the War Office, and after he had made a quiet visit there on the 21st, on the evening of the 21st he told Mr. Burleigh that the next day he was going to take possession by force.

Mr. Stanbery[2] thereupon entered an objection.

The Chief Justice[3] said:

The Chief Justice thinks the testimony is competent.

2233. On April 1, 1868[4] in the Senate during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, a witness called by the managers, testified to conversation which he had had with Gen. Lorenzo Thomas, Adjutant-General of the Army, after the said Thomas had been ordered by President Johnson to supersede Secretary of War Stanton and take possession of the office.

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[1] Second session Fortieth Congress, Senate Journal, p. 867; Globe Supplement, p. 59.

[2] The Senate Journal has Mr. William M. Evarts as entering the objection.

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

[4] Second session Fortieth Congress, Senate Journal, pp. 872, 873; Globe Supplement, pp. 71–72.

Then Mr. Manager Benjamin F. Butler offered this question:

Question. Shortly before this conversation about which you have testified, and after the President restored Major General Thomas to the office of Adjutant-General, if you know the fact that he was so restored, were you present in the War Department, and did you hear Thomas make any statements to the officers and clerks, or either of them, belonging to the War Office, as to the rules and orders of Mr. Stanton or of the office which he, Thomas, would revoke, relax, or rescind in favor of such officers and employees when he had control of the affairs therein? If so, state as near as you can when it was such conversation occurred, and state all he said as nearly as you can.

Mr. William M. Evarts, of counsel for the President, objected to the question as irrelevant and immaterial to any issue in the cause, and as not to be brought in evidence against the President by any support given by the testimony already in.

Mr. Manager Butler argued that the question was justified, because General Thomas was a coconspirator with the President:

You will observe the question carries with it this state of facts: Thomas had been removed from the office of Adjutant-General, for many years under President Lincoln, under the administration of Mr. Stanton, of the War Office. That is a fact known to all men who know the history of the war. Just before he made him Secretary of War ad interim the President restored Thomas to the War Office as the Adjutant-General of the Army. That was the first step to get him in condition to make a Secretary of War of him. That was the first performance of the President, the first act in the drama. He had to take a disgraced officer, and take away his disgrace, and put him into the Adjutant-General's office, from which he bad been by the action of President Lincoln and Mr. Stanton suspended for years, in order to get a fit instrument on which to operate; get him in condition. That was part of the training for the next stage. Having got him in that condition, he being sufficiently virulent toward Mr. Stanton for having suspended him from the office of Adjutant-General, the President then is ready to appoint him Secretary ad interim, which he does within two or three days thereafter.

We charge that the whole procedure shows the conspiracy.

To this Mr. Evarts replied:

The question which led to the introduction of this witness's statements of General Thomas's statements to him, of his intentions, and of the President's instructions to him, General Thomas, was based upon the claim that the order of the President of the 21st of February, upon Mr. Stanton for removal, and upon General Thomas to take possession of the office, created and proved a conspiracy; and that thereafter, upon that proof, declarations and intentions were to be given in evidence. That step has been gained, and, in the judgment of this honorable court, in conformity with the rules of law and of evidence. That being gained, it is similarly argued that if, on a conspiracy proved, you can introduce declarations made thereafter, by the same rule you can introduce declarations made theretofore; and that is the only argument which is presented to the court for the admission of this evidence.

So far as the statements of the learned manager relate to the office, the position, the character, and the conduct of General Thomas, it is sufficient for me to say that not one particle of evidence has been given in this cause bearing upon any one of these topics. If General Thomas has been a disgraced officer; if these aspersions, these revilings are just, they are not justified by any evidence before this court. And if, as a matter of fact, applicable to the situaition upon which this proof is sought to be introduced, the former employments of General Thomas and the recent restoration of him to the active duties of Adjutant-General are pertinent, let them be proved; and then we shall have at least the basis of fact of General Thomas's previous relations to the War Department, to Mr. Stanton, and to the office of Adjutant-General.

And, now, having pointed out to this honorable court that the declarations sought to be given in evidence of General Thomas to affect the President with his intentions are confessedly of a period antecedent to the date to which any evidence whatever before this court brings the President and General Thomas in connection, I might leave it safely there. But what is there in the nature of the general proof sought to be introduced that should affect the President of the United States with any responsibility for these general and vague statements of an officer of what he might or could or would do, if thereafter he should come into the possession of power over the Department?

At the end of the debate the Chief Justice [1] said:

The Chief Justice is of opinion that no sufficient foundation has been laid for the introduction of this testimony. He will submit the question to the Senate with great pleasure, if any Senator desires it. The question is ruled to be inadmissible.

Mr. Jacob M. Howard, of Michigan, a Senator, asked that the question be taken by the Senate; and being put, Shall the question proposed by Mr. Manager Butler be put to the witness? the yeas were 28 and the nays 22.

So the question was put.

2234. An alleged coconspirator was permitted to testify as to declarations of the respondent at a time after the act, the testimony being responsive to similar evidence on the other side.—On April 10, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Lorenzo Thomas, Adjutant-General of the Army, was called as a witness on behalf of the President, and related the circumstances which occurred on February 21, 1868, when, in obedience to the direction of the President, he attempted to supersede Mr. Stanton as Secretary of War.

General Thomas having described his interview with Secretary Stanton, Mr. Henry Stanbery, of counsel for the President, proceeded with the examination:

Q. Did you see the President after that interview?—A. I did.

Q. What took place?

At this point Mr. Manager Benjamin F. Butler interposed an objection, as follows:

I object now, Mr. President and Senators, to the conversation between the President and General Thomas. Up to this time I did not object, as you observe, upon reflection, to any orders or directions which the President gave, or any conversation had between the President and General Thomas at the time of issuing the commission. But now the commission has been issued; the demand has been made; it has been refused, and a peremptory order given to General Thomas to mind his own business and keep out of the War Office has been put in evidence. Now, I suppose that the President, by talking with General Thomas, or General Thomas, by talking with the President, can not put in his own declarations for the purpose of making evidence in favor of himself. The Senate has already ruled by solemn vote, and in consonance, I believe, with the opinion of the Presiding Officer, that there were such evidence of common intent between these two parties as to allow us to put in the acts of each to bear upon the other; but I challenge any authority that can be shown anywhere that, in trying a man for an act before any tribunal, whether a judicial court or any other body of triers, testimony can be given of what the respondent said in his own behalf, and especially to his servant, and a fortiori to his coconspirator. A conspiracy being alleged, can it be that the President of the United States can call up any officer of the Army, and, by talking to him after the act has been done, justify the act which has been done?

Replying to this objection, Mr. Stanbery said:

But, says the learned manager, the transaction ended in giving the order and receiving the order, and you are to have no testimony of what was said by the President or General Thomas, except what was said just then, because that was the transaction; that was the res gestae. Does the learned gentleman forget his testimony? Does he forget how he attempted to make a case? Does he forget, not what took place in the afternoon between the President and General Thomas that we are now going into, but what took place that night? Does he forget what sort of a case he attempts to make against the President, not at the time when that order was given, nor before it was given, nor in the afternoon of the 21st, but

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

[2] Second session Fortieth Congress, Senate Journal, p. 885; Globe Supplement, pp. 137–140.

under his conspiracy counts, the managers have undertaken to give in evidence that on the night of the 21st General Thomas declared that he was going to enter the War Office by force?

That is the matter charged as illegal; and the articles say that the conspiracy between General Thomas and the President was that the order should be executed by the exhibition of force, intimidation, and threats, and to prove that what has he got here? The declarations of General Thomas, not made under oath, as we propose to have them made, but his mere declarations, when the President was absent and could not contradict him-not, as now, under oath, and all the conversation when the President was present and could contradict or might admit. The honorable manager has gone into all that to make a case against the President of conspiracy; and not merely that, but proves the acts and declarations of General Thomas on the 22d; and not only that, but as late as the 9th of March, at the presidential levee, brings a witness, with the eyes of all Delaware upon him [laughter], and proves by that witness, or thinks he has proved, that on that night General Thomas also made a declaration involving the President in this conspiracy, as a party to a conspiracy still existing to keep Mr. Stanton out of office.

Now, how are we to defend against these declarations made on the night of the 21st or the 22d, and again as late as the 9th of March? Does not the transaction run through all that time? How is the President to defend himself if he is allowed to introduce no proof of what he said to General Thomas after the date of the order? May he not call General Thomas? Is General Thomas impeached here as a coconspirator? Is his mouth shut by a prosecution? Not at all. He is free as a witness-brought here and sworn. Now, what better testimony can we have to contradict this alleged conspiracy than the testimony of one of the alleged conspirators; for if General Thomas did not conspire certainly the President did not conspire. A man can not conspire by himself.

The Chief Justice having submitted the question to the Senate, "Is the question admissible?" there appeared 42 yeas, 10 nays. So the question was admitted.

Later, in the examination of the same witness,[1] Mr. Stanbery asked this question:

Did the President at any time prior to or including the 9th of March authorize or direct you to use force, intimidation, or threats to get possession of the War Office?

Mr. Manager Butler objected to the introduction of such testimony. He said that the President had been impeached on February 22, and what directions he had given after that event were not to be a subject of testimony.

Mr. William M. Evarts, of counsel for the President, contended that, as the managers had introduced witnesses to prove what General Thomas said on March 9, it was competent to introduce evidence as to what the President had actually done.

The Senate, without division, admitted the question.

2235. In general during impeachment trials questions as to conversations with third parties, not in presence of respondent, have been excluded from evidence.—On March 8, 1803,[2] in the high court of impeachment during the trial of John Pickering, judge of the United States district court of New Hampshire, Mr. Jonathan Steele was testifying, when, Mr. Joseph H. Nicholson, of Maryland, chairman of the managers for the House of Representatives, addressed the court. He said he wished in case it should be deemed proper by the court, to ask one of the witnesses whether he had conversed with the family physician of Judge Pickering, and what his opinion was as to the origination of his insanity. Mr. Nicholson observed that he had doubts of the propriety of this question, and therefore, in the first instance, stated it to the court.

The court decided the question inadmissible.

Later, on the same day, this witness, in the course of his testimony, was going on to state some conversation he had with Judge Pickering's physician at this time

[1] Senate Journal, p. 886; Globe Supplement, p. 141.

[2] First session Eighth Congress, Annals, pp. 358, 359.

which he was induced to ask in consequence of solicitude to gain true information as to the reported intemperance of the Judge, when he was interrupted by the Court,[1] and informed that this species of testimony had been already decided to be inadmissible.

2236. On July 10, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh was called as a witness for the United States. It was alleged in the articles of impeachment that Marsh, in collusion with the respondent, had effected the appointment of one Evans as post trader at Fort Sill, and that in consideration thereof Marsh had received from Evans certain sums of money which had been shared with the respondent. The witness being examined as to a contract between himself and Evans as to the payment of the above-mentioned sums of money, identified a paper presented to him as that contract. Then these questions were put and answered:

Q. Did Mr. Evans sign that paper with you?—A. He did.

Q. This agreement was reduced to writing in New York City. State whether it was agreed to before it was reduced to writing, and, if so, where. In other words, whether you came to any understanding in Washington before you went to New York City.—A. We came to an understanding as to the amount he was willing to pay, if I would allow him to hold the post and continue the business at Fort Sill.

Q. In that connection, without further questions, give us all that passed between you and Mr. Evans prior to the execution of this contract.

To the last question Mr. Matt. S. Carpenter, of counsel for the respondent, objected, saying:

The Senate, of course, will observe that this calls for a conversation between the witness and a third person, not in our presence, with no pretense that we know anything about it.

The President pro tempore said:

The question is on the admission of the interrogatory.

The question was decided in the negative.

2237. On July 11, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, had been examined and cross-examined, and had testified to sending to the respondent sums of money which he had received in pursuance to his contract with one Evans, the post trader at Fort Sill. Mr. John A. Logan, a Senator from Illinois, proposed this question:

Prior to the sending of the first money, had you said anything to any person or had any person ever said anything to you on the subject of sending money to General Belknap; if so, who was it?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected to the question, but the Senate without division decided that it might be asked.

The witness replied that he had had a conversation with the present Mrs. Belknap. It was before he had sent any money to respondent, but he had sent money to her.

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[1] Aaron Burr, of New York, Vice President, was presiding.

[2] First session Forty-fourth Congress, Senate Journal, p. 969; Record of trial, p. 225.

[3] First session Forty-fourth Congress, Senate Journal, pp. 971–973, Record of trial, pp. 238–241.

Thereupon Mr. Logan asked:

State what the conversation was.

Mr. Manager John A. McMahon objected to the interrogatory, saying:

Even if General Belknap was present, while we might have called it as against him, he can not produce it as in his favor. It is the conversation of a third party. * * * Before the vote is taken, Senators, I desire that all shall understand the precise conversation now called for. It is a conversation between the witness and the present Mrs. Belknap, occurring on the night of the funeral of the second Mrs. Belknap, between the witness and her, not in the presence of General Belknap; a conversation between the two persons on that occasion. Clearly it seems to me the defendant is not at liberty to produce that conversation in his behalf.

The question being taken on the admissibility of the question, there appeared yeas 18, nays 23. So the objection was sustained.

Mr. Henry L. Dawes, a Senator from Massachusetts, then proposed this question:

State all the knowledge or information that General Belknap had, which it is in your power to state, as to the amount of any money sent him or the source whence it came, other than what you have already stated.

Mr. Carpenter having objected, the Senate without division admitted the question.

Mr. John A. Logan proposed this question:

Did you have any agreement with any person other than General Belknap in reference to sending the money you have testified to or any part of it? If so, with whom was such agreement and what was such agreement?

Mr. Manager McMahon objected, and Mr. Manager Elbridge G. Lapham said:

Our objection is that this calls for a conversation with a third person, and is the precise question upon which the Senate has already passed. The witness having stated expressly that he had no conversation with the defendant, the question calls for some express conversation, some expression, agreement, or understanding, and not for an implied or inferential understanding from the acts of the parties.

After argument by managers and counsel, Mr. Frederick T. Frelinghuysen, a Senator from New Jersey, said:

As I understand it, the court, exercising its privilege and against the objection of the respondent, permitted it to be proven that there was a conversation which had relation in some manner to these payments. I think it is the right of the respondent that that conversation should now be given. It was the court, not the respondent, who introduced the fact that there was such conversation that had relation to these payments. I do not think we can fairly exclude the conversation.

Mr. George F. Edmunds, a Senator from Vermont, dissented from the law of the proposition made by Mr. Frelinghuysen.

The Senate, by a vote of 25 yeas, 21 nays, admitted the question.

The witness answered:

I had a conversation with Mrs. Bower, the present Mrs. Belknap, on the night of the funeral. She asked me to go upstairs with her to look at the baby in the nursery. I said to her, as near as I can remember, "This child will have money coming to it after a while." She said, "Yes; my sister gave the child to me, and told me the money coming from you I must take and keep for it." I am not certain about the rest of the conversation. I have in indistinct impression of what was said afterwards. I said, very likely, "All right; but perhaps the father ought to be consulted," and her reply was that if I sent the money to him she would get it any way for the child, or something of that kind. That is as far as I remember it; but I had some understanding; I have sometimes thought that I said something to General Belknap that night. My entire recollection is indistinct about the matter, except her relation of her sister's dying request made an impression on me more than any other part of the conversation.

2238. In the Johnson trial declarations of respondent, made anterior to the act, and even concomitant with it, were held inadmissible as evidence.

Instance wherein a decision of the Chief Justice as to the admissibility of evidence was overruled by the Senate.

The Senate, in the Johnson trial, declined to exclude evidence as to fact on the ground that it might lead to evidence as to declaration.

Leading questions were ruled out during the Johnson trial.

Citation of English precedents as to evidence during the Johnson trial.

On April 11, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was called as a witness on behalf of the President. The witness had testified that between December 4, 1867, and February 4, 1868, he had several interviews with the President relating to Mr. Stanton, Secretary of War. Thereupon Mr. Henry Stanbery, of counsel for the President, asking as to a certain specified interview, propounded this question:

In that interview, what conversation took place between the President and you in regard to the removal of Mr. Stanton?

Mr. Manager Benjamin F. Butler objected to the question.

The Chief Justice[2] said at once, before argument:

The Chief Justice thinks the question admissible within the principle of the decision made by the Senate relating to a conversation between General Thorns and the President;[3] but he will put the question to the Senate, if any Senator desires it.

The managers, having persisted in objection, an argument arose, Mr. Stanbery saying:

When a prosecution is allowed to raise the presumption of guilt from the intent of the accused by proving circumstances which raised that presumption against him, may he not rebut it by proof of other circumstances which show that he could not have had such a criminal intent? Was anything ever plainer than that?

Why, consider what a latitude one charged with crime is allowed under such circumstances. Take the case of a man charged with passing counterfeit money. You must prove his intent; you must prove his scienter; you must prove circumstances from which a presumption arises; did he know the bill was counterfeit? You may prove that he had been told so; prove that he had seen other money of the same kind, and raise the intent in that way. Even when you make such proof against him arising from presumptions, how may he rebut that presumption of intent from circumstances proved against him? In the first place, by the most general of all presumptions—proof of good character generally. That he is allowed to do to rebut a presumption—the most general of all presumptions—not that he did what was right in that transaction, not that he did certain things or made certain declarations about the same time which explained that the intent was honest, but going beyond that through the whole field of presumptions, for it is all open to him, he may rebut the presumption arising from proof of express facts by the proof of general good character, raising the presumption that he is not a man who would have such an intent. * * * Now, what evidence is a defendant entitled to who is charged with crime where it is necessary to make out an intent against him where the intent is not positively proved by his own declarations, but where the intent to be gathered by proof of other facts, which may be

[1] Second session Fortieth Congress, Senate Journal, p. 887; Globe supplement, pp. 150–157.

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

[3] See section 2234 of this work.

guilty or indifferent, according to the intent? What proof is allowed against him to raise this presumption of intent? Proof of those facts from which the mind itself infers a guilty intention. But while the prosecution may make such a case against him by such testimony, may he not rebut the case by exactly the same sort of testimony? If it is a declaration that they rely upon as made by him at one time, may he not meet it by declarations made about the same time with regard to the same transaction? Undoubtedly. They can not be too remote, I admit that; but if they are about the time, if they are connected with the transaction, if they do not appear to have been manufactured, then the declarations of the defendant, from which the inference of innocence would be presumed, are, under reasonable limitations, just as admissible as the declarations of the defendant from which the prosecution has attempted to deduce the inference of criminal purpose.

Mr. Stanbery proceeded to cite from the State trials, p. 1065, the trial of Hardy. Replying, Mr. Manager Butler said:

The learned gentleman from Ohio says what? He says "in a counterfeiter's case we have to prove the scienter." Yes, true; and how? By showing the passage of other counterfeit bills? Yes; but, gentlemen, did you ever hear, in a case of counterfeiting, the counterfeiter prove that he did not know the bill was bad by proving that at some other time he passed a good bill? Is not that the proposition? We try the counterfeit bill, which we have nailed to the counter, of the 21st of February; and, in order to prove that he did not issue it, he wants to show that he passed a good bill on the 14th of January. It does not take a lawyer to understand that. That is the proposition.

We prove that a counterfeiter passed a bad bill—I am following the illustration of my learned opponent. Having proved that he passed a bad bill, what is the evidence he proposes? That at some other time he told somebody else, a good man, that he would not paw bad money, to give it the strongest form; and you are asked to vote it on that reason. I take the illustration. Is there any authority brought for that? No.

What is the next ground? The next is that it is in order to show Andrew Johnson's good character. If they will put that in testimony I will open the door widely. We shall have no objection whenever they offer that. I will take all that is said of him by all good and loyal men, whether for probity, patriotism, or any other matter that they choose to put in issue. But how do they propose to prove good character? By showing what he said to a gentleman. Did you ever hear of good character, lawyers of the Senate? Laymen of the Senate, did you ever hear a good character proved in that way? A man's character is in issue. Does he call up one of his neighbor's and ask what the man told him about his character? No; the general speech of people in the community, what was publicly known and said of him, is the point, and upon that went Hardy's case.

* * * * * * *

But, then, look at the vehicle of proof. What is the vehicle of proof? They do not propose to prove it by his acts. When they are offered, I shall be willing to let them go in. Let them offer any act of the President about that time, either prior or since, and I shall not object, although the Senate ruled out an act in Cooper's case. But how do they propose to prove it?" What conversations took place between the President and you?" I agree, gentlemen of the Senate—I repeat it even after the criticisms that have been made—that you are a law unto yourselves. You have a right to receive or reject any testimony. All the common law can do for you is, that being the accumulation of the experience of thousands of years of trial, it may afford some guide to you; but you can override it. You have no right, however, to override the principles of justice and equity, and to allow the case of the people of the United States to be prejudiced by the conversations of the criminal they present at your bar, made in his own defense before the acts done, which the people complain of. That I may, I trust, without offense say, because there is a law that must govern us at any and all times, and the single question is—I did not mean to trouble the Senate with it before, and never will again on this question of conversation—what limit is there? If this is allowable, you may put in his conversations with everybody; you may put in his conversations with newspaper reporters—and he is very free with those, if we are to believe the newspapers. If he has a right to converse with General Sherman about this case and put that in, I do not see why he has not a right to converse with Mack, and John, and Joe, and J. B., and J. B. S., and T. R. S., and X. L. W., or whoever he may talk with, and put all that in.

I take it there is no law which makes a conversation with General Sherman any more competent than a conversation with any other man.

Mr. William M. Evarts, of the President's counsel, said:

And now I should like to look first to the question of the point of time as bearing upon the admissibility of this evidence. Under the eleventh article, the speech of the 18th of August, 1866, is alleged as laying the foundation of the illegal purposes that culminated in 1868, to point the criminality, that is what made the subject of accusation in that article. Proof, then, of the speeches of 1866 is made evidence under this article eleven, that imputes not criminality in making the speech, but in the action afterwards pointed by the purpose of the speech. So, too, a telegram to Governor Parsons, in January, 1867, is supposed to be evidence as bearing upon the guilt completed in the year 1868.

So, too, the interview between Wood, the office seeker, and the President of the United States, in September, 1866, is supposed to bear in evidence upon the question of intent in the consummation of the crime alleged to have been completed in 1868. I apprehend therefore that on the question of time this interview between General Sherman and the President of the United States, in the very matter of the public transaction of the President of the United States changing the head of the War Department, which was actually completed in February, 1868, is near enough to point intent and to show honest purpose, if these transactions, thus in evidence, are near enough to bear upon the same attributed crimes.

There remains, then, only this consideration, whether it is open to the imputation that it is a mere proof of declarations of the President concerning what his motives and objects were in reference to his subsequent act in the removal of Stanton. It certainly is not limited to that force or effect. Whenever evidence of that mere character is offered that question will arise to be disposed of; but as a part of the public action and conduct of the President of the United States in reference to this very office, and his duty and purpose in dealing with it, and on the very point, too, as to whether that object was to fill it by unwarrantable characters tending to a perversion or betrayal of the public trust, we propose to show his consultations with the Lieutenant-General of the armies of the United States to induce him to take the place.

On the other question of whether his efforts are to create by violence a civil war or bloodshed, or even a breach of the peace, in the removal of the Secretary of War, we show that in this same consultation it was his desire that the Lieutenant-General should take the place in order that by that means the opportunity might be given to decide the differences between the Executive and Congress as to the constitutional powers of the former by the courts of law. If the conduct of the President in relation to matters that are made the subject of inculpation, and of inculpation through motives attributed through designs supposed to be proved, can not be made the subject of evidence, if his public action, if his public conduct, if the efforts and the means that he used in the selection of agents are not to be received to rebut the intentions or presumptions that are sought to be raised against him, well, indeed, was my learned associate justified in saying that this is a vital question. Vital in the interests of justice, I mean, rather than vital to any important considerations of the cause.

Mr. Manager James F. Wilson, quoted the Hardy case, over which a dispute had arisen:

My principal purpose is to get before the minds of Senators the truth in the Hardy case as it fell from the lips of the Chief Justice, when he passed upon the question which had been propounded by Mr. Erskine and objected to by the attorney-general. The ruling is in these words:

"LORD CHIEF JUSTICE EYRE. Mr. Erskine, I do not know whether you can be content to acquiesce in the opinion that we are inclined to form upon the subject, in which we go a certain way with you. Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner and are not evidence for him, because the presumption upon which declarations are evidence is, that no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself. Those declarations, if offered as evidence, would be offered therefore upon no ground which entitled them to credit. That is the general rule. But if the question be—as I really think it is in this case, which is my reason now for interposing—if the question be, what was the political speculative opinion which this man entertained touching a reform of Parliament, I believe we all think that opinion may very well be learned and discovered by the conversations which he has held at any time or in any place.

"Mr. ERSKINE. Just so, that is my question; only that I may not get into another debate, I beg your lordship will hear me a few words.

"LORD CHIEF JUSTICE EYRE. I think I have already anticipated a misapprehension of what I am now stating, by saying that if the declaration was meant to apply to a disavowal of the particular charge made against this man that declaration could not be received; as for instance, if he had said to some friend of his: When I planned this convention, I did not mean to use this convention to destroy the king and his Government, but I did mean to get, by means of this convention, the Duke of Richmond's plan of reform, that would fall within the rule I first laid down; that would be a declaration, which being for him, he could not be admitted to make, though the law will allow a contrary declaration to have been given in evidence. Now, if you take it so, I believe there is no difficulty."

And upon that ruling the question was changed as read by my associate manager, and correctly read by him, and all that followed this ruling of the chief justice and the subsequent discussion was read by my associate manager. The lord chief justice further said:

"You may put the question exactly as you propose."

That is, after discussion had occurred subsequent to the ruling of the chief justice to which I have referred, and in which a change in the character of the original question was disclosed.

"I confess I wished by interposing to avoid all discussion, because I consider what we are doing, and whom we have at that bar, and in that box, who are suffering by every moment's unnecessary delay in such a cause as this.

"Mr. ERSKINE. I am sure the jury will excuse it; I meant to set myself right at this bar; this is a very public place."

Then follows the question—

"Mr. DANIEL STUART examined by Mr. ERSKINE:

"Did you before the time of this convention being held, which is imputed to Mr. Hardy, ever hear from him what his objects were, whether he has at all mixed himself in that business?

"I have very often conversed with him, as I mentioned before, about his plan of reform; he always adhered to the Duke of Richmond's plan."

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And which declaration came within the exception to the rule laid down by the chief justice. The final question was then put:

"From all that you have seen of him, what is his character for sincerity and truth?

"I have every reason to believe him to be a very sincere, simple, honest man."

To which the attorney-general said:

"If this had been stated at first to the question meant to be asked, I do not see what possible objection I could have to it."

* * * * * * *

That remark applies to the last question. The remark was made after the last question was put; but, as I understand it the two questions are substantially the same and are connected, and the remark of the attorney-general applied to both, as the first was but the basis, the inducement to the last.

* * * * * * *

Now, what is the question which has been propounded by the counsel on the part of the President to General Sherman? It is this:

"In that interview what conversation took place between the President and you in regard to the removal of Mr. Stanton?"

Now, I contend that that calls for just such declarations on the part of the President as fall within the rule laid down by the chief justice in the Hardy case, and therefore must be excluded. If this conversation can be admitted, where are we to stop? Who may not be put upon the witness stand and asked for conversations had between him and the President, and at any time since the President entered upon the duties of the presidential office, to show the general intent and drift of his mind and conduct during the whole period of his official existence?

* * * * * * *

We certainly must insist upon the well known and long established rule of evidence being applied to this particular objection, for the purpose of ending now and forever, so far as this case is concerned, these attempts to put in evidence the declarations of the President, made, it may be, for the purpose of meeting an impeachment by such weapons of defense.

It is offered to be proved now, as the counsel inform us, that the President told General Sherman that he desired him to accept an appointment of Secretary for the Department of War to the end that Mr. Stanton might be driven to the courts of law for the purpose of testing his title to that office.

At the conclusion of the arguments the Chief Justice said:

Senators, the Chief Justice has expressed the opinion that the question now proposed is admissible within the vote of the Senate of yesterday. He will state briefly the grounds of that opinion. The question yesterday had reference to a conversation between the President and General Thomas after the note addressed to Mr. Stanton was written and delivered, and the Senate held it admissible. The question to-day has reference to a conversation relating to the same subject-matter, between the President and General Sherman, which occurred before the note of removal was written and delivered. Both questions were asked for the purpose of proving the intent of the President in the attempt to remove Mr. Stanton. The Chief Justice thinks that proof of a conversation shortly before a transaction is better evidence of the intent of an actor in it than proof of a conversation shortly after the transaction. The Secretary will call the roll.

The question being put, "Is the question admissible?" there appeared yeas 23, nays 28. So the question was ruled out.

Mr. Stanbery next asked:

General Sherman, in any of the conversations of the President while you were here, what was said about the department of the Atlantic?

Mr. Manager Butler objected that this question fell within the ruling just made.

Thereupon Mr. Stanbery proposed the question in this form:

What do you know about the creation of the department of the Atlantic?

Mr. Manager Butler said:

We have no objection to what General Sherman knows about the creation of the department of the Atlantic, provided he speaks of knowledge and not from the declarations of the President. All orders, papers, his own knowledge, if he has any, if it does not come from declarations, we do not object to.

The Chief Justice said:

The counsel for the President will be good enough to state whether in this question they include statements made by the President.

To this Mr. Stanbery replied:

Not merely that; what we expect to prove is in what manner the department of the Atlantic was created; who defined the bounds of the department of the Atlantic; what was the purpose for which the department was arranged.

It was also developed by a question from the Chief Justice that the conversation referred to was prior to the attempted removal of Mr. Stanton.

The question being put, the Senate decided [1] without division that the question was not admissible.

Mr. Stanbery then asked this question:

Did the President make any application to you respecting the acceptance of the duties of Secretary of War ad interim.

Mr. Manager Butler said:

I am instructed, Mr. President, to object to this, because an application can not be made without being either in writing or in conversation, and then either would be the written or oral declaration of the President, and it is entirely immaterial to this issue.

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[1] Senate Journal, p. 888; Globe Supplement, p. 157.

Mr. William M. Evarts said:

Mr. Chief Justice and Senators, the ground, as we understand it, upon which the offer, in the form and to the extent in which our question which was overruled sought to put it, was overruled, was because it proposed to put in evidence declarations of the President as if statements of what he was to do or what he had done. We offer this present evidence as executive action of the President at the time and in the direct form of a proposed devolution of office then presently upon General Sherman.

Mr. Butler objected that under the guise of proving an act it was proposed to get in a conversation.

The question being put, the Senate decided without division that the question was admissible.[1]

The question having been put, and General Sherman having testified that the President had tendered him the office of Secretary of War ad interim on two occasions, Mr. Stanbery then asked:

At the first interview at which the tender of the duties of the Secretary of War ad interim was made to you by the President did anything further pass between you and the President in reference to the tender or your acceptance of it?

In response to a question by Mr. Manager Butler as to the scope of the question, Mr. Stanbery stated that the question was intended to draw out the declarations concomitant with the act.

Mr. Butler thereupon entered an objection to the question on the ground that it contemplated an evasion of the principles of the ruling heretofore made. He said:

My proposition is, objecting to this evidence, that the evidence is incompetent and is based upon first getting in an act which proved nothing and looked to be immaterial, so that it was quite liberal for Senators to vote it in, but that liberality is taken advantage of to endeavor to get by the ruling of the Senate and put in declarations which the Senate has ruled out.

Mr. Evarts argued:

The tender of the War Office by the Chief Executive of the United States to a general in the position of General Sherman is an Executive act, and as such has been admitted in evidence by this court. Like every other act thus admitted in evidence as an act, it is competent to attend it by whatever was expressed from one to the other in the course of that act to the termination of it. And on that proposition the learned manager shakes his finger of warning at the Senators of the United States against the malpractices of the counsel for the President. Now, Senators, if there be anything clear, anything plain in the law of evidence, without which truth is shut out, the form and features of the fact permitted to be proved excluded, it is this rule that the spoken act is a part of the attending qualifying trait and character of the act itself.

The question being submitted to the Senate, "Is the question admissible?" there appeared yeas 23, nays 29. So the question was ruled out.[2]

Mr. Stanbery then asked:

In either of these conversations did the President say to you that his object in appointing you was that he might thus get the question of Mr. Stanton's right to the office before the Supreme Court?

Mr. Manager Butler objected to this question as leading in form, and as inadmissible within the decisions already made.

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[1] Senate Journal, p. 888; Globe Supplement, pp. 157, 158.

[2] Senate Journal, p. 888; Globe Supplement, p. 158.

The Senate, by a vote of yeas 7, nays 44, decided that the question was not admissible.[1]

Mr. Stanbery then asked:

Was anything said at either of those interviews by the President as to any purpose of getting the question of Mr. Stanton's right to the office before the courts?

Mr. Stanbery explained that the preceding question seemed to have been overruled because of its form, and he now changed the form as he did not want it thrown out on a technicality.

Mr. Manager Butler objected to the question on the ground that it was incompetent under the rules of evidence to offer in another form a question ruled out as leading, saying:

I had the honor to say to the Senate a little ago that all the rules of evidence are founded upon good sense, and this rule is founded on good sense. It would do no harm in the case of this witness; but the rule is founded on this proposition: that counsel shall not put a leading question to a witness, and thus instruct him what they want him to say, and then have it overruled and withdraw it, and put the same question in substance, because you could always instruct a witness in that way. Of course, that was not meant here, because I assume it would do no harm in any form, and the counsel would not do it; but I think the Senate should hold itself not to be played with in this way.

The Senate without division decided that the question should not be admitted.[2]

Thereupon Mr. John B. Henderson, of Missouri, a Senator, proposed this question in writing:

Did the President, in tendering you the appointment of Secretary of War ad interim, express the object or purpose of so doing?

Mr. Manager John A. Bingham, on behalf of the House of Representatives, objected to the question as both leading and incompetent.

The question being submitted to the Senate, "Is the question admissible? there appeared yeas 25, nays 27. So the question was ruled out.[3]

Mr. Stanbery then proposed this question:

At either of these interviews was anything said in reference to the use of threats, intimidation, or force to get possession of the War Office, or the contrary?

Mr. Manager Butler objected to the question, as falling within the rule already established.

The Senate, without division, sustained the objection.[4]

2239. Evidence as to statements of Judge Swayne to prove intention as to residence and made before impeachment proceedings were suggested was the subject of diverse rulings during the trial.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 22, 1905,[5] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Milton Jackson, a witness for the respondent, was examined

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[1] Senate Journal, pp. 888, 889; Globe Supplement, 158, 159.

[2] Senate Journal p. 889; Globe Supplement, p. 159.

[3] Senate Journal, p. 889; Globe Supplement, pp. 159, 160.

[4] Senate Journal, p. 890; Globe Supplement, p. 140.

[5] Third session Fifty-eighth Congress, Record, pp. 3057, 3058.

by Mr. Anthony Higgins, of counsel for the respondent, as to a conversation which he had with Judge Swayne several years previous to the impeachment in reference to the latter's place of residence, and this question was asked:

Q. (By Mr. Higgins.) What did the Judge state at that time about the subject of his residence?

To that I object, Mr. President, The statement of Judge Swayne, which we offered to prove, were excluded, of course, for a different reason, but certainly there is no rule of law which allows the statements of the respondent to be put in evidence in his own behalf. That, of course, is fundamental. No man can prove what he has done or what he has not done by his own statements as to what he did or purposed to do. There is no more fundamental rule of evidence than that the respondent's statements can not be proved in his favor. If that were so, all Judge Swayne would have to do would be to state that he resided in Florida, and that would make him a resident of Florida, or be evidence of his residence there.

Mr. Higgins replied:

I submit to the Senate that this question is eminently proper as a verbal fact, an act of the judge, ante litem motam, before this matter was mooted, years before, in the announcement to his nearest of kin as to his residence at that time. In order to make clear to the Senate the question upon which it is asked to pass, I will say that the authorities of Leon County, Fla., in which is the city of Tallahassee, gave an invitation to Judge Swayne, written and engrossed, to make his residence and home there, and that this was shown to this witness, and that the Judge gave them reasons why he could not accept that offer, because of where he had elected to live. If that is not fair testimony and within the rule, I do not know what is. It was long before this question was ever raised, not with any view of the possibility of any such proceeding as this. The statement is admissible for a double reason—that he was not going to accept that offer; that the offer was made very shortly after the act of Congress was passed, and therefore the question arose at that time; and in rejecting that invitation he did it because he had elected to reside, as the witness will state, elsewhere in his district and with reference to the requirements of that act.

Now, we have made that statement in answer as a substantive part of the defense, that he announced at that time his intention as to where he expected to live as a proper thing for him to do, and it is an act which I submit it is eminently proper for us to be able to prove.

In reply Mr. Manager Perkins argued:

In other words, Mr. President, the offer of the counsel is this when we analyze it: The question being whether Judge Swayne as a matter of fact became a resident of the northern district of Florida, they can prove that by showing by another witness that Judge Swayne said he intended to become a resident. You can prove a fact. You can prove what a man did; what he was bound to do; that he became a resident. How—by showing what he did? No; but by proving that he said to some one else he intended to become a resident.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, said:

I find that in the trial of Andrew Johnson, page 207 of the proceedings, as reported in the Globe, it was offered for the counsel by the respondent to prove in these words:

"We offer to prove that the President then stated that he had issued an order for the removal of Mr. Stanton and the employment of Mr. Thomas to perform the duties ad interim; that thereupon Mr. Perrin said: 'Supposing Mr. Stanton should oppose the order?' The President replied: 'There is no danger of that, for General Thomas is already in the office,' etc."

Mr. Manager Butler having objected, Mr. Manager Wilson said:

Mr. President, as this objection is outside of any former ruling of the Senate and is perfectly within the rule laid down in Hardy's case—the celebrated English impeachment case—and cited this ruling from that case, which may be found in 24 State Trials, page 1096:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, because the presumption upon which declarations are evidence is that

no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself."

The Chief Justice submitted the question to the Senate whether it should be admitted, and the vote was, yeas 9 and nays 37. So the question was rejected. There you have precedent both English and American.

The Presiding Officer [1] said:

The Presiding Officer will state the question. Counsel for the respondent offered to prove, as affecting the question of his residence, statements made by the respondent to the witness in the year 1894 or 1895 as to where it was his intention to reside. That it the question which is submitted to the Senate.

Mr. HIGGINS. I wish further to say that I intend also to put to the witness the question as to where the Judge stated at the time he did reside.

Mr. MANAGER OLMSTED. That would be equally objectionable.

The PRESIDING OFFICER. And, further, the statements made by Judge Swayne at that time as to where his residence was. Senators in favor of the admission of such testimony will say "aye," opposed "no." [Putting the question.] In the opinion of the Presiding Officer the "ayes" have it. The "ayes" have it. The counsel will ask the question.

On February 23 [2] a witness, Charles F. Warwick, was examined by Mr. Anthony Higgins, of counsel for the respondent, who asked:

Q. Do you know Judge Charles Swayne?—A. Very well.

Q. How long have you known him?—A. Ever since I came to the bar. I think I knew him before that intimately.

Q. Intimately, you say?—A. Intimately.

Q. Do you remember the fact of the act of Congress curtailing his district?—A. I do.

Q. Will you please state whether on or about or after that time, and fix the time yourself, you had any conversation with him, and he with you, concerning where he would make his residence in Florida?

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

We object to that testimony as being irrelevant and incompetent. The declaration of the respondent as to where he intended to reside is, in our judgment, not evidence in this case.

Mr. Porter J. McCumber, a Senator from North Dakota, said:

Mr. President, before submitting the matter to the Senate, I wish counsel would inform the Senate on what principle of law he justifies a proposition to introduce in evidence a self-serving declaration of a party defendant in a criminal proceeding.

Mr. Higgins said:

Mr. President, I had the honor to submit some remarks upon that question yesterday. We contend that such an assertion made before the present impeachment proceedings were mooted or expected, or as the maxim of the law has it ante litem motam, is itself essentially a verbal fact. Residence is made up of two elements—intention and action. Intent without action is futile to make a residence, but intention becomes a most important part of the proposition in the end as to what constitutes residence. As I have said and admitted, alone it will not make it, but it is a part of a whole in which it takes its own due proportion.

Now, if this were a self-serving assertion, made after the fact, if it came into the case in such a way it would be so clearly objectionable that it never would be presented by counsel for the respondent. But we submit it is a most important thing. When the good faith of the conduct of the respondent is in dispute, we bring here a witness of the highest character and standing to prove what at that time was the expressed intention of the respondent in respect to establishing his residence. I think therefore that, while admitting the principle upon which the distinguished Senator raises his question, we have brought this within an exception thereto. If we had expected that this question would be raised again to-day, after it had been disposed of yesterday, we would have come prepared with authorities to submit.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Record, pp. 3145, 3146.

Mr. Manager James B. Perkins, of New York, said:

Mr. President, just a word. I did not again object today because the Senate yesterday, I must confess somewhat to my surprise, allowed a similar question to be answered. Doubtless it was that the legal question involved was not presented by me with the clearness with which it has now been stated by the Senator from North Dakota. The gentleman on the other side misstates the question and avoids the inquiry made by the Senator. It is not can judge Swayne's intention be proved? His intention is a question that perhaps can be proved, but Judge Swayne's intention, no more than any other thing in Judge Swayne's behalf, can be proved by Judge Swayne's own statement.

It is offered to prove here, what? Judge Swayne's intention, by the fact that Judge Swayne said it was his intention. As the Senator from North Dakota properly says, it is an endeavor to prove something in behalf of the defendant by his own statement. There is the inherent vice of the question, and I think the failure perhaps to catch that point yesterday was the reason the ruling was made by the Senate.

Mr. Higgins replied:

Only a word in reply. The learned manager who would confine the evidence of intention to acts, when from the very great case in 3 Washington Report down it is the established law as to citizenship, as to residence, as to domicile, that they are each and every one of them made up of two articles—of intent and of action—and that if you can not prove anything by words you are confined merely in your evidence to acts. That is not the law, with all due respect to my learned friend.

Mr. Manager Olmsted said:

I again call the attention of the Senate to the fact that this precise question was before the Senate of the United States in the impeachment trial of Andrew Johnson, where his counsel offered to prove, for the purpose of showing the intent of the President of the United States, his statements to other parties. There was then cited the celebrated English case of Hardy, reported in 24 State Trials, page 1096, where it was held by the House of Lords:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent"—

Mark the word—

"though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, etc."

Upon the citation of that authority and the argument of the case the United States Senate decided, by a vote of nearly 4 to 1, that such a statement made by the respondent could not be proved by the party to whom he made it.

Mr. Higgins said:

I have not had a chance to reply to that. I agree to that law, for that was not a case of residence, nor of domicile nor of citizenship. It was a case of ordinary criminal conduct, where the intent is inferred from the act. But the difference is laid down in the law, that residence is a mixed question of law and fact; that it is made up of action plus intent, and intent plus action, and therefore it is to be differentiated entirely from Hardy's case, and goes back to another class of authorities entirely.

The Presiding Officer said:

Shall the witness be permitted to answer the question. [Putting the question.] In the opinion of the Presiding Officer the "noes" have it. The "noes" have it, and the answer is excluded.

Later, on the same day,[1] Henry G. Swayne was sworn and examined by Mr. Higgins:

Q. Do you recall the time of the passage of the act of Congress curtailing the northern district of Florida?—A. Yes, sir.

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[1] Record, p. 3153.

Q. July, 1894. Where were your father and family residing at that time?—A. St. Augustine, Fla.

Q. You were not there that year?—A. I was there at that time; that summer.

Q. State what you know as to any facts or acts of Judge Swayne with reference to making his residence at Pensacola.—A. Immediately after the passage of the act, or within a few days thereafter, he left the home in St. Augustine and went to Pensacola, declaring that he was——

Mr. Manager Perkins having interposed, Mr. Higgins said:

I offer to prove by this witness what the judge declared at the time; and I should like to know if the manager objects.

Mr. Manager PERKINS. We object. That is easily answered.

The PRESIDING OFFICER. The Presiding Officer understands that counsel propose to prove the declaration of Judge Swayne made at the time when he left his home in St. Augustine as to where he was going to make his home. * * * The Presiding Officer thinks that may be done. If any Senator desires, he will submit the question to the Senate. * * * This is a declaration made at the time he left his home in St. Augustine as to where he intended to take up his home on leaving the St. Augustine home. * * * If any Senator desires, the Presiding Officer will submit the question to the Senate. [A pause.] The Presiding Officer thinks it part of the res gestae. The Presiding Officer understands that the witness is about to testify to a statement made by Judge Swayne at the time he was giving up his home in St. Augustine; and that the Presiding Officer thinks the witness may state.

Mr. HIGGINS. Please proceed.

A. The statement in full which was made by Judge Swayne at the time, as I recollect it, was that the bill dividing the district or redistricting the State, whichever it was, had just passed Congress and been signed by the President, and that he would be compelled to make his residence within the boundaries of his district, and that he was going to go to Pensacola; and with that declaration he left St. Augustine that summer in the month of July. I was there, having gone down after my collegiate year was over, from Philadelphia, and I, with the other members of the family——

2240. By a majority of one the Senate, in the Johnson trial, sustained the Chief Justice's ruling that evidence as to respondent's declaration of intent, made at the time of the act, was admissible.—On April 13, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Reverdy Johnson, a Senator from Maryland, asked for the recall as a witness of Gen. William T. Sherman, and General Sherman having taken the stand, Mr. Johnson proposed in writing this question:

When the President tendered to you the office of Secretary of War ad interim on the 27th of January, 1868, and on the 31st of the same month and year, did he, at the very time of making such tender, state to you what his purpose in so doing was?

Mr. Manager John A. Bingham objected to the question as incompetent, in accordance with the rulings of the Senate heretofore made.

The question being taken without argument, "Is the question admissible?" there appeared yeas 26, nays 22. So the question was admitted.

And the witness replied, "Yes."

Thereupon Mr. Reverdy Johnson proposed this question:

If he did, state what he said his purpose was.

Mr. Manager Bingham objected to the question, since it was incompetent for the accused to make his own declarations evidence for himself.

[1] Second session Fortieth Congress, Senate Journal, pp. 693, 894; Globe supplement, pp. 169–173.

The Chief Justice[1] said:

The Chief Justice has already said upon a former occasion that he thinks that, for the purpose of proving the intent, this question is admissible; and he thinks, also, that it comes within the rule which has been adopted by the Senate as a guide for its own action. This is not an ordinary court, but it is a court composed largely of lawyers and gentlemen of great experience in the business transactions of life, and they are quite competent to determine upon the effect of any evidence which may be submitted to them; and the Chief Justice thought that the rule which the Senate adopted for itself was founded on this fact; and in accordance with that rule, by which he determined the question submitted on Saturday, he now determines this question in the same way.

Messrs. Managers Bingham and Butler asked if this was not the same question ruled on Saturday, April 11.

The Chief Justice said:

The Chief Justice does not say that. What he does say is, that it is a question of the same general import, to show the intent of the President during these transactions. The Secretary will read the question again.

* * * * * * *

Senators, you who are of opinion that the question just read, "If he did, state what he said his purpose was," is admissible, and should be put to the witness, will, as your names are called, answer yea; those of a contrary opinion, nay. The Secretary will call the roll.

And the vote being taken, there appeared yeas 26, nays 25. So the question was admitted.

2241. Declarations of the respondent made during the act were admitted to rebut evidence of other declarations, made also during the act, but on a different day.

Instance wherein, during the introduction of evidence, an objection withdrawn by a manager was renewed by a Senator.

On February 15, 1805,[2] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, William Marshall was sworn as a witness on behalf of the respondent. During the examination of this witness Mr. Robert G. Harper, counsel for the respondent, asked a question to which objection was made by Mr. Joseph H. Nicholson, of Maryland, one of the managers.

After consultation Mr. Nicholson withdrew the objection, whereupon it was renewed by a member of the court.

Thereupon Mr. Harper, in behalf of the respondent, made the following motion:

Testimony on the part of the prosecution, tending to show from the declarations of the respondent that he had a corrupt intention to pack a jury for the trial of Callender, having been given, he offers in evidence other declarations of his, made during the proceedings, but on a different day, for the purpose of rebutting the former testimony, and of showing that his intentions, in that respect, were pure and even favorable to Mr. Callender.

Thereupon the President[3] said:

This evidence is consented to by the managers. The question is, "Shall it be, on such consent, examined by the court?"

And the question was determined in the affirmative, yeas 32, nays 2.

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

[2] Second session Eighth Congress, Senate Impeachment Journal, p. 520; Annals, p. 251.

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

2242. In the Johnson trial the Senate sustained the Chief Justice in admitting as showing intent, on the principle of res gestae, evidence of respondent's verbal statement of the act to his Cabinet.—On April 17,1868,[1] in the-Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gideon Welles, Secretary of the Navy, was sworn and examined as a witness by counsel for the respondent, and testified that he attended a meeting of the Cabinet on the afternoon of February 21 last. At this meeting, after the departmental business had been concluded, and as they were about to separate, the President made a statement.

Objection as to testimony of what the President said being intimated by the managers for the House of Representatives, Mr. William M. Evarts, of counsel for the respondent, made this offer of proof:

We offer to prove that on this occasion the President communicated to Mr. Welles and the other members of his Cabinet, before the meeting broke up, that he had removed Mr. Stanton and appointed General Thomas Secretary of War ad interim, and that upon the inquiry by Mr. Welles whether General Thomas was in possession of the office the President replied that he was; and upon further question of Mr. Welles whether Mr. Stanton acquiesced the President replied that he did; all that he required was time to remove his papers.

Mr. Manager Benjamin F. Butler at once objected.

Mr. President and Senators, as it seems to us, this does not come within any possible proposition of law to render it admissible. It is now made certain that this act Was done without any consultation of his Cabinet by the President, whether that consultation was to be held verbally, as I think is against the constitutional provision, or whether the theory is to be adopted that the President has a right to consult with his Cabinet upon questions of his conduct.

Mr. Manager Butler proceeded to discuss the constitution and functions of the President's Cabinet, holding that strictly the President might only require written opinions of the heads of Departments.

Continuing as to the competency of the evidence, Mr. Butler said:

Now, the question is, after he has done the act, after he has thought it was successful, after he thought Mr. Stanton had yielded the office, can he, by his narration of what he had done and what he intended to do, shield himself before a tribunal from the consequences of that act? It is not exactly the same question which you decided yesterday by almost unexampled unanimity in the case of Mr. Perrin and Mr. Selye, the Member of Congress, on that same day, a few minutes earlier or a few minutes later? They offered in evidence here what he told Mr. Perrin and what he told Mr. Selye; they complicated it by the fact that Mr. Selye was a Member of Congress; and the Senate decided by a vote which indicated a very great strength of opinion that that sort of narration could not be put in.

Now, is this any more than narration? It was not to take the advice of Mr. Welles as to what he should do in the future, or upon any question; it was mere information given to Mr. Welles or to the other members of the Cabinet after they had separated in their Cabinet consultation, and while they were meeting together as any other citizens might meet. It would be as if, after you adjourned here, some question should be attempted to be put in as to the action of the Senate because the Senators had not left the room. Again, I say it was simply a narration, and that narration of his intent and purposes, his thoughts, expectations, and feelings.

I do not propose to argue it further until I hear something showing why we are to distinguish this case from the case of Mr. Perrin, on which you voted yesterday. Mr. Perrin tells you that on the 22d he waited for the Cabinet meeting to break up, and as soon as it broke up he went in with Mr. Selye, and then the President undertook to tell him. You said that was no evidence. Now, when he under-

[1] Second session Fortieth Congress, Senate Journal, pp. 908, 909; Globe Supplement, pp. 222–225.

took to tell Mr. Welles is that any more evidence? I can not distinguish the cases, and I desire to hear them distinguished before I attempt an answer to any such distinction.

* * * * * * *

It is said that it is an official act. I had supposed up to this moment—aye, and I suppose now—that there is no act that can be called an official act of an officer which is not an act required by some law or some duty imposed upon that officer. Am I right in my ideas of what is an official act? It is not every volunteer act by an officer that is official. Frequently such acts are officious, not official. An official act, allow me to say, is an act which the law requires, or a duty which is enjoined upon the officer by some law, or some regulation, or in some manner as a duty. Will the learned counsel tell the Senate what constitutional provision, what statute provision, what practice of the Government requires the President at any time to inform his Cabinet or any member of them whatever that he has removed one man and put in another, and that that other man is in office? If there is any such law, it has escaped my attention. I am not aware of it.

* * * * * * *

Now, then, what is offered? Stanton has been removed by the act of the President; and thereupon, without asking advice—because that is expressly waived by the learned counsel last addressing us—not as a matter of advice, the President gives information. Now, how can that information be evidence? How can he make it evidence? The information is required by no law, was given for no purpose to carry out any official duty, was the mere narration of what the President chose to nurate at that time.

Mr. Evarts, in behalf of the respondent, argued:

Now, then, it stands thus: That at a Cabinet meeting held on Friday, the 21st of February, when the routine business of the different Departments was over, and when it was in order for the President to communicate to his Cabinet whatever he desired to lay before them, the President did communicate this fact of the removal of Mr. Stanton and the appointment of General Thomas ad interim, and that thereupon his Cabinet officers inquired as to the posture in which the matter stood, and as to the situation of the office and of the conduct of the retiring officer. Here we get rid of the suggestion that it is a mere communication to a casual visitor which made the staple of the argument yesterday against the introduction of the evidence as to the conversation with Mr. Perrin and Mr. Selye. We now present you the communication made by the President of the United States while this act was in the very process of execution, while it was yet, as we say in law, in fieri, being done.

It being in fieri, the President communicates the fact how this public transaction has been performed and is going on, and we are entitled to that as a part of the res gestse in its sense of a governmental act, with all the benefit that can come from it in any future consideration you are to give to the matter as bearing upon the merits and the guilt or innocence of the President in the premises. It bears, as we say, directly upon the question whether there had been any other purpose than the placing of the office in a proper condition for the public service according to the announcement of the President as his intention when he conversed with General Sherman in the January preceding; and it negatives all idea that at the time that General Thomas to Mr. Wilkeson or to the Dakota Delegate, Mr. Burleigh, was saying or suggesting anything of force, the President was the author of, or was responsible for, his statements. The truth is, it presents the transaction as wholly and completely an orderly and peaceful movement of the President of the United States, as, in fact, it was, and no evidence has been given to the contrary, of any occurrence disturbing that peaceful order and as the situation in which its completion left the matter in the mind of the President up to that point of time.

Mr. Benjamin R. Curtis, also of counsel for the respondent, added:

We are anxious that this testimony now offered should be distinguished in the apprehension of the Senate, as it is in our own, from an offer of advice, or from the giving of advice by the Cabinet to the President. We do not place our application for the admission of this evidence upon the ground that it is an act of giving advice by his councilors to the President. We place it upon the ground that this was an official act done by the President himself when he made a communication to his councilors concerning this change which he had made in one of their number; that that was strictly and purely an official act of the President, done in a proper manner, the subject-matter of which each of those councilors was interested in in his public capacity, and which it was proper or the President to make known to them at the earliest moment when he could make such a communication.

Mr. Curtis further reviewed the Constitutional history of the Cabinet to show that the practice was for the President to rely on the Cabinet, both for consultation and decision, finally saying as to his remarks in making this review:

They are pertinent to the question now under consideration, for they go to show that under the Constitution and laws of the United States as practiced on by every President, including General Washington and Mr. Adams, Cabinet ministers were assembled by them as a council for the purposes of consultation and decision, and of course, when thus assembled, a communication made to them by the President of the United States concerning an important official act which was then in fieri, in process of being executed and not yet completed, is itself an official act of the President, and we submit to the Senate that we have a right to prove it in that character.

The Chief Justice [1] said at the conclusion of the arguments:

Senators, the Chief Justice thinks that this evidence is admissible. It has, as he thinks, important relation to the res gestae, the very transaction which forms the basis of several of the articles of impeachment, and he thinks it also entirely proper to take into consideration in forming an enlightened judgment upon the intent of the President. He will put the question to the Senate if any Senator desires it.

Mr. Aaron H. Cragin, a Senator from New Hampshire, asked that the evidence excluded in the case of Witness Perrin [2] be read. This having been done, Mr. Jacob M. Howard, a Senator from Michigan, proposed this question:

In what way does the evidence the counsel for the accused now offer meet any of the allegations contained in the impeachment?

How does it affect the gravamen of any one of the charges?

To this Mr. Evarts responded:

The Senators will perceive that this question anticipates a very extensive field of inquiry—first as to what the gravamen of all these articles is, and, secondly, as to what shall finally be determined to be the limits of law and fact that properly press upon the issues here; but it is enough to say, probably, as we have every desire to meet the question with all the intelligence that we can command, at the present stage of the matter, without going into these anticipations, that it bears upon the question of the intent with which this act was done, as being a qualification of the act in the President's mind at the time he announces it as complete. It bears on the conspiracy articles and it bears upon the eleventh article, even if it should be held that the earlier articles, upon the mere removal of Mr. Stanton and the appointment of General Thomas, are to cease in the point of their inquiry, intent, and all with the consummation of the acts.

The Chief Justice thereupon said:

The Chief Justice will restate to the Senate the question as it presents itself to his mind. The question yesterday had reference to the intention of the President, not in relation to the removal of Mr. Stanton, as the Chief Justice understood it, but in relation to the immediate appointment of a successor by sending in the nomination of Mr. Ewing. The question to-day relates to the intention of the President in the removal of Mr. Stanton; and it relates to a communication made to his Cabinet after the departmental business had closed, but before the Cabinet had separated. The Chief Justice is clearly of opinion that this is a part of the transaction and that it is entirely proper to take this evidence into consideration as showing the intent of the President in his acts. The Secretary will call the roll.

The question being taken, there appeared, yeas 26, nays 23. So the evidence was admitted.

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

[2] See sec. 2244 of this work.

2243. It was decided in the Chase trial that declarations of the respondent after the act might not be admitted to show the intent.—On February 15, 1805,[1] in the high court of impeachment, during the trial of the case of United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, Mr. Joseph Hopkinson, counsel for the respondent, asked of Edward J. Coale, the witness under examination, the following question:

> At the time Judge Chase desired you to make the copy in your hand, did he, or did he not, explain to you his reasons or motives for drawing up the paper from which this copy was made? If yes, what were they?

Mr. Joseph H. Nicholson, of Maryland, one of the managers, objected to the question.

At the suggestion of the President[2] the question was reduced to writing.

Mr. Hopkinson said he thought such questions perfectly legal when they went to show the intention of the accused. "We have heard," said he, "much of the quo animo, and it is perfectly clear that the intention constitutes the guilt of the offense."

Mr. Nicholson said:

> The quo animo is to be collected from the acts of the party. The evidence of his declaration may be shown to prove the quo animo. But I do not consider it to be correct that Judge Chase shall be permitted to give in evidence declarations made at any other time than that when we have stated he made them; otherwise it will always lay in the discretion of the party accused to state declarations made at another time by him for the purpose of justifying any acts he may have committed.

Mr. Luther Martin, counsel for the respondent, said he had ever considered the declaration of the party at the time he was charged with committing a criminal act as competent evidence to show his innocence.

Mr. Nicholson said there was no doubt of it, but that he was not charged with drawing out the paper as a criminal act. Any declaration made by Judge Chase at the time he delivered the opinion of the court may be given in evidence, but any other declarations have nothing to do with the case.

The President said:

> Where was the conversation between the judge and yourself?
> Mr. COALE. At the judge's lodgings.

The question was then taken—

> Is it competent for the counsel for the respondent to put said question to the witness?

And it was determined in the negative, yeas 9, nays 25.

2244. In the Johnson trial the Senate ruled out evidence as to respondent's declarations of intent made after the act.

Comment of the Chief Justice on the Senate's decisions on evidence as to respondent's declarations at or near the time of the act.

On April 16, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Edwin O. Perrin was sworn and examined by counsel on behalf of the respondent. Mr. Perrin testified to an inter-

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[1] Second session Eighth Congress, Senate Impeachment Journal, p. 519; Annals, pp. 242–243.

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

[3] Second session Fortieth Congress, Senate Journal, pp. 905, 906; Globe supplement, pp. 206–208.

view which he had with the President in company with Mr. Selye, a Congressman, on the evening of February 21, 1868.

Mr. William M. Evarts, of counsel for the respondent, asked:

Did you then hear from the President of the removal of Mr. Stanton?

Mr. Manager Benjamin F. Butler at once entered an objection, which caused the counsel for respondent to submit in writing the following:

We offer to prove that the President then stated that he had issued an order for the removal of Mr. Stanton and the employment of General Thomas to perform the duties ad interim; that thereupon Mr. Perrin said: "Supposing Mr. Stanton should oppose the order." The President replied: "There is no danger of that, for General Thomas is already in the office." He then added: "It is only a temporary arrangement; I shall send in to the Senate at once a good name for the office."

Mr. Manager Butler said:

I find it, Mr. President and Senators, my duty to object to this. There is no end to declarations of this sort. The admission of those to Sherman and to Thomas was advocated on the ground that the office was tendered to them and that it was a part of the res gestae. This is mere narration, mere statement of what he had done and what he intended to do. It never was evidence and never will be evidence in any organized court, so far as any experience in court has taught me. I do not see why you limit it. If Mr. Perrin, who says that he has heretofore been on the stump, can go there and ask him questions, and the answers can be received why not anybody else? If Mr. Selye could go there, why not everybody else? Why could he not make declarations to every man, aye, and woman, too, and bring them in here, as to what he intended to do and what he had done to instruct the Senate of the United States in their duties sitting as a high court of impeachment?

And Mr. Manager James F. Wilson added:

Mr. President, as this objection is outside of any former ruling of the Senate, and is perfectly within the rule laid down in Hardy's case, I wish to call the attention of the Senate to that rule again, not for the purpose of entering upon any considerable discussion, but to leave this objection under that rule to the decision of the Senate:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, an evidence against a prisoner, and are not evidence for him, because the presumption upon which declarations are evidence is that no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself." (24 State Trials, p. 1096.)

If this offer of proof does not come perfectly within that rule, then I never met a case within my experience that would come within its provisions. I leave this objection to the decision of the Senate upon that rule.

In behalf of the admission of the evidence Mr. Evarts said:

It will be observed that this was an interview between the President of the United States and a Member of Congress, one of "the grand inquest of the nation," holding, therefore, an official duty and having access, by reason of his official privilege, to the person of the President; that at this hour of the day the President was in the attitude of supposing, upon the report of General Thomas, that Mr. Stanton was ready to yield the office, desiring only the time necessary to accommodate his private convenience, and that he then stated to these gentlemen: "I have removed Mr. Stanton and appointed General Thomas ad interim," which was their first intelligence of the occurrence; that upon the suggestion, "Will there not be trouble or difficulty?" the President answered (showing thus the bearing on any question of threats or purpose of force as to be imputed to him from the declarations that General Thomas was making at about the same hour to Mr. Wilkeson) that there was no occasion for or "no danger of that, as General Thomas was already in." Then, as to the motive or purpose entertained by the President at the time of this act of providing anybody that should control the War Department or the military appropriations, or by combination with the Treasury Department suck the public funds, or to have,

though I regret to repeat the words as used by the honorable manager, a tool or a slave to carry on the office to the detriment of the public service, we propose to show that at the very moment he asserts, "This is but a temporary arrangement; I shall at once send in a good name for the office to the Senate."

Now, you will perceive that this bears upon the President's condition of purpose in this matter, both in respect to any force as threatened or suggested by anybody else being imputable to him at this time, and upon the question of whether this appointment of General Thomas had any other purpose than what appeared upon its face, a nominal appointment, to raise the question of whether Mr. Stanton would retire or not, and determined, as it seemed to be for the moment, by the acquiescence of Mr. Stanton, was then only to be maintained until a name was sent in to the Senate, as by proof hitherto given we have shown was done on the following day before 1 o'clock.

At the conclusion of argument the Chief Justice [1] said:

Senators, the Chief Justice is unable to determine the precise extent to which the Senate regards its own decision as applicable. He has understood the decision to be that, for the purpose of showing intent, evidence may be given of conversations with the President at or near the time of the transaction. It is said that this evidence is distinguishable from that which has been already introduced. The Chief Justice is not able to distinguish it; but he will submit directly to the Senate the question whether it is admissible or not.

The question being taken on the admission of the testimony, there appeared, yeas 9, nays 37. So the evidence was excluded.

2245. In the Johnson trial the Chief Justice ruled that an official message transmitted after the act was not admissible as evidence to show intent.—On April 15, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, during the presentation of evidence on behalf of the respondent, Mr. Benjamin R. Curtis, of counsel, offered a message of the President to the Senate of the United States, bearing date February 24, 1868.

Mr. Benjamin F. Butler, of the managers for the House of Representatives, objected to the admission of the message as evidence, since it was virtually a declaration of the President after he was impeached, and that could not be evidence Mr. Butler stated that the record as to the impeachment was:

That on the 21st of February a resolution was proposed for impeachment and referred to a committee; on the 22d the committee reported, and that was debated through the 22d and into Monday, the 24th, and the actual vote was taken on Monday, the 24th.

Arguing in support of the objection, Mr. John A. Bingham, of Ohio, one of the managers, said as to the message:

Is it anymore than a volunteer declaration of the criminal, after the fact, in his own behalf? Does it alter the case in law? Does it alter the case in the reason or judgment of any man living, either within the Senate or out of the Senate, that he chose to put his declaration in his own defense in writing? The law makes no such distinctions. I undertake to assert it here, regardless of any attempt to contradict my statement, that there is no law that enables any accused criminal, after the fact, to make declarations, either orally or in writing, either by message to the Senate or a speech to a mob, to acquit himself or to affect in any manner his criminality before the tribunals of justice, or to make evidence which shall be admitted under any form of law upon his own motion to justify his own criminal conduct.

I do not hesitate to say that every authority which the gentlemen can bring into court regulating the rule of evidence in procedures of this sort is directly against the proposition, and for the simple reason that it is a written declaration made by the accused voluntarily, after the fact, in his own behalf.

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

[2] Second session Fortieth Congress, Senate Journal, p. 898; Globe supplement, pp. 175–178.

Mr. William M. Evarts, of counsel for the President, argued that as the managers had been permitted to put in evidence a resolution of the Senate passed on February 21, and declaring that the President had exceeded his powers, the counsel for the respondent should be permitted to put in the message, which was an answer to that resolution. Mr. Evarts said:

Now, if the crime [the removal of Secretary Stanton] was completed on the 21st of February, which is not only the whole basis of this argument of the learned managers, but of every other argument upon the evidence that I have had the honor of hearing from them, I should like to know what application or relevancy the resolution passed by the Senate on the 21st of February, after the act of the President had been completed, and after that act had been communicated to the Senate, has on the issue of whether that act was right or wrong? And if the fact that it is an expression of opinion relieves the testimony from the possibility of admission, what was this but an expression of the opinion of the Senate of the United States in the form of a resolution regarding a past act of the President? There could be, then, no single principle of the law of evidence upon which this fact put in proof in behalf of the managers could be admitted, except as a communication from this branch of the Government to the President of the United States of its own opinion concerning the legality of his action; and in the same line and in immediate reply the President communicates to the Senate of the United States, openly and in a proper message, his opinions concerning the legality of the act. What would be thought of the Government that, in a criminal prosecution, by way of inculpating a prisoner, should give in evidence what a magistrate or a sheriff had said to him concerning the crime imputed, and then shut the mouth of the prisoner as to what he had said then and there in reply? Why, the only possibility, the only argument for affecting the prisoner with criminality for what had been said to him, was that, unreplied to, it might be construed into admission or submission; and to say that the prisoner when told, "You stole that watch," could not give in evidence his reply, "It was my own watch, and I took it because it was mine," is precisely the same proposition that is being applied here by the learned managers to this communication back and forth between the Senate and the President.

The arguments being concluded, the Chief Justice [1] said:

There is, perhaps, Senators, no branch of the law in which it is more difficult to lay down precise rules than that which relates to evidence of the intent with which an act is done. In the present case it appears that the Senate, on the 21st of February, passed a resolution, which I will take the liberty of reading:

"Whereas the Senate have received and considered the communication of the President stating that he has removed Edwin M. Stanton, Secretary of War, and had designated the Adjutant-General of the Army to act as Secretary of War ad interim: Therefore,

"Resolved by the Senate of the United States, That under the Constitution and laws of the United States the President has no power to remove the Secretary of War and to designate any other officer to perform the duties of the office ad interim."

That resolution was adopted on the 21st of February, and was served, as the evidence before you shows, on the evening of the same day. The message which is now proposed to be introduced was sent to the Senate on the 24th day of February. It does not appear to the Chief Justice that the resolution of the Senate called for an answer, or that there was any call upon the President to answer from the Senate itself; and therefore he must regard the message which was sent to the Senate on the 24th of February as a vindication of the President's act addressed by him to the Senate; and it does not appear to the Chief Justice to come within any of the rules which have been applied to the introduction of evidence upon this trial. He will, however, take pleasure in submitting the question to the Senate if any Senator desires it. [After a pause.] If no Senator desires that the question be submitted to the Senate, the Chief Justice rules the evidence to be inadmissible.

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

2246. The Chief Justice was sustained in admitting during the Johnson trial evidence of an act after the fact as showing intent.

Evidence of declarations of respondent after the fact was excluded in the Johnson trial, although related to an act admitted in proof to show intent.

On April 16, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Walter S. Cox, an attorney at law residing in the District of Columbia, was called as a witness on behalf of the respondent. The witness having stated that he was connected professionally with the case of Gen. Lorenzo Thomas, who had been arrested on a warrant based on an affidavit of Edwin M. Stanton, Secretary of War, Mr. Benjamin R. Curtis, of counsel for the respondent, asked:

When and under what circumstances did your connection with that matter begin?

To this question Mr. Manager Benjamin F. Butler objected on the ground of irrelevancy.

The Chief Justice[2] said:

The Chief Justice sees no objection to the question as an introductory question, but will submit it to the Senate if it is desired. [After a pause, to the witness.] You can answer the question.

The witness stated that he was sent for on February 22, and went to the President's House, where he saw the President about 5 p.m. Witness was about to relate what the President said, when Mr. Manager Butler interposed an objection.

This produced from the counsel for the respondent the following written offer:

We offer to prove that Mr. Cox was employed professionally by the President, in the presence of General Thomas, to take such legal proceedings in the case that had been commenced against General Thomas as would be effectual to raise judicially the question of Mr. Stanton's legal right to continue to hold the office of Secretary for the Department of War against the authority of the President, and also in reference to obtaining a writ of quo warranto for the same purpose; and we shall expect to follow up this proof by evidence of what was done by the witness in pursuance of the above employment.

Mr. Manager Butler at once objected.

In the course of the arguments Mr. Manager James F. Wilson thus stated the substance of the objection:

Now, I submit to this honorable body that no act, no declaration of the President made after the fact, can be introduced for the purpose of explaining the intent with which he acted. And upon this question of intent let me direct your minds to this consideration—the issuing of the orders referred to constitute the body of the crime with which the President stands charged. Did he purposely and willfully issue an order to remove the Secretary of War? Did he purposely and willfully issue an order appointing Lorenzo Thomas Secretary of War ad interim? If he did thus issue the orders, the law raises the presumption of guilty intent, and no act done by the President after these orders were issued can be introduced for the purpose of rebutting that intent. The orders themselves were in violation of the terms of the tenure of office act. Being in violation of that act, they constitute an offense under and by virtue its provisions, and the offense thus being established must stand upon the intent which controlled the action of the President at the time that he issued the orders. If, after this subject was introduced into the House of Representatives, the President became alarmed at the state of affairs, and concluded that it was best to attempt by some means to secure a decision of the court upon the question of the constitutionality or unconstitutionality of the tenure of office act, it can not avail him in this case. We are

[1] Second session Fortieth Congress, Senate Journal, p. 903; Globe supplement, pp. 197–200.

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

inquiring as to the intent which controlled and directed the action of the President at the time the act was done; and if we succeed in establishing that intent, either by proof or by presumption of law, no subsequent act can interfere with it or remove from him the responsibility which the law places upon him because of the act done.

Mr. William M. Evarts, of counsel for the respondent, argued:

Mr. Chief Justice and Senators, we have here the oft-repeated argument that the crime against the act of Congress was complete by the papers drawn and delivered by the President; that the law presumes that those papers were made with the intent that appears on their face, which, it is alleged, is a violation of that act; and as that would be enough in an indictment against the President of the United States to affect him with a punishment, in the discretion of the judge, of six cents fine, so by peremptory necessity it becomes in this court a complete and perfect crime under the Constitution, which must require his removal from office, and that anything beyond the intent that the papers should accomplish what they tend to accomplish is not the subject of inquiry here. Well, it is the subject of imputation in the articles; it is the subject of the imputation in the arguments; it is the subject, and the only subject, that gives gravity to this trial, that there was a purpose of injury to the public interest and to the public safety in this proceeding.

Now, we seek to put this prosecution in its proper place on this point, and to show that our intent was no violence, no interruption of the public service, no seizure of the military appropriations, nothing but the purpose by this movement either to procure Mr. Stanton's retirement, as was desired, or to have the necessary footing for judicial proceedings. If this evidence is excluded, then, when you come to them summing up of this cause, you must take the crime of the dimensions and of the completeness that is here avowed, and I shall be entitled before this court and before this country to treat this accusation as if the article had read that he issued that order for Mr. Stanton's retirement, and that direction to General Thomas to take charge ad interim, with the intent and purpose of raising a case for the decision of the Supreme Court of the United States between the Constitution and the act of Congress; and if such an article had been produced by the House of Representatives and submitted to the Senate it would have been a laughingstock of the whole country.

The gentlemen shall not make their arguments and escape from them at the same breath. I offer this evidence to prove that the whole purpose and intent of the President of the United States in his action in reference to the occupancy of the office of Secretary of War had this extent and no more—to obtain a peaceable delivery of that trust from one holding it at pleasure to the Chief Executive, or, in the absence of that peaceable retirement, to have a case for the decision of the Supreme Court of the United States; and if the evidence is excluded you must treat every one of these articles as if the intent were limited to an open averment in the articles themselves that the intent of the President was such as I propose to prove it.

At the conclusion of the arguments, the Chief Justice [1] said:

Senators, the counsel for the President offer to prove that the witness, Mr. Cox, was employed professionally by the President in the presence of General Thomas to take such legal proceedings in the case that had been commenced against General Thomas as would be effectual to raise judicially the question of Mr. Stanton's legal right to continue to hold the office of Secretary for the Department of War against the authority of the President, and also in reference to obtaining a writ of quo warranto for the same purpose, and they state that they expect to follow up this proof by evidence of what was done by the witness in pursuance of the above employment. The first article of impeachment, which may, perhaps, for this purpose, be taken as a sample of the rest relating to the same subject, after charging that "Andrew Johnson, President of the United States," in violation of the Constitution and laws, issued the order which has been so frequently read for the removal of Mr. Stanton, proceeds:

"Which order was unlawfully issued with intent then and there to violate the act entitled 'An act regulating the tenure of certain civil offices,'" etc.

The article charges, first, that the act was done unlawfully, and then it charges that it was done with intent to accomplish a certain result. That intent the President denies, and it is to establish that denial by proof that the Chief Justice understands this evidence now to be offered. It is evidence of an

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

attempt to employ counsel by the President in the presence of General Thomas. It is the evidence so far of a fact; and it may be evidence also of declarations connected with that fact. This fact and these declarations, which the Chief Justice understands to be in the nature of facts, he thinks are admissible in evidence. The Senate has already, upon a former occasion, decided by a solemn vote that evidence of the declarations by the President to General Thomas and by General Thomas to the President, after this order was sent to Mr. Stanton, were admissible in evidence. It has also admitted evidence of the same effect, on the 22d, offered by the honorable managers. It seems to me that the evidence now offered comes within the principle of those decisions; and, as the Chief Justice has already had occasion to say, he thinks that the principle of those decisions is right, and that they are decisions which are proper to be made by the Senate sitting in its high capacity as a court of impeachment, and composed, as it is, of lawyers and gentlemen thoroughly acquainted with the business transactions of life and entirely competent to judge of the weight of any evidence which may be submitted. He therefore holds the evidence to be admissible, but will submit the question to the Senate, if desired.

Mr. Charles D. Drake, of Missouri, having asked for a vote, on the question "shall the proof offered be admitted?" there appeared yeas 29, nays 21. So the proof was admitted.

The witness then testified as to directions which he received from the President to institute legal proceedings to test General Thomas's right to the office of Secretary of War.

Mr. Curtis, of counsel for the respondent, then asked:

What did you do toward getting out a writ of habeas corpus under the employment of the President?

Mr. Manager Butler having objected, the question was referred to the Senate and decided to be admissible; yeas 27, nays 23.[1]

The witness proceeded to describe his efforts in court, saying finally:

But the counsel who represented the Government, Messrs. Carpenter and Riddle, applied to the judge then for a postponement of the examination——

Mr. Manager Butler having questioned this statement, the Chief Justice said:[2]

It is an account of the general transaction, as the Chief Justice conceives, and comes within the rule. The witness will proceed.

The witness, having related how General Thomas was discharged from court, proceeded:

Immediately after that I went, in company with the counsel whom he had employed, Mr. Merrick, to the President's House, and reported our proceedings and the result to the President. He then urged us to proceed——

Here Mr. Manager Butler interposed an objection, and Mr. Manager John A. Bingham called attention to the fact that this was asking for the President's declarations on February 26, two days after his impeachment.

Mr. Evarts, of counsel for the respondent, explained:

If it is to turn on that point, which has not been discussed in immediate reference to this question, we desire to be heard. The offer which the Chief Justice and Senators will remember was read, and upon which the vote of the Senate was taken for admission, included the efforts to have a habeas corpus proceeding taken, and also the efforts to have a quo warranto. The reasons why, and the time at which, and the circumstances under which, the habeas corpus effort was made, and its termination, have been given. Thereupon the efforts were attempted at the quo warranto. It is in reference to that that the President gave these instructions. We suppose it is covered by the ruling already made.

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[1] Globe supplement, p. 201; Senate Journal, p. 904.

[2] Globe supplement, p. 202.

The Chief Justice said: [1]

The Chief Justice may have misapprehended the intention of the Senate; but he understands their ruling to be in substance this: That acts in respect to the attempt and intention of the President to obtain a legal decision, commencing on the 22d of February, may be pursued to the legitimate termination of that particular transaction; and, therefore, the Senate has ruled that Mr. Cox, the witness, may go on and testify until that particular transaction came to a close. Now, the offer is to prove conversations with the President after the termination of that effort in the supreme court of the District of Columbia. The Chief Justice does not think that is within the intent of the previous ruling; but he will submit the question to the Senate, Senators, you who are of the opinion that this testimony should be received will please say "aye;" those of the contrary opinion, "no." [Putting the question.] The question is determined in the negative. The evidence is not received.

Thereupon Mr. Curtis propounded this question:

After you had reported to the President the result of your efforts to obtain a writ of habeas corpus, did you do any act in pursuance of the original instructions you had received from the President on Saturday, to test the right of Mr. Stanton to continue in the office? And if so, state what the acts were.

The Chief Justice at once intimated that under the last vote of the Senate this question was inadmissible; but Mr. John Sherman, a Senator from Ohio, asked that the fifth article of impeachment be read:

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, and on divers other days and times in said year, before the 2d day of March, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, to prevent and hinder the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in pursuance of said conspiracy did unlawfully attempt to prevent Edwin M. Stanton, then and there being Secretary for the Department of War, duly appointed and commissioned under the laws of the United States from holding said office, whereby the said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

Counsel for the respondent stated that the question had reference to this article.

The Chief Justice, having had the original offer of proof on the part of counsel for respondent read, said:

The discussion and the ruling of the Chief Justice in respect to that question was in reference to the first article of the impeachment. Nothing had been said about the fifth article in the discussion, so far as the Chief Justice recollects. The question is now asked with reference to the fifth article and the intent alleged in that article to conspire. The Chief Justice thinks it is admissible with that view under the ruling upon the first offer. He will, however, put the question to the Senate if any Senator desires it.

Mr. John Conness, a Senator from California, having asked for a vote, there appeared in favor of admitting the question 27 yeas, and against it 23 nays.[2] So the question was admitted.

2247. The Chief Justice admitted during the Johnson trial as showing intent a question as to action by the respondent, although taken after impeachment.—On April 16, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Richard T. Merrick, attor-

[1] Senate Journal, p. 904; Globe supplement, p. 202.

[2] Senate Journal, pp. 904, 905; Globe supplement, pp. 202, 203.

[3] Second session Fortieth Congress, Senate Journal, p. 905; Globe supplement, p. 205.

ney at law, was called as a witness on behalf of the respondent. Witness testified that he had been counsel for Gen. Lorenzo Thomas when the latter was arrested on complaint of Edwin M. Stanton, Secretary of War, at the time of the President's attempt to remove Mr. Stanton and place General Thomas in the office; and that after the action of the chief justice of the supreme court of the District in discharging General Thomas, he saw the President and communicated to him what had transpired.

Then Mr. Benjamin R. Curtis, of counsel for the respondent, proposed a question which, after objection, was presented in an offer of proof:

We offer to prove that about the hour of 12 noon, on the 22d of February, upon the fast communication to the President of the situation of General Thomas's case, the President or the Attorney-General in his presence gave the attorneys certain directions as to obtaining a writ of habeas corpus for the purpose of testing judicially the right of Mr. Stanton to continue to hold the office of Secretary of War against the authority of the President.

Mr. Manager Benjamin F. Butler objected that the witness had been General Thomas's counsel and had not been employed by the President. Therefore this witness's testimony could not be considered evidence of the President's acts or declarations after impeachment.

The Chief Justice [1] said:

The Chief Justice thinks this evidence admissible within the rule already determined by the Senate. He will submit the question to the Senate if any Senator desires it. [After a pause.] The witness may answer the question.

Mr. Curtis then proposed this question:

What, if anything, did you and Mr. Cox do in reference to accomplishing the result you have spoken of?

Mr. Manager Butler having objected, the Chief Justice said:

The Chief Justice thinks it is competent, but he will put the question to the Senate if any Senator desires it. [After a pause, to the witness.] Answer the question.

2248. In impeachment trials witnesses are ordinarily required to state facts, not opinions.

In the Johnson trial a witness was not permitted, as a matter of proof of intent, to state that he had formed and communicated an opinion to respondent.

On February 11, 1805,[2] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, and while one Henry Tilghman was under examination, Mr. John Randolph, jr., of Virginia, one of the managers on behalf of the House of Representatives, proposed this question:

You say that when the written opinion of the court was thrown on the table, it produced considerable agitation among the gentlemen of the bar. What did you conceive to be the cause of that agitation?

Mr. Philip B. Key, counsel for the respondent, objected.

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

[2] Second session Eighth Congress, Senate Impeachment Journal, p. 518; Annals, p. 180.

The President[1] having required the question to be reduced to writing it was read by the Secretary.

Thereupon Mr. James A. Bayard, of Delaware, a Senator, moved that the Senate should withdraw. This motion was then disagreed to.

The question was then put: "Is it competent for the managers to put the said question to the witness?"

It was determined in the negative, yeas 0, nays 34.

2249. On February 12, 1805,[2] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, George Hay, being under examination, the following occurred:

The WITNESS. Finding that the judge had made up his mind on that subject, and that the law of Virginia was not considered as obligatory, I had no idea of making any motion to the court founded on the doctrine which he had thus denounced. My opinion before, at that time, and at the present time, the opinion which I expressed officially on a late occasion, is, that where the laws of the United States do not otherwise require or provide——

Mr. Luther Martin, counsel for the respondent, said that he apprehended this testimony was of no kind of consequence.

The WITNESS. I was only about to state the reasons why nothing more was said on that subject, or a motion founded on it.

The PRESIDENT.[3] The Senate object to that sort of testimony. You will please to confine yourself as much as possible to facts.

2250. On April 13, 1868,[4] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was called as a witness on behalf of the President, and Mr. Henry Stanbery, of counsel for the President, asked this question:

After the restoration of Mr. Stanton to office, did you form an opinion whether the good of the service required a Secretary of War other than Mr. Stanton; and if so, did you communicate that opinion to the President?

Mr. Manager John A. Bingham at once objected to the question:

Mr. President and Senators, we desire to state very briefly to the Senate the ground upon which we object to this question. It is that matters of opinion are never admissible in judicial proceedings, but in certain exceptional cases, cases involving professional skill, etc.; it is not necessary that I should enumerate them. It is not to be supposed for a moment that there is a Member of the Senate who can entertain the opinion that a question of the kind now presented is competent under any possible circumstances in any tribunal of justice. It must occur to Senators that the ordinary tests of truth can not be applied to it at all; and in saying that, my remark has no relation at all to the truthfulness or veracity of the witness. There is nothing upon which the Senate could pronounce any judgment whatever. Are they to decide a question upon the opinions of forty or forty thousand men what might be for the good of the service? The question involved here is a violation of the laws of the land. It is a question of fact that is to be dealt with by witnesses; and it is a question of law and fact that is to be dealt with by the Senate.

Now, this matter of opinion may just as well be extended one step further, if it is to be allowed at all. After giving his opinion of what might be requisite to the public service, the next thing in order

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

[2] Second session Eighth Congress, Annals, p. 204.

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

[4] Second session Fortieth Congress, Senate Journal, p. 892; Globe Supplement, pp. 163–166.

would be the witness's opinion as to the obligations of the law, the restrictions of the law, the prohibitions of the law. We can not suppose that the Senate will entertain such a question for a moment. It must occur to the Senate that by adopting such a rule as this it is impossible to see the limit of the inquiry or the end of the investigation. If it be competent for this witness to deliver this opinion, it is equally competent for forty thousand other men in this country to deliver their opinions to the Senate; and then, when is the inquiry to end? We object to it as utterly incompetent.

Mr. Stanbery explained the object of the question:

Mr. Chief Justice and Senators, if ever there was a case involving a question of intention, a question of conduct, a question as to acts which might be criminal or might be indifferent according to the intent of the party who committed them, this is one of that class. It is upon that question of intent (which the gentlemen know is vital to their case, which they know as well as we know they must make out by some proof or other) that a great deal of their testimony has been offered, whether successfully or not I leave the Senate to determine; but with that view much of their testimony has been offered and has been insisted upon. That is, it has been to show with what intent did the President remove Mr. Stanton. They say the intent was against the public good, in the way of usurpation, to get possession of that War Office and drive out a meritorious officer, and put a tool, or as they say in one of their statements a slave, in his place.

Upon that question of conduct, Senators, what now do we propose to offer to you? That the second officer of the Army—and we do not propose to stop with him—that this high officer of the Army, seeing the complication and difficulty in which that office was, by the restoration of Mr. Stanton to it, formed the opinion himself that for the good of the service Mr. Stanton ought to go out and some one else take the place. Who could be a better judge of the good of the service than the distinguished officer who is now about to speak?

But the gentlemen say what are his opinions more than another man's opinions, if they are merely given as abstract opinions? We do not intend to use them as abstract opinions. The gentlemen did not read the whole question. It is not merely what opinion had you, General Sherman; but having formed that opinion, did you communicate it to the President, that the good of the service required Mr. Stanton to leave that Department; and that in your judgment, acting for the good of the service, some other man ought to be there.

This is no declaration of the President we are upon now. This is a communication made to him to regulate his conduct, to justify him, indeed to call upon him to look to the good of the service, and to be rid, if possible, in some way of that unpleasant complication. Anyone can see there was a complication there that must in some way or other be got rid of; for look at what the managers have put in evidence!

During the arguments Mr. Roscoe Conkling, a Senator from New York, submitted in writing this question:

Question. Do the counsel for the respondent offer at this point to show by the witness that he advised the President to remove Mr. Stanton in the manner adopted by the President, or merely that he advised the President to nominate for the action of the Senate some person other than Mr. Stanton?

Mr. Stanbery replied that counsel for the President did not propose either, but proposed to show that General Sherman gave his opinion for the good of the service, and for that good thought that somebody else ought to be in the office.

The question being submitted to the Senate, "Is the question admissible?" there appeared yeas 15, nays 35. So the question was excluded.

2251. On July 10, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, testified that he had communicated to the Military

[1] First session Forty-fourth Congress, Record of trial, pp. 229, 230.

Affairs Committee of the House of Representatives certain facts in regard to the post tradership at Fort Sill. Thereupon Mr. Manager John A. McMahon asked:

There has been a criticism made upon your communicating this matter to the Military Committee instead of communicatmg it through the regular channels to the Secretary of War. State your views of that question.

Mr. Matt. H. Carpenter, of counsel for the respondent, objected, on the ground that it might swear away an argument of the defense; but when the managers stated that a similar question had been put to another witness by Mr. Carpenter and admitted by the court the objection was withdrawn.

Thereupon Mr. George F. Edmunds, a Senator from Vermont, said:

I object to that question myself, if counsel do not. I do not think the time of the court ought to be wasted with that sort of evidence.

Thereupon Mr. Manager McMahon withdrew the question.

2252. It was decided in the Belknap trial that a question to a witness might not be so framed that the answer might imply an opinion.

Instance wherein a President pro tempore ruled on evidence during an impeachment trial.

On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was examined by Mr. Matt. H. Carpenter, of counsel for the respondent, who asked this question:

Was there any corrupt agreement or any agreement between you and Mr. Belknap in regard to being appointed post trader at Fort Sill?

Mr. Manager John A. McMahon said:

We object to the word "corrupt." Say "any agreement." I think by using the word "corrupt" you are asking an opinion of the witness. The objection we make is that the question calls for an opinion as to the character of the agreement instead of calling for the agreement itself.

The President pro tempore[2] said:

The Chair sustains the objection.

2253. In the Swayne trial the opinions of witnesses, including answers to questions of mixed law and facts, were excluded.—On February 11, 1905, in[3] the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, A. H. D'Alemberte, was under examination, when Mr. Manager James B. Perkins, of New York, asked this question:

I ask the witness if Judge Swayne, to his knowledge, was in 1900 to 1903 a resident of the county of which he was collector and in which Pensacola is situated?

Mr. Anthony Higgins, of counsel for respondent, objected, saying:

It is a question of law. We have no objection to the witness stating, but desire to have him state, every fact he knows about the movements or the residence of Judge Swayne, or where he actually or bodily was, but to ask a mere conclusion of law is, we think, improper.

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[1] First session Forty-fourth Congress, Record of trial, p. 236.

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

[3] Third session Fifty-eighth Congress, Record, p. 2394.

The Presiding Officer [1] said:

The question is, Was the respondent, to the witness's knowledge, a resident of Pensacola? The witness may answer the question.

The WITNESS. To my knowledge, he was not.

Q. (By Mr. Manager PERKINS). Was Judge Swayne a resident of Pensacola during that time?

Mr. John M. Thurston, of counsel for the respondent, objected, saying:

Mr. President, we are not objecting to their asking this witness whether or not in any particular year, month, week, or day Judge Swayne was in Pensacola. That would be a proper question. It would ask for a fact. But they are asking for a conclusion which can only result from the consideration of many facts related to the law.

The Presiding Officer said:

The witness is asked really for his opinion whether Judge Swayne was a resident at a certain place. If this witness can be so asked, any number of witnesses can be asked the question, and the decision of it would then depend upon the opinion of witnesses.

The question of residence is one of mixed law and fact, and must be determined, as the Presiding Officer thinks, by the Senate upon the proved circumstances and facts of the case and not upon the opinion of witnesses resident in that part of the country. So the question is excluded.

2254. On February 21, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, William A. Blount, was under examination by Mr. John M. Thurston, of counsel for the respondent, when this question was propounded by Mr. Charles A. Culberson, a Senator from Texas:

Q. What was the manner of Judge Swayne as to anger or resentment in imposing sentence in the contempt proceedings?—A. That depends entirely upon the viewpoint of the man who was listening to him. I believed that he was right. It seemed to me——

Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, I object to that. It is not an answer to the question. The witness is giving an opinion.

The Presiding Officer [1] said:

The witness may state how he regarded the appearance of the judge in imposing this sentence.
* * *

The Presiding Officer was about to say that he did not think the witness should make any comment in answering any question as to whether he thought the judge was right or not.

2255. On February 22, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness for the respondent, Thomas F. McGowin, was examined by Mr. John M. Thurston, of counsel for the respondent:

Q. You heard all that was said?—A. I did; all that the judge said.

Q. Yes; all that the judge said. What was the general appearance of Judge Swayne in the delivery of these remarks?—A. As I recall it, I thought the judge spoke with a little more than ordinary deliberation and calmness and firmness, and the impression that was created on my mind was that——

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

Mr. President, I object to the impression created on the witness's mind. What he is entitled to testify to are facts that occurred there at that time.

The Presiding Officer [1] said:

Let the last phrase be stricken out. The witness can not testify to the impression made on his mind.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, p. 2985.

[3] Third session Fifty-eighth Congress, Record, p. 3049.

2256. In the Belknap trial objection was successfully made to an opinion of a subordinate officer as to evidence of the character of respondent's administration.—On July 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Nelson H. Davis, Inspector General of the Army, was examined as a witness on behalf of the respondent, and Mr. Matt. H. Carpenter, of counsel for the respondent, having ascertained that witness had been in the Army during respondent's entire administration and had been holding constant official relations with him, asked:

From all you know of the subject, and from all you know of General Belknap, I ask you what has been the general character of his administration of the War Department?

Mr. Manager George A. Jenks at once objected:

The objection I make to that is that a witness must testify to character instead of to the specific acts of this man, or general acts. He must know what has been said by those who are familiar with his administration in that office, instead of how has he done the business.

Mr. Manager George F. Hoar said:

We understand also that it should be the opposite of the particular offense charged. If a man is charged with adultery, his reputation for chastity; if he is charged with perjury, his reputation for veracity. We suppose the question should be, "What is the reputation of the Secretary for official integrity?" * * * We do not understand that it is competent to prove by a subordinate officer in the Army, as an expert, the general character of the administration of a great officer of state. There is no such thing as an expert in such an administration. We object to the question unless it is limited to the reputation of the Secretary for official integrity.

Mr. Carpenter said:

We shall claim when we come to sum up this case that the general management of the War Department by General Belknap is a proper subject of consideration; that if they could establish this particular charge we could still prove the general management and official conduct of the Department, and then appeal to the Senate upon the whole record of the administration of that office whether this man shall be driven out into a little corner of his life or whether his whole conduct in the office is to be considered.

The Senate, without division, decided that the question should be admitted.

2257. A witness was permitted in the Belknap trial to give in answer a conclusion derived from a series of facts.—On July 10, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was examined by the managers and testified as to payments of money to the respondent from remittances received from one Evans, who had been appointed post trader at Fort Sill through witness's efforts in collusion with respondent. The witness had testified to sending remittances to respondent by express, when Mr. Manager John A. McMahon asked:

Did General Belknap know where these moneys came from that you were sending to him?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected, saying:

I object to that question. That calls for a conclusion, not for a fact. * * * A conclusion may be drawn from a correspondence running through years, and a dozen conversations; but it is a conclusion always. If you ask him what he told General Belknap, or what Belknap ever said to him, that calls for a fact; but to ask him whether he must have known such a thing calls for conclusion.

The question being submitted to the Senate, it was held, without division, to be admissible.

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[1] First session Forty-fourth Congress, Senate Journal, p. 977; Record of trial, p. 261.

[2] First session Forty-fourth Congress, Journal, p. 969; Record of trial, p. 226.

2258. In the Johnson trial the Senate sustained the Chief Justice in admitting as evidence of a general practice tabular statements of documents relating to particular instances.—On April 15, 1868,[1] 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, offered in evidence certain certified documents from the Navy Department, being in the nature of tabular statements of the results shown by the records as to appointments and removals of officers. Mr. Curtis described what was offered as follows:

The documents I offer are not full copies of any record. They are, therefore, not strictly and technically legal evidence for any purpose. They are extracts of facts from those records. Allow me, by way of illustration, to read one, so that the Senate may see the nature of the document:

"NAVY AGENCY AT NEW YORK.

"1864, June 20. Isaac Henderson was, by direction of the President, removed from the office of navy agent at New York, and instructed to transfer to Paymaster John D. Gibson, of United States Navy, all the public funds and other property in his charge."

We do not offer that as technically legal evidence of the fact that is there stated; but having in view simply to prove, not the case of Mr. Henderson, with its merits and the causes of his removal, etc., all of which would appear on the records, but the practice of the Government under the laws of the United States; instead of taking from the records the entire documents necessary to exhibit his whole case, we have taken the only fact which is of any importance in reference to this inquiry. If the Senate consider that they must apply the technical rule of evidence, we must get the records and have the records copied, and of course, for the same reason, readmitted.

There was objection on the part of the managers, but after argument the Chief Justice[2] said:

The counsel for the President propose to offer in evidence two documents from the Navy Department, exhibiting the practice which has existed in that Department in respect to removals from office. To the introduction of this evidence the honorable managers object. The Chief Justice think that the evidence is competent in substance, but that the question of form is entirely subject to the discretion of the Senate and of the Senate alone. The whole question, therefore, is submitted to the Senate. Senators, you who are of opinion that this evidence should be received will, as your names are called, answer "yea;" those of the contrary opinion, "nay."

And there appeared yeas 36, nays 15. So the document was admitted.

2259. A summary by counsel of the contents of documents was held to be in the nature of argument and not admissible as evidence.—On February 23, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the presentation of evidence, offered certificates from certain clerks of United States circuit courts, showing the dates at which the respondent had held court.

Then Mr. Thurston said:

For the convenience of the court and notification to the managers as to what we claim these certificates show, I will ask to have printed in the Record a list compiled by us from the certificates showing the various dates in a brief and concise form in the nature of a calendar, and also showing our computations of the number of days covered by them.

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[1] Second session Fortieth Congress, Senate Journal, pp. 899, 900; Globe supplement, pp. 183–186.

[2] Salmon P. Chase, Chief Justice.

[3] Third session Fifty-eighth Congress, Record, p. 3163.

Mr. Manager Henry W. Palmer, of Pennsylvania, objected, saying:

Mr. President I submit that the certificates when printed will show what they contain, and their computation is what we object to.

The Presiding Officer [1] said:

That is a part of the argument, and the Presiding Officer thinks should be withheld until the argument is commenced.

2260. In impeachment trials public documents are admitted in evidence for what they may be worth.

Ruling by the Vice-President as to evidence in an impeachment trial.

On February 15, 1805,[2] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, Mr. Joseph Hopkinson, counsel for the respondent, offered in evidence a certificate of the clerk of the circuit court of Pennsylvania, to show that at the trial of Fries, in 1799, there were eighty-six civil suits depending.

Also a copy of the indictment on the first trial of Fries.

Also a part of a charge delivered by Judge Iredell at the term when Fries was tried, taken from Carpenter's report of that trial, page 14.

Mr. George W. Campbell, of Tennessee, one of the managers, intimating some objection to receiving this paper in evidence,

The President [3] said it might be read as a report of the case; but what credit it would deserve it would be for the court to determine.

2261. On January 11, 1831,[4] in the high court of impeachments during the trial of the cause of The United States *v.* James H. Peck, the counsel for the respondent introduced as a witness Samuel D. King, a clerk in the General Land Office, to prove certain official records of that office relating to land grants in the Province of Louisiana.

The respondent was on trial for unlawfully oppressing Luke E. Lawless, whom he had imprisoned for contempt in criticizing in the public prints the action of respondent as judge in a case relating to a land grant.

Mr. James Buchanan, of Pennsylvania, chairman of the managers for the House of Representatives, objected to the introduction of the documents, alleging that they referred to land grants in a portion of the territory different from that in which the case in question had arisen, and that they did not show the practice in upper Louisiana, which was the region to which the pending trial related.

Mr. Jonathan Meredith, counsel for the respondent, said:

We produce it as a public document from the proper repository. It purports to be a genuine document, and it shows, as we shall contend, that the same regulations applied to the whole province.

On the question, "Shall these documents be given in evidence?" there appeared yeas 40, nays 0.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Second session Eighth Congress, Annals, p. 243.

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

[4] Second session Twenty-first Congress, Senate Impeachment Journal, p. 334; Report of trial of James H. Peck, pp. 274, 275.

2262. In the Johnson trial a message of President Buchanan, published as a Senate document, was admitted in evidence.—On April 15, 1868,[1] 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, offered, with a view of showing the practice of the Government with reference to appointments to and removals from office, a message of President Buchanan, from the published Executive documents of the Senate.

Mr. Manager Benjamin F. Butler objected:

> The difficulty that I find with this message, Senators, is, that it is the message of Mr. Buchanan, and can not be put in evidence any more than the declaration of anybody else. We should like to have Mr. Buchanan brought here under oath, and to cross-examine him as to this.

The question being taken, the Senate decided, without division, that the evidence should be admitted.

2263. In the Johnson trial the managers were not required, in submitting a letter of respondent, to also submit accompanying but not necessarily pertinent documents.—On April 2, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager James F. Wilson, of Iowa, offered in evidence a certain letter of President Johnson to Gen. U. S. Grant, wherein were two portions referring to accompanying documents:

> GENERAL: The extraordinary character of your letter of the 3d instant would seem to preclude any reply on my part; but the manner in which publicity has been given to the correspondence of which that letter forms a part and the grave questions which are involved induce me to take this mode of giving, as a proper sequel to the communications which have passed between us, the statements of the five members of the Cabinet who were present on the occasion of our conversation on the 14th ultimo. Copies of the letters which they have addressed to me upon the subject are accordingly herewith enclosed.
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> * * * * * * *
>
> There were five Cabinet officers present at the conversation, the detail of which, in my letter of the 28th ultimo, you allow yourself to say, contains "many and gross misrepresentations." These gentlemen heard that conversation and have read my statement. They speak for themselves, and I leave the proof without a word of comment.

Mr. Wilson stated in introducing the letter that the special object of the managers in introducing it was to show the President's own declaration of an intent to prevent the Secretary of War, Mr. Stanton, from resuming the duties of the office, notwithstanding the action of the Senate and the requirements of the tenure of office bill.

Mr. Henry Stanbery, of counsel for the President, entered an objection which was, by direction of the Chief Justice, reduced to writing, as follows:

> The counsel for the President object that the letter is not in evidence in the case unless the honorable managers shall also read the enclosures therein referred to and by the letter made part of the same.

In support of the objection, Mr. Stanbery argued:

> The managers read a letter from the President to use against him certain statements that are made in it, and perhaps the whole; we do not know the object. They say the object is to prove a certain intent with regard to the exclusion of Mr. Stanton from office. In the letter the President refers to

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[1] Second session Fortieth Congress, Senate Journal, p. 900; Globe supplement, p. 191.

[2] Second session Fortieth Congress, Senate Journal, pp. 874, 875; Globe supplement, pp. 80–83.

certain documents which are inclosed in it as throwing light upon the question and explaining his own views. Now, I put it to honorable Senators: Suppose he had copied these letters in the body of his letter, and had said just as he says here, "I refer you to these; these are part of my communication," could any one doubt that these copies, although they come from other persons, would be admissible? He makes them his own. He chooses to use them as explanatory of his letter. He is not willing to let that letter go alone; he sends along with it certain explanatory matter. Now, you must admit, if he had taken the trouble to copy them himself in the body of his letter, they must be read. Suppose he attaches them, makes them a part, calls them "exhibits," affixes them, attaches them to the letter itself by tape or seal or otherwise, must they not be read as part of the communication, as the very matter which he has introduced as explanatory, without which he is not willing to send that letter? Undoubtedly. Does the form of the thing alter it? Is he not careful to send the documents not in a separate package, not in another communication, but inclosed in the letter itself, so that when the letter is read the documents must be read? It seems to me there can not be a question but that they must read the whole and not merely the letter; for it was the whole that the President sent to be read to give his views, and not merely the letter unconnected with these documents.

Mr. Manager John A. Bingham argued against the objection:

We claim that we are under no obligation by any rule of evidence whatever, in introducing a written statement of the accused, to give in evidence the statements of third persons referred to generally by him in that written statement. In the first place, their statements, we say, would not be evidence against the President at all. They would be hearsay. They would not be the best evidence of what the parties affirmed. The matter contained in the letter of the President shows that the papers, without producing them here, have relation to a question of fact between himself and General Grant, which question of fact, so far as the President is concerned, is affirmed in this letter by himself and for himself, and concludes him; and we insist that if forty members of his Cabinet were to write otherwise it could not affect this question. It concludes him; it is his own declaration , and the matter of dispute between himself and General Grant, although it is referred to in this letter, is no part of the matter upon which we rely in this accusation against the President.

Mr. Bingham admitted that if the letters referred to contained a statement relating to the matter with which they charged the President, and if the letter now sought to be introduced showed a statement from them adopted by the President himself in regard to the matter, the objection of respondent's counsel would be well taken.

The question was taken, "Shall the objection of the counsel by the President to the evidence proposed to be offered be sustained?" and there appeared yeas 20, nays 29.

So the objection was overruled and the letter was admitted as presented.

2264. Instance in the Swayne case wherein a witness was permitted to testify as to the nature of a document which was on record in the trial.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 23, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Charles A. Culberson, a Senator from Texas, submitted a series of questions to a witness for the respondent, W. A. Blount:

Q. Were you counsel for O'Neal in the contempt proceedings against him before Judge Swayne?—A. I was.

Q. Did you raise a question of jurisdiction of the court in those proceedings? If so, please state such question fully and how it was raised.—A. I raised the question by a demurrer.

[1] Third session Fifty-eighth Congress, Record, p. 3147.

Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, while ordinarily we would have no objection to the answer which we anticipate, yet the O'Neal case is all here of record, and objection was made yesterday to our asking the witness Greenhut as to the injury he received and which was exhibited in court at the time of that trial. The objection was based upon the fact that the complete record being here we could not go outside of it. Therefore in return I make the same objection that the record of the O'Neal case shows every proceeding that was had therein, including any objection that may have been taken to the jurisdiction.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, said:

Before that is done, may I make a suggestion? This is a very different matter from the testimony which was sought to be brought out by Greenhut. There the attempt was to prove by him the extent of his injuries in a street combat, with no evidence that the facts as to which he was to testify had been before the court. Our objection was not because of the fact that it was in the record, but that it was proposed to prove something as in excuse for the judge which had not been before him at the trial of the case, while here this witness is asked to testify to what occurred at the trial of the contempt case.

The Presiding Officer, said:

Shall the witness answer the question? [Putting the question.] In the opinion of the Presiding Officer the ayes have it. [A pause.] The ayes have it, and the witness will answer.

2265. Instance in the Swayne trial wherein, with the concurrence of counsel, the managers introduced without oral testimony a certified copy of a court record.

In the Swayne trial, evidently by written stipulation between managers and counsel, certified copies of records were used in the same way as the original might have been used.

On February 14, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Samuel L. Powers, of Massachusetts, said:

I offer in evidence, Mr. President, a certified copy of the court record in what is known as the "O'Neal case." This record is made up of what is known as the complaint upon which the order of attachment in this contempt case was issued, and also a demurrer to the original complaint, which appears to have been disposed of, and also the affidavit of the respondent, which is an answer to the complaint, together with other documents, showing the disposition of that case.

It has been agreed between counsel for the respondent and the managers that this record may go into evidence without being read before the court. It is very long and would occupy possibly an entire session if it were read. But I assume, Mr. President, in order to have it go into evidence without being read, it is necessary that we should have the permission of the court to do so. So I tender this record with the request that it become a part of the evidence in this case and be printed as such without first being read to the court.

After the presentation of the affidavits, Mr. Augustus O. Bacon, a Senator from Georgia, said:

Mr. President, before the manager proceeds, as he says he will call only one witness, I desire to know whether the affidavits and such other matters as were included in these answers are offered and accepted as evidence without testimony being given from the stand? I simply wish the information.

Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, there is no objection on the part of the respondent.

I will state, Mr. President, in respect to that matter, that this is the first trial in this court that I am aware of where a stenographic record of what occurred in another court has been presented here.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, pp. 2540, 2551.

In the Peck case, seventy-five years ago, the testimony of what occurred in Judge Peck's court was entirely dependent upon the oral testimony of the witnesses who were present at that trial. It has seemed to counsel for the respondent that they were fortunate in the O'Neal case that a stenographic record had been made and preserved, and that it could be presented here, so that this court would know precisely what had occurred there.

I think therefore it is better that it should go in in that form, even though without the sanction of an oath in this tribunal.

2266. On February 21, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness on behalf of the respondent, was under examination by Mr. John M. Thurston, of counsel for the respondent, when these questions were asked:

Q. Of the original contempt charge. I ask, you now directly as to the other defendant in it, Mr. Paquet.—A. Judge Paquet first appeared in answer to the citation with counsel, and objected to the proceeding upon the ground that Judge Swayne did not have jurisdiction, as the transaction in which counsel were engaged was not an official transaction of an officer of the court. Judge Swayne overruled that contention, and Judge Paquet asked for time in which to make an answer. Thereupon he sued out a writ of prohibition from the circuit court of appeals, which was heard before that court and denied, and then he appeared in the circuit court before Judge Swayne and filed a paper, which was an apology and a purging of the contempt, as I understood, though the paper speaks for itself.

Q. (By Mr. Thurston.) What followed that?—A. Thereupon he was discharged without punishment.

Mr. Thurston then said:

We offer in evidence a certified transcript of that portion of the record in the case, merely asking to have read the paper in which Judge Paquet confessed and purged himself of contempt.

This certified transcript was as follows:

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF FLORIDA, AT PENSACOLA—IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST LOUIS P. PAQUET.

Now comes Louis P. Paquet, respondent in the above-entitled matter, and says:

That upon full and mature consideration of his actions and conduct in the matter referred to in the motion, made as the basis of the above-entitled proceedings, through excessive zeal in behalf of his clients, he did so act that this honorable court was justified in believing that the said actions were committed in contempt thereof and as showing disrespect therefor. That respondent regrets exceedingly the course taken by him in this matter, and now appears in court and requests that he be permitted to apologize for his behavior and file with the records in the above-entitled cause this paper.

LOUIS P. PAQUET, *Respondent.*

Filed March 31, 1902.

F. W. MARSH, *Clerk.*

IN THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF FLORIDA—THE UNITED STATES *v.* LOUIS P. PAQUET.

This cause coming on to be heard, on the application of Louis P. Paquet to withdraw his answer in the above-entitled cause, and the submission of his explanation and apology by the said defendant—

It is now ordered that the said defendant do have leave to withdraw his answer heretofore filed and to subtract the same from the files of this court, and that this court do accept the said apology and statement filed on March 31, 1902, and the said defendant is hereby discharged from the rule to show cause, heretofore granted against him.

Done this April 1, A. D. 1902.

CHAS. SWAYNE, *Judge.*

(Endorsement: United States *v.* Louis P. Paquet. Order. Filed April 2, 1902. F. W. Marsh, clerk.)

[1] Third session Fifty-eighth Congress, Record, pp. 2983, 2984.

UNITED STATES OF AMERICA, *Northern District of Florida:*

I, F. W. Marsh, clerk of the district court of the United States for the northern district of Florida, hereby certify that the foregoing is a true and correct copy of an original paper or document filed in the cause therein specified in said court on the day therein set forth, as the same remains of record and on file in said court.

Witness my hand and the seal of said court at the city of Pensacola, in said district, this 3d day of February, A. D. 1905.

[Seal.]

F. W. MARSH, *Clerk.*

Mr. Manager Henry W. Pahner, of Pennsylvania, said:

We object to that paper. It has never appeared in evidence in this case. The original has never been seen, and whether any such paper exists we do not know. We object to this extract from the minority report, because it was never in the case. * * * The first place where that paper ever appeared is in the minority report. It has never been seen by anybody except perhaps the people who made the minority report. I say it was never offered in evidence in any place, I should like to see the original, if you have it.

Mr. Thurston replied:

This is certified to by the clerk of the court as being a part of the record, and I think, if you will permit me, I have in my pocket the stipulation with the managers that certified copies of records may be produced and used in evidence in the same manner that the original documents could be.

The Presiding Officer [1] said:

The Presiding Officer thinks an official copy of the proceedings in court is proper evidence; and as to the other question, whether this is evidence or not, three parties were proceeded against for contempt. It was one proceeding. The action of the court with regard to two of them has been introduced in evidence, and the Presiding Officer thinks that the action of the court in regard to the third of the persons complained of for contempt can properly be admitted.

2267. By a close vote, after elaborate argument, the record of Congressional debates was admitted during the Swayne trial as having a bearing on the construction of a law.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 23, 1905,[2] in the Senate sitting for the impeachment of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the introduction of evidence, presented and asked to have incorporated in the Record certain extracts from the official debates of Congress. He explained:

These are the debates on three separate occasions when the provisions of law relating to the payment of expenses for travel and attendance of judges holding court outside of their districts were under consideration. We offer it as a part of the parliamentary history of the enactment of these laws and as having some bearing upon their construction.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, objected, saying:

Mr. President, the honorable counsel for the respondent offers certain extracts from the Congressional Record purporting to contain some portions of the debates at various times upon provisions of pending bills, which subsequently became statutes, relating to the payment of expenses of district judges for the purpose, as he states, of construing those acts of Congress. To that we object, first, that it is not competent nor proper in the construction of a statute to consider the debates in Congress, and, second, that if

[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, pp. 3164–3167.

admitted, it would require us in rebuttal to produce all the other portions of the debates, and then to call all those Members of Congress who are not present to ascertain their views upon the construction of the statute for which they then voted. Upon that I will take a very few minutes to refer the Presiding Officer and the Senate to what seems to me to be an entirely conclusive authority upon the subject.

It was decided in The United States *v.* Freight Association (166 U. S., p. 260), as stated in the syllabus:

"Debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body."

Mr. Justice Peckham delivered the opinion of the court. On page 318 he said:

"Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the Members of each House in relation to the meaning of the act. It can not be said that a majority of both Houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various Members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. (United States *v.* Union Pacific R. R. Co., 91 U. S., 72; Aldridge *v.* Williams, 3 How., 9, Taney, Chief Justice; Mitchell *v.* Great Works Milling and Manufacturing Co., 2 Story, 648; Queen *v.* Hertford College, 3 Q. B. D., 693.)

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other, the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it passed."

Now, Mr. President, you will readily see from the few disjointed remarks in the body at the other end of the building, the bill coming before it for the first time, one Member taking an offhand view of a paragraph and saying so and so, and another saying something else, and the great body who vote for it saying nothing, it is improper—and the Supreme Court has so held, and so have the courts of England—that it is absolutely improper to look into the debates for the purpose of construing an act of assembly. You will see at once that in order to do full justice to the subject it would be necessary to call all those Members who did not vote and ascertain their views; which would amount to taking a new vote in the House of Representatives to determine upon the construction of an act of assembly, the construction of which is proper matter for the courts, and in this instance for the Senate sitting as a court.

Mr. Thurston argued:

We offer to prove that on April 24, 1896, when this provision was before the Senate of the United States, the meaning of the clause was discussed on the floor of the Senate, and growing out of that discussion, and for the avowed purpose of making its meaning explicit, an amendment was attached to the clause in the Senate declaring, in substance, that nothing but actual expenses or moneys actually expended should be allowed the judges. That amendment was put on in the Senate. It went to conference and was rejected by the conference report, thereby, as we claim, determining that it was not the sense of the Congress of the United States that this allowance should be of moneys actually expended by the judges.

We further claim that in the proceedings of the House of Representatives, while a similar provision was under consideration on January 27, 1903, an amendment was offered, the purport of which was to prohibit the allowance to these judges of any traveling expenses where they had not actually made the expenditure of money; in other words, to prohibit them from certifying under the law to their traveling expenses when they had been riding free; and that amendment, made for that specific purpose, was rejected by the House, thereby showing, as we contend, the clear intention of Congress to allow the judges to certify and receive necessary or reasonable traveling expenses whether they paid the money out or not.

We further propose to show that in the House of Representatives on January 27, 1903, while a similar provision was under consideration * * * that the House of Representatives on the date I have last named, in further consideration of this appropriation, took proceedings whereby an amendment was

offered to prevent the judges of the courts of the United States from receiving free railroad transportation, which amendment by the House of Representatives was rejected, thereby attesting, as we believe, the opinion or construction of the House of Representatives that the provision of the law permitted judges to receive from the Treasury of the United States reasonable traveling expenses whether they paid their fare or rode free.

Mr. Anthony Higgins, also of counsel for respondent, argued:

Mr. President, in the first place, there are two classes of legislative proceedings incorporated in this offer, as I understand. The one referred to by my colleague in the beginning of his remarks on this offer is where we offered to show the parliamentary history of the clause in the act of June 11, 1896, which is an offer to show an amendment proposed by a Senator, and the adoption thereof in the Senate, and afterwards a conference report, in which the amendment adopted by the Senate was stricken out and a substitute for the same enacted; and in that shape the act of 1896 became a law.

Now, quite apart from the question of the admissibility of debates as to the construction of a statute is the principle that applies on this offer, for I find it laid down by the Supreme Court in the case of The United States *v.* Johnson (124 U. S., 237–253), which supports this proposition:

"In like manner cogent and persuasive is the construction placed by either or both of the two Houses of Congress by legislation and in debate upon the statute."

The syllabus of that case is as follows:

"The joint resolution of Congress of March 31, 1868 (5 Stat., 251) affords evidence that the practice of the Secretary of the Treasury prior to that date not to cover into the Treasury the sums received from the sale of captured and abandoned property, but to retain them in the hands of the Treasurer in order to pay them out from time to time on the order of the Secretary, was known to Congress and was acquiesced in by it, as to what had been previously done; and all this brings the practice within the well-settled rule that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

In other words, Mr. President, those legislative proceedings will make plain that the construction by a Senator upon the act of Congress under which district and circuit judges are paid when absent from their homes in the one case or their districts in the other holding court—that the construction which the learned managers place upon that act was the one which was sought by a Senator in that debate to place upon that statute in express words, and the Senate passed the amendment, and the conference committee struck it out. The Senate amendment, which was virtually a proviso that no expenses should be certified other than those that were actually incurred, was stricken out, and in place of it the last section of the act of 1891, creating the circuit court of appeals, was substituted for it, which said that when these sums were paid to the judge by the marshal they should be allowed to the marshal in his accounts. That clearly comes within the case of The United States *v.* Johnson and of the acquiescence by Congress. It is a much stronger case; it is more than an acquiescence by Congress in the construction, for it is by legislation making the statute in terms to be what excludes the construction that was sought to be put on it by a specific amendment to that effect.

That is a different thing from the mere opinions that are expressed by Members of either House of Congress at the time when a bill is in consideration before it; it is a part of the legislative history of the act, the amendment adopted by the Senate and its being stricken out in conference, and another feature added to the law in substitution for it being a part of our offer in what we seek to prove.

Now, Mr. President, I submit to the Senate that the principle which has been adduced in the case of The United States *v.* Freight Association (166 U. S.) is not applicable to the case that is now before the Senate. It is not simply and merely a question as to what is the construction that would be put upon the act in question by a court; it is not a question as to the construction that will be put upon it by any member of this tribunal. The question, we respectfully submit, is whether or no this statute admits of a doubtful construction and is open to more than one opinion. If a statute is ambiguous, if it has been loosely drawn, if it is not clearly and without any uncertainty of one construction, and therefore not open to construction, then we have authority as old as Judge Story, and coming from authority as high as his, that in a case involving the accounts of an officer under such a statute any doubts are to be resolved in favor of the officer; and by a line of authority in the Supreme Court of the United States, followed frequently and numerously in the circuit courts and in the Supreme Court of the United States, we have a

long line of authority that where a statute is in the least degree open to construction, and in many cases, Mr. President, where it has not been open to construction a long-continued construction of it by the executive officers of the Government has been held to be cogent, to be persuasive, to be decisive.

I had not expected to go into the presentation of that line of authority on this particular question—the question as to whether or no you would admit debates in Congress. Those debates, Mr. President, under the principle which I have now ventured to enunciate—and I do not suppose it will be disputed—go to the point that if the Congress itself in the debates placed a different construction upon this act from what the learned managers place upon it, there could be no crime in this respondent in placing a like construction upon it; that what here was said, and in another body in debate, as to what was the understanding of Congress as to the meaning of this act when Congress was in the process of enacting it, and again and again in repeated years on appropriation bills in identical terms this same statute has been brought up again and again in debate, that what was said there and then by Members of Congress as to the received construction of this act, totally different from that of the honorable managers, goes to show that this could not have been a statute that was not open to a difference of construction and opinion.

Mr. Manager Olmsted replied:

The long line of authorities which the counsel has cited seem to resolve itself down to the case of Johnson * * * in which the recitals in a joint resolution were accepted as evidence, in accordance with the well-known principle of law that the recital in the preamble of a public act of Parliament of a fact is evidence to prove the existence of the fact, not the debates in the House or in the Senate when the joint resolution was passed, but the joint resolution itself. That is the English and American doctrine.

I will simply add one more authority and rest. In the case of The United States against The Union Pacific Railroad (91 U. S., 72), Mr. Justice Davis, delivering the opinion of the court, said, on page 79:

"In construing an act of Congress we are not at liberty to recur to the views of individual Members in debate nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used."

The Presiding Officer said:

The Presiding Officer will submit this question to the Senate: Counsel for the respondent propose to offer certain extracts from the Congressional Record, including debates in the House and Senate, votes in the House and Senate, for the purpose, as stated, of showing the history of the enactment by which the United States judges holding court out of their districts are entitled to expenses and as throwing light upon the true construction of the act. [Putting the question.] In the opinion of the Presiding Officer the noes have it.

Mr. John C. Spooner, a Senator from Wisconsin, demanded the yeas and nays, and the same being taken, there appeared, yeas 34, nays 33. So the evidence was admitted.

2268. The Senate declined to admit in the Belknap trial testimony taken before a House committee and published as a public document.

Instance wherein a Senator objected to evidence which was not objected to by managers or counsel.

On July 6, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, H. T. Crosby was sworn and examined by the managers and was asked if he had any recollection that General Hazen had testified before the Military Affairs Committee of the House of Representatives in regard to the post tradership at Fort Sill. The witness responded in the affirmative. Then Mr. Manager John A. McMahon asked:

Did General Belknap, to your knowledge, know that the testimony had been given by General Hazen before the Military Committee in regard to Fort Sill?

[1] First session Forty-fourth Congress, Senate Journal, p. 961; Record of trial, pp. 186–189.

To this witness replied that he thought General Belknap (the respondent) did know, but this was only an impression which rested on no facts that he could recall.

Mr. Manager McMahon then said:

We propose to show, and we now offer to test the question, the testimony of General Hazen before the Military Committee of the House on the 22d day of March, 1872, and we propose to supplement that with the orders issued from the War Department on the 25th day of March, 1872, which was a very good order, but did not quite reach the Fort Sill case. We offer it now, and desire that the testimony of General Hazen, as published in an official document, shall be read.

Mr. Matt. H. Carpenter, of counsel for the respondent, did not object, but said:

It is testimony taken not only not in this Chamber, but taken in pais. * * * The particular point I want to suggest to the consideration of the manager only is this, that I never heard one man tried on testimony given in some other tribunal. Without proof that the witness was dead or could not be called, and that the party was present and cross-examined him, it can not be done in a civil case. I suggest to the managers that it would be remarkable if you could read a deposition taken somewhere else.

After discussion, Mr. John Sherman, a Senator from Ohio, said:

I should like to ask the witness a question through the Chair. Did General Belknap read or hear the testimony of General Hazen?

The witness said:

I do not know, sir.

Mr. Sherman also asked:

I will ask whether that testimony of General Hazen was published in the public journals and brought to the knowledge of General Belknap.

The witness replied:

I do not know.

Mr. Sherman objected to the introduction of the testimony at this stage of the proceedings.

Later, during the examination of Gen. Irvin McDowell by Mr. Manager McMahon, the following occurred:

Q. In the conversation between you and General Belknap, besides referring to this article in the New York Tribune, did you refer to the fact that General Hazen had testified before the Military Committee?—A. I think that I mentioned the fact that I learned from General Garfield that General Hazen had done so. I think General Belknap told me that General Hazen had done so and had said substantially the same thing. I think General Belknap was indignant at General Hazen having done so instead of having come to him. I think he thought he owed it to him to have made this statement to him personally instead of going elsewhere.

The managers then offered as evidence this order:

[Circular.]

WAR DEPARTMENT,
Washington City, March 25, 1872.

I. The council of administration at a post where there is a post trader will from time to time examine the post trader's goods and invoices or bills of sale; and will, subject to the approval of the post commander, establish the rates and prices (which should be fair and reasonable) at which the goods shall be sold. A copy of the list thus established will be kept posted in the trader's store. Should the post trader feel himself aggrieved by the action of the council of administration, he may appeal therefrom through the post commander to the War Department.

II. In determining the rate of profit to be allowed, the council will consider not only the prime cost, freight, and other charges, but also the fact that while the trader pays no tax or contribution of any kind to the post fund for his exclusive privileges, he has no lien on the soldiers' pay, and is without the security in this respect once enjoyed by the sutlers of the Army.

III. Post traders will actually carry on the business themselves and will habitually reside at the station to which they are appointed. They will not farm out, sublet, transfer, or sell or assign the business to others.

IV. In case there shall be at this time any post trader who is a nonresident of the post to which he has been appointed, he will be allowed ninety days from the receipt hereof at his station to comply with this circular or vacate his appointment.

V. Post commanders are hereby directed to report to the War Department any failure on the part of traders to fulfill the requirements of this circular.

VI. The provisions of the circular from the Adjutant-General's Office of June 7, 1871, will continue in force except as herein modified.

By order of the Secretary of War.

E. D. TOWNSEND,
Adjutant-General.

Then Mr. Manager McMahon said:

Now, if the Senate please, we propose to offer the testimony of General Hazen, as taken before the committee, for this reason and this purpose: We find from two different sources that General Belknap is advised of the fact and becomes indignant with the knowledge that General Hazen has testified to the existence of certain abuses at Fort Sill which lay directly within his province to correct.

Mr. Matt. H. Carpenter, while not objecting formally, said:

You do not prove by anybody that General Belknap ever read that testimony to know what it was. The indignation arose from the fact that he had been talking before a committee when he ought to have gone through directer channels, through the Army.

Mr. Sherman having persisted in his objection, the question was submitted to the Senate.

Mr. Roscoe Conkling, a Senator from New York, asked:

Is that the testimony upon which the Senate is asked to vote that the respondent here was charged with a knowledge of this testimony so as to admit it as a declaration made to him?

Mr. Manager George F. Hoar replied:

I understand that General McDowell's testimony is that General Belknap said to him that General Hazen had testified in substance to the same matters which were contained in the New York Tribune article. * * * Therefore stating to him a knowledge of the substance of General Hazen's testimony. Now, if he had that knowledge of the substance of General Hazen's testimony, it tends to show that he knew that these periodical payments of money which came to him from Marsh were payments of money that had come to Marsh from the post trader. If I am in error as to the extent to which General McDowell's statement went, I can be corrected by referring to it. In other words, if General Belknap was receiving once every three months a sum of money from Marsh in New York, it is important for the Senate to know whether Belknap was informed that those moneys were moneys which were being improperly paid in consequence of this bargain of the post trader at Fort Sill to Marsh; in other words, that he knew where the money he was receiving came from. The article in the New York Tribune contains a distinct assertion of those payments by Evans to Marsh, and, as I understand it, the testimony of General Hazen contains in substance the same thing. It is therefore important not as proving the truth of anything that General Hazen said, but as proving that the Secretary of War was notified that such thing was said at that time.

The question being taken, the Senate declined to admit the testimony, yeas 20, nays 31.

2269. Testimony taken before a House committee and seen by respondent was admitted in the Belknap trial, not as evidence of the fact but as a partial foundation for an inference.—On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Hon. Hiester Clymer, chairman of the Committee of the House of Representatives which had reported the evidence against the respondent, was examined as a witness on behalf of the United States. The witness was shown the manuscript copy of the testimony given by one Caleb P. Marsh before his committee, and, after he had identified it, was asked by Air. Manager John A. McMahon:

After the testimony of Mr. Marsh was taken, state what action your committee took in regard to it so far as the Secretary of War was concerned.

To this question Mr. Matt. H. Carpenter, of counsel for the respondent, objected.

Mr. McMahon explained the objects of the introduction of the testimony:

We propose to put in evidence the fact that the witness Marsh was examined; that his testimony was reduced to writing; that the Secretary of War was officially notified of the fact; that he appeared; that the testimony was read over to him; that he took time to consult; that he finally came in and presented his resignation to the committee, from which we shall draw our inferences as fax as the situation permits. That is all. * * *

Mr. George G. Wright, a Senator from Iowa, asked of the manager:

Do I understand that the managers propose to introduce this testimony and follow it by the single proposition that thereupon the Secretary of War resigned, and thereby ask the Senate to draw a conclusion, or that there was anything said by him or done by him other than the mere resignation?

To this Mr. McMahon replied:

I have already stated that we expect to show that the investigation was continued from one hour in the day until another and then continued until the next day, and that while they were waiting for the matter the resignation was brought in and handed to the committee; and I accept the statement of the distinguished counsel, if he desires it in, for the express purpose of preventing his being impeached. If he desires to prove that fact, I have not any objection certainly.

Mr. Roscoe Conkling, a Senator from New York, asked of the manager:

Shall I understand the managers to propose either to read at large the testimony of Marsh or to have that testimony received here and go upon the record, all for the purpose of proving that after it was delivered the respondent resigned his office? Is that the scope of this proposal, or is it intended to put into the case what Marsh testified in another form on another occasion, that that testimony may speak in this trial?

Mr. Manager McMahon replied:

Mr. President, I will answer the honorable Senator. It is offered in part only for the purpose which the honorable Senator from New York has eliminated from my remarks. The entire purpose is to show that substantially the same testimony as has been given here, not a different statement, but substantially the same statement as has been made here, was read over to the Secretary of War as a charge by one of the coordinate branches of the Government, to which he made no statement under oath or otherwise, and that the substantial facts therein stated having been brought to his knowledge and read without dispute, we are entitled to draw two inferences, the one from his resignation and the other from his failure to deny the facts therein stated, whatever they may have been

Thereupon Mr. Jeremiah S. Black, of counsel for the respondent, said:

That is, you want to use it as a confession.

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[1] First session Forty-fourth Congress, Senate Journal, p. 974; Record of trial, pp. 245–249.

To this Mr. McMahon replied:

If you put it in that severe light, probably yes.

Mr. Montgomery Blair, of counsel for the respondent, said:

I ask the attention of the Senate to the scope of the question which is now to be acted upon, and I put it to this body to say whether any legitimate conclusion such as the counsel for the Government seeks to draw from the conduct which he seeks to prove here would be authorized by the proof. The whole object of the gentleman is to show that in consequence of similar proof being offered before the Committee on War Expenditures and being made known to the defendant in this case he thereupon resigned his commission as Secretary of War, and he admits that at the time this resignation was put in it was done in consequence of an understanding which then was had that thereby impeachment or an action of this kind which is now here pending would be avoided.

Mr. Manager McMahon here interposed:

You misunderstand me. I say if you can prove that, I have no objection.

Mr. Blair continued:

Well, I understand that that is the proof which is to be offered, and is the nature of the case to which the managers now invite this court. Now, I ask the court to consider the state of proof to which the managers invite your attention, and to say whether or not any such conclusion as they seek to have you draw from it could be legitimately drawn. They ask you to draw a conclusion from the fact that the Secretary of War on seeing the proof resigned his office. I ask this court if that is a confession of guilt, or whether anybody in his senses could draw such a conclusion from it, even if it were not accompanied with the facts which we intend to prove if the matter is gone into. We intend to show that the reason of the resignation was that we wanted to avoid this trial, and had reason to believe that the committee before whom this testimony was taken concurred with us in the belief that that would be an avoidance of this trial. Now, take the whole scope of the case, because here is voluminous testimony to be offered and to be considered, and I ask the Senate to consider now before we go into it whether or not any such conclusion as the managers seek to draw from that can be legitimately drawn.

The question being taken, the Senate without division decided to admit the question.

The witness then answered the question, stating that the respondent was shown the testimony of Marsh, that he did not reply to it, and that he sent to the committee information of his resignation as Secretary of War.

Then Mr. Manager McMahon said:

Now we offer in evidence the testimony, the original paper, that was taken before the committee. * * * I offer it in evidence because, of course, it is impossible for this court to know to what extent the defendant was implicated by this testimony unless we know just exactly what the testimony was; and the strength of the inference, or its weakness, must of course be determined by the strength or weakness of the charges and the directness of the testimony.

Mr. Carpenter, of counsel for the respondent, having intimated but not formally made an objection, Mr. Roscoe Conkling, a Senator from New York, said:

Shall I understand that it is now proposed to offer here for any purpose the testimony delivered by Marsh before the committee of the House? If it is, if nobody else does, I raise an objection to that, on the ground that it is incompetent; and I ask for the yeas and nays upon it.

Mr. Francis Kernan, a Senator from New York, asked:

Is the object to have it read as evidence in this case, or read as a communication made to Mr. Belknap?

Mr. Manager McMahon replied:

To have it read precisely upon the principle that the article in the New York Tribune of February 15, 1872, was read, as a charge of certain matters therein stated, but not as evidence of the truth of anything therein stated. Every lawyer, I think, can see the difference.

Mr. Thomas F. Bayard, a Senator from Delaware, asked:

What is the object and intent of this offer?

Mr. Manager McMahon replied:

I think, the honorable Senator from Delaware will remember that in my answer to the remark of the Senator from New York who sits farthest from me [Mr. Kerman] I stated distinctly the object and purpose of this offer, not as evidence to this court of the truth of any fact therein stated, but simply for the purpose of showing that at a particular time certain charges from an authorized source were made against the defendant, which were read to him for the purpose of ascertaining what action he took after this was communicated to him.

Mr. Bayard asked further:

Is it the object of the present inquiry to corroborate or discredit the testimony of Marsh, the witness, or to establish any fact therein referred to, or solely to prove what was the action or conduct of Mr. Belknap when the fact that such charges had been made against him was so made known to him?

Mr. Manager McMahon replied:

Mr. President, the question put to the managers is as follows: "Is it the object of the present inquiry to corroborate or discredit the testimony of Marsh?" In the first place, I will answer in detail that it is to corroborate Mr. Marsh in just this far, not as evidence of any facts stated therein, but when the charge was made by Marsh the Secretary of War by his conduct admitted the truthfulness of it.

Secondly, "Or to establish any fact therein referred to." Not as evidence of any fact therein referred to except in this way, when the fact is charged against the defendant, to draw a conclusion as to its truthfulness or untruthfulness by the action of the Secretary of War in regard to it.

"Or solely to prove what was the action or conduct of Mr. Belknap when the fact that such charges had been made against him was so made known to him." It is solely for that purpose; but from that we draw our conclusion as to the truthfulness or untruthfulness of the charge there stated, but do not seek to establish any minor details on that point.

Mr. Carpenter, arguing against the admission of the evidence, said:

If it is competent to introduce this testimony given by Marsh before the House committee simply because Belknap did not say anything in reply to it, is it not competent to introduce here every newspaper article that has charged him, from Maine to California, with being guilty of this offense, and with being a thief and all that sort of thing, to which he has, under direction of counsel, never opened his mouth, to which he has never written a reply, of which he has never taken the slightest notice? Upon what principle could you introduce the deposition of this witness simply because it was read to the defendant and he said nothing, and exclude a newspaper article which you could show he had seen and to which he had said nothing? We did not care when the article from the New York Tribune was offered to object for certain reasons. It was very doubtful in our mind whether that was legal testimony; but we did not care to object to it. But here is an offer made now the result of which, if sustained, is that if they can show that a newspaper has published an article charging him with being a thief in this particular, calling him all the hard names they can think of in consequence of these charges made here, and that he read it and threw it down, making no remark, that would be as competent as this testimony. It must be borne in mind that that committee had no jurisdiction over Mr. Belknap. Mr. Belknap could have no trial before that committee. A few things maybe mentioned in apolitical trial that would not be proper in a court of law. It was well known that that committee was of an opposite political faith, and it was not expected that much justice would be done to Mr. Belknap or any other Republican; and any lawyer, I think, who had been consulted by Mr. Belknap would have given him the advice

which he did receive, and that was to let the committee alone till they got through, and then see what their charges amounted to. But if the managers can introduce this evidence upon the ground that it was read to him and he said nothing, I submit that every newspaper article which can be shown to have been seen by him is evidence if they can also show that he read it and made no reply.

The question on the admission of the testimony being taken, the Senate decided, yeas 24, nays 14, that it should be admitted.

On July 19 [1] John S. Evans, post trader at Fort Sill, was examined as a witness, and was asked this question by Mr. Carpenter, of counsel for the respondent:

Mr. Evans, after you went back to Fort Sill with your appointment would you have reduced your prices but for the contract made with Marsh?

Mr. Manager McMahon objected, and the Senate, without division, excluded the question.

Mr. Carpenter then said:

Now, Mr. President, following the example of the managers, I offer here in partial corroboration of this witness his examination before the committee of the House, in which he swore distinctly that he would not have made the change of a shilling and that he never would have put prices down until he was compelled by the commission of officers that had jurisdiction.

Mr. Manager McMahon said:

This matter is considered to be ruled out under the decision already made, I take it. If the Senate will not let him swear to it here in open court, they certainly will not allow you to corroborate him in that way.

After argument, during which Mr. Carpenter quoted the words of Mr. Manager McMahon as to the Marsh testimony, wherein he stated that the object was to corroborate Marsh's oral testimony to a qualified extent, the question was taken, and the Senate, without division, excluded the testimony.

2270. Although Judge Swayne had been a voluntary witness before the House investigating committee, the Senate decided that the record of his testimony was prohibited by statute from use in the trial.

Discussion as to the status of the Senate as a court during an impeachment trial.

An argument that an impeachment trial is not a criminal proceeding.

As to whether or not there is a distinction between a misdemeanor and a high misdemeanor.

Instance of an appeal from the decision of the Presiding Officer on a question of evidence during the Swayne trial.

On February 14, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Henry W. Palmer, of Pennsylvania, made the following offer of testimony in support of the articles relating to respondent's alleged improper use of a railway car:

The managers offered to prove that the respondent on the 28th day of November, 1904, at the city of Washington, D. C., voluntarily appeared before a subcommittee of the House Judiciary Committee, not having been summoned as a witness or otherwise, and voluntarily made the following statement.

[1] Senate Journal, p. 982; Record of trial, p. 281.

[2] Third session Fifty-eighth Congress, Record, pp. 2536–2540.

Mr. John M. Thurston, of Nebraska, objected to the introduction of this evidence, claiming that it was prohibited by section 859 of the Revised Statutes:

No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony.

Mr. Thurston said:

Judge Swayne did appear; he was examined and cross-examined, and, speaking a little outside of the record, I know that these questions the managers propose to ask him relate mostly, if not wholly, to his answers made on his cross-examination. But, Mr. President, the law of Congress does not distinguish between a man who comes before Congress or a committee of his own volition and a man who is haled there by process. The prohibition of the statute is as broad as human language can make it. It was designed for a wise and beneficent purpose, and no thought, in our judgment, ought to be had here by the managers in this case against our objection of attempting to override that statute of the Congress of the United States. * * * Mr. President, just a word or two in reference to this last suggestion, which is one which I had not expected to hear—that this trial is not a criminal proceeding. What is it, Mr. President? It has been held through all the history of impeachment trials to be in accordance with trials of persons charged with crimes. The verdict to be rendered in the case is one of "Guilty" or "Not guilty" —a verdict which is only appropriate in a criminal proceeding. Punishment is not of life, or limb, or liberty, but, sir, it is a far graver one, in my judgment, than any of those would be. It is a punishment of so grave a character that it can only be inflicted, under the Constitution of the United States, on being found guilty of high crimes or misdemeanors, and yet the gentleman says, with apparent sincerity, that this is not a criminal proceeding. You are trying this man here on a charge that he is guilty of a high crime or a high misdemeanor, and yet you say it is not a criminal proceeding.

Now, Mr. President, Charles Swayne, as the record shows, appeared before the House subcommittee and was sworn as a witness, and testified there. Afterwards, at another session of the committee, be again appeared, and was again examined and cross-examined before the same tribunal on another day. Did you ever hear in any court of justice the theory, when a man has been sworn as a witness on one day, that you needed to swear him again on the next day in the same case?

Mr. Manager Palmer said:

The offer is to prove that Judge Swayne voluntarily appeared before a subcommittee of the House Judiciary Committee and made a voluntary statement in his own defense. He was not a witness; he was not summoned; and his statement was entirely voluntary. * * * On this occasion he read a typewritten statement, which occupies thirteen pages of the record. After his statement was read certain questions were asked him based on allegations that were made in his statement; and the questions that were asked him, that we now offer to prove, were based on suggestions made in his statement. The questions were asked by members of the committee to clear up some things that Judge Swayne had stated in his written statement. Now, we offer this testimony in entire good faith. * * * I say we offer this testimony in entire good faith. We are not pettifogging; we are not endeavoring to get before the Senate testimony which is not testimony; but we offer it because we believe it is testimony, because it is competent testimony, and because it is the admission of the respondent here, a judge of a Federal court, who, in his own defense, made a voluntary statement, and he ought not to be objecting to it now here, as we believe. * * * No, sir; it was not under oath. To state the fact exactly as it is, Judge Swayne appeared before the committee, and this conversation occurred. On a previous occasion this testimony was given, or at least this statement was made on the last hearing that was had. On a previous hearing, several months before, Judge Swayne appeared and raised some question about some testimony that was given as to his residence. It was said to him by a member of the committee, "There is one man in the United States who knows all about this subject," and Judge Swayne said: "Do you mean me?" The committeeman said: "Yes; I mean you." Judge Swayne said: "Do you wish to have me sworn?" It was said to him: "That is entirely voluntarily with you; you can be sworn if you desire to be sworn." Then he held up his hand, and was sworn.

That was at the hearing some months before. At the last hearing he appeared and read this typewritten statement, which, I say, occupies thirteen pages of the record, and that statement led to the inquiry made by a committeeman, which elicited the information which we now ask to give here. He was not sworn at that time. He had been sworn some months before on a different proposition at his own request or on his own volition.

Now, the reason for this statute is plain. It protects a witness who is compelled to testify to matters which might criminate him. In this case the offer is to show that Judge Swayne appeared voluntarily before the committee—and that is admitted—that he was not a witness summoned to appear, but that he appeared voluntarily, and made a statement and argument in his own defense. Something he said in that argument attracted the attention of a member of the committee who interrogated him and elicited the matter contained in the offer.

The statement is evidence here, first, because this is not a criminal proceeding against the respondent. If he has committed any crime, he can be punished for it in another proceeding. This is a proceeding in which, if Judge Swayne were convicted, he would not be punished as for a crime, but the extent of the punishment would be removal from office. It is a proceeding calculated to keep the judiciary unsullied and pure. It is the only method by which a judge who violates the tenure on which his office is held can be removed. His commission runs that he is to hold this office "during good behavior;" and the only tribunal on earth in which that question can be settled is this august tribunal.

We are here to ascertain whether Judge Swayne has behaved himself well, and whether he is fit to hold this office. This is not a criminal trial; it is not a criminal prosecution; it is not followed by a sentence of any court. All that you can do under the Constitution is to deprive him of his office. If he has committed any offense the Constitution provides that he can be tried for that in another proceeding, and punished if he is found guilty.

The second reason why this is evidence is because he was not summoned to testify before the House committee, but appeared voluntarily to make a statement in his own defense. * * * Mr. President, I wish to call attention to the section of the Constitution of the United States under which this proceeding is had. I said that this was not a criminal prosecution. Did anybody ever hear that a man could be twice tried and convicted for the same offense? If the first trial is a criminal prosecution, then, of course, he could not be tried and convicted again. The provision of the Constitution is this:

"Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law."

Now, I say that is an amazing proposition that this judge who appeared and made a voluntary statement in his own defense should be objecting here now on the ground that it might incriminate him.

The Presiding Officer [1] ruled:

The general proposition that the admissions of a defendant may be proved does not seem to the Presiding Officer to apply to this case. The statute is that—

"No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony."

Now, without deciding technically whether this is testimony which was given by a witness before a committee, or whether it is proposed to use it in a criminal proceeding, or in a court, the Presiding Officer thinks that the intention of the statute is such as to make this evidence inadmissible.

Mr. Joseph W. Bailey, a Senator from Texas, asked that the question be submitted to the Senate.

[1] Orville H. Platt, of Connecticut, Presiding Officer.

Mr. Bailey said:

If the court please, section 103 of the Revised Statutes provides that—

"No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." (See sec. 859.)

Plainly the purpose of that statute was to enable the committees of either House, or either House itself, to compel the attendance and the testimony of any witness, and it provides, contrary to the rule of law not obtaining in the courts, that the witness shall not be permitted to decline to testify upon the ground that it might disgrace him or tend to render him infamous. Having deprived him of the privilege which he would enjoy before the courts of this country, and having compelled him to testify before its committees, even to his own infamy or disgrace, Congress very wisely then provided that such testimony should not be adduced against him in any criminal proceeding in any court.

But, Mr. President, this is not a criminal proceeding within that statute, and this, in my opinion, is not a court within the meaning of that statute. The Constitution may seem to contemplate that we shall sit as a court when we try the President, because it provides that the Chief Justice of the United States shall preside at such a trial. Whether that was intended, as has been suggested by some, to protect the President against the rulings of the Vice-President, who might succeed to the Presidency in the event of the President's conviction and removal, or whether it was intended, as has been suggested by others, to secure a more certain and a more correct interpretation of the law, I do not undertake at this time to decide.

My own opinion is that the reason which prevailed upon the framers of the Constitution to provide that the Chief Justice shall preside over the Senate when it tries the President on impeachment charges was that the Vice-President might be suspected of having a deep and peculiar personal interest in the result of such a trial. But whether one or the other was the reason, it can not be successfully contended that this is a court within the meaning of section 859, or if it shall be held that this is a court, then it can not be contended that this is a criminal proceeding within that section.

The very provision of the Constitution under which we are proceeding negatives the idea that this is a criminal action, because it expressly provides that no matter what our judgment may be, it only excludes the incumbent against whom it may be pronounced from the honorable office which he holds, and it leaves to the ordinary administration of the criminal jurisprudence of the country the punishment for his criminal acts. * * * Mr. President, a judge, in my opinion, may be impeached without being guilty of a crime. He holds his office by a different tenure from that under which other civil officers of the Government enjoy. He holds his office during good behavior, and more than one of the charges in this very case are not a crime. No penalty is denounced against the violation of that provision of the statute which provides that a judge shall reside in the district for which he is appointed, and that his failure to do so shall be a high misdemeanor.

That term is new in legal vernacular. I know of no law books which furnish a distinction between a misdemeanor and a high misdemeanor. Certainly the Constitution does not. Congress has not seen fit to affix a penalty of any criminal nature to this very provision itself, and obviously the whole purpose that Congress had in mind when it declared that a failure to reside in the district for which the judge had been appointed was a high misdemeanor, was that his failure to do so should be an impeachable offense.

I put this case to the court and all the honorable members of it. Suppose there should be nothing before this body but the naked question. Does the honorable judge reside in his district? The law says that if he does not, he is guilty of a high misdemeanor. Does any member of the court doubt that if counsel for the respondent or the respondent himself were to rise in this court and say, "I do not reside in my district," there would be the slightest hesitancy in finding him guilty on that charge? Yet, sir, that charge is not a crime, and no Senator will contend that he could be prosecuted in the courts and punished for his failure to reside in his district. It is declared by law, it is true, to be a high misdemeanor, but it is not a crime, because there is no penalty attached to it by the law. Again, sir, suppose a judge should arbitrarily and maliciously disbar an attorney, does any Senator doubt that he could be, and ought to be impeached? And yet, sir, there is no criminal statute in that behalf provided.

The respondent was not a witness, within the meaning of the statute, when examined before the committee of the House. As has well been suggested by my learned brother near me, whenever a party

to a proceeding voluntarily takes the stand, he must be presumed to know the nature of it, and when he volunteers his testimony everything he says can be used. There are States under whose system of criminal jurisprudence the defendant himself may testify. He can not be called by the State; he can not be compelled to take the witness stand in his own behalf, and if he fails or refuses to do so it is error, and reversible error, for the prosecuting attorney to refer to that fact. But when the accused does take the witness stand in his own behalf, then he is not simply permitted to testify to what he thinks may be to his own benefit. He can be cross-examined, and all he says must be received and considered by the jury as testimony in the case.

When the respondent in this case voluntarily appeared before a committee of the House, with a full knowledge of the nature of its inquiry, and proceeded to state any of the facts, it was within the power and duty of that committee to interrogate him as to all the facts, and when he had made his statement there it does not lie with him to claim immunity under this statute.

I believe that the protection afforded by section 859 was made necessary and proper by section 103.

Having deprived the witness of a privilege as ancient almost as courts of justice, it was just and proper that he should not be exposed to prosecution and conviction upon his own testimony, which he had been compelled to give.

I do believe, further, that this is a court within the meaning of that statute. I am sure that this is not a criminal proceeding within the meaning of the statute, because the respondent might be found guilty of a charge that would terminate his office, although he were guilty of no crime.

I am further sure that the respondent in delivering his testimony before the committee of the House was not a witness within the reason or the protection of the statute, and I am still more certain that if he shall be deemed a witness he must be treated as a witness who came voluntarily to testify and whose testimony may be used against him.

Further discussion having been prevented by reference to the rules, the Presiding Officer put the question: "Is the evidence admissible?" and there appeared yeas 28, nays 45. So the evidence was not admitted.

On February 16, 1905,[1] as the managers were about to conclude the presentation of testimony, Mr. Manager David A. De Armond, of Missouri, referred again to the subject of the respondent's statements before the House committee, and suggested a reconsideration of the former decision of the Senate:

Mr. President, if it can be shown, and it appears of record, so that the showing is not difficult if it exists, that Judge Swayne made any statement before the House committee before the oath was administered to him by that committee as a witness, we shall interpose no objection to such statement. But we do object to any statement that he made before that committee after he was sworn as a witness. * * * I do not desire to add anything to the argument I made the other day on this same question, except to call the attention of the Senate to one provision of the Constitution of the United States. It was urged here the other day that this is not a criminal proceeding, and that Judge Swayne, is not charged with or being tried for a crime. I wish simply to call attention to a section of the Constitution, it being the last portion of section 2 of Article III. I read:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

On motion of Mr. Joseph W. Bailey, a Senator from Texas, and by a vote of yeas 53, nays 18, the doors were closed for consideration of the admissibility of the evidence heretofore ruled out.

On February 20[2] the Presiding Officer announced in the Senate sitting for the trial:

Before the reading of the Journal the Presiding Officer will announce that at the last session of the Senate in the trial of the impeachment the question of evidence was decided, namely, the proposal of the managers to introduce statements by Judge Swayne made before the committee of the House of Representatives, and it was decided that such statements were inadmissible. The vote by which it was decided will appear upon the reading of the Journal.

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[1] Record, pp. 2720, 2721.

[2] Record, p. 2899.

The Journal being read, it appeared that on the question—

Are the statements made by Judge Swayne before the committee of the House of Representatives admissible as evidence?

It was determined in the negative yeas 29, nays 47.

2271. In proving the contents of lost letters the Senate, in the Belknap trial, permitted the witness to be interrogated generally as to the import of a series of letters.

Instance of a ruling by the President pro tempore on a question of evidence during an impeachment trial.

On July 10, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh was called as a witness for the United States, and was questioned as to sums of money which he had sent to the respondent, and as to letters that had passed between them. He testified that he had destroyed all letters and telegrams, although he had received such from the respondent, directing how the money should be forwarded. After this testimony Mr. Manager John A. McMahon said to the counsel for the respondent:

Gentlemen, we have served a notice upon you to produce the letters which have passed between these parties, and, of course, we are ready now to receive them, or to offer evidence of their contents.

The notice was read as follows:

All letters, telegrams, and communications from said Caleb P. Marsh to you in regard to the appointment of post trader at Fort Sill or elsewhere.

All letters from said Marsh to you concerning the management, conduct, or removal of the post trader at Fort Sill.

All letters or telegrams from said Marsh to you in any way connected with the forwarding to you of money, certificates of deposits, drafts, etc.

All letters from said Marsh to you informing you of the state of accounts between him and yourself, particularly the letter informing him of a change in the amount of the annual payment to be made to you by him some time in the spring of 1872.

The time covered by this notice is from June 1, 1870, to March 2, 1876. The dates more particularly referred to are those specified in the seventeenth specification set forth in the fourth article of the impeachment articles filed against you.

Mr. Matt. H. Carpenter, of counsel for the respondent, said:

This notice, as far as it calls for letters touching the management of affairs at Fort Sill, calls for what were official letters, and may be found at the War Department. We have no other letters called for by the notice.

Thereupon Mr. Manager McMahon proceeded to ask questions to elicit proof as to the contents of the letters from witness to respondent, finally asking:

Now, give us the contents, as near as you can remember, or the substance, of one of these letters, without the date?

To this Mr. Carpenter objected, saying:

The rule is perfectly well settled that if an instrument is called for and not produced they may prove the contents of it. There is no doubt about that; but to ask the witness what was the general substance of letters without regard to date is not proving any instrument whatever. I deny that you can take a witness up here and pull a drag-net over the correspondence of business men for years and ask "what was the general purport of your correspondence?" That will not do. That is too indefinite. They will have to introduce the particular letter, and if they do not have it they must account for its

[1] First session Forty-fourth Congress, Senate Journal, p. 968; Record of trial, pp. 220–222.

loss, either by them or by us, and they may then prove the contents of that particular paper; but having shown that a particular paper is lost they can not ask the witness upon the general tenor of all these letters without regard to their date. When the question was put distinctly to this witness as to what were the contents of the letter which accompanied the first remittance, he said he did not remember. Now, if there is any other particular letter which they can locate in the mind of the witness and prove by him its contents, that of course is not objected to; but the question, "what is the general substance of letters, "without regard to their dates, is not proving a particular paper; it is proving at large what was the substance of a general correspondence. That can not be done. You must prove it by introducing every letter by itself. If you have not got the letter, then you must account for its loss and prove its contents, not by proving what was the general tenor of 40 papers. It is for the court to say what the general tenor of them is, after they know each letter, and we are to have the substance of each letter as near as the witness can give it.

Mr. Manager McMahon's argument was:

What we desire to prove is this: We may call his attention to the particular date, but we go further and ask, Was there a general form in which you sent them, or was there any particular letter of which you may remember the substance? The idea is that we have got to go through these 14 different occasions when money was sent, and if he does not remember the contents of a particular letter, therefore it is not competent to testify to the contents of all of them as to his best impression! I understand that the rules of evidence are based upon a knowledge of human nature, upon a knowledge of the infirmities of human nature, and that a witness who has transacted business of this kind, when the documents are in the possession of the defendant, when he undertakes to state here the substance of their contents, is entitled to state it without saying that it was the contents of the letter of the 1st of November or the 6th of October or the 9th of October, 1874. I think I have said all upon this question that the occasion demands.

The President pro tempore having submitted the question to the Senate, it was decided without division that the interrogatory should be admitted.

The witness having, in response to the question, stated the general tenor of one of these letters, this question was asked:

Q. (By Mr. Manager McMahon.) After you had dispatched a letter like that, what letter would you get in return? Give us the contents of one of his letters that you can remember.

Mr. Carpenter said:

I want formally to make the game objection. I suppose, of course, it will be overruled, but I want to make the same point here as upon the former question.

The President pro tempore [1] said:

The Chair will take it as the sense of the Senate that the objection is overruled.

The question having been answered, another question was asked:

Q. (By Mr. Manager McMahon.) State whether, after shipping the money to him by express, you informed him of that fact; and if so, how.

Mr. Carpenter having objected, the President pro tempore submitted the question to the Senate.

Mr. Simon Cameron, a Senator from Pennsylvania, demanded the yeas and nays, which were refused.

Thereupon, without division, the Senate decided the evidence admissible.

Witness having stated that he sent the express receipt by mail when he sent the remittance, Mr. Manager McMahon asked:

State whether you received any reply; and if so, in what shape.

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

Mr. Carpenter, having ascertained that the question did not relate to a specific, transaction, objected.

The Senate admitted the question.

Later Mr. Manager McMahon asked:

When you inclosed one of these certificates of deposit to him, state what was the substance of the letter which you did send to him accompanying the certificate.

Mr. Carpenter having objected unless a particular certificate was specified, the President pro tempore said:

The Chair overrules the objection. The witness will answer the question.

Soon after, Mr. Manager McMahon asked: [1]

When you delivered the money to him [the respondent] you stated that you at first delivered him $1,500 quarterly, and after the lapse of one and a half or two years $1,500 semiannually. State now whether you failed to deliver to him exactly at the time the amount that you were to deliver to him; and if so, why.

Mr. Carpenter said:

I want to object to that question, Mr. President. It is as disagreeable to me to seem to be captious about objections as it is disagreeable to the Senate to have me captious, but the insidious manner in which the facts of this case are sought to be kept out of view, while some deductions and conclusions are forced in as their substitute, is, although very ingenious and very artful and very gradual, yet perfectly apparent. We ought to have the questions so put to the witness that he will understand and that we shall understand precisely what transaction is being referred to. Now, you call his attention to no particular transaction at all; you do not name a place and do not fix a date; you do not determine any particular transaction; and yet you are trying in that way to float him over all of them, when in the only instance in which you put the question direct you did not get what you wanted to get, and I suppose that is the reason why the manager is now seeking to generalize. But it is an improper way, as I believe, to lead this witness. The manager knows perfectly well how to put the proper questions in a direct examination, not fix him between this bowlder and that rock, and lead him from step to step and over gulch and gulf, as he is doing by this method of examination. This is too big a thing to be played on a small mere game. Let us have it out; let us have the facts. This is too big a court to be trifled with by that method of examination. Here is a man put on the stand to swear to we all know what. Why do not they let him swear to it? Why do not they put him right straight forward and let us have these facts in their natural order, and not dragged out one after the other in this indirect and, as I think, improper way?

Mr. Manager McMahon said:

Mr. President, it is a matter of great deprivation to the House of Representatives, no doubt, that the able gentleman (and I say it in all seriousness and earnestness) does not sit here to conduct the case of the Government for it, but that is one of those accidents which we can not prevent, for the simple reason that he fails to be a Member of the House. The House has selected us to try this case, and while we concede to the gentleman (and we concede it honestly, not in any other except the fairest meaning) great ability in his profession and a full understanding of all the points of law and a full knowledge of all the details of practice and a full aptitude in all the details of nisi prius trials, yet we most respectfully submit to the Senate that we, however humble, appear here trying this case on our side, and if the gentleman will but possess his soul in patience for a little while the time will come when he can double this witness up all over four or five times with his unusual skill, and he can bring out all this truth that we are now so insidiously suppressing. He can then make it appear that his

[1] Senate Journal, p. 969; Record of trial, pp. 223, 224.

client is innocent, and that all this that we are introducing as testimony has nothing whatever to do with this case. A little patience now, a little of that which we have exercised, and the time will come when all these material facts in this case, all this hidden truth, can be brought out in the full sunlight that we have had in the last three or four days. Now, we propose, and we must be allowed that privilege, to put the questions to the witness. I never knew that right interfered with before.

The Senate, without division, decided that the question should be put to the witness.

2272. In the Johnson trial the Chief Justice was sustained in admitting as evidence the warrant and papers in a legal proceeding to which respondent was related, but not a party directly.—On April 13, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. R. J. Meigs, clerk of the supreme court of the District of Columbia, was called on behalf of the respondent and testified that on February 22 he affixed the seal of the court to a warrant for the arrest of Lorenzo Thomas. The said Thomas was Adjutant-General of the Army and had been arrested on complaint of Edwin M. Stanton, Secretary of War, who made affidavit that Thomas had been appointed by respondent to take illegal possession of the office of Secretary of War.

The testimony as to the issuance of the warrant having been read, Mr. Henry Stanbery, of counsel for the President, proposed to introduce as evidence the warrant and affidavit on which the warrant was issued.

To this Mr. Manager Benjamin F. Butler objected.

I have the honor to object, Mr. President, to the warrant and affidavit of Mr. Stanton being received as evidence in this cause. I do not think Mr. Stanton can make testimony against the President by any affidavit that he can put in, or for him by any proceedings between him and Lorenzo Thomas. I do not think the warrant is relevant to this case in any form. The fact that Thomas was arrested has gone in, and that is all. To put in the affidavit upon which he was arrested certainly is putting in res inter alios. It is not a proceeding between Thomas and the President; but this is between Thomas and Stanton, and in no view is it either pertinent or relevant to this case or competent in any form, so far as I am instructed.

Mr. William M. Evarts, of counsel for the President, said:

Mr. Chief Justice and Senators, the arrest of General Thomas was brought into testimony by the managers and they argued, I believe in their opening, before they had proved it, that that was what prevented General Thomas using force to take possession of the War Office. We now propose to show what that arrest was in form and substance by the authentic documents of it, which are the warrant and the affidavit on which it was based. The affidavit, of course, does not prove the facts stated in it; but the proof of the affidavit shows the fact upon which, as a judicial foundation, the warrant proceeded. We then propose to follow the opening thus laid of this proceeding, by showing how it took place and how efforts were made on behalf of General Thomas by habeas corpus to raise the question for the determination of the Supreme Court of the United States in regard to this act.

* * * * * * *

It has already been put in proof by General Thomas that before he went to the court upon this arrest he saw the President and told him of his arrest, and the President immediately replied "that is as it should be;" or "that is as we wish it to be, the question in court." Now, I propose to show that this is the question that was in the courts, to wit, the question of the criminality of a person accused

[1] Second session Fortieth Congress, Senate Journal, p. 893; Globe supplement, pp. 166–168.

and this civil-tenure bill. And I then propose to sustain the answer of the President, and also the sincerity and substance of this his statement already in evidence, by showing that this proceeding, having been commenced as it was by Mr. Stanton against General Thomas, was immediately taken hold of as the speediest and most rapid mode, through a habeas corpus, in which the President or the Attorney-General, or General Thomas acting in that behalf, would be the actor, in order to bring at once before this court, the supreme court of the District, the question of the validity of his arrest and confinement under an act claimed to be unconstitutional, with an immediate opportunity of appeal to the Supreme Court of the United States then in session, from which at once there could have been obtained a determination of the point.

At the conclusion of the argument the Chief Justice [1] said:

The Chief Justice think the affidavit upon which the arrest was made is competent testimony, as it relates to a transaction upon which Mr. Thomas has already been examined, and as it may be material to show the purpose of the President to resort to a court of law. He will be happy to put the question to the Senate if any Member desires it. [No Senator being heard to speak.] Read the affidavit.

But before the reading began, Mr. John Conness, a Senator from California, demanded that the question be put to the Senate. This being done, there appeared, yeas 34, nays 17. So the reading of the warrant and affidavit in evidence was permitted.

2273. On April 13, 1868, [2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, R. J. Meigs, clerk of the supreme court of the District of Columbia, had testified as to the issuance of the warrant for the arrest of Lorenzo Thomas on the affidavit of Edwin M. Stanton, and the warrant and affidavit had been admitted as evidence.

Then Mr. Henry Stanbery, of counsel for the President, asked:

Have you got the docket entries as to the disposition of the case of The United States *v.* Lorenzo Thomas, and if so will you produce and read them?

Mr. Manager Benjamin F. Butler objected to the evidence as incompetent.

The Chief Justice [1] said:

The Chief Justice thinks that this is a part of the same transaction, and is competent evidence; but he will put the question to the Senate if any Senator desires it. [After a pause.] The witness will answer the question.

2274. Instance in the Belknap trial wherein a document not pertinent on its face was admitted to prove the negative of a pertinent proposition.— On July 8, 1876, [3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. John A. McMahon, of the managers on the part of the House of Representatives, proposed the introduction as evidence of this letter, as bearing on the charge that the respondent had a corrupt arrangement with Marsh and Evans, who were interested in the post tradership at Fort Sill:

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

[2] Second session Fortieth Congress, Senate Journal, p. 895; Globe supplement, pp. 173, 174.

[3] First session Forty-fourth Congress, Record of trial, p. 208.

General Orders, No. 89.]

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
"Washington, October 12, 1872.

The opinion of the Acting Attorney-General upon the following questions is published for the information and guidance of all concerned:

"DEPARTMENT OF JUSTICE,
"Washington, October 3, 1872.

"SIR: I have duly considered the questions which you ask the Attorney-General in your letter of the l1th instant, and which are as follows:

"Where persons such as post traders, contractors, and others have been allowed by proper authority to erect buildings to facilitate their business upon a military reserve, with no restriction as to the term during which they shall be allowed to remain—

"1. Are such buildings, after the removal of the trader, contractor, or other person from the reserve, still his personal estate, and as such has he the right to dispose of them by rent, lease, or sale to other persons?

"2. Does not such property become part of the realty after the appointment of a trader is revoked or a contractor has fulfilled his contract, or any event happens which dissolves their business connection with the reserve?

"By the order of the Secretary of War of June 17, 1871 (a copy of which you inclose to me), it is provided that 'post traders appointed under the authority given by the act of July 15, 1870, will be furnished with a letter of appointment from the Secretary of War, indicating the post to which they are appointed.'

"They will be permitted to erect buildings for the purpose of carrying on their business upon such part of the military reservation or post to which they may be assigned as the commanding officer may direct, such buildings to be within convenient reach of the garrison.

"They will be allowed the exclusive privilege of trade upon the military reserve to which they are appointed, and no other person will be allowed to trade, peddle, or sell goods, by sample or otherwise, within the limits of the reserve.

"They are under military protection and control as camp followers.

"Buildings erected by post traders on a military reserve, in conformity to this order, are erected for the mutual benefit of the Government and the trader, and are not to be regarded as buildings would be erected by trespassers, or even by tenants under leases, in which no provision is made therefor; but they are erected under a license from the Government and for the mutual benefit of both parties. Under these circumstances I am of opinion that by the proper construction of the license these buildings were not intended to become a part of the realty after their erection; but were to continue the property of the traders, and, lest therefore when a trader is removed from his post, I have no doubt that he has a right to remove the building from the place where it was erected; and that when removed he can dispose of the materials as his own property. But it is very clear that the license to erect such buildings is a purely personal one, and is granted for one purpose only. Therefore, under such licenses, the person so erecting the building would have no right to rent or lease the same or even to sell it to another post trader without permission of the military authorities, but his rights are confined solely to that of removing the building from the reserve. Undoubtedly the property in such a building might, with the approval of the commanding officer, be transferred to another post trader, and such permission would have the same force as a license to a new post trader to erect such a building at that spot.

"I return you the papers inclosed.

"I have the honor to be, sir, your very obedient servant,

"CLEMENT HUGH HILL,
"Acting Attorney-General.

"Hon. William W. Belknap,
"Secretary of War."

Mr. Matt. H. Carpenter, of counsel for the respondent, objected to the letter as without relevancy and having no possible bearing on the case.

Mr. Manager McMahon said:

We have asked the Adjutant-General for a copy of every order that has been issued since the Grierson complaint in regard to post traders for the purpose of proving a negative, but a very important negative in this case, and that is for the purpose of proving that every order that the Secretary of War issued, by a coincidence of good luck, failed to hit the case of Marsh and Evans.

The President pro tempore having submitted the question to the Senate, the evidence was admitted without division.

2275. In the Belknap trial testimony cumulative as to the fact but not as to the intent of respondent was admitted.—On July 8, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Manager John A. McMahon proposed the introduction as evidence of certain letters wherein a complaint had been made through the Solicitor of the Treasury that Evans, the post trader at Fort Sill, was clandestinely selling spirituous liquors, and the following letters in reply thereto:

WAR DEPARTMENT,
Washington City, November 2, 1871.

SIR: I have the honor to reply to your letter of the 28th ultimo on the subject of the illegal introduction of spirituous liquors, etc., into the Indian country by Evans & Co., and other parties, that previous to the 28th ultimo, on which date Evans, post trader at Fort Sill, was authorized to take to that post monthly ten gallons of brandy and ten gallons of whisky for the use of the officers there, no permit had been given him or the other parties referred to to introduce any liquors into that country.

Very respectfully, etc.,

W. W. B.,
Secretary of War.

THE SOLICITOR OF THE TREASURY DEPARTMENT.

WAR DEPARTMENT, *November 8, 1871.*

SIR: In further response to your letter of the 28th ultimo on the subject of the alleged illegal introduction of liquors, etc., into the Indian country by certain persons, among others Evans & Co., of Fort Sill, I have the honor to inform you that Mr. John S. Evans, post trader at Fort Sill, through his friends, denies having taken liquor into the Indian country without authority. Mr. Evans was appointed to the post tradership on October 10, 1870, and holds it in his own name and not in that of Evans & Co., and no complaint has ever been made against him by the military authorities at Fort Sill, he having been regarded a good and law-abiding business man.

I therefore request that no proceedings be commenced against him without a thorough investigation of the charges that he has been engaged in such practices shows they were well founded.

Very respectfully, etc.,

W. W. BELKNAP,
Secretary of War.

TO THE SOLICITOR OF THE TREASURY.

The respondent was charged in the articles of impeachment with having appointed Evans corruptly and with sharing in connection with one Marsh in a tribute paid by Evans in consideration of the appointment.

Mr. Matt. H. Carpenter, of counsel for the respondent, said:

I object to all that proof. It does not go, so far as I can ascertain, to sustain any charge made in these articles at all, nor is it evidence of anything necessary for them to prove so far as I can see. They certainly do not state any reason why this should be received. One of the managers says he wants to

[1] First session Forty-fourth Congress, Senate Journal, p. 965; Record of trial, pp. 204–206.

prove by it that Evans was there acting as post trader and that Belknap knew it. As they have shown the fact that Belknap appointed him, it is pretty good evidence that he knew that Evans was appointed. There is no question made here that Belknap did not know that he was the post trader there; not the slightest. * * * You have proved by the only testimony which can prove it—to wit, the record of his appointment—that he was appointed. After you have proved the record of a judgment in a court of record, you can not call witnesses to prove that the judgment was rendered, because that is cumulative. You have introduced conclusive evidence, and I have said to you that we do not deny it; we make no point upon it. Of course the Secretary knew that Evans was post trader.

Mr. Manager McMahon said:

The letters which we now offer by way of introduction to subsequent letters are letters which make certain specific charges against the post trader, John S. Evans. The theory of this prosecution is, and up to this point tolerably well sustained, that John S. Evans was appointed through the influence of Caleb P. Marsh and in pursuance of a corrupt bargain between them, the profits of which were equally divided between Marsh and the Secretary of War; that the Secretary of War did actually and personally receive his share of the fruits of this arrangement no man who has any regard for testimony can doubt. The great question for this tribunal is whether he received it knowingly, under such circumstances that any officer of honesty and integrity ought to have known where this money was coming from.

The particular point, therefore, to be investigated is the conduct of the Secretary of War. Whenever this particular post trader is affected, from whom he is receiving his gains, the particular point is to discover how the Secretary of War acts. What he may say is very direct and positive testimony, but it is not anymore direct and positive than what he may do. * * * We have introduced conclusive evidence that John S. Evans was, in fact, the post trader, but whether the Secretary of War had forgotten the fact in the multitude of his different appointments is another important fact in this case which we propose to show had not occurred; that he had not forgotten that John S. Evans was the post trader, but, on the contrary, that he was receiving testimony as to John S. Evans's good character, supporting and sustaining John S. Evans all along.

The President pro tempore submitted the question to the Senate, who decided without division that the evidence should be admitted.

2276. The Senate in the Belknap trial declined to admit evidence of a fact occurring after respondent had ceased to hold the civil office.

Instance of a ruling by the President pro tempore on a question of evidence in an impeachment trial.

On July 8, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, E. D. Townshend, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent, when the latter proposed to offer in evidence a certain circular general order, issued March 7, 1876, from the War Department, and sent to every post in the United States directing the officers to examine whether the post traders were satisfactory; and, if not, to state that fact or to have them removed; and that in pursuance of the order, at Fort Sill on the 11th of April, 1876, there was a meeting of the officers and every one of them recommended the reappointment of Mr. Evans.

Mr. Manager William P. Lynde said:

We object to the introduction of that circular in evidence. It bears date, I think, 7th of March, after the resignation of Mr. Belknap, and has nothing whatever to do with the case now before the court so far as we can see. * * * It seems that this investigation was not had until Mr. Belknap had sent in his resignation and vacated the office of Secretary of War. He had made the appointment previously, it is true, on the recommendation of the officers at Fort Sill, when he was Secretary of War; but

[1] First session Forty-fourth Congress, Senate Journal, p. 965; Record of trial, pp. 209–211.

he refused to make it until Mr. Marsh threw in his interest and influence with the Secretary of War, who, had informed Mr. Evans that he had already promised this appointment to Mr. Marsh. That the officers at Fort Sill found no fault with Mr. Evans and excused him of the high charges which he made for the goods which he sold to the officers and soldiers on the ground that he was paying $12,000 a year bonus we are informed by the letters of the commanding officers at the post and by the other evidence we have introduced in the trial. Therefore that these same officers should, subsequent to the resignation of the Secretary of War, when this matter was under investigation and when Mr. Evans was no longer called upon to pay this bonus of $12,000, have sufficient confidence in his integrity to recommend his continuance in that position, makes nothing in favor of the accused in this case. We therefore claim that it has no pertinency to the issue before the Senate, and ask that it may be excluded.

Mr. Montgomery Blair, of counsel for the respondent, said:

Mr. President and Senators, the court will observe that there are two theories here; one by the prosecution and one by the defense, and they recur at every stage of this case. Yesterday we had this battle with the managers, they assuming that we knew of these arrangements, of the existence of this contract, and were receiving knowingly this money. Of course they think that theory is true, and of course they think there is no other theory in the case. But there is another which we mean to make good to this court, and it is that we knew nothing of the consideration whatever; that this appointment was made in perfect good faith; that so far as we knew the law was being executed, and when failure of its execution was called to our attention we got the advice of our officers, those who were most familiar with this case, and got their remedies and applied them. They would think the argument to be on their side that we ought to have immediately removed this man, broken up his establishment, and turned him out, as the President did when the fact was finally brought to his attention and it was published that this contract existed. Let the Senate assume, as we infer they will assume, that the Secretary of War knew nothing of this transaction between these other parties; and that this man executed his duties faithfully. That he did execute them faithfully and that he was a good officer, we think is proved by the unanimous recommendation of the officers and soldiers at this post. We want now to show to the court that this officer, notwithstanding all the charges which were made, was recognized as a good and proper officer, and did his duty so satisfactorily that every officer at the post recommended his reappointment. We think this competent proof. We think this proper to go before the Senate as a circumstance to weigh in their judgment upon this case.

The President pro tempore having submitted the question, "Shall the circular be admitted?" the question was determined in the negative without division.

Thereupon Mr. Carpenter offered the recommendation made by the council of administration, which convened at Fort Sill on March 7, 1876.

Mr. Manager John A. McMahon objected.

The President pro tempore [1] said: [2]

On the same principle decided by the Senate, the Chair sustains the objection, the paper being subsequent to the resignation of the Secretary of War. * * * The Chair * * * decided it on the principle that it was subsequent to the date of resignation, and on that the Chair ruled. The Chair will, however, submit the question to the Senate, if desired, Shall this paper be admitted?

The question was determined in the negative without division.

2277. Judge Swayne being charged with submitting false certificates of expenses, evidence tending to show that other judges had submitted similar certificates was excluded.

Letters from other judges stating their construction of the law as to expenses were not admitted in behalf of Judge Swayne, charged with submitting false certificates.

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

[2] Record of trial, p. 211.

A statement signed by the Secretary of the Treasury, but not under seal, summarizing the contents of official documents, was objected to as evidence in the Swayne trial.

Objection that new matter in respondent's answer, not responsive to any charge in the articles, should not lay a foundation for the introduction of evidence.

On February 23, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the introduction of testimony, made the following offer:

I now offer in evidence certified statements from the Treasury of the United States showing in detail the number of days in each year from April 1, 1895, down to March 31, 1903, during which the several circuit and district judges of the United States were attending court away from home or out of their districts, and showing the amount of expenses for travel and attendance to which each and all of them certified and received.

I make this offer as tending to show from an analysis of the certificates and accounts the contemporaneous judgment which has been placed upon the statute in question by the action of many of the judges of the courts of the United States, and also by the administrative officers of the Treasury Department.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, objected, saying:

I desire that it be noted on the record that what this paper purports to be, as stated in the caption, is this:

"Statement showing amounts paid to United States circuit judges as expenses claimed while attending circuit courts of appeals away from their residences, and amounts paid to United States district judges as expenses claimed while holding court out of their own said courts, being in the first circuit."

And then there is one for each of the other eight circuits. * * * To that I offer the objection, which I will ask the Secretary to read:

The Secretary read as follows:

First. It is not responsive to any allegation contained in any of the articles of impeachment.

Second. If the subject-matter of the offer in any way relates to averments contained in the answers of respondent to the first, second, and third articles of impeachment, nevertheless, the said averments are not responsive to any charge contained in the articles of impeachment and present no issue for determination in this cause.

Third. The offer of respondent is only to show that the judges named did receive for their expenses an amount equal to $10 a day in the aggregate, but does not include an offer to prove that they did not actually expend as much as, or more than, the amount charged by the honorable judges to the Government as their said expenses of travel and attendance in holding court, and the evidence is therefore immaterial and irrelevant.

Fourth. That it is not averred in the answer nor offered to prove that the respondent, either at the time of or prior to the alleged false certification of his expenses in 1897, had consulted or conferred with or taken the opinion or had knowledge of the action of any of the judges referred to in the offer.

Fifth. It is not competent for respondent, in his own defense, to prove the usage or practices of other judges in other courts, particularly as it is not offered to show that he had knowledge thereof.

Sixth. If respondent has been guilty, as charged, of falsely certifying his expenses and collecting upon his own certificate an excessive amount from the Government, it is no justification for him to show that he subsequently ascertained that others had been guilty of the same offense.

Seventh. The certificates offered from the Treasury Department are not under its seal as required by the statute to make them admissible in evidence.

Eighth. The statements offered are not copies of any official papers or records remaining in the Treasury Department, but consist of some figures and data purported to have been made up after the consideration of such papers and records. They do not purport to show the amounts of expenses certified

[1] Third session Fifty-eighth Congress, Record, pp. 3169–3174, 3176.

by the judges named therein, nor whether they were more or less than $10 a day. They show merely the amounts alleged to have been paid in each instance, without stating whether the said amount was more or less than the amount certified by the judge to have been expended. They do not include the certificate of the judge nor the account of the marshal who paid him. They are partial and incomplete, and not authorized by any statute to be used as evidence.

Ninth. The offer contains an unwarranted insinuation that other judges have collected from the Government for expenses sums greater than they actually expended, but without showing or offering to show what amounts they actually did expend, or certified as having been expended, and if received, will necessitate the calling of all of the said judges, as a matter of justice to them and to all the people of the United States, for the purpose of rebutting the said insinuation contained in the offer.

Mr. Manager Olmsted then said:

Mr. President, if I may be permitted to speak upon this point, there is nothing in any article of impeachment making any reference whatever to any Federal judge save only this respondent, who is himself charged in the first article with having in 1897 falsely certified to the amount of his expenses and received the money upon his said certificate. In his answer, after admitting that he did make that certificate, but denying in rather a vague way its falsity, he says, on page 27 of this record—it is the last paragraph on the page—

"respondent says that he is fortified and confirmed in his honest belief that the construction so placed by him, etc., was and is right * * * by the fact that he is informed"—

Now, in 1905, nine years after he made that certificate, he is informed—

"and verily believes, and as the records of the Treasury Department will show, that many of the circuit judges of the United States and district judges did the same thing."

That, I submit, Mr. President, is new matter, not responsive to anything in the charge and having no proper place in the respondent's answer, and evidence under it is inadmissible upon the ruling of the Presiding Officer and of the Senate made upon the 14th instant upon our offer to prove the inconvenience to suitors and counsel of the absence of the respondent from his district. It was ruled inadmissible. That evidence was responsive to new matter inserted in the answer of the respondent, but the answer itself in that particular was not responsive to any averment in the articles of impeachment.

I want, just at this point, Mr. President, to state that the honorable counsel for the respondent took us to task for making a written offer embracing an admission made by the respondent, to which they objected. He took us to task in terms of great indignation for trying to get before the Senate matter in an improper way. I call your attention to these three exhibits attached to their answer, and ask what words of condemnation are strong enough to apply to the introduction in that manner of what is intended to be evidence in advance of the hearing of the case for the purpose of influencing the court in its decision? Upon the ruling I have already cited, and upon every authority, this evidence would have to be rejected for that reason.

But next, Mr. President, the offer is only to show that the judges named in those papers did, in certain instances, receive for their expenses as much, or a sum equal to $10 for each day if divided by the number of days. But it is not offered to show—the statement offered does not even refer to the subject, and respondent makes no offer to show—that those judges, nor any of them, did not actually expend that sum, and this is, I say, a cowardly insinuation against honorable judges—the dragging of their names in the mire without any attempt to prove that they have been guilty of any offense whatever.

Of course, Mr. President, if a judge is holding court in New Orleans, where, as I know from very recent experience, people may reasonably expend a good deal more than $10, or in New York, or in Chicago, or in San Francisco, and if his expenses amounted to $12.50 to $15 a day, he could get not to exceed $10; and so, of course, this statement would show that what he got amounted to $10. That is the maximum fixed by the law, but it is not the slightest evidence that he did not expend the money. They do not offer to introduce the certificates showing what his actual expenses were. So I say, that, lacking that essential element, it is not evidence at all in this case.

It is not pretended that this respondent at the time of making his certificate in 1897 knew the opinion of or consulted any other judge in the United States.

In regard to the fifth objection, Mr. President, it is not competent for the respondent in his own defense to prove the usage or practice of other courts or other counties. I propose to submit a very high authority. In the celebrated trial of Prescott in Massachusetts, made notable by the eminent

array of counsel and managers involved, Judge Prescott, the probate judge, entitled upon one side of the court to take fees, was charged with taking more than the law permitted him.

In one case the excess was $1.98, and in another article some $39 of excessive fees were involved. He was convicted upon both charges. He offered to prove the usage of other courts and other counties throughout the State for the purpose of showing his intent to have been an honest one and in accordance with the practice throughout the State. That offer was made by Mr. Samuel Hoar and supported by himself and Daniel Webster, but they were completely overthrown in their argument by Mr. Manager Shaw—the same Mr. Shaw who afterwards became chief justice of the supreme court of Massachusetts, and, in the opinion of many men, secured a place in the history of the jurisprudence of this country second only to that of Chief Justice Marshall. I ask that the court will hear the offer which was made by Mr. Hoar in that case:

The Secretary read as follows:

The counsel for the respondent read the motions when put into writing, as follows, viz:

"1. And now the counsel for the respondent move that, in order to rebut the charge of willful and corrupt misconduct, they may be permitted to prove that at the time of the respondent's appointment to office there did exist, and continually since has existed, in the probate offices of the several counties in this Commonwealth a practice according to which, in cases of application for administrotion, certain official papers are prepared and executed and certain official acts done and performed which are not particularly enumerated in the statute called the 'fee bill,' and fees paid therefor, and to show the usual amount of such fees.

"2. And now the counsel for the respondent move that, in order to rebut the charge of willful and corrupt misconduct, they may be permitted to prove that at the time of the respondent's appointment to office there did exist, and continually since has existed, in the probate offices of the several counties of this Commonwealth a practice according to which, in cases of application for administration, certain official papers are prepared and executed and certain official acts done and performed which are not particularly enumerated in the statute of the Commonwealth, commonly called the 'fee bill.'"

Mr. President, to make this as brief as possible, that offer having been elaborately argued by those eminent gentlemen, was rejected by a vote of more than 2 to 1. Judge Prescott was convicted and removed from office upon those two articles. If this respondent has been guilty of any offense it is no excuse for him to say that somebody else did the same thing in later years, and in some other court; and in any event his offer does not include anything tending to show improper conduct by any other judge.

But again, that paper is not offered under the seal of any Department. It is not so authenticated as to be admissible in evidence. It does not purport to be a copy of any record in any Department. It is simply a lot of figures made up by somebody purporting to have been abstracted or extracted from certain documents, we know not what. It certainly does not show that any other judge ever certified to $10 of expenses when his actual expenses were less.

Now, when we offered the three certificates showing Judge Swayne's certificates and the action thereon we were required by the honorable counsel for the respondent to put in the whole record, the marshal's account, the action of the Treasury, Department—every paper on file. These papers which they offer are not evidence in any proceeding on earth and would not be received in any court in Christendom.

Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, I must confess to my surprise at the last objection raised by the learned manager. It is true, I find, that the certificate to these statements is not attested by the seal of the Treasury Department, but it is signed by the Secretary of the Treasury; and the only effect of that objection would be to require us to have the seal put to this paper between this time and the next meeting of this body. I hardly suppose that the learned managers will stand on that. An objection which merely goes to the authentication and which does not dispute its genuineness, it seems to me, is hardly worthy of either this tribunal or this grave proceeding. Nor have I supposed that either side in the prosecution of this case would undertake to put unnecessary tasks upon the other or lengthen the proceedings.

The learned manager said that the counsel for the respondent had compelled the managers to put in evidence certain certificates of the judge when they put in their Treasury statements in support of

the articles against Judge Swayne—the first, second, and third. We put no compulsion upon them that I remember. They took their own course, and a very proper course. They rely upon their allegation of the untruthfulness of the certificate, and of course they put in the certificate. It would have been open to us to have loaded up this record with all of these papers from the Treasury Department and to have brought the originals here to the extreme disturbance of the public business. But, as we supposed, contributing to the need of dispatch of the Senate under its present conditions, we have got a succinct statement which gives all the material facts; for, Mr. President, behind the certificate here, as to every item, it is presumable, and there certainly is in the Treasury Department, certain other evidence. The course of proceeding in this case, as shown by the very certificate put in by the managers, is that at the end of a session of court held by a judge away from his home, at the circuit court of appeals, or away from his district in the district court, he presents his certificate to the marshal, stating the number of days and the amount of expenses, which he certifies to, and on that the marshal pays to him the amount and takes his receipt, which, under the form prescribed by the Department of Justice, is at the bottom of the certificate. A form of that was presented by my colleague only a few moments ago and admitted without objection.

That certificate is by the statute made the voucher upon which the marshal is reimbursed for his payment to the judge; and, as I shall call attention to, the statute requires that he shall be repaid—that he shall be allowed his account. The marshal then presents such item with the other items going to make up his account, his entire account, under the act of 1875, which we put in evidence here this afternoon, to the United States judge for that court. In the particular cases, we have an object lesson here in the certificate introduced by the managers in condemnation of Judge Swayne, that there the marshal of Texas in two instances presented that account before the local judge, Judge Bryant, who did not sit in two certain trials growing out of the failure of a bank because he was interested in the matter in some way, and Judge Swayne held two long trials, one in one year and the other in another year, and made these certificates.

Now, the marshal presented his account to Judge Bryant, and, under the statute, the United States attorney for that district was at that time required to be present and his presence to be noted upon the record. The marshal's account had to be sworn to. The judge's certificate is prescribed, and the statute prescribes that he shall approve or disapprove of that account, as shall be according to law and as may be just.

So you have now the act of the marshal in paying the judge, and the act of the local judge in approving the account in the presence of the district attorney, who is there when he approves it in order to protect the United States. All that happens in the very district where the expenditures are made and where the judge knows and the district attorney knows and the marshal knows, each of their own knowledge, as to what is the amount of expenses that would be involved in a residence there. The account then goes with the marshal's to the Department of Justice, under the terms of the act which will be printed in the Record to-morrow, and is there audited, in the first instance, by the Auditor of the Department of Justice. From there, after the lapse of sixty days, it goes to the Treasury Department and is audited by the Auditor for the State and other Departments. It is then subject to the disallowance of the Comptroller, either of his own motion or upon its being brought before him.

You have, therefore, Mr. President, in this case the act in succession of six executive officers in confirmation or disallowance of such accounts. These certificates show that there has not been a single account disallowed by all of these officers; that from the beginning to the end there has been no objection made under the terms of this statute to the construction placed upon it by Judge Swayne, namely, that the certificate under which the payments were made were those that allowed a certificate of $10 a day irrespective of the fact as to whether that amount was actually expended or not. * * * I ask the learned manager if this fraud, which is a fraud before this Senate, was not such a fraud when it was brought before Judge Bryant? If it is a fraud now, it was a fraud then; and was there anything that has been proved by these witnesses that Judge Bryant did not know of his own knowledge? Did he reside in Tyler? I do not care. If he did, he knew it because he lived there. Did he reside elsewhere? Then he had to go away from his home, though in his district, to be sure, when he held court in Tyler, and he knew what it cost him just as much as Judge Swayne knew. Did not the district attorney know it? Did not the marshal know it? And does the learned counsel pretend to say that because of the terms of this certificate, as prescribed by the acts of 1891 and 1896, if that was a crime, it was not the duty of that district attorney to present Judge Swayne to his grand jury and have him indicted;

that it was not the duty of Judge Bryant to bring it to the attention of the district attorney; that it was not the duty of the marshal to protest? Is it possible that there is any fraud that can exist within the jurisdiction of the Auditor of the Department of Justice, of the Auditor of the Treasury Department, of the Comptroller of the Treasury that they can not unkennel and uncover, and that it is not their duty to do it?

No, Mr. President, it can not be held in the face of that that any such construction could be put by them upon the act of 1891 and the act of 1896 as to these fees. They did not abandon their duty; they do not stand here as convicted of any such absence or lack of it. What they did do was to say, "We are concluded by the certificate because we can not go behind it; we are concluded by the certificate because the statute intended to make it an allowance when the judge certified it, irrespective of what the actual expenses were."

The Senate will perceive, Mr. President, therefore, that the admissibility of these certificates rest upon something else than the mere act of the circuit and district judges of the United States in their several and respective actions in the amounts they certified under this statute. It brings up as a ground of admissibility of these certificates the contemporary construction placed by the executive officers upon the certificates of the judges as made from time to time. The form in which we have presented it is compendious. It is stripped of every unnecessary matter of evidence, which would merely load it up with lumber. It is brought down to the naked skeleton of facts of what is vital; but it puts before the Senate all of the evidence, coupled with the acts of Congress, that is necessary, and is in no sense unfair to the managers, because it apprises them of everything that they might desire to know.

Mr. President, I had hoped that this discussion would be left to the final argument; and for my colleague and myself we are willing that that course should be pursued now. I would stop at once any further discussion of this subject and leave it until the final argument to complete then what I have already said, so as not to take up the time of the Senate; but that offer does not seem to meet with the views of the learned managers, and I am compelled, therefore, to go into the discussion of the case—I say of the case—as made now by this objection to our certificates.

What we contend, Mr. President, is that the proper construction of these acts of Congress of 1891 and 1896 as to judges holding court away from their homes or out of their districts, is the one placed upon it by Judge Swayne; and that is they were authorized to certify their expenses at $10 a day as an allowance or compensation for such services. I shall endeavor to be very brief. The act is:

"That any justice or judge who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides"—

And, mutatis mutandis, it is the same in the case of a district judge when he holds court out of his district—

"shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed $10 per clay, and such payments shall be allowed the marshal in the settlement of his accounts with the United States."

The prior state of the law was that the Judge for such service was paid his actual expenses upon vouchers filed with his accounts. This will not be disputed, I presume, and I have assumed that there is no doubt as to the state of the law.

The true construction of these statutes is that Congress intended that a judge rendering such service should be paid $10 a day as an allowance for compensation for the service. That such is the true construction of the act will appear from its provisions, as shown by its language, and from the changes wrought thereby.

What is meant by "reasonable expenses" as used in the act? It was changed, Mr. President, from "actual expenses" and, therefore, presumably on its face does not mean "actual expenses." * * * Understand, Mr. President, I am arguing that this evidence is admissible because of the contemporary construction placed upon the statute by the officers, and that the statute is one which will bear construction, that it is open to construction. If it is not open to construction, if it is so clear, as the managers contend, that there is no doubt about it, in such case as that the authorities would not apply.

I must therefore make a case where it is apparent upon the face of the statute that it is doubtful and is uncertain, and hence I am compelled to go to that task if this question is to be determined on its merits. I regret it very much.

All the expenses must not merely be reasonable. The term "expenses incurred in travel" is easily defined, but it is difficult to place limits upon the term "attendance." Certainly it can reasonably be held to include (1) many expenses which might not be included under the word "actual" as construed by the accounting officers of the Government; (2) many expenses not incurred in attendance, but caused by attendance, and (3) the expenses are "not to exceed $10 a day."

What light does this provision taken in connection with the words "for travel and attendance," throw upon the true construction of the words "reasonable expenses?" If a judge spends $13 one day and $7 another, shall he certify $20 for the two days, or only $10 for the one day and $7 for the other, and $17 in all? * * * I had very nearly completed, Mr. President, the argument I was submitting about the fact that contemporary construction applies because the statute itself is one that is loosely drawn. If the words "not to exceed $10 a day" are given a hard and fast interpretation, then it must be held to mean in the case to which I have already referred that it is not to exceed $10 for any one day, and so in this instance supposed the judge would certify $17 and lose $3. That is, if he expended $7 one day and $13 another, he could only certify to the $7 that he spent that day, and only $10 for the day he spent $13; but even the learned managers will not contend that that is the construction. Why? Because it is "for travel and attendance." Oh, they say, going about large districts, you have got to have traveling expenses, and a man will spend $20 or $30 a day sometimes in traveling and all that; but what becomes, then, of your construction that it is $10 from day to day?

But, again, Mr. President, did the word "reasonable" mean an amount not as fixed by the judge's certificate, but as determined by the personal habits of the judge, and, indeed, the state of his health, or the individual limitations of his physical needs?

But light is shed upon the meaning of the words "reasonable expenses," as used in the act, by its provisions fixing who shall determine what expenses are reasonable.

That takes me to what I have already submitted, namely, a contemporary construction, in which it is said that the amounts shall be allowed to the marshal in his accounts, and the sum on the certificate shall be paid by the marshal.

I assume, again, in answer to the suggestion of the Senator from Virginia (Mr. Daniel), that it is by no means clear. On the contrary, I think it is clearly the other way; that under this act the certificate of the judge is conclusive; that is, that it is irrebuttable and irreversible, because the statute makes it so. I submit to the Senate, as a most serious matter, that it is not irreversible where there is knowledge that a fraud has been committed; and I can add nothing to what I have already said as to the case where the district attorney, the marshal, and the judge all have knowledge of it.

Mr. President, not detaining the Senate longer on that, I appeal to a case that is higher authority, I submit, than the one cited by the learned manager from an impeachment trial in Massachusetts; and that is the case of The United States *v.* Hill, where the doctrine of cotemporary construction was applied to a statute nothing like as ambiguous and loosely drawn and uncertain as the one now under consideration here. That case was where a clerk of the district court of the United States for the district of Massachusetts had not returned in his emoluments his fees for naturalization papers.

Mr. Manager Olmsted concluded the argument—

In the first place, the act itself does not vest any power or discretion in Judge Bryant, or the marshal, or anybody else except the judge who certifies, for it provides:

"For reasonable expenses for travel and attendance of district judges directed to hold court outside of their districts, not to exceed $10 per day each, to be paid on written certificates of the judges, and such payment shall be allowed the marshal in settlement of his account with the United States."

Provided the judge certified to a sum not to exceed $10 a day, what marshal had the right to sit on the account? I would not like to be that marshal. He would have been in jail for contempt inside of thirty minutes. What judge had a right to pass upon it? What Treasury official had a right to pass upon it? No one. The judge makes a certificate as to his expenses; and if it does not exceed $10 a day it is paid without question, and must be.

Now, in this offer of evidence there is not a word about the amount expended by any other judge. It is not pretended in there that any judge did not expend every dollar for which he was reimbursed by the Government. There is not anything in there about the construction of any official. We do not know whether their expenses exceeded $10 or not. We only know they did not get more than $10 for any one day.

Now, one word more about the absence of the seal from that paper. Of course there is no seal on it, and it is not a question of waiting until to-morrow for them to get a seal on it. There can not be a seal on it. The Department can only put the seal on certified copies of papers or documents in the Department, which that is not. The act of Congress provides:

"Copies of any books, records, papers, or documents in any of the Executive Departments authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."

That is not a copy of any record or any document or any book. It is some figures taken off by somebody, and we do not know who, and it simply shows the amounts paid to the judges therein named. There is no insinuation, except by counsel, that any one of these honorable judges charged or certified to any amount in excess of his actual expenses. There is nothing upon which to base the insinuation that a judge, having expended two or three or five dollars a day, certified that the expenses were $10 and collected the money from the Government.

On the same day, at the evening session, the question of the admissibility of the evidence was put by the Presiding Officer: [1]

The Presiding Officer thinks it becomes the duty of the Presiding Officer again to submit to the Senate the question with regard to the admission of evidence offered by counsel for respondent, which was submitted when a quorum of the Senate was not present, but when a quorum of the Senators sworn in the impeachment trial was present.

Counsel for the respondent offer in evidence certain statements of the Secretary of the Treasury, not under seal, purporting to show amounts paid to United States circuit judges as expenses claimed while attending circuit courts of appeals away from their residences and amounts paid to United States district judges as expenses claimed while holding court out of their own districts or while attending circuit courts of appeals away from their residences.

The question is, Shall the statement referred to be admitted in evidence? [Putting the question.] The "noes" appear to have it. The "noes" have it, and the statement is not admissible.[2]

Mr. Thurston then said:

Mr. President, I should like to have the Reporter read my two previous offers, which I desire to remake in the same terms I did before, and let the ruling be had upon them.

The Reporter read as follows:

Mr. THURSTON. Mr. President, we offer and ask to have incorporated in the record the opinion of the three circuit judges of one circuit, construing the law under which articles 1, 2, and 3 are framed. To be perfectly fair, I will state that this is in the shape of a letter, and has been written recently. On the question of offering it, I do not care to state to whom it is addressed or what judges sign it, but I offer it as an opinion of those judges on this question. The date of it is February 6, 1905.

The PRESIDING OFFICER. The Presiding Officer will exclude that paper.

Mr. THURSTON. I ask to have my second offer read.

The Reporter read as follows:

Mr. THURSTON. We offer in addition thereto similar opinions contained in letters of about the same date, signed by fifteen members of the Federal judiciary. They are all the same.

Mr. MANAGER PALMER. If they are similar——

The PRESIDING OFFICER. For what purpose?

Mr. THURSTON. For the same purpose that I offered the single letter.

The PRESIDING OFFICER. For what purpose?

Mr. THURSTON. For the purpose of showing the construction placed by these judges on the statute under which articles 1, 2, and 3 are framed.

The PRESIDING OFFICER. The Presiding Officer will exclude those papers.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] A short time previously the yeas and nays had been taken on this question, showing 10 votes for admission and 34 for exclusion. This vote showed the absence of a quorum, and therefore was of no effect, except as indicating the division of opinion.

2278. The Senate in the Belknap trial admitted evidence of an act which, in substance, amounted only to a refusal of respondent to confess culpability.—On July 8, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, E. D. Townshend, Adjutant General of the Army, a witness for the United States, was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent, and asked what the finding of the court-martial was in the case of Capt. George T. Robinson, of the Tenth Cavalry, and especially for a letter addressed by the said Robinson to W. W. Belknap, Secretary of War, and dated St. Louis Barracks, Mo., April 2, 1875. Mr. Carpenter explained the purpose of this evidence:

This man Robinson was, as I understand, court-martialed and sentenced by the court to be dismissed the service. He was at the St. Louis Barracks at the time; and after the finding by the court was sent on to Washington to be approved by the Secretary of War he wrote a letter to the Secretary substantially stating the allegations which are now made in these articles and by the testimony offered by the managers, and containing what we regard as a blackmailing appeal to the Secretary of War, that he must disapprove of the findings of that court or the writer would take steps to disclose what he says existed in regard to the tradership at Fort Sill. (It was for transactions in connection with this tradership that the respondent was impeached.) Thereupon General Belknap examined the papers in the case, found that the proceedings were regular, that the court was justified in its finding, and he approved the finding and cashiered the captain, and filed this of record.

Mr. Manager George F. Hoar objected to the evidence:

Mr. President, it seems to me that that act of the Secretary of War affords no evidence or presumption of his innocence. A blackmailing officer, himself convicted by court-martial, sent to the Secretary a certain threat and demanded certain action. If the Secretary of War had acceded to his demand, he would have put himself in the power of that officer forever; and the acceding to that demand or concealing the letter from the persons about him in the War Department would have been a confession of guilt. On the contrary, the exhibition of the letter and the going on with the court-martial was denial. All, therefore, that it is offered to show from the conduct of the Secretary of War is that in April, 1875, being charged with this offense, he denied it and did not confess it; in other words, he seeks to make evidence for himself by proving a denial, which is the substance of his own conduct.

The question on the admission of the paper being submitted to the Senate, they decided, yeas 21, nays 18, that it should be received. So the objection was overruled.

2279. In the Belknap trial the Senate, by a bare majority, admitted, to show intent, evidence that respondent had not inquired into newspaper charges reflecting on his subordinates.—On July 10, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Whitelaw Reid, editor of the New York Tribune, was called as a witness for the United States, and examined as to a certain article which appeared in the Tribune as to the relations of the respondent with the post tradership at Fort Sill. In the course of the examination Mr. Manager John A. McMahon asked:

You can state now whether at any time, personally or by letter, the Secretary of War addressed you any communication to find out your authority for the statements in that article.

Mr. Matt. H. Carpenter, of counsel for the respondent, objected that the testimony sought was wholly immaterial and irrelevant to the case.

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[1] First session Forty-fourth Congress, Senate Journal, p. 966; Record of trial, pp. 212, 213.

[2] First session Forty-fourth Congress, Senate Journal, p. 967; Record of trial, pp. 218, 219.

Mr. Manager McMahon argued:

We do not know at this stage of the objection whether the witness will say "yes" or will say "no," and therefore the argument must be directed on the hypothesis that he may answer either way, and at this stage of the inquiry, if it is admissible in case he should answer either way, it is, of course, competent, and I think it is competent no matter how it may be answered. Why? Here is an article charging the existence of a grievance at Fort Sill, the payment of a tribute by one man to another for being kept in the place. We have already called Mr. Smalley, who wrote the article, and proved by him that no inquiry was made of him as to the authorship of that article, and that there was no general conversation had in regard to it. We now propose to go to the headquarters, to the fountain, and inquire whether anything was said to the editor of the paper in regard to this matter; and for this purpose I do not care what the answer maybe. If the answer is "yes," we desire the communication, whatever it may have been; if the answer is "no," our argument will be, in my judgment, equally strong, if not stronger, than it would be if we had the direct communication.

Now, I will put it on the hypothesis that the witness will answer "yes." Are we not entitled to know what the Secretary of War said when such a thing as this was published? I need not argue that question. Suppose now that he will answer "no;" are we not entitled to a knowledge of the fact as we propose to prove it here that, although these charges were publicly made in regard to the management of affairs at Fort Sill, the names having been given, the parties being specified, and one of the parties specified being, as we shall show, at that time an intimate personal friend of the Secretary of War, at no stage of the proceedings was any inquiry made by the Secretary of War from any person who would have any right to speak in regard to the source of the information of the facts stated in that communication? We draw our argument from that, and I have no objection to stating it. Our argument is this, that his conduct in that matter is the conduct of a guilty man; it is the conduct of a man who knows that the facts exist; of a man who knows all about the statement's in the New York Tribune article, and he does not me to go to anybody to find out the authority.

Mr. Carpenter said:

The rule, of course, must be the same here as it would be in the trial of any criminal case in a court of law, and is this Senate to establish the rule that, as often as a newspaper contains a libel upon an individual, that individual must go and shoot the editor, or must sue him for libel, or demand his authority for the article, or stand convicted of the charge? That is the question. They propose to convict this man of everything said in that article because he did not go and make a row about it, because he did not go and demand the authority upon which it was published, bring a libel suit, or shoot the editor. The man who is perfectly conscious of integrity in the matter never runs after such articles—at least there is no law that compels him to do so, and there is no law of presumption against him if he refuses to do it. I should be surprised to see any judicial court establish such a rule, and I should be anxious and curious to see how many of the Senators now sitting in the view of the Chair would be on their way for about five hundred editors within the next twenty-four hours. If it is a good rule against the Secretary of War, it is a good rule against any public man or any private citizen, and as often as any one of you Senators see a libel upon you in regard to any subject you must "jump for" the editor or you confess your guilt.

The President pro tempore having submitted the question, "Shall the managers be permitted to propound said interrogatory to the witness?" it was decided in the negative without division.

Then this question was asked:

Q. (By Mr. Manager McMahon.) Did you receive any communion from General McDowell in regard to this article in the New York Tribune?

Mr. Carpenter objected to the question.

Mr. Manager McMahon said:

Mr. President, I simply propose to show that at the time this thing occurred a communication was addressed, and to call for that and have it handed to me. Then I propose to have General McDowell

recalled, and to refresh his recollection by the contents of that letter. I do not propose to offer it now. * * * Am I not entitled to prove a certain letter which I desire to use in the progress of this case, and to identify it as the letter which the witness has received from a certain person in due course of mail?

The question being submitted to the Senate, they decided without division that the interrogatory might be propounded.

Later, during the same day,[1] Gen. William B. Hazen was called as a witness on behalf of the United States, and Mr. Manager McMahon asked:

State, if you know, who furnished the information upon which the New York Tribune article was published.

This question was later modified to this form:

After the publication of this article in the New York Tribune, state whether the Secretary of War, officially or otherwise, made any inquiry of you in regard to the truth of the statements contained in that article.

Mr. Carpenter objected.

Mr. McMahon explained:

From our own standpoint, amusing the testimony which we have already given to be correct, which we have a right to do, we have heretofore proven that the article in the New York Tribune was brought to the knowledge of General Belknap. We have to-day proven that General Belknap had ascertained that the authority for those changes was General Hazen, who had Fort Sill within his lines and who had troops stationed there. We have had from another source that General Belknap was exceedingly indignant * * * because General Hazen had represented it to a committee instead of to him. Now, this is the inference we want to draw from it: There is no libel in the New York Tribune article upon Secretary Belknap; on the contrary, if you will read that article you will find that it expressly excludes the Secretary from participation in this matter, and says that he knows nothing about it. It is no libel upon him in a newspaper, which is a subject upon which my friend is so sensitive, and upon which the counsel made the point, and very properly, that a man should not every time run and see the author of a newspaper article; but here are charges put in this article, coming from an officer whose name is not given, but then at the bottom of it is stated that these charges are made on the authority of a high officer under the Government in the Army. Here is the Secretary of War not charged, not implicated, no libel put upon his character, no stain upon him, but a grievance, a monstrous grievance, is called to his attention, one that demanded the immediate arm of the Government to remedy if it were true. While I submit to the decision that was made a while ago in regard to the testimony of Mr. Whitelaw Reid, and did not propose to argue it at that time, I say that it is the very highest kind of testimony upon a question like this, that when these charges are made in a public newspaper, not against this gentleman who is upon trial, but against certain other individuals, and public attention is called to them, an extract from a letter quoted with quotation marks to indicate that it is an extract from an officer at that point, and then that is fathered by a leading officer in the Army—I say we have a right to show, as we propose now to show, that instead of hunting up whether these things are true or not, instead of endeavoring as an officer of the Army to correct these evils, he cloaks them, does not inquire even when he knows the officer who is the authority for this statement, or the officer commanding this particular post. He shuts his eye to the transaction and goes nowhere for information. He goes neither to Mr. Smalley, who wrote the article, nor to Mr. Reid, who published it, nor to General Hazen, who was the authority for it, and as we shall show hereafter, he neither goes to Evans nor to Caleb P. Marsh to learn anything about it.

Are there no inferences to be drawn from these facts? Is it not the best kind of testimony when we have got the peculiar case that we have here? Then what are your relations, Mr. Secretary, or what were your relations to this man? Was Mr. Marsh privately milking him and dividing with you and you knew it? The inference is almost irresistible that he was aware of all these facts. He knew that General Hazen was the man who was responsible for this statement, and yet he neither corrects the abuses nor calls upon General Hazen in any shape or form.

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[1] Senate Journal, pp. 969, 970; Record of trial, pp. 228, 229.

Mr. Carpenter argued:

The testimony has already shown that Belknap was indignant at Hazen because he had violated the regulations of the Army and had not communicated what he pretended to know as a fact through the military channels, as it was his duty to do, but poured it out into the bosom of a congressional committee. The testimony also shows that Belknap did go to work investigating this matter through the proper channels. He wrote a letter to Grierson, who was in command of the post, and to Evans, and to others there, in regard to the matter. The letter of Mr. Grierson making his report is on the 18th of February. It was received about ten days after that, and the order correcting the whole thing was made on the 25th of March.

Is it possible that Mr. Belknap is to be condemned here because he did not select that particular method of investigation which the managers wish he had selected? He went to work regularly and efficiently. He did not wish to imitate the irregular conduct of General Hazen. Because Hazen had violated his duty and the regulations of the Army, it was not necessary that Belknap should also violate his duty, nor was it necessary that he should chase the newspaper or chase any correspondent of a newspaper; but he set immediately to work investigating through the regular military channels, where officers made their reports upon their character as officers and where if they were untrue they could be court-martialed for their untruth; not anonymous correspondence in newspapers, but regular official investigation, and on the 25th of March the whole matter was cured by the order of that date.

That is the state of facts. The question put to the witness is, Did General Belknap go to you about this matter? They might as well call any other man in Washington and ask, "Did he go to you about it." Belknap was under no obligation to go to General Hazen. He went through the regular channel to the commander of the post. General Hazen was not the commander of that post, and if General Hazen had known anything of irregularities there while he was in command of the post the regulations of war made it his duty to communicate it through the military authorities, not through political and congressional channels, but to make it directly through the official military channels. Then it could be corrected according to the discipline of the Army.

The question being put, "Shall the managers be permitted to propound the said interrogatory?" there appeared ayes 19, noes 18. So the interrogatory was propounded.

2280. In the Peck trial a witness was not permitted to testify to general public opinion on a subject not closely related to respondent's act.

Instance wherein, during an impeachment trial, the respondent personally examined a witness.

On January 11, 1831,[1] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness, Robert Walsh, was under examination, when this question was asked by the respondent himself:

Do you or not know that at and before the time of the publication there was a general belief in the State of Missouri that many claims to lands in that State, under Spanish grants, were fraudulent?

The publication referred to was an opinion by Judge Peck in a case relating to Spanish grants, the case of Soulard's heirs, published in a newspaper in St. Louis. The impeachment arose from the fact that Judge Peck had punished for contempt one Lawless, who had published a criticism of the opinion.

Mr. James Buchanan, of Pennsylvania, chairman of the managers for the House of Representatives, objected to the question. It was argued in behalf of the objection that in the trial of a district judge, for the imprisonment of a citizen without law and unjustly, the high court of impeachment might not be led off to

[1] Second session Twenty-first Congress, Senate Impeachment Journal, p. 333; Report of trial of James H. Peck, pp. 269–273.

the trial of fraudulent land claims in Missouri, and to the trial of them by common rumor. There would be no end to such an inquiry.

In opposition to the objection it was urged by Mr. Jonathan Meredith, counsel for the respondent, and by the respondent himself, that they were prepared to prove fraud in particular cases, and especially fraud by Soulard. It was proper to show what facts the court had in mind when the proceedings against Lawless was had. If the judge believed that the publication by Lawless contained a misrepresentation of the opinion as to the grants, and tended to show them of a fair character, might he not have rightly considered it his duty to repress such an attempt.

Arguing for the managers Mr. Henry R. Storrs, of New York, asked if rumor was evidence in any cause. Suppose, moreover, that it could be proved that there were ten thousand fraudulent land claims in Missouri. What bearing had that on the question of the impeachment. The question was whether Mr. Lawless fairly represented the opinion delivered by the judge, or whether the judge might commit him for a contempt in publishing such an article. Admit even that the claim of Soulard was fraudulent, that claim was not in issue now and the high court was not trying its merits.

The question being put: "Shall this interrogatory be put to the witness?" there appeared yeas 141 nays 27.

2281. In the Peck trial the person alleged to have been oppressed by respondent was required to testify as to acts of his own implying malice against the respondent after the said alleged oppression.—On January 11, 1831,[1] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness on behalf of the managers, Luke E. Lawless, was under cross-examination by counsel for the respondent. The respondent was on trial for unlawfully oppressing Lawless by imprisoning him for contempt for criticizing in the public prints a decision by respondent as judge in a case relating to a claim of Soulard's heirs.

Lawless had been imprisoned for an article signed "A Citizen" and published in a St. Louis paper in 1826. Mr. Jonathan Meredith, counsel for the respondent, now produced several newspaper articles published after the publication of 1826, and some published as late as 1830, and proposed this question:

> Are you the author of all or either of the articles contained in the newspapers now handed to you relating to the respondent?

Mr. James Buchanan, of Pennsylvania, chairman of the managers on behalf of the House of Representatives, objected to the question, on the ground that a witness on cross-examination might not be compelled, if the publications were reprehensible, to accuse himself. It was also urged by Mr. George McDuffie, of South Carolina, one of the managers, that the letters were wholly external to the case, for it could not be supposed that Judge Peck, in imprisoning Lawless, could have had foresight of these publications. They had nothing to do with the question as to whether or not Judge Peck was guilty of illegally imprisoning a citizen.

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[1] Second session Twenty-first Congress, Senate Impeachment Journal, p. 334; Report of trial of James H. Peck, pp. 275–277.

Mr. Meredith contended that in a case of libel or slander subsequent words or libels might be given in evidence to show quo animo the words were spoken or the libel written. He referred in support of this to Second Saunders on Pleading and Evidence, page 382.

On behalf of the managers it was urged that the authority cited might be applicable if Mr. Lawless were on trial for a libel, but could any authority be produced to prove that a witness under examination might be called on to establish his own guilt, if there be any, by his own testimony? Was not this directly in face of the constitutional provision that no person should be compelled to be a witness against himself? Should a judge be permitted to drive a man by oppression into the public newspapers for redress and then be allowed to use those very publications for the purpose of proving the existence of malice in the author previous to the date of his punishment.

Mr. Meredith said:

I am perfectly aware that we are not now trying Mr. Lawless for a libel. The argument and the authority were merely analogical—they both apply to this case. The principle is the same as in a case of libel. One of the great questions in this cause is the question of misrepresentation. After we have shown the misrepresentation it may be necessary, perhaps, to go a step further and show that it was intentional. We take that step when we show subsequent attacks upon the respondent, of which Mr. Lawless was the author. Is not this the object of such evidence in the case of a libel? And why should it not be as competent in a case of this kind, where intention is the question? It matters not at what subsequent period these publications were made. * * * They relate back to the original publication, and show the design and intention of the author. Again, does the lapse of time at all affect the second view with which this testimony is offered? Mr. Lawless is a witness in this cause. He has testified before this court, and one inquiry, and a main inquiry, is with what temper is he here as a witness? And do not these publications, if he be the author of them, go to evince that temper and feeling?

On the question, "Shall this interrogatory be put to the witness?" there appeared, yeas 28, nays 13.

2282. The witness having testified that a report of a speech was made partially by others as well as by himself, the report was not admitted in evidence.

Instance of a ruling by the Chief Justice on a question of evidence during the Johnson trial.

On April 3, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler offered in evidence a report of a speech of the President printed in a newspaper.

Mr. William M. Evarts, of counsel for the President, objected to the admission of the report as evidence on the ground that the reporter Hudson, who had been examined, had testified that a portion of the speech had been printed from notes taken by another reporter.

After discussion the Chief Justice[2] said:

The managers offer a report made in the Leader newspaper of Cleveland as evidence in the cause. It appears from the statement of the witness Hudson that the report was not made by him wholly from his own notes, but from his own notes and the notes of another person whose notes are not produced, nor is that person himself produced for examination. Under these circumstances the Chief Justice thinks that that paper is inadmissible. Does any Senator desire a vote of the Senate on the question?

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[1] Second session Fortieth Congress, Senate Journal, p. 880; Globe supplement, pp. 106, 107.

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

Mr. Charles D. Drake, of Missouri, having asked for a vote of the Senate, the question was taken on admitting the paper as evidence, and there appeared, yeas 35, nays 11. So the report was admitted.

2283. Judge Swayne being charged with wrongfully committing persons for contempt, testimony as to the condition of the jail was ruled out as immaterial.—On February 16, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Charles M. Coston, a witness on behalf of the managers, was questioned by Mr. Manager David A. De Armond, of Missouri, as to the acts of the respondent in committing certain persons for contempt, and this question was asked:

Q. Well, where were they in the county jail?—A. They were in a room next to what they call "the prisoner department of the jail." This jail is a brick building, two stories in height. There is an entrance——

Mr. John M. Thurston, of counsel for the respondent, here intervened, objecting:

Mr. President, is Judge Swayne, this respondent, to be answerable for the manner in which the imprisonment was conducted in the absence of any testimony tending to show that he gave any directions with respect to it? If not, we object to this feature of the testimony.

Mr. Manager De Armond said:

Mr. President, the object of the inquiry was to ascertain where they were confined and how they were confined—something about the jail and the accommodations, or the lack of accommodations, that they had in the jail, in a general way, and the punishment that they endured under this sentence of the court. * * * We think it is material to the issue to show what the punishment inflicted upon them was, and to leave the court, in passing upon the matter with all the testimony upon the subject before the court, to determine how far the judge knew that such accommodations or lack of accommodations would be their lot in sentencing them—whether it was a proper sentence as to the amount of punishment or whether it was excessive. We are getting at the animus of the judge. * * * I think upon the question whether the sentences were excessive or not—as to that branch of it—it would be competent for the respondent to show, if he could show, that the imprisonment was not for an unusually long time; that the punishment was not excessive, if, as a matter of fact, the persons sentenced to the jail were taken to quarters which were commodious and clean and if there were no especially contaminating influences from the low class of criminals confined in the same jail at the same time; if they were the only occupants, for instance, and were in the rooms or apartments of the sheriff or keeper of the jail, instead of being in with the common criminals—I believe that would be competent for the respondent to offer in the case. It seems to me it is competent for those prosecuting the case to show the kind of confinement, the kind of place to which he sentenced them, bearing upon the question whether he had the right to send them there at all, and whether the punishment was excessive in sending them there for that length of time. That is all I wish to say about that.

For information, I ask the President whether I am to understand the ruling to be that all questions in regard to the jail are to be excluded? I do not wish to ask questions simply for the sake of asking them, of course.

The Presiding Officer[2] said:

The Presiding Officer does not see that the question as to the character of the jail or the way in which the persons sentenced for contempt were confined there is proper. It can not be said that Judge

[1] Third session Fifty-eighth Congress, Record, pp. 2718, 2719.

[2] Orville H. Platt, of Connecticut, Presiding Officer.

Swayne is responsible for that without some evidence is adduced showing that the judge directed something to be done which was improper. * * * The Presiding Officer thinks that it is not material to this issue to prove the condition of the jail. If any Senator so desires, the Presiding Officer will submit the question to the Senate.

On February 20,[1] during examination of a witness, Simeon Belden, by Mr. Manager De Armond, the following occurred:

Q. What was done with you?—A. I was locked up in the jail.

Q. What part of the jail—in a cell or not?

Mr. THURSTON. Wait a moment. We interpose the same objection that we made the other day. Nothing that possibly happened in and about that jail or the manner or method of the confinement of the witness could be chargeable to Judge Swayne.

Mr. Manager DE ARMOND. Mr. President, when the matter was up before, what we were trying to show was the general condition of the jail and the general way in which the prisoners were handled or cared for there. Now, I am asking simply a narrative. There was a sentence pronounced against this gentleman and Mr. Davis, and I am asking what was done in the carrying out of that sentence. I suppose, if the sentence had not been carried out at all, it would be competent for the respondent to show it, and I think it is certainly competent for us to show whether it was carried out and how it was carried out. I do not mean in the way of going into the details or description about the jail, but what was done with these men.

The PRESIDING OFFICER. Anything more than that they were imprisoned for a certain length of time?

Mr. Manager DE ARMOND. Well, I desire to show where they were put, where they were changed to—without going into the matter of details—and how long they were kept there.

The PRESIDING OFFICER (to the witness). Answer the question.

A little later,[2] while Mr. Manager De Armond was examining a witness, Michael Murphy, the following occurred:

Q. State whether or not you were in charge of the jail when General Belden and Mr. Davis were brought there by the United States marshal or deputy marshal.—A. Yes, sir; I was in charge of the jail.

Q. Was there a commitment brought with them?—A. To the best of my knowledge; yes, sir.

Q. State what you did with them.—A. I——

Mr. THURSTON. One moment. We object to this. We did not insist very hard on our right to this objection while Mr. Belden was testifying, but it is certain that what took place in that jail, its condition, the way the prisoners slept, the way they were fed, the way they were treated, could not be used to prejudice the court against Judge Swayne unless they first laid the foundation for it by showing that he was responsible for it or directed it.

The PRESIDING OFFICER. That was the opinion of the Presiding Officer on a former day, but the questions which were asked Mr. Belden were allowed on the ground that they were a narrative of what occurred. The Presiding Officer does not think that evidence showing that the condition of the jail was an improper one is admissible unless it be shown that it was known to Judge Swayne and that was part of his motive in committing them there.

Mr. Manager DE ARMOND. I was not going to ask the witness about the general condition of the jail. I was going to ask questions practically the same as those asked General Belden; about what was done with them.

The PRESIDING OFFICER. What is the purpose of the questions?

Mr. Manager DE ARMOND. To show the punishment they endured.

The PRESIDING OFFICER. Unless there is something unusual in the character of the jail which was known to Judge Swayne, the Presiding Officer thinks the evidence is inadmissible.

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[1] Record, pp. 2906, 2907.

[2] Record, p. 2908.

2284. Decisions as to relevancy of testimony during the Peck trial.—On December 23, 1830,[1] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness, Luke Edward Lawless, was under cross-examination by Mr. William Wirt, counsel for the respondent. The witness, in a communication signed "A Citizen," and published in a St. Louis paper, had criticised an opinion delivered by Judge Peck in the case of Soulard's heirs. The judge was now on trial for punishing Lawless for contempt.

Mr. Wirt asked a question, reduced to writing, as follows: The witness is asked to refer to such parts of the opinion of the respondent in Soulard's case as support the first specification in the article signed "A Citizen."

Mr. James Buchanan, of Pennsylvania, of the managers on the part of the House of Representatives, objected that the question was irrelevant. The court had before them, he said, the publication of the witness, in which he had placed his assumptions in one column, and the passages in the opinion from which they were deduced in another column.

Mr. Wirt responded that the managers in opening the case had argued that there had been no misrepresentation of the opinion in the letter; and the question which he had asked was useful in determining the truth or lack of truth in the claim of the managers.

The question having been read to the court, the Vice-President put the question: "Shall this interrogatory be put to the witness?" and it was determined in the affirmative, yeas 32, nays 10.

2285. On December 22, 1830,[2] in the high court of impeachment during the trial of the cause of The United States *v.* James H. Peck, while a witness, Luke Edward Lawless, was under cross-examination, Mr. Jonathan Meredith, counsel for the respondent, put the following interrogatory:

> What was your contract for professional compensation in the case of Soulard's heirs?

It was for criticism of Judge Peck's decision in the case of Soulard's heirs that the witness had been punished by Judge Peck, and it was because of this punishment that the impeachment proceedings had been instigated.

The question being objected to by the witness and also by the managers for the House of Representatives, the question was put: "Shall this interrogatory be put to the witness?" and decided in the negative, yeas 19, nays 23.

2286. On January 10, 1831,[3] in the high court of impeachment during the trial of the cause of The United States *v.* James H. Peck, a witness, Josiah Spalding, was asked the following question by Mr. Jonathan Meredith, counsel for the respondent:

> What are the terms in which Mr. Lawless, according to general reputation, is in the habit of speaking of courts, both in their presence and out of court?

Judge Peck was on trial for the punishment of Mr. Lawless for contempt of court in criticising in a newspaper an opinion by the judge.

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[1] Second session Twenty-first Congress, Senate Journal, p. 329; Report of the Trial of James H. Peck, pp. 122–125.

[2] Senate Impeachment Journal, p. 328, second session Twenty-first Congress.

[3] Second session Twenty-first Congress, Senate Impeachment Journal, p. 332; Report of trial of James H. Peck, pp. 261–263.

Mr. James Buchanan, of Pennsylvania, chairman of the managers, objected to the portion of the question contained in the words "and out of court."

Mr. Meredith admitted that he should not have asked the question had he not thought he had the assent of the managers.

The court, by a vote of yeas 3, nays 39, sustained the objection.

2287. General decisions during the Johnson and Belknap trials as to relevancy of testimony.

Instances of decisions by the Chief Justice on questions of evidence during the Johnson trial.

On April 15, 1868,[1] 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, offered in evidence a letter of McClintock Young, Acting Secretary of the Treasury, removing Richard Coe from the office of appraiser at Philadelphia.

Mr. Manager Benjamin F. Butler objected to the proposed evidence as irrelevant. The letter, it was true, showed the direction of the President that the act be done; but if it were admitted it would be necessary to investigate whether or not the Acting Secretary or even the President might make the removal without consent of the Senate.

Mr. Curtis argued as to the act of Mr. Young:

He says that he proceeds by the order of the President, and I take it to be well settled judicially and practically that wherever the head of a Department says he acts by the order of the President he is presumed to tell the truth, and it requires no evidence to show that he acts by the order of the President. No such evidence is ever preserved, no record is ever made of the direction which the President gives to one of the heads of Departments, as I understand, to proceed in a transaction of this kind. But when a head of a Department says "by order of the President I say so and so" all courts and all bodies presume that he tells the truth.

The Chief Justice [2] ruled:

The Chief Justice thinks that this evidence is admissible. The act of a Secretary of the Treasury is the act of the President unless the contrary be shown. He will put the question to the Senate, however, if any Senator desires it. [After a pause.] The evidence is admitted.

2288. On April 20, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of the examination of Alexander W. Randall, Postmaster-General, proposed certain questions which were objected to. As a result of this the Chief Justice [2] said:

The honorable manager appears to the Chief Justice to be making a statement of matters which are not in proof, and of which the Senate has as yet heard nothing. He states that he intends to put them in proof. The Chief Justice therefore requires that the nature of the evidence that he proposes to put before the Senate shall be reduced to writing as has been done heretofore. He will make the ordinary offer to prove, and then the Senate will judge whether they will receive the evidence or not.

Thereupon Mr. Manager Butler submitted this offer:

We offer to show that Foster Blodgett, the mayor of Augusta, Ga., appointed by General Pope, and a member of the constitutional convention of Georgia, being, because of his loyalty, obnoxious to

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[1] Second session Fortieth Congress, Senate Journal, p. 899; Globe supplement, p. 183.

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

[3] Second session Fortieth Congress, Senate Journal, p. 915; Globe supplement, pp. 240–242.

some portion of the citizens lately in rebellion against the United States, by the testimony of such citizens an indictment was procured to be found against him; that said indictment being sent to the Postmaster-General, he thereupon, without authority of law, suspended said Foster Blodgett from office indefinitely, without any other complaint against him and without any hearing and did not send to the Senate the report of such suspension, the office being one within the appointment of the President by and with the advice and consent of the Senate; this to be proved in part by the answer of Blodgett to the Postmaster-General's notice of such suspension, being a portion of the papers on file in the Post-Office Department upon which the action of the Postmaster-General was taken, a portion of which have been put in evidence by the counsel of the President, and that Mr. Blodgett is shown by the evidence in the record to have always been friendly to the United States and loyal to the Government.

Mr. William M. Evarts, of counsel for the respondent, objected to this evidence as wholly irrelevant to this case. The evidence concerning Foster Blodgett was produced on the part of the managers, and on their part was confined to his oral testimony that he had received certain commissions under which he held the office of postmaster at Augusta; that he had been suspended in that office by the Executive of the United States in some form of its action, and there was a superadded negative conclusion of his that his case had not been sent to the Senate. In taking up that case the defense offered nothing but the official action of the Post-Office Department, coupled with the evidence of the head of that Department that it was his own act, without previous knowledge or subsequent direction of the President of the United States. In that official order, thus a part of the action of the Department, it appears that the ground of it was an indictment against Mr. Blodgett. A complaint was made that that indictment was not produced. The managers having procured it, having put it in evidence, they now propose to put in evidence his answer to that indictment or to the accusation made before the Postmaster-General.

After argument Mr. Manager Butler modified the question so as to stand as follows:

The defendant's counsel having produced from the files of the Post-Office Department a part of the record showing the alleged causes for the suspension of Foster Blodgett as deputy postmaster at Augusta, Ga., we now propose to give in evidence the residue of said record, including the papers on file in the said case, for the purpose of showing the whole of the case as the same was presented to the Postmaster-General before and at the time of the suspension of the said Blodgett.

Mr. Evarts said:

Our objection to that offer, as we have already stated, is that it does not present correctly the relation of the papers.

The Chief Justice said:

The Chief Justice will submit the question to the Senate. The original offer to prove has been withdrawn. The offer which has just been read has been substituted. Senators, you who are of opinion that the evidence now proposed to be offered should be received will say aye; contrary opinion, no. [Putting the question.] The noes have it. The evidence is not received.

2289. On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William. B. Hazen, a witness on behalf of the United States, was recalled, and in the course of cross-examination, Mr. Matt. H. Carpenter, of counsel for respondent, asked:

Is it according to discipline in the Army for an officer to publish scandal of the President which he knows nothing about except from hearsay?

[1] First session Forty-fourth Congress, Senate Journal, pp. 973, 974; Record of trial, p. 245.

Mr. Manager John A. McMahon said:

I must at this point enter an objection. It seems that my friend here is pursuing the old line, having the old misapprehension that every now and then crops out in this case. The misapprehension is that he is trying General Hazen and not General Belknap.

Mr. Carpenter argued:

Mr. President, this witness has been laboring for months to get up this impeachment for his own vindication. He comes back here to-day for explanation, and I am doing everything in my power to assist his purpose. I want to show what his motives have been; I want to show that they are utterly groundless; I want to show that he has violated all the proprieties and all the duties of his official station by the hand he has taken in this matter and his anxiety to fan public sentiment against General Belknap, who has never done him an injury in his lifetime, and who had shown him so many favors that General Sherman objected to his giving him another; and that is the man who repeats gossip against the President and against the then Secretary of War, and publishes it in letters over his own name.

The Senate, without division, decided the question inadmissible.

2290. On January 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Hon. Hiester Clymer, chairman of the committee of the House of Representatives which had taken the testimony on which the impeachment was based, was examined as a witness for the United States, and then was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent. Mr. Carpenter asked:

How long has the committee been engaged in investigating the affairs of the War Department?

Mr. Manager John A. McMahon objected, saying:

I only want to understand how far this is to go. If any inference is be drawn from any investigation held there that there is nothing else in this matter but what has been charged, we shall claim to put in the testimony which has been taken, which we shall certainly claim throws a good deal of light on other transactions and on this. We have carefully excluded them up to this point.

The question being put to the Senate, the interrogatory was admitted without division.

Very soon thereafter, the witness was reexamined by the managers, and Mr. Manager McMahon asked:

Had your committee taken any other testimony except Mr. Marsh's at the time that the House ordered the impeachment of Mr. Belknap and notified the Senate to that effect?

Mr. Carpenter having challenged the question, Mr. McMahon stated that it was put to rebut the presumption raised by the former question. If that was pertinent, this was.

After discussion the question was put: "Shall this interrogatory be admitted," and there appeared, ayes 11, noes 16, no quorum.

Thereupon, to save time, Mr. McMahon withdrew the question.

2291. On July 11, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, was under examination, when the following questions were asked, and the following colloquy took place between Mr. Matt. H. Carpenter, of counsel for the respondent, and Messrs. Managers John A. McMahon and Elbridge G. Lapham:

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[1] First session Forty-fourth Congress, Senate Journal, p. 975; Record of trial, pp. 254, 255.

[2] First session Forty-fourth Congress, Senate Journal, p. 973; Record of trial, p. 243.

Q. (By Mr. Manager McMahon). Your wife has been subpoenaed as a witness to attend this tribunal?—A. Yes, sir.

Q. I desire you to state now whether she is able to attend.

Mr. CARPENTER. What is the object of that?

Mr. MANAGER MCMAHON. We want to know from the witness whether she is able to attend.

Mr. CARPENTER. We object. What has that to do with this case whether she is well or sick?

Mr. Manager MCMAHON. We have a right to send for her if she is able to come. Let the objection be passed upon by the Senate.

The PRESIDENT pro tempore. The counsel object to the question propounded by the managers. Shall the question be admitted?

The question was determined in the affirmative.

Q. (By Mr. Manager McMahon.) State whether your wife is able to be present in court to be examined as a witness.—A. She is not; she is very ill.

Q. Have you the certificate of a surgeon to that effect?—A. I have.

Q. Whose certificate is it?—A. Dr. Alfred L. Loomis.

Mr. CARPENTER. Will the managers state now what the object of that testimony is?

Mr. Manager LAPHAM. It is to inform the Senate the reason why we do not call Mrs. Marsh.

Mr. CARPENTER. Is it proposed to raise any presumption against the defendant?

Mr. Manager LAPHAM. We shall argue that hereafter.

Mr. CARPENTER. We will take her testimony that was given before the committee if the managers want that, or consent to have her deposition taken. We want to completely repel the presumption that Mrs. Marsh being ill is any evidence of our guilt.

Mr. Manager MCMAHON. The managers here decline to do that. I do not agree with them in that matter. The counsel will make his application to the Senate personally.

2292. Testimony admitted in the Swayne trial as material, although objected to as not bearing directly on the issues.—On February 21, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness called on behalf of the respondent, was examined by Mr. John M. Thurston, of counsel for the respondent, and was questioned as to a suit known as the Florida McGuire case, the following being one of the questions:

During the first week of the court what steps did you take, if anything, to inform yourself as to the probability of the case being tried and as to when it might be reached upon the docket?

Mr. Manager David A. De Armond, of Missouri, objected:

We think it is an immaterial matter what steps he took to ascertain when the case would be for trial and what he did about it. He is not a party to the record nor a party to the proceeding that we are trying.

Mr. Thurston said:

Mr. President, we propose to show that the defendants in that case prepared themselves for trial, got out their list of witnesses, were ready for trial when the case was reached, and that they had a right to demand from the judge that he should not grant any postponement of that trial unless upon legal cause shown.

Mr. Manager DE ARMOND. I suggest in regard to that matter that the persons upon the other side are the persons whose conduct should be inquired about. What the defendants in that Florida McGuire case did or what they thought certainly are not matters for which the attorneys upon the other side could be held responsible. It is not inquiring anything about the attorneys of Florida McGuire—the parties who are proceeded against for contempt—but it is inquiring about what the attorneys upon the other side did, and what the attorneys upon the other side thought, and why the attorneys upon the other side did or thought certain things.

[1] Third session Fifty-eighth Congress, Record, p. 2980.

The Presiding Officer said: [1]

Does the Presiding Officer understand that that was stated in the trial of that case?

Mr. THURSTON. Yes, Mr. President. I also propose to show it for another purpose. It is part of the res gestae of this proceeding that has been gone into in detail and in such a manner that we might have objected at every step, but which, in deference to the desire of this court to proceed as rapidly as possible, we did not take advantage of.

The PRESIDING OFFICER. The Presiding Officer thinks the question may be asked.

2293. On February 21, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness on behalf of the respondent, was examined as to a suit known as the Florida McGuire case by Mr. John M. Thurston, of counsel for the respondent:

Q. On that trial were there any witnesses called by Florida McGuire or her counsel or examined on her side who did not live in Pensacola, either upon or in the immediate vicinity of the Rivas tract?—A. So far as I know, not. I have to answer that this way: That a good many of these witnesses are known to me only in a general way, and I know generally where they reside. I do not know them personally, but I think that they all reside within a mile of the courthouse in Pensacola.

Q. How long, in your judgment, would it have taken the United States marshal to have subpoenaed them all as witnesses?—A. If they had all been at home at the time they could have been subpoenaed in an hour and a half or two hours.

Mr. THURSTON. We offer this original praecipe for witnesses in that case. It is the original document which was identified the other day, and we ask, for the purpose of making up the record, that the certified copy may go in instead.

Mr. Manager David A. De Armond, of Missouri, said:

We ask what is the object of offering this paper? What is it for? What do counsel expect to prove by it?

Mr. THURSTON. The object is to disprove the testimony of Judge Belden, who was very clearly brought to state that the only reason they decided to discontinue the Florida McGuire case was that they needed forty or fifty witnesses, many of them living at a distance, and that they could not possibly secure them from the time of Saturday afternoon, when court adjourned, to Monday morning, when the case was to be called. * * * I have now shown that upon the reincarnation of the Florida McGuire case the same case between the same parties was tried out in full in the same court, and that on that trial they only asked on behalf of Florida McGuire for twelve witnesses by subpoena, and that they all lived, and that all the witnesses they produced lived, right there. It is in line with our insistence that here was a conspiracy against the dignity and the honor of the court by its officers; and that it is a mere subterfuge in their testimony to claim that they discontinued that case because they had a multitude of witnesses who could not be obtained, when the fact was, as we propose to show and insist, that their discontinuance of that case resulted solely and alone because they were held and taken to task for their conspiracy and for their contempt.

Mr. Manager DE ARMOND. Mr. President, the statement of the witness, Belden, was that they had forty or fifty witnesses for the trial, which was expected to take place in November, and that it would be impossible to get them for Monday, with notification upon the Saturday preceding.

This, now, is a paper which purports to be a list of some of the witnesses called for and used upon a trial which took place some time the next year in the suit brought over again—in another suit. It does not at all follow from the fact that this paper contains a list of twelve names that they did not have forty or fifty witnesses for the trial before, nor does it follow that the names of all the witnesses are contained upon the paper, or that they did not need or did not use any other witnesses upon the second trial. So it is an immaterial sort of paper, we think.

The Presiding Officer [1] said:

The Presiding Officer thinks the paper bears on the question, although it is not conclusive.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, p. 2982.