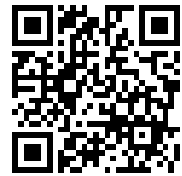

SENATE OF MINNESOTA.

IN THE MATTER OF THE

Impeachment of Sherman Page,

JUDGE OF THE TENTH JUDICIAL DISTRICT.

Cushman K

EX-GOV. DAVIS' CLOSING ARGUMENT FOR THE RESPONDENT.

ST. PAUL:
RAMALEY & CUNNINGHAM PRINTERS.
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MANAGERS ON THE PART OF THE HOUSE OF REPRESENTATIVES.

HON. S. L. CAMPBELL,
HON. C. A. GILMAN,
HON. W. H. MEAD,
HON. J. P. WEST,
HON. F. L. MORSE,
HON. HENRY HINDS,
HON. W. H. FELLER,

COUNSEL WITH MANAGERS—W. P. CLOUGH, ESQ

ATTORNEYS FOR RESPONDENT.

HON. C. K. DAVIS, St. Paul,
HON. J. W. LOSEY, La Crosse, Wis.
J A. LOVELY, ESQ., Albert Lea.

OFFICERS OF THE COURT

President—HON. J. B. WAKEFIELD.
Clerk—CHAS. W. JOHNSON.
Sergeant-at-Arms—M. ANDERSON.
Assistant Sergeant-at-Arms—G. M. TOUSLEY.
Stenographic Reporters—G. N. HILLMAN,
JAY STONE.

SENATE OF MINNESOTA,

IN COURT OF IMPEACHMENT.

STATE OF MINNESOTA *versus* SHERMAN PAGE.

THIRTY-THIRD DAY.

ST. PAUL, TUESDAY, JUNE 25th, 1878.

The Senate was called to order by the President.

The roll being called, the following Senators answered to their names:

Messrs. Ahrens, Bailey, Bonniwell, Clement, Clough, Deuel, Doran, Drew, Edgerton, Edwards, Finseth, Gilfillan C. D., Gilfillan John B., Goodrich, Hall, Henry, Hersey, Houlton, Langdon, Lienau, Macdonald, McClure, McHench, McNelly, Mealey, Morrison, Nelson, Pillsbury, Remore, Shaleen, Smith and Waite.

The Senate, sitting for the trial of Sherman Page, judge of the district court for the tenth judicial district, upon articles of impeachment exhibited against him by the House of Representatives.

The Sergeant-at-arms having made proclamation,

The Managers appointed by the House of Representatives to conduct the trial, to-wit: Hon. S. L. Campbell, Hon. C. A. Gilman, Hon. W. H. Mead, Hon. J. P. West, Hon. Henry Hinds, and Hon. W. H. Feller, entered the Senate chamber and took the seats assigned them.

Sherman Page; accompanied by his counsel, appeared at the bar of the Senate, and they took the seats assigned them.

The PRESIDENT to Mr. Davis: Are you ready to proceed?

MR. DAVIS. Mr. President and gentlemen of the Senate:

I hope that no one will accuse me of expressing an affected diffidence when I state that I address myself to the consideration of the issues involved in this proceeding with the most oppressive feelings of self-distrust. Under ordinary circumstances, and before ordinary tribunals, advocates versed in the practice of our profession feel that they stand on ground made certain beneath their feet by precedents which have been confirmed by the acquiescence of generations. They appeal ordinarily to men trained in the administration of those precedents.

They can look back to examples hoary with an immemorial antiquity, and they look forward in case of error to corrective and higher tribunals.

The body which I am to address is differently constituted. The proceeding which you are sworn to consider, is peculiar in its nature. Precedents are few, and, to a distressing extent, they are contradictory. We have been told that many of the axiomatic rules which govern the administration of legal right and responsibility, must not be influential here. The training of some members of this court admonishes me that as to them, it will be sufficient if I perform my duty in a strictly forensic manner. But these are a minority. I shall, I trust, commit no offense, if in my efforts to convince the understanding and to enlighten the consciences of those members of this court who are not of the legal profession, I labor overmuch in the treatment of many questions which in a court of law would not justify the least discussion.

The articles of impeachment exhibited by the House of Representatives of the State of Minnesota against the respondent, have been fully heard upon the proofs. All incidental questions have been set forever at rest, and have passed into precedents which will survive every person who witnesses this solemn proceeding. The clamorous voices of comment are hushed, the myrmidons of hatred are now awed into expectant silence, the voice of affection has died away into silent and secret prayers to the God of justice, at this moment, when prosecutors and accused, friends and foes, stand in the presence of the law, whose embodiment you are, to hear her final words. This is the moment when counsel assume the exercise of sacred functions. The strategy of this contest has done its work, and he who yesterday was rightfully contending with every weapon which he could draw from the arsenal of offense or defense, is now consecrated to the duty of guiding blindfold justice along the sacred way. I pause before the task: would that it were in stronger hands than mine!

The power of the State, when concentrated against an individual, is of almost resistless efficacy. The condemnatory forces of society converge upon him in every open, in every occult form. This is true, even, in prosecutions for minor offenses, where the person is accused and tried by a social fragment of that great aggregation which we call the State. Even in such cases modern civilization has inherited some of the reproaches of darker times. The citizen who falls into the clutches of an indictment finds it hard to restore himself to the place from which it drags him. Consummate legal ability arrays itself against him. The executive officers of the law are his antagonists. The limitless resources of the public treasury subsidize his prosecutors. The active hostility or the cold aversion of his fellow citizens breaks down his courage. The law which confronts him as his opponent, out of its omnipotence listens languidly before it strikes to a few cold, defensive maxims often of as little efficacy as a Tartar's windmill prayer. But aided by them he is not wholly defenceless. Revered principles which are without beginning of days in the law speak with peremptory voice in the assertion of certain constitutional rights which are his, and which no court can take away. They ordain that he shall be tried under salutary forms; that he shall be informed of the nature and cause of what he is accused; that he shall be presumed innocent until the proof

that he is guilty seals up every avenue of presumption that he is innocent. Such principles as these walk with him through the fiery furnace of his trial like inseparable angels of deliverance.

But in proceedings like this we have been most feelingly admonished that many of these safeguards, inadequate as they often are, are not for this respondent. Counsel have invoked into this trial the clamor of the newspapers. Counsel have appealed to the result of elections in a county whose turbulence now finds its last disreputable expression on the floor of this Senate. We have been informed that this is a political issue. This court has put us to the ordeal of accusations which do not accuse, made by accusers who have no rightful power of accusation. The respondent has been compelled to defend himself against charges of which the House has absolved him, and against other charges which that body never saw. With some acts he has been accused by the House; with others he has been charged by the accusation of those who have no more power to do what they have done than they have to break the apocalyptic seals.

He has been compelled to defend at once himself and the constitution itself which has been assailed in his person, and to be the victim of a paradox which will be a puzzle to after times. The men of years to come will ask when it was that constitutional safeguards so vital and so plain were overthrown; antiquarians will quarrel over the issue whether and when the House of Representatives as an impeaching body ceased to exist, and when its functions were merged in a select body of usurpers termed managers.

In ordinary cases a person accused of crime finds the legal elements of his defence in the statutes and the text-books in which it is defined, and it is the duty of the public prosecutor to bring him clearly and entirely within the limits of those definitions. But we are told that the respondent is to be tried for crimes which are nowhere defined, which no statute has declared, upon which no text-writer has commented. He is accused of breaches of taste and decorum; he is on trial for acts which society may visit with social censure, yet over which no court from the highest to the lowest, excepting this, has ever yet coveted or had jurisdiction.

Standing here for a judge thus assailed, defending the constitution thus attacked, striving to replace precedents thus rudely pushed from their pedestals by the iconoclastic rage of the real prosecutors of this judge, I do not regard myself as speaking on this day for my client alone. Momentous and far-reaching as the consequences of this prosecution have been and may be to him, the effect of this proceeding to my mind, goes far beyond him and embraces persons other than he. I speak to-day for the judicial office; I speak to-day for the integrity and independence of the judicial department of this government. It will be my endeavor on this great occasion to ward off from that department the profaning hands which have been so rudely laid upon it.

I have been bred and brought up to regard that department as sacred. The philosophy of our institutions has placed it in theory above the influence of popular faction, clamor and distrust. Consider for a moment, Senators, the position in which a person placed in the office of a judge finds himself. No matter how active his

temperament may be, no matter how decisive his executive ability, no matter how clear his convictions as to what ought or ought not to be in the community in which he lives, yet by public sentiment he is sequestered and set aside from interference with very many of the concerns of daily civic life. He becomes a legal monk as to secular affairs. If he is assaulted in person or character, it is generally deemed unseemly for him to resent; if he complains, he is liable to the imputation of mingling in concerns from which his office should absolve him. If he is assailed upon the very seat of judgment by acts which derogate from the majesty of the law and the dignity thereof which he represents, this proceeding demonstrates that any effort which he may make to protect that which society holds most sacred, is to be deemed a criminal act and a cause of impeachment.

The whole theory of the judicial office as formulated in our constitution is this: That although the executive may and must interfere *suo arbitrio* with the daily concerns of life, that although the legislature *suo arbitrio* may and must create the occasions upon which that interference is perpetrated, yet that the judge, standing between the legislature and the executive, with clear mind, with unclouded eye, with unbiased judgment and perfectly untrammeled by the fitful whims of popular desire, is to weigh, consider and restrain when either of these transcend their powers. The philosopher Hobbes held that mankind is fully personified in a single man. His Leviathan is the gigantic man pictured in the frontispiece of his book, whose outlines, lights, shadows, articulations, members and garments are formed by a multitude of minute human forms and faces. He held that the colossal being which we name society, has, like individual man, its virtues which rise above the stars, has its vices which have their roots in the depths. That it has its passions, its will, its temptations, its revenges, its remorse. This conception, so persuasive of the dignity of man, is true. Correctly apprehended, it dilates the meanest human being so that he illustrates the history of empires, and is an index to all the records of time. Let it never be forgotten that society has its conscience also. It is not alone that secret monitor—that omniscient and unerring judge—that only perfect element of a humanity, otherwise erring and fallible all throughout—which the Almighty has installed in the temple of our being to judge us during our mortal lives infallibly as He will at last. It is more. Society has a visible conscience. It exists in our judicial system, speaking from the bench of judgment and with the voice of judges. Legislators err. They sin against constitutional precepts; they sin against the eternal laws of right upon which the deep foundations of government must rest if they rest on lasting bases, and such errors sap and mine the goodly structure of the state until the dome falls into the vault, unless this embodied conscience of the state corrects them with its irreversible judgments. Executives err. The unhallowed hand of executive power sometimes touches the ark of human liberty, and from it the God who hallows it departs unless it is re-consecrated by the atoning power of this conscience of the state.

It is of vital moment to the community that this embodied conscience be left to work according to its dictates, under the rules and regulations of the laws which it administers. But disturb it once; tell those who represent it that they are to be brought before legislatures and by legis-

latures into account for every act they may do, no matter whether with the purest integrity, and you debauch that embodied conscience, just as you debauch the conscience of a man, when, do what he may, the best he may, the world drags him into adverse and unjust judgment. How naturally we appeal to that embodied conscience of states! When all else seems going to wreck and chaos, to what do men turn? To the judiciary. There is that, men say, which administers the law of abstract right; there is that, which, if anything can, will save us. Only a short time ago, when this nation hung trembling upon the verge of revolution and dissolution; when the will of the people as expressed at the polls in a presidential election was doubtful in its results; when accusations of fraud were exchanged from all sides; when the premonitory roar of enraged parties was threatening anarchy; when Congress seemed powerless, and the term of a President was about to expire; when all was uncertainty; when business languished, and every patriotic heart almost ceased to beat in the presence of a great wrong threatening a great danger, the American people, by an instinctive effort, not made within the limits of any strict construction of our constitution, organized a tribunal to settle that great controversy, and in a moment the proud waves of revolution were stayed, and the light of peace poured like a sun-burst over the darkened land.

If these remarks are true of ordinary courts, how true they are of such a court as this? From your judgment there is no appeal. It is irreversible. It stands forever. Yourselves or your successors cannot take it back. The arm of executive pardon is not long enough to reach or temper it. If you invade the judicial department no prophetic soul can predict the results which may follow your misguided action.

You are no mere caucus, gentlemen. The constitution of this State prescribes your oath, and it was formulated with expressive solemnity by the chief justice when he administered it to you, "that you will do justice impartially according to the law and the evidence. *So help you God.*" And with that obligation resting upon your souls, am I not safe in appealing to you with confidence that you will try this case like judges, and not like partisans? The question is not whether you, in your private or even in your legislative capacity, may wish to get rid of a man who is disagreable to somebody; it is not whether you, in your electoral capacities, would or would not vote for Sherman Page, if he were a candidate for the office he holds. The question is, whether the prosecution has brought this case within the limits of your oaths, and whether you can say under your sense of obligation to God to whom you have appealed, upon the law and the evidence, that this man is guilty of corrupt conduct in office, or of crimes and misdemeanors.

There are certain great preliminary questions which are not only proper but necessary to be considered, before I address myself to the particular issues which you are to adjudicate. The first is what offences are impeachable? For what crimes have you the right to try this respondent? By what acts can he forfeit his office? By what misdoings is he to be driven into oblivion, into the wilderness of everlasting shame, to look back in his unending flight, upon the gates of society, forever closed to him,

"With dreadful faces thronged and fiery arms."

If our constitution itself, by apt words of indubitable limitation, defines clearly and restrictively the path which you are bound to tread to a result, then it is not necessary to look to the blood stained precedents of York and Lancaster, to ascertain by what processes legal in form but unjust in substance, power can bare its arm and inflict the immedicable wound of impeachment.

The constitution of this State provides that certain officers (therein named) may be impeached for corrupt conduct in office, and for high crimes and misdemeanors.

Mr. Manager CAMPBELL. *High* crimes? *High* crimes is not in.

Mr. DAVIS. Thank you.

"For corrupt conduct in office, and crimes and misdemeanors."

The words, *corrupt conduct in office*, are not in the federal constitution, and that difference in these instruments is exceedingly significant. It seems that our constitutional convention had a reason with that great instrument of federal organization before it, for defining and limiting the powers of the legislature with greater restrictions than was deemed necessary by those wise men who framed that immortal document. It was perfectly well known that the phrase *high crimes and misdemeanors*, as used in the federal constitution had opened the way to discussions of great difficulty, had given rise to legislative and forensic controversies, which no debate or judicial construction has yet settled; and so, in guarded language, with the experience of centuries before them, as well as the federal instrument, the men who constructed the constitution of this State, so expressed themselves, that it differs from the federal constitution in this most important particular, and perhaps differs from the constitutions of many other States.

Now, Senators, this difference was not made without a reason. It was not made without some grave reason, which it is our duty to search and consider. My proposition is, that the constitution of this State in that respect should receive a limited construction; that they who framed it, and the people who adopted it, have dictated a limited construction by the use of the terms which they have chosen. There are many reasons which cause me to urge, with entire confidence, that this is the correct view. Under the other systems by which the judges were appointed for life, an unworthy man, a debauched man, a depraved man, holding his office by a tenure which endured as long as his life itself, was frequently a most serious problem, as well as a most foul disease in the body politic. But we have adopted another system. We have made our judiciary elective. Within the short term of seven years, if the people of his district choose, begins and ends any man's judicial life. The people have retained in their hands a corrective power.

There is, too, another provision of our constitution which by implication certainly, and I think expressly, authorizes the legislature of this State to practically deprive of office any unworthy or unfaithful judge by abolishing his judicial district; the only restriction imposed being that it shall not in the meantime abolish his salary.

Again, as I have remarked incidentally, the terms of office of these men are short. The communities in which they live sit in judgment

upon them every seven years; and hence the necessity has abated for those extraordinary assertions of power which in former times have disgraced the annals of jurisprudence, even when directed against unworthy men. Because no precedents are so dangerous as bad precedents in a good cause. I say, therefore, that those dangerous precedents of former times have become valueless in the light of that strict construction which I think it is your duty to adopt.

From these considerations I proceed to state more definitely our proposition. It is that the words "corrupt conduct in office," and "crimes and misdemeanors" mean that the crimes and misdemeanors must be *indictable* crimes and misdemeanors, and that outside of those indictable crimes and misdemeanors, there is still a field of jurisdiction upon which this Senate may enter, and that field is where the person accused has been *corrupt in office.* Corrupt in the execution of his official duties is what that phrase means. It does not mean that he may have done unseemly things while not performing his official functions; it does not mean that he may have erred against the social laws; it does not mean those acts of doubtful morality which do not rise to the dignity, or rather which do not sink to the debasement of crime. It means, as to a judge, that he has acted with judicial corruption in performing his office. And no gloss, whether given by the most perversely expert expounder of statutes or by the most unlettered man, using only the lights which sense brings to bear upon the ordinary use of terms, can give to that phraseology any other construction.

I am aware, gentlemen, in taking this position, that I am striving against a vague and wandering notion that the jurisdiction of the Senate in this respect is transcendant, unregulated and extraordinary. I must confess, that in the earlier days of this trial, before my mind had been brought to bear upon this question under any particular sense of immediate responsibility, it was somewhat prejudiced by that same impression, but it is enough to say in advance, before I cite authorities upon the subject, that such an assumption was a contagious error imparted by a diseased public sentiment, which error, research and reflection have entirely dissipated.

When a public officer stands before the community arraigned by any considerable number of its members as an offender, the desire to get rid of him on the part of his enemies, becomes absorbing and over-powering; and it has even happened in cases like this—where what he did was forbidden by no law, where what he did was not in the execution of the duties of his office—that a vicious and tyrannical public sentiment; that worst of mobs, namely, the mob which works and acts under the disguise of law—has been sufficient to rise up and override those well-constructed bulwarks which perpetually stand around every man for his safety. And probably the impression which has prevailed in these times, in the years in which we are presently living, has been derived from the bitter feeling which was excited throughout the United States by the impeachment of President Johnson.

Now, at the risk of offending prejudices which are yet smouldering in their ashes, I venture to say that in times to come, when this generation shall have passed away, and our children read that record, that proceeding will be adjudged by history as one of the most flagrant

invasions of executive power by legislative authority that the annals of judicial abuse have furnished. He may have erred; he may have gone astray in judgment, but that he was a criminal, history will not pretend.

I desire to cite in confirmation of the views which I have just advanced, page 257, vol. 6, of the American Law Register. During the impeachment of President Johnson when the questions now under present consideration were distracting the minds of the country, a gentleman, connected, so far as I know, with no party, at least not publicly and notoriously so, a teacher of law, a man who, whenever he speaks upon a legal subject is listened to with respect by all of our profession,—whose mind was influenced by what he deemed to be "the radically erroneous views" which were then taking possession of the public mind—a man who was engaged in educating students in our profession, with no partisan object to accomplish, with no other view than to fulfil the high duties of a tutor to the rising generation—Professor Dwight, of Columbia College—an eminent publicist,—expressed himself in the manner following in this volume of the American Law Register:

"Still it is requisite that a *crime* should be committed as a basis for the accusation.

I. *The crimes for which an impeachment may be had.*—Upon this topic it is important to make two inquiries: first, what were the subjects under the English law which could be tried by impeachment; second, what cases under our system can be tried in this manner.

"In examining the first question, it must be conceded that the judgments of the courts are not absolutely uniform This could hardly be expected, both because there is no system of appeal, by means of which authoritative precedents could be established, and because the House of Lords has been at times impelled by faction or overborne by importunity or overawed by fear. The weight of authority is therefore to be followed. So said the great Selden, in a speech which he made as one of the committee of the House in the impeachment of Ratcliffe. "It were better to examine this matter according to the rules and foundations of this House, than to rest upon scattered instances." The decided weight of authority is, that no impeachment will lie except for a true crime, or in other words, for a breach of the common or statute law, which, if committed within any county of England, would be the subject of indictment or information. This proposition is plainly inferred from the doctrine already established, that impeachment is simply a method of procedure. It pre-supposes the existence of the crime for the redress of which a trial is instituted. What would have been the check upon the most arbitrary action of the House of Lords, if it might decide the existence of a common law crime, without reference to already settled rules?

"While the irregular cases upon this subject are few, the rule that a true crime must have been committed is settled beyond dispute, This is clearly shown by the way in which the House of Commons when flushed with power or chafed with indignation rebel against it. Over and over again they assert that the great statute of 25 Edward III., defining treason, is not applicable to trials of impeachment. They plausibly maintained that the statute was only for the courts of ordinary criminal justice; and that the statute itself applied a different rule to trial by impeachment. But the law was settled after the most extended and prolonged discussion in favor of the doctrine that the court of imeachment must administer the same law as the criminal court; *Howell's*, S. T. 1213; 6 Id 346. Thus the Earl of Orrery was not tried in A. D. 1669, as the offense charged was thought not sufficient to constitute treason, and the case was directed to be heard in a court of law; 6 *Howell's S. T.* 917.

"The stringency of these rules often led the Houses, when under excitement, to pass bills of attainder. They could enact that an obnoxious person was guilty, if they could not prove his offense. This course was resorted to in the well known case of the Earl of Strafford. So too, when the Earl of Clarendon in Charles II's time could not be successfully impeached, the King intended to bring him before the court of the Lord High Steward, which could be organized so as to secure a conviction; 3 *Campbell's Lord Chancellors*, 243, 4 *London Ed.*, 1848.

"The later and most authoritative decisions are clear to this effect. In the impeachment of the Earl of Macclesfield, who was a great lawyer, and at one time Lord Chancellor, the case was put exclusively on such criminality as is the subject of an indictment. It was argued that he had violated the statute of 6 *Edward VI. c.* 16, concerning the administration of justice, while he rested this defense on the fact that it was not criminal for a judge to receive presents either by statute or common law. The decision of this case against Macclesfield is criticised by Lord Mahon and others, but is defended by Campbell, on the ground that the statute of *Edward VI.* was violated: 16 *Howell's S. T.* 823; 4 *Camp. Lord Chancellors* 536. This is one of the best considered cases on the subject, and preceded the formation of our constitution by only a few years.

"The last case of impeachment in England, that of Lord Melville in 1806 for malversation in office, is very instructive. The question was put to the judges whether the acts with which he was charged were unlawful so as to be the subject of information or indictment. It having been decided that they were not. Lord Melville was acquitted: 29 *Howell's S. T.* 1870 These last two decisions, made when there was an entire absence of party feeling, and the court acted throughout with judicial impartiality, deservedly outweigh scores of instances if they could be produced, which have occurred in the heat and frenzy of a revolution."

I ask the Senate to pause and consider that precedent. This learned writer remarks that the case of Lord Melville occurred in times when there was no excitement and apparently no party feeling eager to convict him. With all the precedents before them, some of which my learned opponents must and do contend warranted his impeachment, the House of Lords paused and took the opinion of the judges of England, whether or not the acts with which Melville was charged were the subject of indictment or information. They held that the acts for which the articles of impeachment were preferred were neither indictable nor ground for a criminal information, and for that reason the House of Lords acquitted him.

Mr. Dwight proceeds:

"I have dwelt the longest on this point because many seem to think that a public officer can be impeached for a mere act of indecorum. On the contrary, he must have committed a true crime, not against the law of England but against the law of the United States. As impeachment is nothing but a mode of trial, the constitution only adopts it as a *mode* of *procedure* leaving the crimes to which it is to be applied, to be settled by the general rules of criminal law.

"There was for a long time a fluctuation of opinion on the point whether the common law crimes did not exist under the general government. Justice Story lent the great weight of his influence to the opinion in favor of their existence. His discussion of the subject of impeachment rests upon this view. Mr. Rawle is of the same opinion. Both of these eminent writers admit that if there are no common law crimes for which indictments can be brought, there are none for which impeachment can be instituted. Mr. Rawle is especially clear upon this point: 'The doctrine that there is no law of crimes except that founded in statutes, renders impeachment a nullity in all cases except the two expressly mentioned in the constitution, treason and bribery, until Congress shall pass laws declaring what shall constitute the other high crimes and misdemeanors.'"

The whole article is exceedingly instructive, but the limitations of this occasion prohibit me from going into it any further than is absolutely necessary.

Much has been said here by way of assertion and little by way of correct statement as to what was done in President Johnson's case. What was not done is much more instructive for your guidance. There were eleven articles. The second, the third and the eleventh,—and indeed, all the rest except the tenth, by their express terms, charged the president with violations of certain acts of Congress, enacting that certain

acts or omissions, shall be criminal. But the tenth was that famous article wherein the president was charged with committing acts and making speeches not officially. And I repeat, that the record of what was not done on that occasion by the Senate of the United States, is much more instructive upon the question under present consideration. Articles two, three and eleven, were voted upon. These articles charged the president with the commission of statutory crimes. But article ten which charged those breaches of decorum, those acts not done officially, was not brought to a vote before that body; that with the other articles, was swept into the limbo of oblivion by the adjournment *sine die* of the Senate.

If there was any act during that president's term which justly subjected him to criticism, it was that series of speeches which he made on his delirious journey through the country. The fact that he made them was too apparent for controversy; and yet after all the argument upon that subject, where Gen. Butler burlesqued the topic by saying that proceedings of this nature are a sort of "inquest of office," the Senate of the United States never dignified that article by voting upon it. If it had been honestly deemed valid, if Senators had actually thought that outside the domain of statutory, common and constitutional law, there is a region where a man may offend without knowing that he is a criminal, and that this president had erred into that region and had so offended, would they not have brought that article to a vote after it had been propounded so solemnly and argued so thoroughly?

Gentlemen of the Senate, there are grave historical reasons why the construction of the constitution for which I contend, ought to be sustained. The progress which the English people have made to their present state of freedom has been against the power which inhered in corrupt and tyrannical parliaments to pass bills of attainder and *ex post facto* laws. With the capacity to pass bills of attainder and *ex post facto* laws also existed from immemorial time, this power of impeachment; but in those troubled ages when King, House of Lords and Commons, often banded against the people, or against some champion of their rights it was as often found that the rules which protect a person accused of crime, not only in courts of impeachment, but in all other courts, were too strong and merciful to bring him to judicial conviction before the House of Lords, prejudiced as it was, and consequently in those dark days for human liberty, using the possibilities of that lamentable infirmity of human nature that men will do those acts as legislators which they will not do as judges, the course was often adopted when impeachment failed, or even when impeachment was pending and seemed likely to fail, when the consciences of men could not be prevailed upon to say judicially that a man was guilty, to call upon them to enact in their legislative capacity by bill of attainder or by *ex post facto* statute that the direst results of a judicial conviction should follow.

The Earl of Strafford, a man undoubtedly guilty of stupendous political offenses, was impeached before the House of Lords. The trial was proceeding with due solemnity, but he was able to say in that immortal defense—which brings tears to the eyes of posterity wherever it is read, and which almost redeems the man—"I find this crime written in no book of common or statute law." It shook the consciences of the Lords. It drew from Sir John Elliot one of the most admirable expositions of

constitutional law on this subject that ever has been or ever will be made. But the necessity for his overthrow was deemed transcendant and overpowering, so fearfully did his massive abilities energize the obdurate perversity of the King, and consequently by dark and unholy arts, while that impeachment was pending and Strafford was pleading for his life before the Lords, a bill of attainder was introduced in the House of Commons, hurried through the House of Lords and he went to the block; a man judicially innocent although probably morally not.

Coming down to a later reign, we find the case of Bishop Atterbury, at once the pillar of the church and state; a great man, as divine and statesman, in those troubled days of the changes of the English constitution, "when one man in his time played many parts." He was accused, not provably, of improper relations with the Pretender, then living in France. There was no proof against him. He was impeached, and there were no witnesses. While those proceedings were pending, and were certain to fail, the ever-recurring bill of attainder was introduced, and the great prelate went darkling into foreign lands, to die amid the consolations of those whose language he could not understand.

Sir John Fenwick in like manner was accused during the same reign. He was lured back to England by promises of safety. The confession which he was required to make was not satisfactory because it did not implicate the men whom destructive partizans desired should be accused. He was therefore impeached. His wife, by a memorable effort of conjugal heroism, spirited away the witness and hid him in Paris. A bill of attainder was introduced and passed the parliament and he went to the block.

Let me read from Macauley's History the arguments which were adduced to those infuriated legislators why such a proceeding was not proper, and why they should not sit as judges of the court of impeachment even. I cite page 417, 4th volume of Macauley's History of England:

"Warm eulogies were pronounced on the ancient national mode of trial by twelve good men and true, and, indeed, the advantages of that mode of trial in political cases are obvious. The prisoner is allowed to challenge any number of jurors with cause, and a considerable number without cause. The twelve, from the moment at which they are invested with their short magistracy till the moment at which they lay it down, are kept separate from the rest of the community. Every precaution is taken to prevent any agent of power from soliciting or corrupting them. Every one of them must hear every word of the evidence and every argument used on either side. The case is then summed up by a judge that knows if he is guilty of partiality he may be called to account by the great inquest of the nation. In the trial of Fenwick at the bar of the House of Commons all these securities were wanting. Some hundreds of gentlemen, every one of whom had much more than half made up his mind before the case was opened, performed the office both of judge and jury. They were not restrained as a judge is restrained, by the sense of responsibility, for who was to punish a parliament? They were not selected as a jury is selected, in a manner which enables a culprit to exclude his personal and political enemies. The arbiters of the prisoner's fate came in and went out as they chose. They heard a fragment here and there of what was said against him, and a fragment here and there of what was said in his favor. During the progress of the bill they were exposed to every species of influence. One member might be threatened by the electors of his borough with the loss of his seat; another might obtain a frigate for his brother from Russell; the vote of a third might be secured by the caresses and Burgundy of Wharton. In the debates acts were practiced and passions excited which are unknown to well-constituted trifflunals, but from which no great popular assembly, divided into parties, ever was or ever will be free. The rhetoric of one orator called

forth loud cries of 'Hear him!' Another was coughed and scraped down. A third spoke against time in order that his friends who were supping might come in to divide. If the life of the most worthless man could be sported with thus, was the life of the most virtuous man secure?"

Proceeding in the order of time along the history of such prosecutions made effectual by bills of attainder or of pains and penalties, we find the trial of Queen Caroline. The argument of her counsel, Lord Brougham, has been cited here as authority that an offense not defined by common or statute law is impeachable. It was an argument merely. The queen was accused of a life of habitual adultery with an Italian menial named Bergami. By the statute and common law that was undoubted treason, if committed within the realm. But whatever she did had been done on the continent of Europe, outside of the jurisdiction of England—was not committed within the realm, and the opinion of the judges having been taken upon that point (as it was in the case of Lord Melville), they held that adultery committed without the realm, and with an alien, was not treason, and was not subject to impeachment because it was not a statutory or common law crime. Lord Brougham had argued that the remedy was impeachment. He so argued as a reason why the proposed proceeding should not be adopted. He was overruled. And so the bill of pains and penalties was again started from its lair to devour that innocent woman. And there, for the first time in the history of that nation, that proceeding broke down, both in principle and in fact. It beat against that feeble woman powerlessly, and it fell lifeless at her feet, never to be resurrected again.

Why do I cite these oracular precedents? For what reason do I point to those ancient and eloquent warnings? It is because side by side with those constitutional provisions which confer upon bodies constituted like this, the power of impeachment there exist in federal and state constitutions, provisions declaring that no State shall pass any bill of attainder or *ex post facto* law. Our ancestors suffered under them. By them great families had been "entombed in the urns and sepulchres of mortality.' They saw that the law of impeachment when it was found insufficient to minister to the vengeance or cupidity of those in power, was supplemented by laws of attainder, bills of pains and penalties and bills *ex post facto* (for they are in substance the same thing), and they decided that the citizen should never again be endangered by them. They resolved that there should be but one means to work political death. They resolved that when justice refused to strike, parliamentary majorities should not assassinate.

Gentlemen, if a person can be convicted by a Legislature of that as criminal which no law has defined as a crime, is it not the same as the passage of a bill of attainder, or an *ex post facto* law? Wherein lies any distinction? The House of Representatives prefers a propositon in the shape of articles to annihilate the civic life of a citizen; the Senate gives its consent. You have created and punished that as criminal which was not criminal before. To the plea which the respondent makes that this is a court, that you are sworn to decide according to law and the evidence, you reply "that may be so, but we find historic precedents where that plea has been circumvented, and we propose to follow them." But when you do that act in the name of the people of

this State, which you are asked to do in substance here, do it manfully. Call in the House of Representatives; pass and send your bill of attainder and *ex post facto* law to the Governor; do it openly and not from the ambush of impeachment. Let the people know that this attack is open and not covert. Tell them that all these historic precepts and securities by which our safety is confirmed, from which these immemorial precedents stand up and surround the respondent like a flaming wall of security, are frightful delusions, and that the evil spirit which once robbed the citizen of his citizenship and of his estate, which sent him to the block, which corrupted his blood through endless generations of attaint, has merely deserted its old abodes and still constitutionally lives in the forms of impeachment. Tell them that the language of the constitution in which it is written that a judge may be impeached for corrupt conduct in office and for crimes and misdemeanors, means everything which importunate faction clamoring for revenge can find to blame in strictly private conduct. I implore you to recur to your oaths. You are sworn to administer justice in this case according to the law and the evidence.

Mr. LOSEY [interrupting]. *Impartially.*

Mr. DAVIS. Impartially, as my colleague reminds me. What law? Is it the law of your own will? Have you merely sworn in this case to do as you please? Have you taken an oath to obey the laws and to support the constitution, and yet at the same time do you claim to be emancipated from them to an extent as wide as infinity itself? Go back Senators, to the law under which you hold your seats. Place yourselves as if you were in a jury-box listening to the charge of a judge, and speculate upon what those words mean. How instantly society would topple from turret to foundation stone, if the law advocated today were the law in ordinary criminal proceedings! Upon the floor of this Senate at this moment sit grave magistrates and men who have been magistrates. They never heard, they never will hear except in the law of such mockeries as this, such precedents as are sought to be here ordained, that a man can be accused of acts which are not defined as criminal either in the statute, common or constitutional law.

To further sustain our proposition, I desire to cite Story's Commentaries on the constitution, section 796, and particularly section 797.

"The next inquiry is, what are impeachable offenses? They are "treason, bribery, or other high crimes and misdemeanors." For the definition of treason, resort may be had to the constitution, itself, but for the definition of bribery, resort is naturally and necessarily had to the common law, for that, as the common basis of our jurisprudence can alone furnish the proper exposition of the nature and limits of this offense. The only practical question is what are to be deemed high crimes and misdemeanors; Now, neither the constitution, nor any statute of the United States has in any manner defined any crimes except treason and bribery, to be high crimes and misdemeanors, and, as such impeachable."

In this connection I wish to call the particular attention of the legal gentlemen of the Senate to the federal constitution, out of which some confusion has arisen in the application of the doctrines of Justice Story respecting the powers of congress to impeach. Under the constitution as expounded by the supreme court, there is no common law of crimes in the United States. In other words, no act except treason is criminal

against the United States, except those prohibited by statute, treason being defined in the constitution itself. Hence the question early arose, how an officer can be impeached for crimes and misdemeanors in the absence of any statute making the offensive act criminal. That problem was solved by determining that although for ordinary purposes of indictment there may not be any common law offenses against the United States, yet for the purposes of impeachment, the framers of the constitution must be held to have adopted the great body of the common and statutory laws, and while an act to be impeachable must be a crime against common or statute law, to the extent of making public officers amenable to this process of impeachment the common law of crimes for that restricted purpose does exist, and that result was arrived at after great difficulties and severe struggles. With that explanation I will proceed to read further from Justice Story.

"In what manner, then, are they to be ascertained? Is the silence of the statute-book to be deemed conclusive in favor of the party, until Congress has made a legislative declaration and enumeration of the offenses, which shall be deemed high crimes and misdemeanors? If so, then, as has been truly remarked, the power of impeachment, except as to the two expressed cases, is a complete nullity."

And that was the opinion of Mr. Rawle, one of the earliest expounders of the constitution, a man nearly cotemporaneous with its adoption.

"It will not be sufficient to say, that in the cases where any offense is punished by any statute of the United States, it may and it ought to be deemed an impeachable offense. It is not every offense that by the constitution is so impeachable. It must not only be an offense, but a high crime and misdemeanor; besides, there are many most flagrant offenses, which by the statutes of the United States, are punishable only when committed in special places and within peculiar jurisdiction, as, for instance on the high seas, or in forts, navy-yards and arsenals ceded to the United States. Suppose the offense is committed in some other than these privileged places, or under circumstances not reached by any statute of the United States, would it be impeachable?"

Now, would that consummate jurist, Justice Story, who, when he wrote this book was a member of the Supreme bench of the United States, have troubled himself to speak of crimes which are not impeachable, if it is true, as has been argued here, that not only the whole region of defined crimes, but the whole region of morals, is a domain over which this court has jurisdiction? Even within the body of the statutory and common law itself, this expounder, through whom the constitution speaks, has declared that there are offenses which the power of impeachment does not reach. He proceeds:

"Again, there are many offenses, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute-book. And, indeed, political offenses are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it."

Still going back to the common law of England, there being no political offenses against the common law of the United States except made so by statute.

Now how does he propose to solve that difficulty? He says:

"Resort, then, must be had either to parliamentary practice and the common law, in order to ascertain what are high crimes and misdemeanors, or the whole subject must be left to the arbitrary direction of the Senate for the time being. The latter is so incompatible with the genius of our institutions, that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice,

which might make that a crime at one time, or in one person, which would be deemed innocent at another time or in another person. The only safe guide in such cases must be the common law, which is the guardian at once of private rights and public liberties. And however much it may fall in with the political theories of certain statesmen and jurists, to-day the existence of a common law belonging to and applicable to the nation in ordinary cases, no one has as yet been bold enough to assert, that the power of impeachment is limited to offenses positively defined in the statute-book of the union, as impeachable high crimes and misdemeanors."

Senators, I am exceedingly anxious to be thoroughly understood here. When this question first arose in the early days of the Republic, it was settled that there were no offenses against the United States except those defined by statute law; whereupon, Mr. Rawle, one of the earliest commentators upon the constitution, held that in the absence of such statutes there was no power of impeachment whatever under the constitution for any offense except treason and bribery, which are defined in the constitution itself, and that raised a very great practical difficulty, because we who are familiar with the criminal jurisprudence of the United States know perfectly well that burglary, larceny—in fact almost the entire catalogue of crimes are wholly left to the administration of the state governments. Then arose another school of constitutional expounders, who held that while it might be true that for the purposes of indictment and punishment in the ordinary courts, there were no offenses against the United States except such as were statutory, yet that the constitution for the purposes of impeachment must be held for those purposes to have adopted the common criminal law of England.

Now however much Justice Story may be cited (and he always is,) and commented on, and read carelessly, misapplied and made obscure, such, I venture to say, is the conclusion to which any candid man will come who reads his language in the light of history and controversy.

Upon this subject I read from the first of Kent's Commentaries, marginal page 343, note. He cites the language of Justice Story, which I have just read.

"The learned commentator, [Justice Story] in the volume last cited, ably, and, in my opinion, satisfactorily contends that the common law, in the absence of positive statute law, regulates, interprets and controls the powers and duties of the court of impeachments under the constitution of the United States; and though the common law cannot be the foundation of a jurisdiction not given by the constitution and laws, that jurisdiction, when given, attaches and is to be exercised according to the rules of the common law. Were it otherwise there would be nothing to exempt us from an absolute despotism of opinion and practice."

The opinions of these jurists, gentlemen of the Senate, are to my mind, of somewhat higher authority than the argument of Manager Butler in the prosecution of President Johnson.

The same was true at principle at common law in England. I cite from the 4th of Blackstone, page 259:

"The high court of Parliament, which is the supreme court in the kingdom, not only for the making but also for the execution of laws by the trial of great and enormous offenders, whether lords or commoners, in the method of parlimentary im-impeachment. As for acts of parliament to attaint particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. But the impeachment before the lords by the commons of Great Britain, in parliament, *is a prosecution of the already known and established law*, and has been

frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom."

The whole confusion of ideas as to the powers of a court of impeachment has arisen from an identification of what Parliament could do in the exercise of its right to pass acts of attainder and what it could do under its power to impeach. Justice Blackstone in his commentary, says: "he speaks not of acts of attainder because they are in the nature of new laws;" but when he speaks of the court of impeachment he says it is a prosecution "of the already known and existing law." It is lamentably true that inaccurate scholars, partizan advocates, perverted senators, sitting with predjudicated opinions in judgment upon men, have drawn from the bloody records of attainder the argument that the proceedings in the high court of impeachment are not of the "already known and existing law" in face of the fact that all the sages of jurisprudence concur in saying that they are, and in face of the fact that the framers of the Federal and State constitutions all concur in ordaining that the Legislature shall not pass acts of attainder, or *ex post facto* laws.

There are, to my mind, other arguments, derived from the constitution itself, which prove that our exposition of the law of impeachment is correct. By the constitution of this State the functions of government are divided into three departments—the legislative, the executive and the judicial. They are made independent of each other. By constitutional inhibition the members of either of these departments are forbidden to exercise the functions of either of the others. The whole design of the founders of this commonwealth was that the members of those departments shall be perfectly free in the exercise of their functions, unaffected by any direct action of the other or of the other two combined. The judiciary has no right to enter this hall in its ermine and speak to you; you have no right to enter the adjoining room and exercise the least function of the Supreme Court. Judiciary and legisture, together, have no right to go into the governor's chamber and dictate to him what he shall do or what he shall not do. Perfect independence, freedom of action, unaffected by the action of any other department, is guaranteed to every officer.

The only occasion upon which the legislature is authorized to lay its hands upon the judiciary or on the executive, is when a member of either of those departments has committed a crime or misdemeanor, or has been corrupt in office. Was not that language used thus guardedly because the legislature had just adopted a provision that these departments shall be independent, and that no member of one shall infringe upon the functions of the other? But if this doctrine which you are asked solemnly to write in a book, and give down to recorded time is true, then I say that the executive and the judiciary are at the mercy of the legislative department of this government. For if it is true that this is a great political inquisition, that its object is, and only is, to get rid of somebody who is not liked, or of some one who has been guilty of a breach of decorum, who confessedly has committed no crime, then I say no reins can be put to the unbridled audacity of any House of Representatives which may accuse, or any Senate which may convict. With the observance of the construction which I have advocated, the way is clear, and easy. The governor sits securely in his seat of office; the judges sit securely upon the bench of judgment; they are impregnable

against popular faction or legislative prejudice, as long as they are not corrupt in office, as long as they have not committed crimes or misdemeanors. Was it ever contemplated gentlemen of the Senate, to place the stability of those two great departments of the state at the will of irresponsible legislative majorities? Surely not, surely not. That guarded language by which the powers of the departments were distributed and made exclusive in their possessors, was used for a different purpose. Provisions were introduced for the express purpose of making this government move on serenely and smoothly, unaffected by any such extraneous and erratic perturbations as those which you are asked to solemnly put into ruinous operation by your decision.

This is a court. Your duties are judicial. You have ceased your legislative functions. You are a Senate it is true, but you are a Senate sitting as a court. This court is presided over by a president who rules upon questions of procedure. You are governed by the rules of evidence; you are sworn to decide this case impartially according to law and evidence and not according to what your own wild and unregulated notions may be of what is fit or just. Each man of you rises in his place and solemnly gives in his verdict, and as the result may be, the judgment of this court is entered in the record, and punishment or acquittal follows. Beware gentlemen, how you trespass beyond the jurisdictional boundaries of the tribunal which you are! Beware how you infringe upon the province of any other deparment of government! Recollect that what you do here does not end here. It passes into precedent. You may make this persecution of an upright judge, the last that this Senate will ever witness; or you may throw open wide the doors of the House of Representatives, and of the Senate of this State, to every eruption of every little local mob upon whom a magistrate or officer judicial or executive may have placed the hand of the law somewhat too heavily too be comfortable.

I desire to be further heard for a moment upon the correct construction of this phrase, "corrupt conduct in office." Of course I do not intend to argue here, I could not do it with any assurance, that the words "corrupt conduct in office" as used in the constitution do not mean every kind of corruption. That is not the meaning. A man may be corrupt in his office in many senses outside pecuniary corruption. It means corrupt intention in the execution of official duties. It means not only doing wrong, but it means doing wrong wickedly intending to do wrong. If a magistrate does wrong thinking that he is doing right, he is protected in what he does by every law which the wit of man has ever enacted. If he does right why of course the question of intent is wholly immaterial

I cite from Russell on Crimes. 1st vol, mar. page 135.

"Where an officer neglects a duty incumbent on him, either by common law or by statute, he is indictable for his offence; and this, whether he be an officer of the common law, or appointed by act of Parliament; and a person holding a public office under the King's letters patent, or derivatively from such authority, has been considered as amenable to the law for every part of his conduct, and obnoxious to punishment for not faithfully discharging it. And it is laid down generally, that any public officer is amenable for misbehavior in his office. There is also the further punishment of the forfeiture of the office for the misdemeanor of doing anything directly contrary to its design."

"The oppression and tyranical partiality of judges, justices and other magistrates

in the *administration* and under color of their office, may be punished by impeachment in Parliament."

Judges may be punished by impeachment, but it must be for oppression and tyranical partially *in the administration* and *under color of their office.*

I read from 4 Blackstone, page 141.

"There is yet another offence against public justice, which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the *oppression* and tyranical partiality of judges, justices, and other *magistrates*, in the administration and under color of their office."

The PRESIDENT. The Senate will take a recess for five minutes.

After recess.

Mr, DAVIS [resuming]. Some reference has been made to a provision of the statute of Minnesota, which makes all breaches of official conduct indictable offenses. The existence of that statute has no possible connection with this proceeding. It is simply declaratory of the common law, by which all official misconduct by certain officials was always indictable, but at the same time it always was a principle of the common law that a judge of a court of record is not indictable for any act done with jurisdiction in the performance of his official duty. So that the statute of the State of Minnesota being declaratory merely of the common law, that law existing if that statute never had been passed, simply affects the class of officers which the common law affected, and has no operation whatever upon the judges of the courts of record. The reason of that principle is perfectly obvious. It would be most disastrous to all order if a judge holding a court could be indicted by the grand jury he has charged and tried by a petit jury empanneled before him. And hence it never was meant to apply to cases of that kind, and what is denounced as a crime and misdemeanor and made indictable in that provision of our statutes, was never intended to affect judicial officers.

I said a few moments ago that it is not sufficient that the respondent or any magistrate upon trial has erred in judgment. To a practiced eye the respondent may not seem to have gone wrong, while to an eye unpracticed (and such eyes seem to see clearer in such cases as this, probably by the clairvoyancy of a transient judicial trance) he may seem clearly to have gone wrong. There is not a member of our profession who does not often have expressions of wonder made to him by censorious and self-sufficient laymen why many well-settled legal principles exist, of which they cannot see the philosophy or reason. Even if the respondent has been wrong there must have been the intent to do wrong, he must have done wrong purposely, he must have done it purposely and with a corrupt heart; he must be shown before you to be acriminal with the same certainty of proof as is required in the case of the commonest felon. It must appear that he is not only a weak and erring man, not afflicted, perhaps, with more than his share of the common infirmities of humanity—not only that he has been impulsive beyond what you would have restrained yourselves to—but that he has deliberately, knowing his duty, seeing his way clear, turned aside from that way and took the path of malice, injustice, partiality, bias, corruption. If he has simply erred he is not impeachable. Consider that striking illustration of this principle in the history of our own times and within

the memory of every adult upon this floor. During the rebellion President Lincoln organized military commissions in the North and South, and memorably one in Indiana, which tried Milligan and Bowles. Those commissions sat upon the estates, liberty and lives of men. They had the warrant of the President and the great seal of the United States given under the supposed necessities of a flagrant and destructive rebellion; they were vindicated by every principle of self-preservation which can give validity to doubtful acts—if such principles can ever give validity to such acts. The lives of men depended upon them, the property of men was given away by them, and yet when their proceedings came before the Supreme Court of the United States, they were all declared unconstitutional, and flagrantly so. Was it proposed to impeach the President on that account? Was a voice ever raised in this nation proposing it? Never that I remember. But if there had been it would have been answered, "It is true he mistook the law, the court has so declared it, but he did it in the interests of justice, of honesty, of tranquility, of national preservation. That great and patriotic heart was right in what that great and patriotic head had, in doing, erred." And yet if he had been on trial before the Senate of the State of Minnesota, you would have heard learned managers gravely arguing, as Mr. Clough argued the other day, spelling out syllabically the meaning of crooked and often contradictory statutes, that because he did not do as some other man might have done, therefore wickedness must be imputed to him like original sin. The converse of that proposition is true.

If I shall succeed in demonstrating to you when I come to the particular matters which demand my consideration, that from article one down to article ten, and all of its progeny of specifications, that this respondent was right, judicially and legally right, in what he did; that he acted according to law, and within its restrictions; then, gentlemen, his intention or personal feelings have nothing whatever to do with this controversy. If I do right; if my actions are right, neither society nor the law of society, calls my intentions into controversy. If the respondent was right in regard to what he charged against Ingmundson; if he was right in what he said to the grand jury; if he was right in proceeding against Stimpson; he may have had against all those men the malignity of Jeffries, and it will make no difference. Otherwise, Senators, a judge adjudicating the cases of men whom he knows to be his enemies must sometimes decide wrong in order to escape impeachment. Such is the ridiculous dilemma to which that view of the case reduces such a proposition. This is not a court of error. I might agree with every single one of the propositions which my brother Clough elaborated so learnedly the other day, and still the merits of this case would not be touched. You may, as judges, in instance after instance, say that if this were before you on writ of error, you would reverse the action of the respondent, and still you have not touched the merits of this controversy which are the heart of the man. It is not enough to show that the law has been misconstrued; it must be shown that the law has been wickedly perverted and made to say that which it never was intended to say. The New York Senate sat as a Court of Errors, and at the same time it had the power of impeachment. It never was asserted that the right of impeachment went hand in hand with the power to reverse, no matter how clearly able counsel may have demonstrated that some of the judges in New York erred. The judgment which followed was that of reversal. It never was thought, it never was maintained, except in

the confusion and dust with which it has been attempted to envelope this controversy, that to every error of judgment in legal proceedings, blame is to be imputed. Why, if that were so, gentlemen, the history of judges would be little else than a history of their impeachments. Go into the next room and see those thousands and thousands of volumes arrayed there upon the shelves, and you view nothing but the marshalled ranks of error. The cases reported so voluminously in those books are cases where fallible beings have erred, or have been said to err. Through court after court those errors have been traced, and yet how rarely it has been claimed—and it is to the glory of human nature that we are able to say it—that because a judge has misconstrued anything so difficult and perplexing as the science of jurisprudence is, therefore corrupt motives must be imputable to him. And yet the argument the other day proceeded almost entirely upon the theory that if my learned and ingenious friend—whose powers of investigation are so very great—could convince you that this man had made a mistake, corrupt motives are therefore imputable.

There are certain presumptions, gentlemen of the Senate, which operate as limitations upon your power of decision, to which it will be my duty to call your attention at this present time. In the first place, there is the general presumption, applicable to all public officers, that whatever they have done has been done correctly. In regard to a judicial officer, jurisdiction once being shown, the presumption is that he has proceeded correctly, and decided correctly.

Upon that I cite section 713 of Wharton upon Criminal Law:

"Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favor of their due execution. In these cases the ordinary rule is *omnia prasumunter rite et solenniter esse acta donec probetur in contrarium.* Everything is presumed to be rightfully and duly performed until the contrary is shown. The following may be mentioned as general presumptions of law, illustrating this maxim: That a man acting in a public capacity, is duly authorized so to do; that the records of a court of justice have been correctly made, according to the rule, *res judicata pro veritate accipitur;* that judges and jurors do nothing carelessly and maliciously; that the decisions of courts of competent jurisdiction are well founded, and their judgments regular and legitimate; and that facts, without proof of which the verdict could not have been found, were proved at the trial."

Therefore it is not necessary for this respondent in regard to any of these charges by which it is alleged that he has made a mistake, and because he has made a mistake, that therefore it may be inferred that he is criminal, to enter into an elaborate defence in advance to show that he was right. These records which have been produced here of proceeding after proceeding, jurisdiction once being conceded or proved, stand enveloped in the presumption that the decision which was made upon them was right. And I might say here for fear I shall forget it in a more proper connection, that the presumption is much strengthened in this case by the fact that none of these records wherein he is alleged to have erred, were ever removed from his court to a court of final revision. Stimson has never taken up any of the records, there was no *certiorari* made on that order of the judge that Stimson should pay the fees into court. The Riley case was never appealed. There was no appeal, and hence the presumption becomes stronger.

There is another presumption which adds great force to that of regularity, and goes hand in hand with it. It is a presumption which arises out of

the extraordinary force which the State has when it converges its power upon a person accused of crime. Our fathers well knew that the man who is accused of crime fights with society banded against him. It is a matter of common observation that that is so. Friends fall off, resources fail, the public print may be full of exaggerated statements against him, there exists that universal feeling of distrust which leads us all to avoid a man who is accused. Hence sprang up that merciful maxim that a person accused of any offence, be it high or low, is conclusively presumed to be innocent until he is proved guilty by such a weight of evidence as shuts the avenue of every presumption in his favor. He must be proved guilty beyond a reasonable doubt, beyond the last reasonable doubt which can arise in the mind of any rational person considering the case. Doubt, not only as to the act, doubt, not only as to the intent, but doubt as to the motive, doubt as to each element of the act. And if, after hearing all this testimony,—even supposing and conceding for the purposes of this branch of the discussion only, that there is anything here which calls for the invocation of that maxim—if there should be in the minds of any of you after this discussion has closed, a doubt made apparent by a scintilla of reason whether this respondent did not think he was acting within the duties of his office, whether he was not promoting the welfare and good order of society, whether he was not subserving the cause of common honesty, whether he was not preserving the dignity of his office and the law of the State as it stood there embodied in and administered by him,—if in your minds there exists a reasonable doubt as to any of these propositions, then I say he must go quit. Take your own cases, sitting here as judges—sitting as Senators in your judicial capacity. How often, undoubtedly, during this trial, must have occurred to you grave questions weighing solemnly and heavily upon your consciences. Some of you may have had some prejudices against this respondent and are striving with them yet; some of you may have some prejudices in favor of this respondent and are striving with them yet. But under the circumstances, gentlemen, can you not appeal to your own consciences and say: "If I do the best I can with the lights which I have, and with the infirmities with which Almighty God has laden me, He will not hold me responsible, nor can society?" He who is made a judge is not by that act translated into perfection. He goes to the bench with the same infirmities that he had in the walks of daily life. He struggles against them, as you here must struggle against them, and as you must in other capacities if you do your duty. Your constituents knew what kind of men you were when they sent you here. His constituents knew what kind of a man he was when they elected him to be their judge. Nearly six years of his term have rolled around. That he has administered justice impartially between man and man, is not denied. His bitterest enemies come here and say that when he holds the scales of justice, their prejudiced eye cannot see that it turns a hair. What private suitor is here, man or woman, to claim that he ever has removed the land-marks of property or decided wrongfully in a case which involved private rights? All these cases wherewith he is accused, are where he has acted for the State of Minnesota in his public capacity against trangressors. His hand is as clean as an angel's of bribery. It is not pretended that he is not the justest man that sits upon any bench in this State. I say, therefore, that his counsel have a right to envelope him in the presumptions: first, that he has decided

legally, and, secondly. to ask you to give to him to an extent never given before, to any person accused, the benefit of that other presumption,—that until he is clearly proven guilty, until he is clearly shown to be a criminal in the very worst and lowest sense,—he is not amenable to the extreme penalty which the constitution of this State pronounces upon persons in his situation declared to be guilty.

The principle of reasonable doubt is excellently laid down in section 29 of 3d volume of Greanleaf on Evidence:

"A distinction is to be noted between civil and criminal cases, in respect to the degree or *quantity of evidence* necessary to justify the jury in finding their verdict for the government. In civil cases, their duty is to weigh the evidence carefully, and to find for the party in whose favor the evidence *preponderates*, although it be not free from reasonable doubt But, in *criminal* trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is, therefore, a rule of criminal law, that *the guilt of the accused must be fully proved.* Neither a mere preponderance of evidence, nor any weight of preponderant evidence is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt."

Mr. President, I shall feel exceedingly obliged if the Senate will take a recess at this time.

Senator PILLSBURY. I move that the Senate go into secret session.

Which motion prevailed.

AFTERNOON SESSION.

The PRESIDENT. Governor Davis will resume his argument for the respondent.

Mr. DAVIS. Mr. President and gentlemen of the Senate: At the recess taken by the Senate this morning, I had practically completed the preliminary remarks which I felt called upon to make.

I do not think I overestimate the importance of these large and general considerations which appeal not only to your own sense of duty as judges in this business, but which also establish to my mind, most conclusively, that this is a judicial proceeding before a judicial body, in the very highest and best sense of those terms. I am firmly persuaded that if we should leave this case right there, relying upon a complete understanding by you of the principles which I endeavored to establish, and upon their judicial application by you as judges, we could do it with perfect safety. For in my judgment, if the accountability of this respondent is tried by those tests, this prosecution loses its last remaining prop.

If you have no power to pass in effect a bill of attaint, if you have no power to pass in effect an *ex post facto* law, if you sit here in fact as judges without fear, favor or hope of reward instead of politicians truckling for approval or future promotion, if you do not break down the presumption that this man as a judicial officer has done correctly, if you do not strip from him entirely the armor of that maxim which ordains that he is conclusively presumed to be innocent until he is conclusively proven to be guilty, then I repeat, that the last remaining prop upon which this case rests falls away.

But in a proceeding of this character, no duty is performed unless it is fully performed, and I should fall short of what is due from me, of what is due to my client, if I did not proceed to the consideration of the ma-

terial and specific matters which have been alleged against him, and I therefore proceed to the discussion of the various articles and specifications of impeachment which have been propounded. And I shall apply to them as I proceed in the analysis of the testimony, the general principles which I have endeavored to establish, and which I hope have obtained a firm lodgment in your understandings.

The first article of impeachment charges, in substance (stripped of its unnecessary wording) that the respondent maliciously and wrongfully refused to permit Mr. Mollison's case to be tried at the term at which the indictment was found and continued the case; and that at the terms which have intervened since September, 1873, when he was indicted, down to September, 1877, the defendant in that case appeared each term in court and demanded his trial, but that at each term the respondent of his own motion continued the case, and that the respondent has never procured another judge. Such, gentlemen, I undertake to say, is a fair condensation of the charges propounded in that article.

The charge is three-fold: 1st, That the respondent *refused* to permit Mr. Mollison to be tried at the term at which the indictment was found—and this charge proceeds on the assumption that the respondent himself had a right to try him. 2d, That Mr. Mollison appeared at each term and demanded a trial, but each term the respondent of his own motion continued the case—which also implies that the respondent had the right to try him at any term. And 3d, That the respondent has never procured another judge for that purpose—which abandons the assumption in the first two subdivisions which I have made of this article, and proceeds upon the ground that although the respondent has not the right to try him, yet, that he did not adopt the measures which the law placed in his power to secure a magistrate for that purpose.

Under the first subdivision which I have made of this article, it must appear that the respondent wrongfully and maliciously refused to permit the cause to be tried at that term. The Senate will bear in mind that this was a term of court which was held by the respondent himself. If the respondent had no right to preside as a judge in this case for the reason of his interest therein, then of course that subdivision of this article falls entirely to the ground. In regard to the question of the right of Mr. Mollison to a trial—the constitution provides, it is true, that a person accused of crime is entitled to a speedy trial. But that provision must receive a reasonable construction; it does not mean immediate, instantaneous trial. All public business is not to be stopped—the administration of justice in all of its various complications is not to be arrested for the purpose of giving a person accused of crime a trial upon the instant. A fair and reasonable construction of that constitutional provision, is simply this: That reasonably speaking, within such reasonable time as may be consistent with the other interests of justice, a person accused of crime is entitled to a trial. Furthermore, this right to a speedy trial is a right wholly in favor of the defendant. He can waive it. He does waive it when he applies for a continuance. When a court announces that it has no right to proceed upon the trial and that announcement meets no remonstrance, and the case goes over without any objection or exception, he has waived it just as strongly as if it had been done upon his own motion for a continuance.

Now let us see whether the allegations of this article that Mr. Molli-

son has been anxious for a disposition of this case is at all borne out by any course of procedure that he has adopted under the statutes of this State which give him certain rights in certain contingencies.

I cite 2nd. Bissel, page 978:

"If a defendant indicted for a public offense whose trial has not been postponed upon his application, is not brought to trial at the next term of court in which the indictment is triable after it is found, the court shall order the indictment to be dismissed unless good cause to the contrary is shown."

This is a plain provision of the Statutes of this State made for the benefit of persons in such predicament as Mr. Mollison is alleged to have been, that if for any cause the power of the State is not brought to bear upon him to give him his trial at the next term after the indictment is found it is the defendant's privilege to have that indictment dismissed unless good cause to the contrary is shown by the prosecution. It is a striking, uncontradicted fact, in these proceedings, that it nowhere appears in testimony—and, conclusively, it is not the fact—that in this long period of time, from 1873 until 1877, Mr. Mollison, although he had Mr. Cameron for his counsel—a gentleman presumed to be fully alive to the rights of his client—ever made any motion before Judge Page, Judge Mitchell or Judge Dickinson, who were there, that he might be accorded this statutory privilege. If that is true, gentlemen, what becomes of his assumption that he was denied a hearing in that court; that he was deprived of the rights which the constitution and the statutes, taken together, guarantee to him.

Section nine provides:

"If the defendant is not indicted or tried as provided in the last two sections, and sufficient reason therefor is shown, the court may order the action to be continued from term to term."

That places the situation in this way: Two terms have rolled around, from the term at which he was indicted. It was the privilege of Mr. Mollison to move for a dismissal of this indictment, and when that motion is made the court cannot continue the case, but must dismiss it unless sufficient reason is shown for the continuance. Thus the State in its mercy, casts the burden of showing sufficient reason for the perpetuation of the case in court, upon the prosecution. Now, gentlemen, "it is the language of truth and sober earnestness" to say that Mr. Mollison never availed himself of either of those provisions during all this period of time when he claims to have been harrassed and abused and prevented from getting justice.

Again, (I cite from page 1,046) he could have applied for a change of venue. This statute, section 160, provides:

"All criminal cases shall be tried in the county where the offense was committed, except where otherwise provided by law, unless it appears to the satisfaction of the court, by affidavit, that a fair and impartial trial cannot be had in such county, in which case the court before whom the cause is pending, if the offense charged in the indictment is punishable with death or imprisonment in the State Prison, may direct the person accused to be tried in some other county, in the same or any other judicial district in the State, where a fair and impartial trial can be had; but the party accused is entitled to a change of venue once and no more."

It will be found that this was an offense for which in the discretion of the court, the person charged may be punished by imprisonment in the State Prison. The statutes of this State prescribe no specific pun-

ishment for the crime of libel, but they do provide for cases where the statutes have omitted to prescribe a punishment.

Section 280, page 1,062:

"In any case of legal conviction where no punishment is provided by statute, the court shall award such sentence as is according to the degree and aggravation of the offense, not cruel or unusual, nor repugnant to the constitutional rights of the party."

I undertake to say that this provision of that statute gives the court the power in an atrocious case of libel in his discretion, subject, of course, to the revisory power of other tribunals if the punishment is cruel, harsh or unusual, to imprison a person upon conviction, in the penitentiary.

Referring to the first subdivision which I have quoted, it is made a ground of offense against this respondent that he did not give Mr. Mollison his trial at that term. To that there are two answers—one of fact and the other of law. The first, as I shall demonstrate further on, is that Mollison did not demand it, and the second is, that under the statutes of this State, this judge had no right to try this case, and he would have been much more impeachable if he had undertaken to try and sit in judgment upon a case wherein a person was prosecuted for a libel committed upon himself, than he would be, doing as he has done, to refuse to sit upon it and endeavor to procure the services of another judge.

I cite 2*d Bissell, p:* 723, *section* 20:

"No judge of any of the courts of record of this State shall sit in any cause in which he is interested, either directly or indirectly, or in which he could be excluded from sitting as a juror."

There are two grounds of disqualification in that statute, direct or indirect interest on the part of the judge, and then such general grounds as would exclude him from sitting as a juror in case he were qualified to be drawn.

I cite from pages 1055–6 of the same volume of Bissell to ascertain what are the disqualifications of jurors:

"Particular causes of challenge are of two kinds:

"*First.* For such bias as, when the existence of the facts is ascertained, in judgment of law, disqualifies the juror, and which is known in this chapter as implied bias.

"*Second.* For the existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the triers, in the exercise of a sound discretion, that he cannot try the issue impartially, and without prejudice to the substantial rights of the party challenging, and which is known in this statute as actual bias."

"Causes of challenge for implied bias:

"*First.* Consanguinity or affinity, within the ninth degree, to the person alleged to be injured by the offense charged, on whose complaint the prosecution was instituted, or to the defendant.

"*Second.* Standing in relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense, or on whose complaint the prosecution was instituted, or in his employment on wages.

"*Third.* Being a party adverse to a defendant in a civil action, or having complained against, or been accused by him in a criminal prosecution."

Upon those grounds of statute, if the respondent had been a private person and had been drawn as a juryman, he would have been dis-

qualified upon the general ground of the statute, by reason of direct or indirect interest in the controversy, and if not upon these grounds, then for the existence of the state of mind known as actual bias. If he had been a private person and drawn on a jury and the challenge had been interposed, it needs no citation of authority to convince any man not of our profession that the principles of justice would be violated by allowing a person who has been libelled to sit in judgment upon a case in which his feelings and reputation were so deeply involved.

But if these grounds are not valid—and I am aware that there are authorities the other way—if, upon those grounds, the reasons of exclusion which I have stated, should fail, then the legislature seems to have provided for just this case, by excluding the person alleged to be injured by an offense; and if that were not sufficient or were not this case, then by being a party adverse to the defendant in a civil action. Now, it is amply in proof here that the respondent had sued Mr. Mollison in libel for damages, and that the civil action was based upon the same state of facts upon which this indictment was predicated. So that, the first allegation in the article that he did not give him a trial at the same term, falls to the ground, for two reasons: First, Mr. Mollison was not entitled to have all the functions of public justice arrested that his case and his alone might be tried by another judge brought in instanter for that sole purpose; and second, for the further and substantial reason that the respondent could not legally try that case. He would have been impeachable if he had attempted to do it by reason of disqualification resulting from his interest in the case, and from his relations to Mr. Mollison in the civil action.

Being thus disqualified to try this case, what was the respondent's duty? It was not, as I have remarked, to turn his court into a special tribunal for another judge to try Mr. Mollison immediately; but it was to use due and reasonable diligence, if Mr. Mollison requested it (which he never did), to procure the attendance of another judge. If a defendant does not request—if a man indicted for a crime sits by silently and lets the indictment be pigeon-holed, his attorney mum as the grave from term to term, and does not call the attention of the presiding judge to the case, and it is a case of peculiar delicacy, such as a libel upon the presiding magistrate, which it is not seemly for him to push by hastening another judge to try it, it is very questionable in my mind whether a judge who never calls in another judge when not moved thereto by the defendant, is open to any denunciation on that account. Mr. Mollison never made any such request for another judge. His attorney never made any such request. If Mollison did anything, it was to come into court from term to term and bawl out from any part of the court room, "I am here! I am ready!" But, supposing to a severe eye it may seem to have been the respondent's duty in the true sense and meaning of the constitutional provision upon that subject, to have procured another judge, when should he have done it? I say, within a reasonable time; not invidiously quickly, not invidiously dilatorily, but within such reasonable time as the state of the public business and the necessities for the trial of the indictment would warrant. I will go back to say here, in reference to a proposition in regard to disqualification, which I thought I had done with, that I desire to cite the attention of the Senate to a case in the 22*d Minnesota*, the case of Jordan against Henry, *page* 245. There are some peculiar circumstances about

this case which attract the attention. Mr. William Henry was a justice of the peace. He is the same gentleman who is now a Senator in this body. His attorney in that case was the Hon. Henry Hinds, one of the managers of this impeachment. Some property had been stolen from Mr. Henry which he was very anxious to recover, and he being a justice of the peace for the county of Scott (acting honestly no doubt, at least the case was of such doubt that eminent counsel on both sides went to the supreme court upon it in the utmost good faith)—accordingly issued a search-warrant to a constable in the county of Scott, directing him to search the house of a certain citizen for the recovery of that property. The question arose whether the justice had the right, the offense being alleged to have been committed against him, to proceed judicially. The case was very ably argued and fully presented in the supreme court, and the court held:

"A search warrant issued by a justice of the peace, commanding search to be made for certain property of such justice, alleged to have been stolen, is void, and the fact that the property to be searched for is the property of the justice appearing upon the face of the warrant, the warrant furnishes no protection to the constable who executes the same."

The court says:

"In view of this provision of the statute, defendant, Henry, was interested in the proceedings in which the warrant was issued in like manner as he would have been in an action of claim and delivery instituted by him to recover the books charged to have been stolen. He was, therefore, wholly disqualified to issue the warrant, because, independent of general considerations of propriety and decency, the statute declares that no judge of any of the courts of record of this State shall sit in any case in which he is interested directly or indirectly, or which he would be excluded from sitting as a juror; and by general statutes, chapter 65, section 4, this provision is made applicable to justices of the peace, as being a law of a general nature, and not inconsistent with the justice's act. The warrant was, therefore, void."

Now, unless this Senate is above all law, if the views of the learned managers in this case are not correct, if you are to be controlled by any precedents, it results that if the respondent had undertaken to try Mr. Mollison, and it had resulted in conviction, that conviction would certainly have been reversed by the supreme court; it would have been void. Mr. Mollison would have been entitled to his emancipation upon *habeas corpus*—possibly the respondent would have been liable to a suit for damages for proceeding against him. He would certainly have made himself liable to impeachment if he had done it. But for not doing it, for abstaining from that which the supreme court of this State have decided that a magistrate of this State must abstain from, he is brought to the bar of this court and his impeachment is sought upon the ground that he did not give Mr. Mollison a trial at that term, when it was perfectly manifest that he was the only judge presiding who could have held that term, all considerations of public interest being considered.

To proceed: What was the respondent's duty, if I am correct in this assumption, that he could not try it? It was, as I have said, to procure another judge as soon as the grounds of public convenience would admit; and as soon as another judge, considering the importance of his duties, could be prevailed upon to come.

I refer to second Bissell, page 723, section 21:

"Whenever a judge of the district court is interested as counsel or otherwise, in the event of any cause of matter pending before said court, in any county of his dis-

trict, another district judge, in an adjoining district, shall, when thereto requested by said judge, attend and try said cause, and the judge of any district shall discharge the duties of the judge of any other district when convenience or public interest requires it; and whenever a district judge is a party or otherwise interested in any cause, another district judge in an adjoining district, shall, within his district, transact any *ex parte* business, hear and determine motions and grant orders, in such causes when brought before him, which acts shall have the same force as if done in the district in which such acts are pending."

I pause right here to refute an assertion of the managers which has been made over and over again, with great apparent confidence, that the respondent had it in his power to detail into his district a judge from any other district in this State. This statute provides in express terms, that a judge of a court, situated as the respondent was in this instance, can call upon "the judges of *adjoining districts*," and that they, and they only, are subject to his call under such circumstances.

Now, what did the respondent do? This court will take judicial notice of the boundaries of the judicial districts of this State, and upon doing so it will see that the district of Judge Page is surrounded by Judge Mitchell's, Judge Lord's, and what is now Judge Dickinson's district, formerly Judge Wait's. There were three judges, then, upon whom he might call. The testimony shows that immediately upon Judge Page going upon the bench, for the purpose of clearing the calendar of cases in which he was interested, he did call upon Judge Wait, and that Judge Wait went to Austin and transacted some business; that, however, was before the Mollison indictment. The Mollison indictment was found in September, 1873. The uncontradicted testimony of the respondent, shows that he wrote to Judge Lord, requesting his attendance; but to that application no answer was received. It may not be improper for me to state that the feebleness of Judge Lord's constitution and health, is perhaps a thorough explanation why he did not feel as if he could go into the respondent's district to try that case. Within a short time after this indictment was found, the respondent entered a very earnest correspondence with Judge Mitchell, which correspondence finally resulted, after the engagements of Judge Mitchell had been fully considered and he had emancipated himself from them enough to tell the respondent that he could hold a term of court there, that by the time the next term of court came around after this indictment was found, namely, the March term, 1874, it had been fully arranged between the respondent and Judge Mitchell, that Judge Mitchell would come there in July and try all cases in which the respondent was interested or which he was disqualified from trying. We, furthermore, find from the uncontradicted testimony of the respondent and of Mr. Elder, that the respondent in open court, explained the difficulties he had had in obtaining a judge to take his place for those purposes, and notified the bar that he had finally succeeded in engaging Judge Mitchell to promise that he would be there in July. And I think that Mr. Elder testifies that he, under the direction of the court, notified the attorneys personally who were interested in cases which the respondent could not try, that such would be the case. And Judge Mitchell was there. He came and opened the court within seven months after the indictment of Mollison. What took place on that occasion I shall comment on, further along.

Now, permit me to go back and consider briefly, the testimony under this Mollison article. Judge Page went upon the bench in January,

1873. It is a matter of common history that that was a time when the public mind was peculiarily feverish and susceptible upon the subject, whether the railroad corporations of this State and throughout the country had not acquired such a dominant position over public affairs and public men, as rendered their existence exceedingly dangerous to the body politic unless restraints were put upon them. At that time no more dangerous charge could have been made against a public man,—no more heinous charge could have been made against any judge, than, at that moment, when not only this State, but the entire community of the Union was lying in a sense of apprehended danger from the encroachment of bodies politic upon the rights of the people, to accuse him of corrupt alliances with, or corrupt decisions made in favor of a railroad corporation. Accordingly, shortly after Judge Page took his seat upon the bench, we find that this man Mollison, apparently without any provocation, appears in print, in a public journal, printed in the city of Austin, wherein were set out, the nauseous details of that libel accusing this respondent of "plowing with the railroad heifers," with corruptly deciding in favor of the railroad, a certain question in regard to taxes by which, as the libel said, $50,000 would be lost to the county of Mower. That was the libel; that was the charge made against this untried magistrate—a man scarcely firm in his seat—of making a decision, which, in the slow progress of the administration of justice, the supreme court of this State, some four years afterwards, affirmed. That there was any excuse or vindication for this libel, no man has risen in his place with hardihood enough to affirm That it was an atrocious lie was demonstrated by the abject retraction, which was afterwards published. That it was malicious speaks trumpet-tongued from every line of it; that it was intended to break down this respondent and destroy his usefulness in the inception of his judicial career, will, I think, be made abundantly manifest before I close my argument upon another branch of this particular case. Mr. Mollison was arrested, and it is in proof by the officer who arrested him, that when he took him into his custody informing him of that for which he was detained, instead of expressing any surprise or any contrition for his crime, he threatened to do just as he did afterwards in that court room to "*make his tongue ring*," against the respondent. Mollison is brought into court. He is arraigned at the bar. Any man with the least impulse towards decency would have acted differently. The district attorney read the indictment; Mollison was listening and when the officer arrived at that part of the indictment which contained the words in which this malignant libel was set out, this man began to nod. The body of the county of Mower was there, the grand jury was presumably present; the best citizens in that community were there seeing their neighbor enter upon the yet unattempted task of his judicial position, and this impudent and infamous libeller, standing in the presence of justice, instead of behaving himself with a decorum which few men are so abject as to altogether lose the sense of, reiterated his libel by nodding his assent to it when it was read to him for the purpose of obtainiug his plea.

Now, I undertake to say that when Mollison, upon the stand, endeavored to explain his conduct at the bar, by saying it was a habit, he told a falsehood. The witnesses for the prosecution all concur that the movement of his head there was offensively made. It was

intended to show "what kind of a man he was," and was the prelude to that ringing of his tongue against the respondent which he threatened to perpetrate when the officers arrested him. The court very properly stopped the reading of the libel and asked him what he was nodding his head for. And if Mr. Mollison's own testimony is true, he gave the judge three impudent answers. "My head is my own," "I will nod it if I have a mind to," and when the respondent threatened to commit him he said, "I am in custody already." That Judge Page did not stop and commit him then and there, that he did not instantly try him for a contempt committed in the presence of the court, and order him into custody, speaks volumes for his self-restraint. Of what use is any court of justice if a person arraigned for libel can come into court and endorse it, assert it and re-assert it by nodding his head over and over and over and over again in the most offensive manner, looking around in the meanwhile for the gratulations of the men who may sympathize with him? The respondent asked Mr. Mollison about bail; he was determined to give no bail. He wanted his trial; he had no lawyer there; he had not prepared for it. He perfectly knew that the delicacy of the respondent's position was such that he could not try him. He intended to put him in a false attitude; he intended to be martyrized. "I will give no bail; I have no counsel; I have not prepared for trial, but I want my trial." The court told him very kindly, "I cannot try you. I will have to procure another judge for that purpose," and Mollison retired to the body of the court room to take his seat.

Up to this time the conduct of the respondent demonstrates his self-control. I do not believe there is another magistrate in this State who would have tolerated that conduct for an instant. He would have stopped it instantly, would have asserted the dignity of his court, would have preserved its usefulness. And I verily believe if the respondent had laid a strong hand upon these men in the earlier days of his judicial term, these disgraceful overridings of the judicial power of the State by that ungodly mob at Austin, would not have brought them before the bar of this Senate to have their miserable little local quarrels settled by the high process of impeachment.

Mr. French says that when the district attorney in reading the indictment reached that part which contained the libel, Mr. Mollison commenced to nod. Mr. French does not say that the respondent was angry; he said that he was decidedly stern and that he did not know whether he was angry or not. Now, how does that testimony on behalf of the prosecution, compare with Mr. Mollison's manner and his vociferous attempt at imitation of the judge's language and manner on that occasion? After Mollison had been arraigned and on the same day, he retained Mr. Cameron, who came in and the bail was fixed.

It is said that the bail was exorbitant. I do not think that the sum of $1,500 as bail in a case like this when the defendant is able to give it, is at all exorbitant when the flagrancy of the crime is considered which Mollison confessedly committed, and when his actions and demeanor in court are taken into consideration. There is no allegation in the articles that this bail was exorbitant; it is simply brought in under that comprehensive pretext called malice, to show that this respondent had some feeling against Mr. Mollison. So far as the testimony is concerned it does not appear that there had ever been any trouble between

the two men in the world. But in any event whether the respondent should have fixed $1,500 bail or $1,200 bail, or less bail, no one ever complained that it was exorbitant; it was given readily; the defendant had no difficulty in obtaining it; no motion was ever made to reduce it; he did not take his commitment under it and appeal to the supreme court or to any other tribunal by writ of *habeas corpus* to have it reduced to theguage which in the year of grace, 1875—five years afterwards—for the first time, the managers appear to have reached.

Permit me here to revert to a conflict of testimony. The respondent in his answer avers this indictment was procured without his knowledge, direction or advice; that he first knew of it when the grand jury brought it in. Upon that there is contradiction. Mr. Kimball who was a member of that grand jury, stating that a great portion of the respondent's charge was upon the matter of libel; that he had read from some books upon that subject; that he recollects it because it was the first grand jury upon which he ever served and possibly the last. I do not intend to impute anything designedly wrong to Mr. Kimball in making that statement; but I think I can show you from the testimony that he is thoroughly and completely mistaken; that he has two events confused; that Judge Page never said a word to that grand jury upon the subject of libel, but that the indictment arose from other causes.

In the first place, Judge Page most squarely contradicts it; and now right here. for fear I shall not mention it in its proper connection, although I doubtless shall a dozen times before I get through—I wish to call the attention of the Senate to the fact that although the respondent has arrayed himself in square contradiction to a good deal of testimony from various men, yet wherever the events concerning which he and those men have testified have taken place in the presence of others, the respondent has been amply and abundantly corroborated. It is only when McIntyre and Baird locate him alone with them in a barn yard for the purpose of matching their testimony against his, that the least criticism can be made upon the respondent's testimony for the want of full, ample and proper corroboration. Judge Page testifies that he gave no charge at all upon the law of libel. Mr. Wheeler was the district attorney at that time. He testifies that Judge Page never said a word to the grand jury about libel in his charge in September, 1873. This witness would be likely to recollect correctly on that subject. He drew the indictment, and the details and the circumstances from which Mr. Kimball doubtless gets his ideas are the fact that the question of of libel did come up in the grand jury room (that is what Mr. Wheeler says), and the district attorney did produce the books upon that subject and read from them to the grand jury. There is where Mr. Kimball gets his impression that the judge charged the jury upon the subject of libel. Again, Mr. Spencer was foreman of that grand jury, and he says there was nothing in the charge upon the law of libel. Now, so far as the testimony is concerned, weighing it fairly, the testimony of the respondent, the testimony of the district attorney that Mr. Kimball is mistaken, the testimony of the foreman of the grand jury that Mr. Kimball is mistaken—these three concurring, it is perfectly manifest that Judge Page was not pressing Mr. Mollison to an indictment; knew nothing about it; that the matter arose from the sense of outraged sentiment which the grand jury felt, and that the matter came into Judge Page's court by regular channels.

Mr. Mollison is contradicted so often through these proceedings by perfectly reputable witnesses, that he is entirely unworthy of your belief. He undoubtedly told a falsehood when he said he merely nodded there because it was his habit to nod. The rascal knew when he was giving his testimony upon the stand in the other room, that he had done a wrong act, and he laid it to the force of habit. He didn't think of the remark which he made "that he would make the court house ring." He did not appreciate how all honest men would regard a libeller as atrocious as he has proved himself to be. He furthermore says that standing before the judge, and after his plea had been entered, he asked liberty to speak, and that the judge said "not a word, sir." He never made any such request in that way; he never met with any such answer. His request was not made under those circumstances. He did not desire to address the court; he desired to address the by-standers before whose eyes he had insulted the court. He felt encouraged because he thought perhaps the judge did not dare to commit him for nodding his head insultingly.

I read from the testimony of Sterling Chandler, (June 11th, page 90 of the journal):

"Was special court deputy. Mollison nodded his head at the words '*plowing with the railroad heifers.*' The judge asked him if he had counsel. Page didn't say he would put him in the hands of the sheriff. After Mollison took his seat he got up and wanted to make an explanation or a speech, and the judge would not allow it."

In other words, and the testimony shows that another case was on trial, (and was interrupted for a moment for the purpose of arraigning Mollison,) that after Mr. Mollison had been arraigned, had turned his back upon the court, had retired beyond the bar, got among the audience and sat down, and the other case was progressing, he rose from his seat and wanted to make a speech. This man who "was going to make his tongue ring," this man who had nodded at the most bitter and caustic language of that libel for which he had been arraigned, wanted "to make a speech," and the judge would not permit him. Which one of you, gentlemen, would have permitted it under the circumstances?

Mr. F. W. Allen (June 11th, page 97,) testifies:

"Arrested Mollison. Before Mollison was taken to court he made repeated threats that he would *make his tongue ring* against the judge. The judge asked him if he wanted counsel, and he said he didn't want any. He nodded his head. He sat down in the audience; he rose up and asked him if he could speak. The judge told him that at that time he couldn't hear him. He insisted on talking and the judge told him to sit down"

From the slight view which we have been able to get in this trial of this precious Mr. Mollison, it seems to me that that probably is about what took place on that occasion. That the judge had treated him forbearingly, Mr. Mollison felt encouraged, he went back to his seat, and then rose and said, "May I make a speech?" or "May I explain?" and the judge told him, (as any other magistrate would have been likely to have done,) mildly, that he could not hear him at that time, another case was progressing; that Mollison insisted on talking, and that thereupon the judge told him in peremptory tones *to sit down*, and he doubtless *sat* down where he belonged. [Laughter.]

The testimony of Mr. Wheeler:

"Mr. Mollison told the court, from the audience, that he wanted to make a speech, and the court told him that he couldn't, that it was not the proper time, that his case

would be heard in court. He persisted in his attempt to speak and the court told the sheriff to make him sit down."

It was not necessary for us to accumulate witnesses upon that point. There is no doubt about what Judge Page did on that occasion. That his conduct was forbearing seems to me clear beyond all controversy. I firmly believe that if that libel had been against any private person, and a flagrant libeller like Mollison brought into court had nodded and reiterated the libellous words, any other judge of a court of record in this State would have committed him immediately for his conduct, instead of exhibiting the forbearance which the respondent unquestionably showed in this instance.

Now, where is the proof of malice, of bad feeling, of harshness, of injustice? There is none whatever.

Again, it was said that Mr Mollison could not get his trial. The first article avers, and the House of Representatives have come here and as solemnly affirmed that the respondent *never* procured another judge to try this case. Is it possible that the learned managers who drew these articles did not *know* or did not inform themselves of the undoubted historic facts which accompany this transaction? The charge is not that the respondent failed within a reasonable time to procure another judge, but it is that he never procured another judge. And they go on and give a table of terms, from 1873 down to 1877, which looks like the tables of the divisions of time in the old arithmetics we used to study, when this man has been "ringing" his tongue and howling for a trial, and could not be tried. And yet we find Judge Mitchell there in July 1874, in pursuance of a correspondence which Judge Page had with him early in that year, which correspondence was announced from the bench to the bar, and again brought to the attention of the bar by the clerk under the respondent's direction. And so positive was the prosecution in the early days of this proceeding, before many of the mists which encompassed this transaction had cleared away from even their eyes, that Mr. Clough wished to correct a supposed mistake on my part, for he said: "I wish to correct a misapprehension into which the learned gentleman has evidently fallen, because I know he would not willingly make a mis-statement In the first place it is a mistake that Judge Mitchell attended the district court of Mower county for the purpose of trying Mr. Mollison. There was no jury in attendance there at the term that Judge Mitchell attended." My learned friend was badly instructed; he was entirely and utterly mistaken himself. I do not censure that. The facts of this case are very complicated, but I do complain of these men who fomented this matter in the House of Representatives, who would not let the fact be known, and who have misguided the House of Representatives before this body to solemnly declare there never was a judge there from 1873 until 1877, for the purpose of trying this case.

Judge Mitchell, (June 7th, page 63 of the journal) produces a letter from the respondent, of the 21st of February, 1874. He testifies that he went there and held a term in July, 1874; he testifies that a jury was in attendance. He uses this language: "This is my very distinct recollection." In regard to this Mollison case he says: "It was called and continued by consent." Furthermore, the calendar of that term is produced, and the entry of the State of Minnesota against Mollison has an note in Judge Mitchell's hand writing, "continued by consent." Mr.

Mollison testifies himself that he was present at Judge Mitchell's court and that he staid there until his case was disposed of. Mr. Wheeler, the prosecuting attorney, testifies that the case of Mr. Mollison, was continued after conference between himself and Mr. Cameron, Mollison's attorney, and yet this prosecution has the hardihood to say in its articles, "that the respondent never procured another judge to try said case," when the contrary appears in proof. Then their counsel under misapprehension, says that although Judge Mitchell was there, no jury was there; and yet Judge Mitchell says "the jury was called; it was discharged;" "such is my very distinct recollection;" and the clerk swears that his books show that he paid twenty-two jurymen for attendance at that term. If it were necessary to add confirmation to the testimony of such a man as Judge Mitchell—a man who has the entire respect of every person in the State who knows him or knows of him, there is the testimony of Mr. Elder, "that Judge Page, at the March term, 1874, stated that there would be an adjourned term for the trial of that (the Mollison) and other cases; stated that he had difficulty in getting a judge; that a jury attended at Judge Mitchell's term; the Mollison case was continued by consent,—after the attorneys had consulted. Cameron appeared for Mollison. My books show twenty-two jurors paid."

I will read Judge Mitchell's testimony, as it happens to be under my eye:

"Q. Did you proceed to open and hold a term there?
A I did.
Q. Were you ready to try all cases that were to be tried?
A. I was.
Q. Jury cases called?
A. Yes sir.
Q. Was there a jury in attendance?
A. That is my very distinct recollection.
Q. Do you recollect calling the calendar?
A. It is my recollection that I called both the civil and criminal calendar.
Q. Jury and court cases?
A. Jury and court: the attention of the witness is called to page 98 of the court calendar, the entry of the State of Minnesota against D. S. B Mollison.
Q. Is there anything in that entry or on that page, by which you recognize it; on either page by which you recognize it?
A There is
Q. What is it, Judge Mitchell?
A. It is an entry made by myself.
Q. Read it, please.
A. "Continued by consent."
Q. That is opposite the entry of the case?
A. State against
Q. State against Mollison.
A. Yes sir.
Q. That is your handwriting, is it?
A. It is.
Q. Have you any recollection independent of that entry, or your mind refreshed, by it, as to the circumstances connected with that continuance by consent?
A. My recollection is that the county attorney was in court at that time, who I think was Mr. Wheeler; and my recollection is that Mr. Cameron was in court, and who appeared on the calendar as the attorney, or one of the attorneys, for the defendant.
Q. And that they consented?
A. That is my recollection."

Now what a charge that is to ground articles of impeachment upon! A charge false in law, false in fact, demonstrated to be so by the testi-

mony of their own witnesses, and dying in the very act of its birth, and yet insisted upon down to the last scene of this lugubrious farce!

The respondent is not charged in the articles with compounding the crime of libel, and yet the Senate in its wisdom, admitted testimony of what took place between the respondent and Gordon E. Cole, and Mr. French in regard to the settlement of the civil cases. Nothing exceeds the audacity of this Mower county clique, and they are perfectly adequate to the occasion of charging Sherman Page and Gordon E. Cole with compounding a felony or misdemeanor if it is necessary to subserve their purposes.

There is some misapprehension about the rights of private prosecutors in offenses of this character. I admit that the ground of control of a private prosecutor over an offense directed solely against himself (such as libels are), is somewhat vague and indeterminate. But this is certain, that in such cases as that, at common law, to use the good old language of the writers in that department of the law, "in the hope that these matters might be settled, the prosecutor and the defendant were allowed to go out of court and speak together;" and judges always listened very considerately, and willingly allowed prosecuting officers to enter a *nolle prosequi*, when, after the parley of the parties out of court, the offended person was satisfied. It was a wise policy and in the interests of public harmony.

Mr. Davidson, in whose paper this libel was perpetrated, let it rankle and fester in the minds of that community from 1873 unretracted and unqualified for five years. That want of retraction was equivalent to a continual reassertion that Judge Page's relation with the railroad companies were those of judicial adultery, and that he had made a dishonest decision by which the county of Mower had been robbed of $50,000. What was the man to do? Was he to cower under it? Were the people of his district through which that railroad runs, (for I believe it was the Southern Minnesota,) to be permitted from year to year to absorb the poison of this libel into their minds until they lost confidence in him? The proprieties of his position forbade him from doing what men in the private walks of life can do, to wreak personal revenge upon a person perpetrating a libel in that manner. I think the bringing of private libel suits matters of very questionable policy. But he felt bound to bring one. The people of the county rose up, indicted Mollison for libel, the respondent procured a judge to try this malefactor, he was not ready for trial, his attorney wanted the case continued, and so, from term to term, that case remained upon the record, that libel remained unretracted in Mr. Davdison's paper, until the Supreme Court of this State—thank God an institution above even the attempt of crimination by this Mower county ring—held that that decision was righteous and right. The astute counsel of these defendants then told them they must retract or criminal and civil consequences would follow, which would doubtless be unpleasant to them, whereupon Davdison and "all the little creatures whom God, for some inscrutable purpose" has permitted to infest the county of Mower, got down on their bellies and wriggled at the feet of counsel. [Laughter.]

What does Gen. Cole do? No one will dispute the high standing of that gentleman at the bar of this State, or his most perfect understanding of all the ethics of our profession. He is not the man to be engaged in compounding misdemeanors. It seems from the testimony of Mr. French, on page 38 of the journal of May 28th, that when he

went into court Mr. Cole was moving before Judge Dickinson to dismiss the Davidson and Bassford state cases, urging as a reason that they had agreed to publish a retraction which he thought would be satisfactory to the respondent. The judge passed the cases for the present. Judge Dickinson did not say to Gen. Cole, "Gen. Cole what business have you to stand before me arguing my right to direct the county attorney to consent to entering a *nolle?*" General Cole is too fine a lawyer; Judge Dickinson too accomplished a judge to see any impropriety whatever in what was in fact done. He told Gen. Cole when that statement was made. "We will pass these cases for the present."

Now, it seems that Judge Page, Mr. Davidson, Mr. Bassford, Mr. French and General Cole got together and Mr. Davidson is very anxious to make it appear that he was negotiating there for Mr. Mollison, but it is not worth our time to argue although Mr. Mollison was probably in court at the time, certainly his counsel, Mr. Cameron was there that he was no party to that interview. Judge Page swears that he never heard Mr. Mollison's name mentioned, and General Cole says he is not certain whether the judge could have heard it or not when Mr. Davidson mentioned it to him, and Mr. French says that Mr. Davidson said to him, "This will include the Mollison case, will it not?" and that he supposed this was in the hearing of the judge. But whatever was done, it resulted in the parties coming to an agreement and Judge Dickinson recognizing it as to the Davidson & Bassford cases that the criminal prosecution should be dismissed, because satisfaction had been rendered by retraction.

As to Judge Page's position in that matter, I have this to say: That he acted—I will not say with more delicacy, because that is not the term to apply to such men as Judge Dickinson and General Cole—but he acted with more circumspection and care than did the magistrate or the lawyer, because according to the testimony of Mr. French, when it was proposed to Judge Page, or that when it was indicated to him that as a consequence of the satisfaction of these civil actions a dismissal of the criminal proceeding might follow, he said:

"I want it understood, that so far as I am concerned, I am perfectly satisfied. I have no disposition to prosecute these cases, but I want it understood that you have charge of that matter and it is not for me to say."

What more could the respondent have said? What less could he have said? So far from there being any malice towards Mr. Davidson or Mr. Bassford or anybody there, he was willing upon their retraction to abstain so far as he was concerned, but feeling the delicacy of his position, he told the prosecuting attorney, "it is not for me to say."

Senators will bear in mind that although General Cole, an upright and high-minded lawyer, was willing to advise his clients, Davidson and Bassford, to retract, Mr. Cameron, who was doubtless around the court room at that time, had no such magnanimity in regard to his client Mollison. From that time down to this, Mollison has never retracted that libel; from that day down to this, no retraction has been made in his behalf; from that day down to this, his tongue has "rung" against this judge; even down to his ridiculous declaration of war in case a prejudiced Senator should not be permitted to sit upon the trial of this case. I should not spend so much time in elaboration of this article if I did not deem that such articles as this amply characterize all the rest and show the animus of this entire proceeding; that there is

an undertone of hate and malice that runs all through this infernal clamor. No high-minded man like Wm. Meighen—not one single man, woman or child outside the county of Mower—appears here against this respondent. That he has preserved the observance of private right no man denies, except these men who were arrested in their raids upon the treasury. And I bring my mind to bear particularly upon this Mollison article, to show the extremes to which these men are willing to go, to show how they will lie, how they will cheat, how they will juggle, how they will do all acts of judicial uncleanness to present the facts before the Senate, not as they are, but as they desire them to be. And after this examination of the testimony, I challenge the gentlemen to tell me what shred of truth there is left of this Mollison article? The article itself is a weak but wicked lie; the testimony by which Mollison substantiates it is a weak but wicked lie. The libel itself was bad enough, but to place upon the enduring records of this tribunal such a charge as this and to endeavor to sustain it by such robust and muscular swearing, passes anything in the records of audacity that I have ever witnessed in any court.

The PRESIDENT. The court will take a recess for five minutes.

AFTER RECESS.

I crave the attention of the Senate now to the second article, known as the Riley article. The substance of this article is a charge that the respondent, in March, 1875, wrongfully, maliciously, and with intent to injure Mr. Riley, appeared before the county commissioners and asserted that it would be illegal to allow his bill, by reason whereof the board did not allow it. The same act is charged to have been again committed by him in January, 1876. Then follow allegations of a suit by Riley, of a malicious judgment by the respondent against him that the issuance of the subpœnas was unauthorized by law, by reason of which Riley was never paid.

That article is susceptible of two divisions: First, what the respondent is alleged to have done before the board of county commissioners; second, what he is alleged to have done in court when the matter was judicially before him.

In regard to what he did before the county commissioners, I ask the Senate to apply that portion of my argument made this morning wherein I attempted to demonstrate that no person in the situation of the respondent, is liable except for corrupt conduct in office, viz., for corrupt conduct in the performance of his judicial duties. I undertook to demonstrate that where the act is not a crime or a misdemeanor, it must be culpable within the meaning of the words "corrupt conduct in office;" and that it must be *conduct in office*. The words are so plain that they almost beggar any attempt at elucidation.

The respondent, in going before the county commissioners, did not act in his judicial capacity. He expressly stated to those gentlemen that he did not. I think he had a right to be there. Professedly and actually he was acting outside his judicial capacity. Were any judicial proceedings going on? Was his signature to any judicial paper required? Was any motion being made before him? Was there a question for him to decide? He was no more acting judicially in the conduct of his office there, than he is acting judicially when he goes to the polls and votes, or performs any other act which a citizen may rightfully do. And hence if my construction of the constitution is correct, that portion of

this article falls entirely from your consideration. Whatever his conduct there may have been, whether, as we maintain, perfectly proper and right, or whether, as they claim, exceedingly improper and indecorous (and they claim nothing more), it is nothing for which a Senate can impeach; it does not rise to the dignity of those offenses which remove a man from office, or disqualify him forever for holding any office of trust, honor, or profit in this state.

It is my design in summing up this case, in the first instance to attract the minds of Senators to the legal considerations which I think applicable to the facts, and to follow them by such discussions of the testimony as seem to me material. I have endeavored to make a careful analysis of all this testimony; I have so done with that of every witness—have digested it, have arranged it in its place. I think I am qualified to state how different parts of that testimony bear upon the whole. I shall endeavor to state it correctly, within its proper limits. If I err I beg immediate correction, for the mind of no man is capable of grasping without mistake such a mass of testimony, some incongruous, some not, some grossly immaterial.

The constitution of this State gives to the person accused of crime the right of compulsory process. That right is not given without a reason. It is an innovation upon a barbarous feature of the common law, by which the hands of a person accused of crime were frequently tied in such a manner that he could in no wise protect himself. The constitution of this State gives the accused the right to be heard by his counsel; and yet at common law, (and it will surprise many men not of our profession to learn it) until within the last one hundred and fifty years, a person accused of felony was not allowed to have a lawyer plead in his defense, nor to cross-examine witnesses, nor to sum up the case. The provision which authorized the accused to be heard by counsel in his own defense, does not bind the State to give him counsel free, as the State furnishes a public prosecutor. It merely gives him the right to have counsel. So the right to the process of subpœna merely gives him the right to take from the court that compulsory process, not to have it served at public expense.

In the 2nd of Bissell on page 978, section 11, it is provided as follows, (and it is upon this section that a deal of harping has been done and a deal of astute misconstruction has been lavished):

"The clerk of the court at which any indictment is to be tried, shall at all times, upon the application of the defendant, and without charge, issue as many blank subpœnas under the seal of the court, and subscribed by him as clerk, for witnesses within the State, as are required by the defendant."

A very just, humane, and beneficent provision of law. But the question is what does it mean, and were the defendants in these cases at the time when they ordered the subpœnas within the purview of this statute? What are the controlling words in this statute? The controlling words are those words which fix the time when the right to that compulsory process begins. It does not necessarily begin when the grand jury return their indictment. It unquestionably does not exist until a certain state of facts arises which makes it morally certain that the indictment is to be tried upon an issue which needs witnesses. What is the first object of witnesses in criminal cases? It is to prove or disprove certain facts. If there is no question of fact before the court, there is no necessity for any witnesses; and until a plea is entered, it is not certain whether the

issue raised or to be raised, will be one af fact or law. Upon a plea of not guilty to an indictment, the right of a defendant to blank subpœnas is most unquestionable. But that case was not this case. What response had those defendants made to that indictment? They had demurred. They had told the court by their demurrer that the indictment was so defective that they could admit it all and that there never would be any necessity for witnesses. And it so proved.

After demurring and while the demurrers were still pending, as I shall show when I come to consider the facts, they attempted to bleed the treasury of the county of Mower by subpœnaing a host of witnesses. So I say I am right in this construction that although this is a right, yet there is a time fixed when that right becomes operative, and up to which time it has no existence at all. I hold that a person cannot interpose to an indictment a successful demurrer, as this was, and at the same time encumber the county with the expense of as many witnesses as he, within his discretion, may choose to summon for the trial of that which, upon his solemn demurrer, he has asserted will never be tried at all. Is not that view reasonable? Does it not appeal to your understandings as a conservative and wise exposition of that statute? If it does not upon my say so, let me reinforce it by the authority of a very eminent judge in this State, given in testimony. Judge Mitchell of the Winona district, was upon the stand here, and we took occasion to ask him what the practice is in his district upon that point, and he told this Senate that it is not the practice in that district for a party to go to the clerk and draw out as many blank subpœnas as he chooses without an order from the court. That a defendant applies to the court for his process, representing the existence of a state of facts warranting the issuing of blank subpœnas for witnesses and that upon the word of a reputable attorney, that privilege is always granted by the court. This is his language:

"The custom has been for the counsel to apply to the court for a direction to the clerk and sheriff. I found that custom in existence when I went on the bench, and it has so continued up this time, so far as I now recollect."

Now, the district over which Judge Mitchell presides, at one time covered a part of the respondent's district. In old times the counties of Houston and Fillmore, I think, were a part of what is Judge Mitchell's district, and when the respondent went upon the bench he undoubtedly found a practice there which went beyond the memory of any practitioner. It was that the parties had not the power at all times to go of their own motion to the clerk for process and put expense upon the county at their own sweet will, but according to the old practice, the wise and conservative practice which prevailed in the district, they must apply to the judge for a direction to the clerk.

Other provisions of the statute confirm the wisdom of this practical construction which has grown up in the third district. When the demurrer is overruled—and I wish to correct a mis-statement of my learned friend, Mr. Clough, for I think I understood him to say that trial was instantaneous—

MR. CLOUGH. [Interrupting.] *Plea* instantaneous.

MR. DAVIS. "Plea instantaneous,"—but you didn't say that he was

entitled to four days for trial afterwards—a fact which you suppressed.

MR. CLOUGH. I did not suppress it.

MR. DAVIS. [Continuing.] My learned friend answered, in reply to a statement by us, "that a defendant had twenty-four hours to plead;" but he did not state, in addition to that twenty-four hours, he has certainly four days to prepare for trial. So no wrong is committed. If a demurrer is overruled, a defendant has four days as a matter of right, and has such further time, either as a matter of continuance or delay, as will enable him to prepare himself fully to meet the charge which the State has propounded against him.

I cite page 1,051, of Bissell's Statutes, section 198:

"If the demurrer is allowed, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offense, unless the court allows an amendment where the defendant will not be unjustly prejudiced thereby, or be of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, directs the case to be submitted to the same or another grand jury."

Now this indictment had been found the term before these subpœnas were issued. If the demurrer was sustained, the court had to do one of two things: it either had to discharge the defendant or re-submit the charge to another grand jury; and so the the case was certain to go over upon the demurrer which was interposed in case it was allowed. I say, therefore, that the defendants had the time to plead which statutes under such circumstances gave them.

Now, upon one point I believe that the prosecution has fallen into a most radical error, inasmuch as it has taken that for granted in the construction of the statute which a critical reading will not sustain. Down to this time I have simply considered whether the defendant had the right to compulsory process, namely the blank subpœnas. I have not considered, except by general reference, the question which has rather been taken for granted here, whether they were entitled to the services of the public servants of the State, to serve it at public expense, a right which is by no means the same. The constitution of this State simply provides that a defendant shall have the compulsory writ of this State placed in his hands. The statute which I have read, provides that the clerk shall issue blank subpœnas, but neither that constitution nor that provision of statute provides that the defendant shall have for nothing the services of the public officer to make service of that writ. He is entitled to the writ, and unless the statute which I am about to read gives him the power of the State *gratis*, then this Riley case falls to the ground, no matter what the right to the issue of subpœnas may be. I call the particular attention of this court to the provisions of this statute to show that Mr. Riley never had any valid claim against the State for his services as deputy sheriff. Sec. 42, page 976 of Bissell's statutes reads:

"When any prosecution, instituted in the name of the State, for breaking any law thereof, fails, or when the defendant proves insolvent, or escapes, or unable to pay the fees when convicted, the fees shall be paid out of the county treasury, unless otherwise ordered by the court."

In the absence of any statute upon the subject of the expenses of criminal prosecutions, it is perfectly manifest that they do not lie upon any

municipal corporation or county, but are a charge upon the treasury of the state at large. I say that neither at common law nor under any of the statutes anterior to this that I am aware of, does the expense of criminal prosecutions fall upon any county. In the absence of statutory provisions, the expenses of such a trial, the State of Minnesota being the plaintiff, is upon the public at large, and not upon any subdivision such as a county, town or city. That being the case as a general principle, the counties of this state are not liable to pay the expenses of prosecution, except under circumstances distinctly provided for, and for the purposes and in the instances stated in some statute to that effect. And it is an error of construction of this statute to assume that the counties of this state are bound to pay the expenses of the defendant in any case. This statute does not warrant that construction, no matter to what extent a contrary interpretation may have been indulged in. This statute is for the protection of the treasury against the demands by officers for fees incurred by the state. The context shows that it relates wholly to state fees, for it contemplates a judgment for costs against a defendant. It imposes upon the county the burden of state fees in state cases. This is the only statute which makes the county liable to pay officers' fees for services for the state in state cases; otherwise, the expenses of criminal proceedings, like the salaries of the judges, would be general charges upon the state treasury.

Let us further consider this statute:

"When any prosecution, instituted in the name of this State, for breaking any law thereof, fails, or when the defendant proves insolvent, or escapes, or is not able to pay the fees when convicted, the fees shall be paid out of the county treasury, unless otherwise ordered by the court."

The statute, throughout its entire text, proceeds upon the ground that the defendant himself is liable for the costs of his defense. "When the defendant proves insolvent or escapes," the fees must be paid by the county. "When he is not able to pay the fees when convicted," the expenses of the prosecution, "the fees shall be paid by the county, *unless otherwise ordered by the court.*" The object of this statute was to prevent public officers, sheriffs or attorneys, from running up exorbitant bills against the state or the county. It was, in the first instance, to declare when a county shall be liable for fees, and it is liable for fees in three instances. It is liable for fees when the prosecution fails; it is liable for fees when the defendant proves insolvent or escapes; it is liable for fees when the defendant is unable to pay the fees when convicted, "*unless otherwise ordered by the court.*"

It means simply this: that if the convicted defendant proves insolvent or escapes, the clerk or the sheriff, unless the court otherwise orders, can look to the county for their fees. If the defendant is unable to pay the fees when convicted, the clerk and the sheriff, may look for their fees to the prosecution. If the prosecution fails, they must look for their fees to the State, because, of course, judgment cannot go against the defendant in that instance. But this statute nowhere says, no statute of this State anywhere provides, that any county shall be liable, absolutely, to a defendant for the expenses of serving the process of the court. I ask a close analysis of this section of our statute. The more it is looked into, the clearer it will appear, that its object is to prescribe when counties shall be liable for the fees, instead of making them an expense from the State treasury; it was designed to protect the counties, and, incidentally,

the State, from the rapacious exorbitancies of sheriffs and clerks. From its very purview it contemplates that the county shall pay fees only when defendants cannot; that defendants must pay fees when they can. I believe this is a fair construction of that statute, and that Mr. Riley was not entitled to fees for serving the process of those defendants, All the statute gives these defendants gratuitously, is the blank subpœnas of the court, and if they desire the services of an officer they can hire that officer to serve it just as they would have to do in a civil action.

Again, I had always supposed, as regards the validity of this Riley claim, that when an officer of court wishes to obtain his fees, he must have them taxed by the tribunal he serves—a thing which Mr. Riley never did. He made out his bill to the full extent; never went before the court for his taxation; never submitted it to judicial consideration; took it over to the county commissioners—and from that dates all the trouble in this transaction.

I cite page 975 of Bissell's statutes, section 35:

"No fees shall be taxed for services as having been rendered by any clerk, sheriff or other officer, in the progress of a cause, unless such service was actually rendered, except when otherwise expressly provided."

That section, by implication, says that the fees of officers must be taxed. It is not permitted to any clerk, sheriff, or any ministerial officer of court, exercising one of the most subordinate of its functions, to make a conclusive claim upon the public treasury until it has been decided upon by the magistrate presiding.

Mr. Riley's bill was void for another reason. It was presented to the county commissioners in 1875, and the prosecution was then pending, and, of course, had not "failed." The order sustaining the demurrer was not filed until August, 1875. In January, 1876, the bill was again presented to the county commissioners, but the respondent had previously, in open court, directed that the fees should not be paid by the county and Mr. Riley was notified.

[A paper was here handed to Mr. Davis, and he continued]:

A question has been submitted to me. [Reading]:

"Could not the subpœnas have been served by any person other than an officer, for instance, by a friend?"

I will state that such was my first impression. But my recollection is now, that I examined the statutes upon that subject and found that subpœnas can be served by a private person in civil cases only. It is one of those nice little artifices whereby the officers of court have reserved to themselves the prerogative of serving subpœnas in criminal actions, and demands a strict construction of the statute to which I have just now called the attention of the court. The right ought to be, of course, the same in criminal as well as civil cases.

Under my construction the respondent's decision of the case was correct. The statutes make the judges, for certain purposes, the guardians of the public treasury. The respondent did his duty in vacating a stipulation which made an attack upon the treasury under a false statement of what took place in court and of its records. Courts take judicial

notice of their records and proceedings. I do not know, gentlemen of the Senate, what there was wrong in the respondent going before the commissioners and telling them, at their request, what was a fact. We all know that in outside districts much more freedom of intercourse exists between the judges and the citizens than perhaps does in the larger places. How natural it was for honest old Judge Felch, in the recess, when a disputed question of fact came up, to say, "I will go up to Judge Page's house and have him come down here, and find out"—not what the law is—but "what the fact is." The law was plain enough, and there was no dispute about it. I venture to say that there is not a district judge in this State who is not from time to time called upon by persons of co-ordinate branches of the government, exercising their functions of office to tell what has taken place in his court. He generally does it without objection; it is done without impropriety. And when Judge Felch became alarmed at what seemed to be a steal upon the treasury of the county, he went to ask Judge Page what the fact was. The respondent might have been more circumspect, he might have been more prudent, but he went there in the full conciousness that he was doing nothing wrong. And when the fact was asked him, he told the commissioners just as he understood it to be.

These indictments, gentlemen, were consequences of that riot, which this Senate has solemnly decided it will know nothing about, which took place in the city of Austin in 1874. I stated there was a riot there. I have an impression that something has been said about it in this court. It has been more than darkly hinted several times here that there was a riot in the city of Austin, and it appears of record here that these men, Beisicker, Walsh and another, were indicted as among the rioters. They were indicted at the September term, 1874. Whether they were arrested at that term or not my memory does not serve me, but I will venture the assertion that the demurrer was put in at the term at which the indictment was found.

The March term of 1875 comes around, and no notice having been made, no issue of fact joined, what do we find? We find French and Cameron joining hands in iniquity; they make up their minds "to put up a job" on the county treasury, and Hall and his deputy, Riley, join hands with them. Mr. French, without any consultation with the court, took out subpœnas for the State, and Mr. Cameron, without any leave obtained, as would be necessary in Judge Mitchell's district, ordered his respective clients to take out subpœnas for the defense. French takes out subpœnas for the State, for the witnesses "to be and appear and testify in a certain issue of fact" which had not been formed, and Cameron directs his client to take out subpœnas for "the within named witnesses to be and appear and testify concerning certain issues of fact" which had not been formed! This was a double-handed theft, and how many witnesses Hall subpœnaed on behalf of the State, God only knows—this record don't show. But it is a moral certainty that that unregenerate Riley subpœnaed *ninety witnesses* [laughter] on behalf of the defense, to appear and testify in an issue which had not been formed! More than that; although this matter was depending upon a demurrer, and he had subpœnaed ninety men, he did not have to go for any of them outside the corporate limits of the city of Austin, and I dont suppose the precious Hall had to go any further for his covey. It would not be expected that Riley, the deputy, *could* subpœna more witnesses than Hall, the sheriff. It would be gross

insubordination to do so, and I take it for granted that Hall was not surpassed by his deputy in that respect. [Laughter.] And so these ninety men are subpœnaed to come and testify upon an issue of law! And who do you suppose were in those subpœnas? Why, the very defendants themselves were subpœnaed as witnesses in their own case, and Riley taxes his fee against the county. And after Tom. Riley had searched and raked as with a fine tooth comb the city of Austin for witnesses whom Hall had not captured, he turns around and subpœnas *himself*. [Great laughter.] Having performed that automatic feat, he naturally looks around for other worlds to conquer, and it occurs to him that there still remain two individuals whom he has not grasped within the comprehensive powers of the subpœnas which he held, and so he subpœnas Cameron and Crane, the defendant's attorneys. [Laughter.] And I have no doubt that Hall subpœnaed French. [Renewed laughter.]

Now that is the transaction, gentlemen. I am making no misstatements, no exaggerations here. Those subpoenas are in this court, those names are on the back. This is the transaction, in all its original, unvarnished cussedness, just exactly as I tell you. [Laughter.] And Judge Page is to be impeached, because, hating a thief—knowing one when he sees him—he doesn't, perhaps, round all the sharp corners of the law, but cuts across-lots after him with a club! [Prolonged laughter.]

There are some interesting conflicts of testimony here. It was very necessary to show malice against Riley. That seemed to be the principal trouble with these managers—the acts themselves not being particularly out of the way—the respondent must be shown to be bedevilled by malice. And so Mr. French comes upon the stand and testifies that at a meeting *in March* 1875, Judge Page and he had some words before the county commissioners, wherein, I think, Mr. Riley's name was mentioned in a derogatory manner. Now we assert that it is proved by a decisive preponderance of testimony, that Mr. French has brought forward and interpolated into what took place before the board of county commissioners in March 1875, something which took place at another session before Riley's bill came into existence. It is a very difficult task, gentlemen of the Senate, to transport from a date and place where it has no possible relevancy in this proceeding, a body of facts entirely unconnected with it, and before your very eyes fabricate it into the texture of the issue so that no seam shall be visible.

Judge Page testifies that the meeting when Mr. French called him corrupt, was in January 1875, when the Baird bill was under consideration; and the Senate will bear in mind that this Riley bill did not originate until March 1875. It shows that either Mr. French or Judge Page is wrong and mistaken or worse than wrong or mistaken.

Now let us see whether Judge Page is confirmed, for I made a statement a few moments ago that in all the instances where Judge Page has made statements contrary to those of Mr. French or any other witness where that witness does not locate him *solus cum solo*, Judge Page is confirmed by the testimony of bystanders. Now bear in mind that Mr. French testifies that this altercation between him and Judge Page was in March 1875, and was over the Riley bill. J. P. Williams testifies on June 12th that he was county auditor and clerk of the county board; that at the January meeting 1875, the Baird bill was under consideration; the Riley bill not under consideration; no such bill before the

board: that the altercation was then between Judge Page and Mr. French.

H. E. Tanner testifies on June 12th:

"The commissioners were present at the controversy; that was in January 1875. It occurred in reference to the Baird bill; the Riley bill not before the board, and Riley's bill not mentioned. Respondent not before the board at the March session."

A. J. French testifies on June 12th:

"The controversy was in reference to the Baird bill; the Riley bill was not before the board; it was in January; not presented until afterwards, and then there were no words between respondent and French; no expression about 'big men with little brains,'" &c.

The fact is, that when this Riley bill was up before the county commissioners, which was in March, there were no words at all between Mr. French and Judge Page. Mr. French says that there were words at that time; that the judge used derogatory language in regard to Mr. Riley; and that he, (French) called the judge corrupt. But the respondent, backed up by the clerk of the board, the county auditor the county commissioners, Mr. French and Mr. Tanner testify that at the time when this Riley bill was under consideration, there were no words, and that the occasion when the words were used, was when the Baird bill was up, before the Riley bill came into existence. That matter is not so important in itself, but it illustrates the *animus* of this business. It proves this disposition, this willingness, which witnesses have, to take events which have no possible bearing upon these proceedings and bring them into relation and contact with events which have. Because this is a most wicked attempt, gentlemen of the Senate, to show that some other conversation which Judge Page may have had with some person months before the inception of the particular matter in controversy, was really in regard to that upon which you are to pronounce this respondent guilty or innocent.

I propose to demonstrate to you from the record of this board of managers which was made to the House of Representatives, that they are accessories after the fact to this diabolical attempt to impute to Judge Page, language on this occasion which he used on another. I refer to the report of the House committee on page 247 of the House journal:

"Mr. Campbell S. L., from the committee on judiciary, to whom was referred the resolution of the House relative to the charges against Hon. Sherman Page, reported that they had had the same under consideration, and submit the following report:

* * * * * * * * * * * *

"As to the matters alleged in the eighth specification, your committee finds that *in January*, A. D. 1875, Judge Page was requested by one of the members of the board of county commissioners of Mower county, to appear before said board with reference to the allowance of certain bills of George Baird, sheriff, and Thomas Riley, constable, upon which the board had already passed; that he went before the said board and told them that the bill of Baird contained illegal charges, and that the bill of Riley was entirely illegal; that he expressly told the board that he appeared before them as a citizen and a taxpayer, and in the interest of economy; that the commissioners told said Page that the county attorney had instructed them that the charges in the Riley bill were just and proper, and that they constituted a legal and valid claim against the county."

So it is the same transaction. Now this report, upon which these articles of impeachment are predicated under the signature of my esteemed friends, solemnly certifies that when Mr. French and Judge Page had this conversation, it was in January, 1875; and they just as solemnly certify that the Riley bill was under consideration in January, 1875. But upon closer examination, it was found that this would not work; it was found that Riley's bill had no existence in January, 1875;

that it did not come into being until March of that year. And if they wanted to be correct they must bring that conversation, which they solemnly asserted took place in January, 1875, relative to the Baird and Riley bills, out of January, and bring it down to March; and at the word of command every one of those witnesses changed front. [Laughter.] One county commissioner who had sworn positively that it was in January, came upon the stand and said he had refreshed his recollection by consulting a memorandum that he had never made.

Now, there is something wrong about this. Mr. French is either mistaken or he is worse. It is diabolical, I repeat, gentlemen, to impute to this respondent, conversations in regard to this occurrence, which never had relation to it. Mr. Hall was brought on this stand the other day, in rebuttal, and it was attempted to prove by him that this transaction was in March, and yet, upon cross-examination, he said that in January. 1875, there was something said about corruption on the part of this respondent by Mr. French. Thus we find that wherever their minds are not directed to a particular point with the strained effort of falsification, the truth rises in insurrection whether in the report of committee, upon cross-examination, or upon Mr. French's admission that he swore differently before the judiciary committee. The fact is, that a most unrighteous attempt has been made here to graft into that interview upon the Riley bill, conversations which Judge Page never had in relation to it. There is the report of the House committee; there is the testimony of that county commissioner, getting himself and them out of a bad position by *refreshing* himself with contradiction; there is the change of front on this whole business for the purpose of enabling Lafayette French to lug in that little piece of personal and individual malice.

Malice must be shown, and hence Mr. Hall and these three or four fellows, who must have a phonograph concealed about their persons, come on the stand to tell the same story after Hall has whispered it into their funnels, and all the managers have to do, is to turn a crank and the record of conversations and occurrences of years ago, comes out in a character fitted for the occasion. They want to prove malice, and Mr. Hall waltzes gracefully to the stand again and attempts to tell this court that sometime after the election, Judge Page met him in Mr. Engle's store and said something about how he dared appoint a man of Riley's character to the position of deputy sheriff. Now, gentlemen, Mr. Engle was there, and heard all of that conversation. He took part in it; he has been here upon the stand. I do not want to say anything unnecessarily harsh. I shall not go to any particular length to commend the appearance or demeanor of our own witnesses. Those things all speak for themselves more forcibly than I can. You saw Mr. Engle's appearance—his want of interest in this case; you saw Mr. Hall—his great interest in this matter. Mr. Engle distinctly swears that no such conversation as that ever took place. He testifies that there was a general conversation there between two citizens, (Mr. Hall being present,) in which it was asserted that it was wrong to barter off the offices of the county as a reward for votes. I think so too, every man on this floor, in his conscience, thinks it is wrong, in a candidate for an office, to promise this man and that man—no matter how bad his moral character—"if you will vote for me, you shall have such and such an office." It is not only wrong, but it is a misdemeanor at common law, and punishable as such. It is bribery; it is the selling of office; it is political simony.

Now after Mr. Engle departs from the stand, some of these gentlemen from Mower county who serve in the double capacity of witness and sergeant-at arms, having intimations of the surroundings of the the men at the time of this conversation, went down and dug up from the prairie of Mower county, some one who says he heard that conversation with Mr. Engle, a man never heard of before in connection with this prosecution—and he comes gaily up to testify that Mr. Engle is not correct in his statement.

Is this conversation proved? Do you believe Hall with all his interest and zeal, or do you believe the respondent, giving a plain, unvarnished version of this affair backed up by witnesses of the character he produces?

Now, after French, Cameron and Kinsman had played this little game upon the county of Mower, by Hall, on behalf of the State, subpœnaing most of the inhabitants of Austin, and Riley on behalf of the defense, subpœnaing all the rest, [laughter] French and Kinsman get their heads together and conclude that they have a good thing. Hall is sure of his pay anyway, for the county can't go behind that, and hence they go to the board of county commissioners, and are there together. And Mr. French, although he must have known how wrong this was (it speaks very badly for his integrity and his qualifications as a public officer) Mr. French, although he must have known how wrong this was, deliberately advises those gentlemen who look to him for legal instructions, that Riley's bill is a valid claim against the county.

The Senate will bear in mind that Judge Page and Mr. Elder have both testified (Judge Page first testifying that he had heard this crime was on foot to make expense against the county,) that when the judge saw the clerk in the act of issuing some subpœnas of this character he asked him what it was for, and upon being informed, told the clerk not to issue any more, and that the expenses would not be paid by the county. That was an order in open court within the language of the statutes which I have just read. It was not necessary to be entered in writing, because the provisions of statute which require orders to be entered in writing are wholly in relation to civil actions. There is many a thing done in court, many a direction to its officers not entered in writing; a rule is made upon evidence; an exception is taken, but there may be no formal record of it. It may be in the minutes of the judge, or in his memory, but it has no entry in the minutes of the clerk.

French and Kinsman, in rummaging around that clerk's office, discover that the order is not entered upon the minutes of the clerk—not through any fault of the judge—because he is not responsible for the omission of the clerk of the court.—These gentlemen finding that such a record does not exist, conclude they have "got a good thing,"—to use Mr. Kinsman's expression. Whereupon they go down arm in arm, I presume, before the board of county commissioners; Kinsman inserts his little bill, French stands by and says it is all right; the county is unquestionably bound to bleed," still some of these hard-hearted old fellows do not exactly see that, they see that the transaction is iniquitous, they propose to find out the facts and they ask the judge. But in any event Mr. French advises the county commissioners not to heed the facts, and Mr. Kinsman sues the county of Mower in a justice court. Well, what a suit! Kinsman prosecuting the county, and French *defending* it? They appear before the justice of the peace, and what does French do? Does he interpose any offense? No. Does he subpœna the clerk of the court? No. Does he bring the judge

there to prove whether he has disallowed that bill? No. And even Mr. Kinsman, when asked by my associate, "What did Lafayette French do to win that case?" opened his mouth, gasped for breath and finally said, "I can't tell." [Laughter.] And he couldn't. Even French's legal obstetrics could not abort the suit. Very much to his astonishment, no doubt, the justice who tried the case, rendered a judgment against the county. By that time the matter began to smell fulsomely, and French thinks it is best to take an appeal, and he does appeal. And then begins to work, and he himself, in view of all these facts which he well knew had taken place in court between the judge and the clerk, and which Riley knew—for he was there, or his principal was, when the respondent informed the clerk that the expenses of those subpœnas would not be paid by the county—with his own hands concocts one of the most extraordinary stipulations which an attorney ever framed to give away his client. It was not a case where the seductive Kinsman led this young man astray; *he* wooed and hugged Kinsman and offered up his young affections to him voluntarily, without ever sighing, "I will ne'er consent." He drew up a stipulation which stipulated away from the county of Mower, the only defense it had, which was that an order had been made that the claim should not be paid by the county. And then that precious brace of malpractitioners stand up before the judge and offer him that stipulation. I might remark here that although Mr. Kinsman knew what Judge Page's views were upon the facts of this transaction, he was willing to try the case before him, provided he could dictate the facts. Those two lawyers imagined that they could stipulate right and justice away before the very eyes of that judge; that they could estop him from doing justice by a dirty little stipulation; that they could rob the people, because openly and avowedly they had stipulated and confederated in writing to do so.

They hand it up to Judge Page.

My views of the functions of a district judge or any public officers, may be rather old-fashioned and narrow, but I believe that every public officer, by virtue of his office, is bound to protect the State and its treasury. Whether he is a senator, a judge, prosecuting officer or attorney, the duty, to my mind, is the same. I say that every man who holds a public office is by a tenure, stronger than that which is written in any obligation which the statute lays upon him, bound to protect the State and its treasury; and when Judge Page saw that a disreputable county attorney had not done his duty, it was his duty as a public officer to see that the treasury was not robbed by that false token.

Is it possible that a corrupt attorney general and a corrupt lawyer can make a stipulation which will give away thousands of dollars or thousands of acres from the State—and that a judge who knows it must be bound to give to that stipulation the sanctity of judicial conclusiveness? Suppose a private case: Two lawyers confederate and conspire to rob a client. They agree to do it by a stipulation to be presented to a judge who knows that the case is being given away and that a client is being assassinated in the temple of justice and upon its consecrated altar, and that, too, through falsification of the records of the court over which he presides. Is the judiciary to be dragged down from its proud position to be the mere executive of the wiles and tricks of dishonest lawyers? Did not this judge do right when he read that paper and said: "This is wrong; this is not the fact; you have falsified what took place here in court; I know it and you know I know." And what did the fellows do when they were caught up in the strong grasp of that honest man? Kinsman stood mute; French scratched his head and said: "Well, now you speak of it, I do recollect something of it; if

that's so, I want the stipulation changed." And so it was changed, and the respondent told these gentlemen: "These are the facts, I think —if the record don't show it, I will leave it to your proof. Call Mr. Elder; call the witnesses; call this man who was there getting the subpœnas at that time; be yourself sworn, Mr. French; let us know what the fact is, I may be mistaken." Mr. Kinsman himself testifies that the judge offered to hear proof upon that subject. Did Mr. French put in proof there to show what the fact was—that the order had been made that the fees should not be paid? No. Aud finally, Mr. Elder came in and was sworn by the direction of the respondent, and that miserable little steal sank into the grave which had been dug for it, the ground closed over it, and it never would have risen again had it not been dug up to spend its effluvium in this court.

And you are solemnly asked to impeach Sherman Page for corrupt conduct in office, and crimes and misdemeanors, and forever disqualify him from holding any office of trust and profit in this State! Glorify French and Kinsman; impeach the upright judge who, in every act he did, acted in the interest of common honesty, in rebuke of disreputable counselors who infested his court.

This brings me to article III.

Senator DORAN. Mr. President, I move that the Senate adjourn.

Which motion prevailed.

Attest:

CHAS. W. JOHNSON,
Secretary of the Senate and Clerk of the Court of Impeachment.

THIRTY-FOURTH DAY.

ST. PAUL, WEDNESDAY, June 26, 1878.

The Senate was called to order by the President.

The roll being called, the following Senators answered to their names:

Messrs. Ahrens, Armstrong, Bailey, Bonniwell, Clough, Drew, Edgerton, Edwards, Finseth, Gilfillan C. D., Gilfillan John B., Goodrich, Hall, Hersey, Houlton, Langdon, Lienau, Macdonald, McClure, McHench, McNelly, Morehouse, Morrison, Nelson, Remore, Rice, Shaleen, Smith, Waite, Waldron and Wheat.

Mr. DAVIS [proceeding]. Gentlemen of the Senate: In the consideration which I wish to give to the remaining articles of impeachment, I hope that I shall be able to compress my remarks within the limits of to-day.

It is a matter of very great regret to me, and it certainly has imposed upon me a burden much greater than I expected, that our associate, Mr. Lovely, who was entirely familiar with the details of this case, having been connected with it from the beginning, and who was expected to take almost entire charge of some of the articles which I am compelled to sum up, was so suddenly taken sick and deprived of the privilege and duty of addressing the Senate. The fact that by that casualty the duties have been thrown upon me which he was expected to perform, must be the explanation why in some respects, my argument upon the law and the facts may lack the symmetry that possibly it might exhibit had

I had greater opportunities of giving my attention to those articles with which I expected to have little or nothing to do.

The article to which I shall ask your attention this morning, is the third article, known as the Mandeville article. The gravamen of that article is, 1st, that Mr. Mandeville was duly appointed a special deputy of the court; 2nd, that the respondent addressed to Mr. Mandeville when he applied for an order for his pay, certain language, which, regarding the official proprieties of his position, he ought not to have addressed to him; 3d, that he refused to give Mandeville an order for his pay; and 4th, his filing the order after the close of the term.

It is very important for the Senators to understand, in the first place, the origin of the authority which inheres in the court to authorize the sheriff to employ special deputies for the purpose of attending upon the court during the term. The crowding a court room with bailiffs and special deputies, who derive their pay from the county, was at a very early time in this State felt to be a grevious burden upon the treasury. It is the experience of those who are accustomed to attend upon courts of justice, that sheriffs have, too often, to reward friends, to relieve themselves of care and duties, crowded the court room with unnecessary attendants. Accordingly the legislature of this State, in 1873, enacted in Bissell's Statutes, pages 725-6, section 34:

"On or before the holding of any term of the district court, or court of common pleas of this State, the judge thereof shall determine and fix by his order, the number of deputies which shall be necessary for the sheriff of that county to have in attendance upon such terms, and thereupon such sheriff shall designate and appoint such deputies. Such deputies, appointed as aforesaid, shall be paid their *per diem*, to be determined by the court, for attendance upon such court, in the same manner as provided by law for the payment of grand and petit jurors."

Two things are perfectly manifest from this statute: The first is, that as a condition precedent to the appointment of any deputy, the judge shall, on of before the term, fix by his order the number of deputies for the occasion; second, that the sheriff shall thereupon, namely, after the court by his order has fixed the number which he deems necessary, designate and appoint such deputies. If the court on or before the commencement of the term makes no order at all on the subject, it must be deemed conclusive that in the opinion of the court, no special deputies are necessary. If the court deems no deputies necessary and therefore makes no order, the condition precedent upon which solely depends the sheriff's right to appoint, fails entirely, and anything that the sheriff may do in the way of putting special deputies in the court room, if he does it at all, is done without authority of law—at least, so far as putting an obligation upon the county is concerned.

Now, it is one of the charges in this article that the respondent in this case did not on or before the commencement of the term make any order at all in regard to appointment of a special deputy. It is averred in one of the charges in this article of impeachment, that he made no order on that subject until after the term had closed, and that is charged not as a legal act but as an offense. Hence, Senators, upon the very theory upon which the prosecution is proceeding, Mr. Mandeville was never a special deputy duly appointed, because the court had not on or before the term at which it is claimed he served, made any order whatever, authorizing his appointment, and, therefore, he was never entitled to any fees.

It is impossible for me to perceive how the force of this argument can be evaded when any one reads this statute with eyes which desire to be convinced. When we consider the evil which it was designed to

remedy; when we comprehend that its only object was to save money to the treasury by extending the judge's corrective authority over this otherwise unlimited power of the sheriff, the fact that the respondent did not before or at the time make any order at all on the subject, is conclusive that he deemed that the sheriff himself was sufficient to attend that term, and that no special deputy would be needed.

Senators will not forget that this was not a general term for the trial of many cases—jurors coming out and going in. It was a special term, for the trial of one particular case—the case of the State of Minnesota against Jaynes.

If my legal proposition is correct; if Mr. Mandeville was never legally appointed; if he had no standing in court as a special deputy, why then the charge entirely falls to the ground, irrespective of the voluminous mass of testimony which has been given to sustain and rebut it. Let me illustrate to show that Mr. Mandeville had no relation to this county which made the county his debtor. Suppose he had brought an action against the county of Mower to recover this small item of his fees as special deputy, it would not have been sufficient for him to allege that he served during the term, that the sheriff appointed him, and that the judge saw him in the execution of certain duties. He would have to base his right to recover upon the statute and upon statutory grounds. If he were plaintiff in such a case, he would be compelled to allege that the court, on or before the term, made an order fixing the number of deputies, and that "thereupon," in the language of the statute, "the sheriff appointed him" for that purpose, and that under that appointment and order he served. But the facts in this case would not warrant any such allegation. Mr. Hall has time after time deposed here, that between him and Judge Page nothing whatever took place as to the number of deputies to be appointed. If that is true, then Mr. Hall had no right to appoint anybody. A further discussion of that proposition will only obscure it; the force of the argument lies in its statement. Read the statute, collating it with the undoubted facts as averred by the prosecution and asserted upon the face of the article itself, and any charge of error of judgment, to say nothing of malicious intent on the part of the respondent, fails. It only results, that, knowing the fact, and stating the fact to be, for the purposes of this case, as the prosecution claims, this respondent did his duty under that statute. He told Mandeville that he never had authorized his appointment, and that he must look to Mr. Hall for his pay.

Now, what are the facts under this Mandeville article? Mr. Mandeville testifies that he commenced to work at the first day of the term. He also testifies as Judge Page came in that day and was proceeding to the bench, Mr. Hall told the judge that he "had set Mr. Mandeville to work." But it is noteworthy, in that connection, that while the respondent denies that any such language was ever addressed to him in his hearing, Mr. Hall does not attempt to confirm Mr. Mandeville, that any such statement was made by him.

The respondent testifies (and I depart now from the assumption of the prosecution, to our own theory of the case) that before the term commenced, he had a conference with the sheriff in which both of them recognized the importance of the issue which that special term was held to try, agreeing that it was extremely desirable, under the cir-

cumstances of great excitement which prevailed in that community, that a perfectly reliable man should be had for special deputy to take charge of the jury, and that Mr. Allen was agreed upon for that purpose. It is undisputed in this case that Mr. Allen did go to work as a deputy at that term. It stands here as an uncontradicted fact, that no information was conveyed to the respondent, that Mr. Mandeville was there in any other capacity, (if he were there at all) except as an assistant to the sheriff—not at the charge of the county, but at the sheriff's charge. It also exists in testimony here, uncontradicted, that Mr. Mandeville and Mr. Allen both claimed pay as special deputies at that term and that the sheriff drew his per diem for his attendauce there. It is in testimony here, by certain jurors, that they saw Mr. Mandeville around there during one day, and did not see him there afterwards. It is in testimony by other jurors that Mr. Allen performed the duties of special deputy at that time and that Mandeville's attendance, if it existed at all, was only intermittent and occasional. Mr. Mandeville testifies that after the adjournment of court, and while the judge was sitting alone at the bench writing up his docket, Mr. Hall escorted him and Mr. Allen, to the judge and said that he had brought them there to get an order for their pay.

It is to be remarked here, that the judge does not give such deputies an order for their pay, and the statute does not authorize him to do it. The statute authorizes the judge, not to appoint the deputies or give them an order for their pay, but it merely empowers him to fix their per diem. That is all he has to do after determining the number. The presence of these deputies before the judge was not for the purpose of having the per diem fixed; was not necessary for the fixing of their per diem; that could be done as a matter of record, without their attendance. It is entirely consistent with Mr. Hall's present attitude in this case, that he thought, that probably the judge had not made a formal order how many deputies should be employed on that occasion, and that he brought those two men there for that purpose.

Mr. Mandeville testifies that the respondent said "that he could not attend to them now, but in the afternoon he would." There is a little inconsistency here. If the respondent was filled with these feelings of rancor, which must be established in order to make him liable, why did he not, in the morning, when Mr. Hall brought these men before him, pour out his bitterness, as it is claimed he did in the afternoon? He merely said to them, "I am busy now, in the afternoon when I have my docket written up I will attend to it." Mr. Mandeville testifies that in the afternoon the respondent looked up and said, "Boys come up here" —an expession which, I venture to say, the respondent with his habits in the use of language, never used. Now I wish to call the attention of this senate particularly to what Mr. Mandeville says took place to show how utterly inconsistent it is with what must have been the facts. Mr. Mandeville testifies that the respondent said, "Mandeville, how did Hall come to appoint you court deputy? What dirty work did you do to help elect him that he appointed you court deputy?" That is partly true and partly untrue we assert. I have no doubt that Judge Page asked Mr. Mandeville how Mr. Hall came to appoint him a special deputy, in view of what the respondent knew the precedent facts were. But that he ever said "What dirty work did you do to help elect him that he has appointed you court deputy," I do not believe, and it is

flatly contradicted by Mr. Allen, the only other witness who heard the conversation.

Judge Page, according to Mr. Mandeville, said "that he considered it a steal and did not propose to sanction any of their steals," and he finally said, "I shall take time to comsider this matter, I shall not give you an order to-day." Now there is an inconsistency there—an inconsistency which becomes the more clear when we consider the decisive character of Judge Page as it is established by the testimony. If he had ever in the first place reproached Mr. Mandeville for being there, spoken about dirty work and denounced his demand as a steal, he is not the man who would have said as Mandeville swears he said, at the conclusion of such remarks, that he would take time to consider whether he would sanction a steal or not. He never would have said, "I shall not give any order to day." If he ever had announced to Mr. Mandeville, that he considered that matter a steal it would have been the last of it then and there.

Was it not a steal? The respondent testifies that he and Mr. Hall agreed before the commencement of the term that there should be but one special deputy; and that that deputy should be Mr. Allen—a man peculiarly fitted for the position. To be a special deputy he must be appointed in pursuance of the statutes. The statute further provides that the appointment of a deputy sheriff shall be recorded in the office of the register of deeds of the county; and on the second day of the term, as this testimony shows, the appointment of Mr. Allen was so recorded, and the appointment of Mr. Mandeville never was. There is the contemporaneous act of Mr. Hall, exactly tallying with the fact which the respondent through his counsel asserts at this moment. On the second day of the term, and probably just after this conversation between Judge Page and Mr. Hall, Mr. Hall does the only act which authorizes any person to serve as special deputy, by recording the appointment of Mr. Allen in the office of the register of deeds, and he never recorded Mr. Mandeville's appointment.

But it is claimed that the testimony in this case shows that Mr. Hall himself called Mr. Allen as a juror at that term. I am surprised that any act that sheriff Hall did on that occasion should be brought forward to cast a favorable light upon the evidence of the prosecution. The testimony of Mr. Severance, who was in attendance throughout the whole of that term, and which will not be disputed or questioned by any man who knows him, shows most conclusively that the actions of sheriff Hall in regard to jurors was most disreputable and unworthy of the position he held. It was a case which had excited that excitable community, and had divided it asunder. It had already been tried twice. On one trial a jury disagreed, on another, the verdict was set aside. With the peculiar aptitudes which exist in Austin, all the men, women and children, old enough to understand the case, were arrayed against each other in hostility. And that sheriff kept the court idle two days while going through the city of Austin with a poll list doubtless for the purpose of obtaining his *per capita* fee for jurors; bringing into court man after man whom he knew to be incompetent; and bringing in Mr. Allen for the purpose of leeching the treasury of that county, as he attempted to do on every occasion. And I say it redounds to the disgrace of Mr. Hall that having appointed a man deputy, he should produce that deputy as a juror, simply because he knew he must be rejected either as a deputy or as having formed and expressed

an opinion. Why, in the language of Mr. Severance, "It became a farce—a perfect burlesque." And when the judge reprimanded the sheriff for keeping the business of the court delayed, and bringing up man after man who could not serve as a juror, and told him to go into the adjoining towns, what did the sheriff do? He jumped the towns adjoining the city of Austin and went to towns fifteen miles away to get a jury, made a mileage of 60 miles over the country by wheel, at that time of the year when the roads were almost impassable, still further locked up the business of the court in order that he might steal more, and leech the treasury of that county in the way of mileage.

It is claimed as an offense on the part of this respondent, that he did not file this order in regard to Mr. Allen until after the term. I do not see anything significant in that. For certain purposes, under the statutes of this state, the courts are always open; term always goes on. I will not take the time to cite the statutes, but for the transaction of *ex parte* business, it is always term time in this state. And does any Senator honestly suppose that the respondent took the pains after the term to file an order to beat Mr. Mandeville out of some six or seven dollars pay? It is too trivial; human nature does not descend to meannesses so ineffably small. In their attempt to show that this was an exception to the practice of the respondent in such cases, they show that it was not an exception, for in producing such orders, made on other unquestioned occasions, they produce one fixing the number of special deputies, which was filed during the term, and another where he did just as he did in this Mandeville case—filed the order after the term had closed. There is nothing significant in that. What does Judge Page testify as to this conference between himself and Mr. Mandeville?

"At the June term, 1876, opening of court talked with Hall; Hall wanted a good deputy; both agreed that Allen should be appointed; nothing said about Mandeville. Hall never told him Mandeville had been appointed; Hall never stated, I have brought my deputies to get their pay. I asked Mandeville what services he had performed and what he claimed pay for. That was the first that I knew he claimed pay as deputy. I said to him, I did not authorize his appointment as deputy, and if Mr. Hall had appointed him to attend to his duties, I thought it was a matter that Hall should adjust."

How perfectly consistent that statement is, in view of the record facts in this case! We find that on the second day of the term, tallying right in with the respondent's statements as to what had taken place on first day, Mr. Hall records the appointment of Mr. Allen in the office of the register of deeds, so as to authorize him to be a deputy and a special deputy to attend at that term of court. We find Mr. Allen serving as a deputy of court, recognized as such by the court, jurors and bystanders. Mr. Mandeville's appearance on that occasion is exceedingly fleeting and evanescent. Some men saw him there once and did not see him there afterwards. When we come down to the final act why do we find Mr. Hall, according to his own statement, coming up to the judge at all to have an order for his special deputies? How natural it was for Judge Page, when Mr. Allen and Mr. Mandeville both came before him, and Mr. Mandeville demanded his pay, to ask him "what services have you performed? "I never gave any order for the appointment of more than one deputy." He said nothing to Mr. Allen on that occasion, because it was well known that Mr. Allen had been appointed and had served.

Mr. Mandeville's appearance was a surprise to him; he had decreed

and ordered that no more than one deputy was necessary at that term of court, and he asked Mr. Mandeville "What services have you performed? I have not authorized your appointment, and if Mr. Hall has found it necessary to engage you here, he ought to pay you." I believe solemnly, that is all that took place, and that this talk about "dirty work" is all an afterthought. Senators will bear in mind that the testimony in regard to the transaction at the bench is the testimony of three men. Mr. Mandeville says that a certain conversation took place; the respondent says that no such conversation ever occurred. There was but one other man there; that man was Mr. Allen, a person in whom, up to the time of the commencement of these proceedings, both the respondent and Hall had implicit confidence, and I am not taking too much for granted when I rely upon that fact in making my assertion that he must be a man entitled to credit. Mr. Allen is produced as a witneas, and he is asked what judge Page said; he gives it in language equivalent to that used by the judge, and he denies positively that the respondent ever addressed such words to Mr. Allen as "Mr. Mandeville, what dirty work did you ever do to help elect sheriff Hall that he should appoint you deputy?" Now it is true that immediately after Mr. Allen gives that testimony, some one girds up his loins and hies down to Austin to bring up some person to testify that Mr. Allen has made a different statement; but even the testimony of these persons goes to show how utterly uncertain and unreliable impeaching testimony of this character is. This new version leaves out the phrase "dirty work."—"what work have you done to help elect Mr. Hall, that he should appoint you deputy?" We have not the whole conversation, even if that language was used. The objectionable adjective "dirty" has dropped out by the testimony of their own witnesses in rebuttal. A conversation never can be understood until the whole of it is given, and in the intercourse which took place between Judge Page, Mr. Mandeville and Mr. Allen at that bench, it is not impossible that that question may have been asked, "what work did you do for Mr Hall that he should appoint you deputy?" I don't believe it ever did, but if it did what is there wrong? What is there of judicial corruption necessarily inherent in it? What is there in it worthy of being dignified by such a prosecution as this? If words proceeding from the mouth of magistrates or any person, are susceptible of two constructions, one innocent and one blameworthy, not only the law of charity but the law which is administered in the courts, imputes to that language the innocent meaning. Is there any feeling of hostility shown here against Mr. Mandeville or attempted? Anything to show that this judge was not acting magisterially on that occasion? Was *he* reaching his hand into the treasury to help anybody pilfer therefrom?

The statute imposed upon this respondent the duty of fixing the *per diem* of such deputies as the sheriff might appoint under his order fixing the number. Mr. Mandeville appeared before him as a claimant—he had to decide it. Did he decide it right or did he decide it wrong? The duty was upon him to decide that little case: the parties were before him—they were heard. And upon any theory, whether for prosecution or defense, he told Mr. Mandeville that he could not have his pay because the condition precedent, which the statute in guarding the public treasury had made indispensably necessary, had not been performed.

I repeat what I said yesterday, that if this judge has decided right in this matter, if his decision was lawful, his motives or his feelings are entirely immaterial. A magistrate may have against a party, the malice

of Jeffreys himself, but if he proceeds correctly and decides rightfully, unexceptionably, his motives have nothing, whatever, to do with it, nor has the state of his personal feelings. Otherwise a judge would have to decide unjustly, sometimes, on account of his feelings, to save himself from impeachment. And if, on looking over this entire Mandeville article, you make up your minds that this was a lawful decision, then whatever else was done on that occasion, whatever language or infirmity of expression the court may have been betrayed into, cannot constitute that corrupt conduct in office, the elements of which I endeavored to define in my argument yesterday.

Now how does this matter stand as to its bearing upon the treasury of the county of Mower, Sheriff Hall drew pay for attendance at that term; he also drew pay for summoning that multitude of jurors. Mr. Allen took charge of the jury. If Mr. Hall drew pay for his attendance, *per diem* and so forth, it seems to have been because he was there all the while. That must have been the assertion expressed or implied upon which his voucher was composed. Mr. Allen took charge of the jury, and from these circumstances we find that the sphere of the sheriff's duties was entirely filled by Mr. Hall, the sheriff, and Mr. Allen the deputy. I imagine that Mr Mandeville is one of those men who are around court houses, waiting for a job to turn up; and that in the hurry and press of that occasion, Mr. Hall may have employed him upon some duty; and it occurred to Mr. Hall, after the term was over, inasmuch as the court had possibly made no written order, that it was a good opportunity for him to pay Mr. Mandeville from the treasury of the county. Accordingly he approached Judge Page for that purpose, and failed. No suit was ever brought against the county, the bill was never presented to the county commissioners. It never was asserted in any form except as a crime in this high court of impeachment.

I proceed now to the consideration of article 4, known as the Stimson case. The gist of that article is, that the court ordered Stimson to pay over the money paid by Weller, without notice to, or opportunity by Stimson to defend himself, and threatened to punish him. Stripped of all the circumlocution of legal expression, that is what this article charges.

The Senate will bear in mind in listening to what I have to say upon this article, that Mr. Stimson was an officer of the court; that his relations to that court were not those of an ordinary citizen; that he was the servant of the court, subject to its directions, bound to preserve its dignity, amenable to its discipline.

The facts in this case were these: A man named Weller had been convicted of larceny before a justice of the peace. It was a criminal proceeding; the justice of the peace had fined him. Weller had taken an appeal, and the same result had followed in the court above. It all ended in a fine pronounced by the ministers of the law against Mr. Weller.

As a foundation for all that I have to say upon that subject, I assert, that when, in a criminal proceeding, a defendant is fined a pecuniary amount, that fixes and sets limitations to his liability; and no ministerial officer of the court has power, with process or without, to swell his fine under the guise of costs for executing the sentence.

It is implied, if not expressly provided in the constitution of this State, that punishment shall be fixed, limited and certain; and in the case of a fine, no ministerial officer of the court has power to extend that punishment, any more than the warden of the penitentiary has a right to extend a term by reason of the misconduct of any convict. In order to carry out that principle, persons who are under fine are not subject, ordinarily, and, I think, not at all, to execution against their goods and chattels, but their body is taken, and when the sheriff takes the body of a prisoner on a final commitment, was it ever heard, that he or the public could hold the prisoner, until he had paid his mileage or his prison fees? I am not speaking now about those little petty points of practice which I shall be obliged to discuss in a moment, but was it ever heard, I repeat, where a public officer, under the criminal process of a court, has arrested a person in satisfaction of a fine, that he can hold him, indeterminately, after the full amount of the fine has been paid, simply because there are costs and fees not included in the fine, yet to accrue?

Weller was fined seventy dollars; the costs of the prosecution were added to that and fixed; no officer costs beyond that were allowed as appeared from the testimony, although it was not very explicit upon hatt point. Weller, who was a poor man and subject to repeated visitations by the blessed Stimson, had finally, little by little, after considerable exertion, paid into the hands of the officers of the court, but not a cent to Stimson, the whole amount of seventy dollars and the costs. He imagined, and I think the law told him, that when he had paid the amount of his fine he was even with the State of Minnesota, but there stood upon the records of that court under the guise in which French and Stimson had made them appear, the false averment that all of that money had not been paid to the state; that Stimson or somebody had tolled the grist which never in fact went through his hands; that Weller was still liable to be taken on execution, that although he had paid the full amount that the law had said he should pay, yet nevertheless the records of the court showed an unsatisfied criminal judgment against him, Now what does Mr. Weller do? He had no desire to be snatched at by any more of the myrmidons of that sheriff 's office. He had had considerable experience with Mr. Stimson, and—as he had a right to do, that is as he would have had a right to do in any other county than the county of Mower—he goes before the grand jury to lay his case before them. He says there has been extortion here; I have paid my debt to the state of Minnesota, and this officer has stolen a part of it, and the judgment is unsatisfied.

The grand jury examine Weller; whether they had Mr. Stimson before them does not appear; but these facts all appear as I have stated. They bring in their finding to the court and make a presentment. And it appears that a certain officer of the court, has in contempt of the court abused its process—has in contempt of the court embezzled the school funds of the state of Minnesota.

Now I repeat that the powers of the court over Mr. Stimson as an officer are entirely different, so far as their corrective vigor is concerned, from the powers of the court over a private individual. It is important that the people have confidence in the administration of justice, and to that end the court has summary powers over its officers. If

money is deposited with the clerk and he does not pay it over, neither the party nor the court is driven to an action of assumpsit to recover it. It is a new doctrine that, if money be paid in to a sheriff or the clerk, and sheriff or clerk embezzles it, the party wronged is to be driven to his circuitous action of assumpsit against a man confessedly a thief. Take our courts of record in a place like this.—there are hundreds of thousands of dollars on deposit in the registry of courts for railroad condemnations, or as assets in bankruptcy; the officers of the court have this money; they must check it out upon the order of the court. Supposing that a person entitled to a sum under those circumstances, brings to the clerk the order of the presiding judge, and the clerk says, "I—I—I haven't got this money—I—I have disbursed it—I have sunk it." What in all time have all courts done with such culprits? They have laid their hands immediately and heavily upon them, and made them disgorge; they have the right to do it, and it is their duty to do it.

Let any one who has any curiosity remaining on that subject step over into the supreme court room and ask for the record in the case of Gronlund, an attorney of that court. It was charged against him that he had embezzled and refused to pay over the money of a client. He was cited before that tribunal; he made his explanation, such as it was. It was adjudged a high contempt of the courts of this State; he was ordered to refund it, and he languished in the jail of Ramsey county as a penalty for his crime. There is no trial by jury in such cases; none is necessary, the exigencies of public justice do not permit it. The supreme court of this State did not err in that matter; it is a plain jurisdiction, given by the statute over all its officers, attorneys as well as others. There are two other proceedings of the same character pending in that court to-day; and there is not a district judge in this State, who has not, in the course of his administration of justice, been compelled, with a temperate, yet firm hand, to execute the process of contempt upon the derelict officers of his court.

But it is said that there was a technical difficulty in the way here. That Mr. Stimson was executing process in a civil action; that he had the right to execute civil process; that civil process was the only process proper or that could be executed under those circumstances. I am free to admit that there is much to be said on both sides of that controversy. My learned friend argued strenuously the other day, that by some process of transformation, a criminal case becomes a civil proceeding in consequence of an appeal. I deny it. He argued very forcibly on his side—I cannot, of course, argue so forcibly upon mine—but I shall present some considerations to this tribunal to show that there is something to be said by us upon that subject, and that it remained a criminal proceeding not subject, so far as the penalty is concerned, to be increased by any costs, from its inception down to its very end.

I cite 2nd Bissell, page 779, section 125. It is a chapter in regard to justices of the peace, their jurisdiction in criminal cases and proceedings thereon:

"Upon a compliance with the foregoing provisions, the justice shall allow the appeal and make an entry of such allowance in his docket, and all further proceedings on the judgment before the justice shall be suspended by the allowance of the appeal. The justice shall thereupon make a return of all the proceedings had before him, and cause the complaint, warrant, recognizance, original notice of appeal, with

proof of service thereof, and return, and all other papers relating to said cause and filed with him, to be filed in the district court of the same county on or before the first day of the general term thereof next, to be holden in and for said county. And the complainant and witnesses may also be required to enter into recognizances with or without sureties, in the discretion of the justice, to appear at said district court at the time last aforesaid, and to abide the order of the court therein."

The recognizance is that the defendant shall be present in court—thus complying with the first pre-requisite of the administration of criminal law, that a defendant cannot be tried unless he is present.

"Upon an appeal on questions of law alone, the cause shall be tried in the district court upon the return of the justice; on an appeal taken on questions of fact alone, or upon questions of both law and fact, the cause shall be tried in the same manner as if commenced in the district court"

Now, this was an appeal upon questions of both law and fact; it was a case of larceny. This statute provides that in such cases, where an appeal is taken in that manner, the case shall be tried in the same manner as if commenced in the district court. When a case of larceny is commenced in the district court, it is commenced by indictment. Hence this appeal by Mr. Weller upon questions of law and fact should have been tried in the same manner as a case of larceny would have been tried if originally commenced in the district court. And no Senator of our profession, or outside, ever heard of an indictment for larceny resulting in a civil judgment, except in this case. The only provision of our statute which authorizes an execution upon judgment for fine and costs for the use of the county, is while the case remains in the justice court. When it comes into the district court, then, I repeat, it must be proceeded with in the same manner as cases originally commenced there. The judgment in this case was that the defendant should pay the fine imposed by the justice, and costs; no prospective costs for serving the execution could have been collected, because the statutes do not contemplate any such costs.

But this execution, though regular on its face, was void, because it was wholly unsupported by any valid judgment. If this case must have been proceeded with in the same manner as cases originally commenced in the district court, then the judgment should have been different, and neither the clerk nor Stimson had the power to issue or execute the process of that court against the property of Weller. This was a criminal proceeding; the recognizance which Weller executed to the State of Minnesota was that he should be present at the trial of that appeal. It is to be conclusively presumed that he was present at the time, just like any other culprit arraigned at the bar of justice. When such a culprit is found guilty by any mode of proceeding, he remains in the custody of the law until he has paid the mulct imposed upon him. There is no way under the constitution of this State, or at common law, by which his property can be sequestered or reached so long as he remains in the custody of the law; and the statutes of this State are explicit upon that subject.

Senators will bear in mind that this was a case, which, upon appeal must have proceeded in the same manner as cases originally commenced in the district court, and that it was a case of larceny.

I cite page 106 of Bissell, on judgment and execution in criminal cases in the district court:

"Whenever any person convicted of an offense is sentenced to pay a fine or costs, or to be imprisoned in the county jail, or state prison, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county or his deputy, a transcript from the members of the court, of such conviction and sentence, duly certified by such clerk, which shall be a sufficient authority for such sheriff to execute such sentence; and he shall execute the same accordingly."

The execution which is provided in criminal cases in the district court is not a *fi. fa.* against the property of the defendant; but it is a transcript of the minutes of the court which simply certifies that judgment has been rendered which is delivered to the officers of the court and which is his authority to do that which is necessary for the purpose of securing the amount of the fine; and that authority under that proceeding authorizes no levy, but by principle as old as the common law, simply authorizes the sheriff to take the body of the defendant and hold him until the fine be paid or he be pardoned.

In making this argument I am not disguising the fact that there is considerable legal force in what my learned friend said the other day; I will not be so disingenuous as to pretend that I do not feel it. If you were sitting here as a Court of Errors, to determine whether you would reverse the judgment of this respondent in that matter for an error of the head not of the heart, while I should still have confidence and think our position is right, it might be that you would see the matter in the light in which my learned friend sees it. But where there are two roads laid out by the statute, where the understanding halts and falters, as to which one it ought to pursue, where two counselors who are endeavoring to be honest in presenting the law differ so diametrically, and argue so strenuously each from his own position, where the difficulty is not created by the facts, but where it inheres in the very law itself, which the respondent was bound to administer,—was it ever heard of until this day, that in taking either road which the statute it seems has opened to the judicial mind, he does so at the risk of committing an impeachable offense because he has not taken the other?

My learned friend, however, in his onset upon the respondent, stopped with that legal discussion. I do not believe that his mind is so constituted that he thinks that because a judge may differ from him upon a question of law he ought to be impeached. No member of our profession is, or can be, so uncharitable as that. But I must avow that the impression created upon my mind, by the manner in which counsel treated this branch of the discussion was exceedingly painful. He seemed to argue that it must follow, as an inevitable consequence, if in this case of conflicting statutes, the court be deemed to have erred, the sword of impeachment must fall with irreversible stroke upon his head. His argument was more significant in what is omitted than in what it contained; for he entirely omitted any consideration of the proposition which my associate enforced in his powerful opening of this case, that Mr. Stimson did nothing whatever to earn any money under this execution, and that his claim was therefore a fraud and steal. Now from this moment I say I do not care what the law was on that subject, it is immaterial what kind of a judgment should have been entered, or whether that execution was valid or not—I will concede that it may be. I say, conceding it to be a valid judgment and execution, this deputy sheriff made it the element of extortion and fraud and embezzlement of the money of the state of Minnesota, as the grand jury found.

Look at the return: that he had collected twenty dollars on this execution and deducted five dollars and fifty cents for his fees. Gentlemen, he took that execution and went twice to Lansing. He never made a levy under it. His doings were all a sham; he went to Mr. Weller's place of business and drove a yoke of cattle out into the yard and let Mr. Weller drive them back with his consent, and yet he swears he made a levy. He went there again and made another levy by driving the cattle out of the yard and Weller drove them back with his consent. That is no levy, or it is a release of the levy. He never arrested Weller; he never laid hands under his process on an article of Weller's property which he retained. He made two fruitless journeys to Lansing, which the cross-examination shows were upon other missions as well as that. He finally took Mr. Weller's promise that he would send twenty dollars up to Mr. French; and that twenty dollars never was in this man Stimson's hand. But, hearing that the money had been paid into the hands of French, Stimson calls on him and they make a little divide whereby Mr. Stimson rakes down five dollars and sixty cents, and the balance of the money is suffered to go into the registry of the court.

I am not informed whether any Senator has ever served in the office of sheriff; if so, I ask him to resort to his experience and tell me what this sheriff ever did to earn any fees under this execution? He had gone down there and laid his hands on that property and then released it and thereby released the sureties to the appeal bond; he had given away the rights of the State. He made a corrupt agreement with this defendant that if he would not execute that process the defendant would give $5.60. That was the agreement that Weller and this man made: "you can go home—I will send up some twenty dollars to Lafayette French, and out of that, for your forbearance, for not doing your duty, you just pocket $5.60." And so French and this deputy sheriff pounced down on this little morsel of twenty dollars and Stimson took the fruits of his corrupt agreement with Weller, out of it.

I wish to read an extract from his cross-examination on the 29th of May, page 75:

"Q. When you received that execution where did you start with it first?
A. To Lansing.
Q. How far is it from Austin?
A. Six miles.
Q. What is Mr. Weller's business.
A. Farmer.
Q. You say you made a levy upon some cattle?
A. Yes sir.
Q. Did you do it then?
A. Yes sir.
Q. On the first day you were there?
A. The first day I was there.
Q. What did you do to make that levy?
A. The first thing that I done—
Q. Did you take possession of the cattle?
A. I drove them into the road sir.
Q. What did you do with them then?
A. He took them back again. [Laughter.]
Q. What did you do then?
A. I went back, took him into the sleigh and went to Austin with him.
Q. Did you drive the cattle away?
A. No sir.

Q. Did you take and retain possession of them?
A. No sir.
Q. Did you ever take a receipt for them of any person?
A, No sir.
Q. You never did?
A. No sir.
Q. You drove them into the road and he drove them back?
A. Afterward, yes sir.
Q. With your consent, didn't he?
A. Yes.
Q. You call that a levy, do you?
A. Yes sir, I did at that time.
Q. You call it a release of the levy too, don't you?
A. Yes sir
Q. And was it then that this agreement was made about this twenty dollars?
A. No sir.
Q. When did you make the agreement with regard to the twenty dollars?
A. Some time after that, I can't state how long.
Q. On the occasion of your visit to Lansing again?
A. Yes sir, I think I was there once before that time.
Q. Did you make a levy on that occasion?
A. I told him I was going to take the cattle.
Q. What did you do that time?
A. I took the cattle.
Q. What did you do with them?
A. I gave them back again. [Laughter.]
Q. Then you made the arrangement about the twenty dollars, did you?
A. Yes sir.
Q. When did you take the watch?
A. That same day.
Q. Did you make a levy on that?
A. No sir.
Q. How many times did you visit Lansing in all?
A. I can't state positively, two or three times, perhaps three times. I went there once I remember when he was not at home.
Q. Did you go up there solely for this purpose each time?
A. I can't say as I did.
Q. What other purposes did you have in going there?
A. I presume I had some other papers to serve on the road?
Q. You presume you did; did you as a matter of fact?
A. I don't remember.
Q. What is your impression?
A. I think the first time I didn't have any.
Q. You think the other times you did?
A. I think perhaps I might; I couldn't state.
Q. Who did you receive this twenty dollars from?
A. From Lafayette French.
Q. He was the county attorney, wasn't he?
A. Yes sir.
Q. This execution which you had in your possession at that time, was an execution rendered in a criminal proceeding against Mr. Weller, was it not?
A. Yes sir, it was.
Q. Mr. French was the county attorney of that county?
A. He was.
Q. The fine for which that execution called was twenty dollars, was it not?
A. It was a larger amount than that—$80 or something—I don't remember how much, at first.
Q. Seventy or eighty dollars—somewhere along there?
A. Yes sir.
Q. And the *modus operandi* of this business was, that the defendant in the case paid twenty dollars to the county attorney, and the county attorney paid it over to you, and you pocketed $5.50 and paid the balance into the court?
A. I kept five dollars and a half, and paid the balance to the clerk of the court.
Q. Did you put any returns upon that execution of the amount of your fees in items?
A. No sir.

Q. Will you state to the court how you made up that bill of $5.40?
A. I couldn't state it now the way I done it?
Q. Are you familiar with the statutes of the State, in regard to the fees of officers levying execution?
A. Somewhat.
Q. Will you go to work and construct, for the benefit of this Senate, a bill of costs of $5.40 for the services you have described and performed?
A. I can by explaining how I made it up.
Q. That's just what I have been asking you to do, go ahead?
[A pause.]
Q. For instance, did you charge for these levies?
A. Yes sir.
Q. Did you charge for both of the levies?
A. Well, I can explain—
Q. Did you charge for both of these levies?
A. I can explain how—
A. I don't think I did—but for one of them.
Q. Which one?
A. The first one I guess, or the second, I don't know which it was.
Q. Did you charge for that operation with the watch?
A. No sir.
Q. Did you charge mileage?
A. Yes sir.
Q. Did you charge mileage?
A. I think I charged mileage twice for going up there.
Q. You had other process?
A. I am not positive I had.
Q. You think you had?
A. I don't remember.
Q. If you had, did you charge mileage for that too?
A. I presume I did, yes sir.
Q. Now go to work, and item by item, for what you did there, inform this Senate how you got a bill of $5.50 out of that matter?
A. I would like the privilege of telling just how it was.
Q. I want to know how you got a bill of five dollars and forty or fifty cents out of that?
A. Well sir, in the first place, the mileage; I was there twice.
Q. That is how much?
A. It was twelve miles up there and back.
Q. How much a mile did you tax the county for that?
A. I guess ten cents a mile; I don't remember what I did charge for the service of it; I presume a dollar, it might have been less.
Q. The service of what?
A. The execution.
Q. What else did you charge for?
A. When I got the execution renewed; paid the clerk of court for renewing the execution.
Q. Was that after you make the levy?
A. I think it was before I made the levy. I don't remember exactly the time.
Q. Then you held the execution for sixty days and did not do anything with it, and got it renewed and charged the county with it, did you?
A. I did not hold it for sixty days.
Q. How old was it when you got it?
A. I don't remember. I know I had to get the execution renewed.
Q. You charged that to the county?
A. No sir, I charged it to Mr. Weller.
Q. You got it out of that twenty dollars, didn't you?
A. Yes sir.
Q. Go on?
A. Well, the understanding was, that Mr. Elder was to pay the balance. He was to pay for the cow and Mr. Weller was to apply that amount on the execution; he was to endorse that on to the execution.
Q. Did you charge for that understanding?
A. I presume I did.
[Laughter.]
Q. Did you trade him that cow on the execution.
A. No. He did not take the cow afterwards."

The fact is, that this deputy sheriff went down there, engaged in a cow trade and took a bribe from Mr. Weller that he would not levy upon his cattle but that he would give him a chance to sell a cow so that he might steal $5.60 out of the proceeds of that live stock transaction. And the respondent is to be impeached. [Laughter.]

I cite, 1st Bissel page 236, sec. 98:

"No sheriff or other officer shall directly or indirectly ask, demand or receive for any service or acts by him performed in pursuance of any official duty, any more fees than are allowed by law, under penalty of forfeiting for such offense to the party aggrieved treble the sum so demanded or received, to be recovered in a civil action."

A sheriff cannot exact fees on an execution unless he executes the process, and it is not pretended that Stimson ever did in this case.

I cite 2d Bissell, page 975, sec 33, to show that this man was guilty of misdemeanor:

"No fee or compensation allowed by law shall be demanded or received by any officer or person, for any service unless such service was actually rendered by him, except in case of prospective cause hereinafter specified.

"A violation of either of the last two sections is a misdemeanor; and the person guilty thereof shall be liable to the party aggrieved for treble the damages sustained by him."

It was a criminal act that Stimson had committed. He had besides made himself civilly liable to three times the amount which he had collected. He was an officer of the court; the process of the court had been used in trading cows—squeezing this $5.60 out of the county of Mower. It was a flagrant contempt of court. The more contemptible because it was *so* insignificant—a little, dirty steal! [Laughter.]

Was the respondent wrong in taking an officer of his court to task for conducting the ministerial duties of his position in that manner! The grand jury investigated it. They made a formal presentment; the court called Mr. Stimson before it. An investigation took place (as I shall show in a moment by an examination of testimony), and Stimson admitted every one of the facts charged without objection, exception or reservation, and as I shall maintain, without asking for any further hearing than he had. Why he was just like any other little thief caught with the money in his hands—He admitted it; he was willing to disgorge. There sat the grand jury before him—There was Mr. Weller in court, liable to be imprisoned again if Stimsom was allowed to hold his money in this way. It is only a part and parcel of the way these men down there in Mower county treat the public treasury. He made no objection. He was requested to pay over the money so that the grand jury might see the process of deglutition reversed, and he walked up and did it. Now who will say that the action of the respondent was not right and morally right? I may admit that he might have travelled the technical zig-zag of assumpsit or indictment, but he was not bound to do it in the case of an officer of his court.

I have cited the Gronlund case, I now cite, to show that this was a contempt of the court, and punishable by the summary process of the court, the second Bissell 939:

"The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

THIRD—Misbehavior in office, or other wilful neglect or violation of duty by an attorney, council, clerk, sheriff, coronor, or other person appointed or elected to perform a judicial or ministerial service."

If my proposition is true and my law is right, this man Stimson being a deputy sheriff, had neglected his duties; he had been guilty of embezzlement. He had also laid himself liable to damages, and how was he to be punished? To be punished summarily—in some cases having an opportunity to be heard. He had such an opportunity. The grand jury had made their presentment; it was read or explained to this man and he admitted it, as I shall show when I come to examine the testimony. Everything was done that he could have required to give him a hearing.

This proceeding is as old as the common law, and has been exercised in parliamentary bodies. Precisely the same principle was considered by the supreme court of the United States in the case of Randall against Bingham, reported in the 7th of Wallace, page 539. The grand jury in that case, upon the strength of a letter charged that an attorney and counselor had been guilty of such a violation of his professional duties as to induce the supreme court of Massachusetts to call that gentleman before them, very much as Judge Page called Mr. Stimson, and it disbarred him after a very informal hearing, and he sued the justice who disbarred him for damages, alleging as Stimson does here, that he had no sufficient opportunity to be heard—possibly that he had not been indicted and convicted—that the law did not in stately ceremonial reach him in tangled ways. The case went through all the courts. Here is what the supreme court of the United States holds·

"The informality of the notice, or of the complaint by the letter, did not touch the question of jurisdiction. The plaintiff understood from them the nature of the charge against him, and it is not pretended that the investigation which followed was not conducted with entire fairness. He was afforded ample opportunity to explain the transaction and vindicate his conduct. He introduced testimony upon the matter, and was sworn himself.

Here Stimson admitted the act, just as the grand jury charged it. "It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties on affidavit and sometimes they are taken by the court upon its own motion." Such is the opinion of the Supreme Court of the United States. That is not only the practice in all courts in compelling extortionate officers to give up extorted fees, but it has been the practice in parliamentary bodies, and it was once adopted in a case of a man, who will be revered as long as the English language is spoken, or understood. I read from the life of the Earl of Nottingham, on page 194, vol. 4, of the Lives of the Lord Chancellors, of England. John Milton was thrown into prison in the disturbances which followed the overthrow of the Commonwealth, and while he was there some ancestor of Stimson squeezed the poet for fees. [Laughter.] With the advent of better times the laureate of Paradise was liberated, and, having been committed under an order of the Parliament, the question of restitution was brought up. Lord Campbell writes thus:

"As a lawyer, I blush for my order while I mention Finch's last appearance in the Convention Parliament. John Milton, already the author of COMUS and other poems, the most exquisite in the language after being long detained in the custody of the Sergeant-at-arms, was released by the order of the House—most men, however 'cav-

alierly" inclined, being disposed to forget his political offenses. The Sergeant had exacted from his person, fees to the amount of £150—a sum which, with great difficulty, he had borrowed from his friends. The famous Andrew Marvell brought the matter before the House, and moved that the money should be refunded. He was supported in this motion by Colonel King and Colonel Shapcot, two officers of undoubted loyalty as well as gallantry; but Mr. Solicitor General Finch strongly opposed it, saying that 'this Mr. Milton had been Latin Secretary to Cromwell, and, instead of paying £150, well deserved hanging' However, the matter was referred to a committee of privileges, who, I hope, decided for the poet."

Now, gentlemen of the Senate, before I leave this portion of the charge, allow me to give it a parting kick by asking the question if it is not a grave and weighty matter for the Senate of Minnesota to be engaged so many days in deciding whether it will forever wreck the life of a man upon whose character rests no taint or stain of pecuniary corruption, for simply taking a rapacious officer by the neck and making him throw up what he had so wrongfully swallowed? If this magistrate thought he was doing right and was actuated by those motives of honesty which all men recognize, and admire when they do recognize them, will the Senate suffer that he, believing himself to be acting rightfully in that matter, shall be branded with the ineffaceable stamp of infamy, and be punished with such extremity of punishment as that which must follow conviction upon this or any other article?

A few words as to what actually occurred in court. Stimson testifies that he called him up, did not explain anything and told him to pay the money over right there and then, and when he told him he hadn't it, commanded him to borrow it. And that he said further:

"Young man, if you commit that offence again I will punish you to the full extent of the law."

Now, Mr. Root, for the prosecution on the thirtieth of May, page 16, testified:

"A few moments after the grand jury came in with a presentment, respondent said he had been informed that Stimson had money in his hands that he had collected as a fine that belonged to the county; asked him if he had, and he said he had; He told him he must pay it over to the clerk; that there was a way for them to get their fees, by presenting his bill to the commissioners. Stimson asked to explain, but this witness testifies that the court refused to hear him He said nothing about young man."

Mr. Hammond, who testified on the 30th of May, page 16, says on his cross-examination, that the judge stated the circumstances of the case to Mr. Stimson, and that he can't remember whether the grand jury brought in a presentment. Judge Page's testimony is that the grand jury made a presentment; that he did not know at the time that Stimson was a deputy; that he came forward:

"I stated to Stimson what was contained in the presentment; I stated it was a criminal case; that it was a fine and that when Weller paid it he was entitled to his discharge: the fine was a definite and fixed amount, and that Stimson was not entitled to the fees. I then stated to Mr. Stimson that the simplest way to dispose of this matter was to pay over the fees to the clerk, and so directed him to do."

So far from there being any malice in that matter, this judge exercised a merciful discretion. I have already shown that Stimson was guilty of a misdemeanor. If the judge had adopted a severe course, he would have told the grand jury that on that presentment they ought to indict; that it was their duty to do so, and so made Mr. Stimson a great deal of trouble; but in the exercise of that discretion in which courts

indulge in matters of trivial offence, he told Mr. Stimson in substance, instructing him that it was a crime and outrage, "the matter is small, it is your first offence—pay the money into the clerk of the court and the grand jury will undoubtedly ignore it." Judge Page states that Mr. Stimson made no request to be heard further or to explain it. He never used the phrase, "young man."

Mr. Elder testified on the 12th of June, pages 92, 93: He says in substance, that Mr. Stimson came forward; that the contents of that presentment were fully explained to him and he admitted that they were all true. The conversation occurred back and forth between him and the judge. The matter was fully heard, fairly understood by both parties, and as the result of it, Stimson paid over the money.

On the 13th of June, page 2, is found in the testimony of Mr. Harlan Page the most explicit account of that transaction which I have been able to find on either side. Mr. Page is a banker in Austin. He was in court at that time and observed this proceeding. He says, on pages 2 and 3:

"The judge said, 'Mr. Sheriff, have you a deputy by the name D. H. Stimson?' Mr. Hall assented and the judge said, 'is he in the court room?' Mr. Hall said 'yes,' and looked in the back part of the room; and then the judge said, 'you will call him.' Mr. Stimson immediately started forward and stepped inside the railing. The judge made some statement in reference to the Weller case, and asked him some questions with reference to it, as to the collection of some money to which he assented, stating I think, that he had collected $20; or rather, I think, he had received from Mr. French $20, and that he had paid it over. There was some question about the fees; he had deducted his fees, and the amount brought out then was $14.50, I believe $5.50 being deducted for fees. The judge stated in the first place that the fees were too much, and that he was not entitled to the fees, and then he said something connected with the case that the punishment was a fine, and the law contemplated that as a limit of punishment, and that he should not be made to pay more than that; he then asked him to pay the money over—the balance—to the clerk of the court in presence of the grand jury, so that the grand jury might see that it was paid. I don't remember if that was the form of the expression. Mr. Stimson said he hadn't the money with him, and the judge said to him, 'you can get it.' Mr. Stimson said, 'can I go to the bank;' the judge said, 'certainly, or perhaps the sheriff'—turning his head towards Sheriff Hall, to his right—'perhaps the sheriff can loan it to you.' Mr. Hall said he guessed the sheriff was in the same fix. Mr. Stimson, I think, in the mean time had started toward the back part of the room as though he was going to the bank, and several persons offered money to him. I don't know who they were, and he stepped up and paid it over."

Now if that witness is not greatly in error, this plain unvarnished statement probably puts the situation just about exactly as it was. The judge heard Mr. Stimson with great consideration and explained the whole of the circumstances to him. When Mr. Stimson said he wanted to go to the bank, the judge said "certainly he could go, or perhaps the sheriff would loan the money to him," instead of using that brutal phraseology which was given in the testimony of Mr. Stimson, that he turned and said "he could not go—pay it right down—borrow it of the sheriff." Mr. Page is a gentleman of veracity, and that account of the transaction is so distinct and clear, and so likely to have taken place, that I am inclined to take it as the true and most complete version.

Again, Mr. Kinsman, a witness produced for the prosecution to sustain this article, was asked, on cross-examination, how long it took for the court to explain:

"Q. It took long enough so that the court explained to Mr. Stimson the circumstances under which it was claimed he had collected that money, did it not?
A. Yes sir.
Q. Then there was a full explanation made by the court of the facts, and he admitted it, did he not?
A. Yes sir, that was in the first instance.
Q. He admitted that the facts were as the court stated?
A. With regard to the collection of it?
Q. Yes, and as regards the circumstancas under which the execution was issued. The court told him that the execution was illegal, did he not?
A. He told him the retaining of the fees was illegal. I don't know that he told him that the execution was illegal.
Q. What was the case as to the explanation to Mr. Stimson by the respondent?
A. I think that the respondent explained the case as a case in which the State was a party plaintiff, and that the execution was for a fine—was to collect a fine, I think.
Q. A fine imposed in a case in which the party should have been in the custody of the officer until it was paid, was it not?
A. I don't remember about that.
Q. You can't state whether the language was used or not?
A. I have no recollection.
Q. It was in the case of the State against Weller, was it?
A. Yes sir, I understand it so.
Q. And he so stated?
A. Yes sir, I think he stated so.
Q. To Mr. Stimson?
A. Yes sir.
Q. After the facts were stated by the court, did the court ask Mr. Stimson if he assented to the correctness of the facts as stated?
A. Yes sir, he asked him if it was true, and Mr. Stimson stated that it was.
Q. Did he?
A. Yes sir.
"Q. Did you notice anything unusual in the tone of the court at the time he asked the sheriff if he had a deputy by the name of David H. Stimson?
[No answer.]
Q. Answer my question whether he did or did not?
A. There was something unusual in the—as I understood it. I may be mistaken in regard to it—I think he called him 'D. K. St mson.' That was everything unusual about it—his name was D. H.,—and I noticed it not being his name.
Q. That was the unusual thing about it?
A. Yes sir.
Q. He made a mistake in the name?
A. Yes sir.
Q. No other unusual thing about it?
A. No sir; I didn't notice anything."

So we find Mr. Kinsman substantially agreeing with Mr. Page. Mr. Kinsman does not recollect any such remarks as Mr. Stimson says were made by the respondent to him about getting the money of the sheriff, and it seems to have been an orderly, decorous proceeding upon the part of the judge, laying his hand mildly upon a ministerial officer of the court, to correct him for a first offense.

I wonder, if a ministerial officer of this Senate were discovered in extortion or the collection of illegal fees, if this body, after solemn deliberation, would conclude that it had no power to correct that wrong as a contempt. You would do it in a moment. The right to do so is inherent in your very constitution. If the court cannot make itself respectable and dignified, against the attacks and malversations of its own officers, why of course there is no other agency in the world that can. And hence severity on the part of courts, when it is necessary, towards its officers, has always been countenanced. When a man enters into the service of the court as a ministerial officer, he assumes certain obli-

gations and gives up certain ordinary privileges that he would have as a citizen owing no duty to the court except when regularly cited there.

The PRESIDENT. The Senate will take a recess for five minutes.

AFTER RECESS.

MR. DAVIS. [Resuming.] Mr. President: We have proceeded in the consideration of these articles of impeachment, down to article fifth, the Baird article. I sincerely wish that I could have as authentic an exposition of the conviction of the senate that they do not wish to hear argument upon that article, as we did that they would not hear testimony. We were distinctly notified by this body, after one manager had asserted that there was, in his opinion, nothing in this article, that they would hear no testimony upon it. We were as distinctly notified that this senate would not quash it. We have been placed between the devil and the deep sea in this respect, and I have great doubt as to what course I ought to pursue—whether to discard this article entirely —as the Managers and the senate seemed inclined to do one day—or to treat it with solemn and extended argument and consideraiton, as another manager and the senate seemed inclined to do on another day.

It is the first time, may it please the Senate, that I ever witnessed or ever read in all the annals of judicial abuse, that a controverted article upon which a prosecution had offered no proof whatever, should be retained for purposes of conviction, and yet the defendant be allowed to give no proof upon the subject. But I will treat this article with a few words.

It propounds that the respondent, with the intent to humiliate George Baird, wrote to him a certain letter which is set out. It is not charged that he published any such letter to the world. It was designed for aught that appears, for the private eye of George Baird; except by the act of exhibition by George Baird himself he need never have been in the least humiliated in the matter. It was taken by Baird, if by anybody, and publicly put into this impeachment nest to be hatched.

The respondent has made in his answer, full and sufficient reply to everything charged against him worthy of a moment's attention. He avers, in the first place, that he is the judge of that judicial district; he avers, in the second place, that for days, there had been a riot in the city of Austin; that danger to life and property were apprehended; that meetings were held in the houses of citizens to devise means for public protection; that the streets of that town were guarded by patrols; that the sheriff had been inadequate and insufficient in the performance of his duty when requested by the mayor of the city to arrest the rioters. The respondent also alleges that while this insurrection against law and order was flagrant, he was called by the duties of his position from Austin to Preston to hold a term of court; that the riot renewed or rather continued; that danger to his family was apprehended, and he was summoned by telegraph, to put into execution, the undoubted powers which inhered in him; that he did write a letter to the sheriff of that county—as I shall demonstrate he may have done, must have done and should have done—instructing him under the right he had to instruct him, that he should preserve the peace in manner and form prescribed by the statutes.

Gentlemen of the Senate, I do not know, and the managers have been peculiarly cautious that we should not know, precisely what attitude they assume in regard to the truthfulness of this article. If they ask you to take the article as true, then we ask you under the circumstances to which you have made us submit, to take that answer as true. It is asking none too much. Enough has come out in this case already, to show that such a state of facts did exist there, for Beisicker, Walsh, and these other men, were indicted for participation in that same riot.

Now, taking both the article and answer as true, with the exceptions of the allegations of wrongful and malicious intent to humiliate George Baird, which we humbly trust the Senate will consider as denied by the implicit form of denial which we adopted for that purpose, I undertake to demonstrate that the respondent acted within the strict line of his duty, and would have been blameworthy if he had not acted in just the way he did. And in doing that, I shall do what the learned counsel did not do. I shall read from the statute. I shall not content myself with saying merely that this was a proceeding which was all right and correct, in imitation of his course of assertive denunciation. I shall show that every line and every word in that letter—every act that this judge did, were written, said and done, in the line of his duty under the statutes of Minnesota, which he was sworn to enforce. And my argument will essentially be the reading of the law. I refer to page 628 of the general statutes. I cite this to show that the respondent throughout his district, whether in Albert Lea or Caledonia, or at any intermediate place, whether present or not, is the chief conservator of the peace in that judicial district.

"SEC 1. The judges of the several courts of record, in vacation within their respective districts, as well as in open court, and all justices of the peace, within their respective counties, shall have power to cause all laws made for the preservation of the public peace to be kept, and in the execution of that power, or for good behavior, or both, in the manner provided in this chapter."

As to his duties in relation to riots, I cite page 616 of the same compilation. The Senators, by reference to that article of impeachment, will find that it contains no allegation that the state of things at Austin did not warrant such an order as that conveyed in the letter to Mr. Baird, if the court had power under any circumstances to give it. Chapter 98, section 1, reads:

"If any persons, to the number of twelve or more, any of whom being armed with any dangerous weapons; or if any persons to the number of thirty or more, whether armed or not, are unlawfully, riotously or tumultuously assembled in any city, town or county, it shall be the duty of the mayor and each of the aldermen of such city, and of the president and each of the trustees of such town, and of every justice of the peace living in such city or town, and of the sheriff of the county and his deputies, and also of every constable and coroner living in such city or town, to go among the persons so assembled, or as near them as may be with safety, and in the name of the State of Minnesota, to command all the persons so assembled, immediately and peaceably to disperse; and if the persons so assembled shall not thereupon immediately and peaceably disperse, it shall be the duty of each of the magistrates and officers to command the assistance of all persons there present, in seizing, arresting and securing in custody, the persons so unlawfully assembled, so that they may be proceeded with according to law.

"Section 2. Whoever being present and commanded by any of the magistrates or officers mentioned in the preceding section, to aid or assist in seizing and securing such rioters or persons so unlawfully assembled or in suppressing such riot or unlawful assembly, refuses or neglects to obey such command, shall be deemed to be one

of the rioters or persons unlawfully assembled, and shall be liable to be prosecuted therefor and punished accordingly.

"Section 4. If any persons who shall be so riotously and unlawfully assembled, and who have been commanded to disperse as before provided, refuse or neglect to disperse without unnecessary delay, any two of the magistrates or officers before mentioned may require the aid of a sufficient number of persons, in arms or otherwise, as may be necessary, and shall proceed in such manner as in their judgment is expedient, forthwith to disperse and suppress such unlawful, riotous or tumultuous assembly, and seize and secure the persons composing the same, so that they may be proceeded with according to law."

The result of this is, that the judge is a conservator of the peace throughout his district, with all these various subordinate officers subjected to his authority for that purpose by a statute which places them under his direction to the extent of empowering them to use arms if necessary to disperse rioters.

Section three of this statute, framed for public safety, for public peace and for the protection of the law-abiding, provides that if any person does as George Baird did on that occasion, he is guilty of a misdemeanor. Section six provides that if, after such orders are given in regard to arms, the rioters refuse to disburse, and any of them are killed, the person killing them shall be held guiltless and fully justified in law.

Now let us consider what order the respondent gave. Here is the order, and I ask any Senator to take the statute which I have just read, and see whether the order by its terms is not limited to just the authority which the statute confers upon judges and authorizes them to confer upon officers such as George Baird was:

"STATE OF MINNESOTA,
TENTH JUDICIAL DISTRICT.

To GEORGE BAIRD,
Sheriff of Mower County:

You are hereby ordered and directed to disperse any noisy, tumultuous or riotous assemblage of persons numbering thirty or more, or a less number, if any of them are armed, found anywhere within the limits of your county, and for such purpose you are authorized to call to your aid any number of persons, and arm with fire-arms any number of men not exceeding twenty-five. Such armed force to be under your charge and who will obey your orders.

In your proceedings you will be guided by the provisions of chapter 98 of the General Laws of this State." (Which is the statute I have just read.) "You are especially directed to disperse in the manner above indicated any assemblage of persons whose evident design and purpose is to violate and prevent the execution of the laws of the State and the ordinances of the city of Austin.

Witness my hand this 2nd day of June, 1874.

SHERMAN PAGE,
Judge of the District Court, Tenth Judicial District."

"PRESTON, June 2d, 1874.

GEORGE BAIRD, Esq., Sheriff:

I have this day heard with shame and regret that another noisy assemblage of riotous men have been allowed to parade the streets of Austin at night, defying the law and disturbing peaceable citizens. I send you herewith an order of a positive character. Rest assured you will not disobey any further order with impunity. Every good citizen of Austin ought to be ashamed of his town and of its civil authorities.

Yours truly,
S. PAGE."

Gentlemen of the Senate, within the past two years a portentous social phenomenon has appeared in this country, which, five years ago, no one of us could have had any reason to anticipate. From the seaboard to where civilization stands pausing on her western outpost, this country is infested with lawless tramps, who set the law at defiance,

who capture trains, rob homes, ravish women, murder citizens and who are rapidly, by some strange social elective process, taking unto themselves the forms of belligerent organizations. In our cities a wilder vagary has found expression. That which was formerly deemed to be an exotic, has been discovered to be indigenous though heretofore dormant in our soil. In Chicago, in St. Louis, in New York, in every considerable city of this country, the horrid front of communism has been reared. It threatens the holy bounds of property. It has its organization, its design, its avowed purposes, and bears to the other portent the relation of fire to powder. Only last year the electric thrill of one riot ran from the sea-board to the Mississippi River, and palsied the great arteries of commerce in a day; it sacked and burned the mighty city of Pittsburg; the great state of Pennsylvania, with its four millions of people lay crushed in its folds, and the authority of the Federal Government was powerless for a time.

With the coming of the harvest, there will sweep over the face of this state, bands of lawless men, unarmed now, perhaps to be armed in the future. From a sightly hill near the farm of the senator from Wabasha I venture to say that in two months, thousands of those men can be counted coming no man knows whence, and going no man knows where. And I say that in these times when such dangers are reasonably to be apprehended, the magistrate who has the courage to command the sheriff of his county to execute the law by taking life if necessary—to tell the citizens that they shall be protected in doing what the law says they may do—deserves the plaudits and commendations of his fellow men, instead of being arraigned before a court of impeachment. This charge is a public danger, senators. A few men like Sherman Page might have saved the city of Pittsburg that day. There would not at least have been that abject cowardice, while millions of property and hundreds of lives went out of existence—and when I see a sickly sneer of incredulity upon the face of any man who lives far secluded from any danger of that kind, it makes me tremble for the justice of this court.

If the senate will indulge me in a recess, I feel warranted in stating that I will close this afternoon, perhaps asking the senate to sit until six o'clock.

Senator HENRY. I move to take a recess until 2 o'clock.

Senator GILFILLAN, J. B. I would ask the counselor what time would suit him to continue.

MR. DAVIS. Two o'clock will suit me as well as any hour.

The motion prevailed.

AFTERNOON SESSION.

Mr. DAVIS. [Resuming.] May it please the Senate: In the view which I have taken of this case, but two transactions remain which demand any serious or prolonged exposition. It is true that article ten yet nominally exists in this proceeding, and perhaps ought to receive my slight consideration. I will, therefore, depart for a few moments from the numerical order of these articles and consider this article, and the specifications which have been begotten upon its prolific body.

Article ten propounds the general charge that the habitual demeanor of this respondent to officials of the county of Mower and to persons

everywhere else who have excited his displeasure, has been arbitrary, oppressive and tyrannical.

We took exceptions to the validity of that article at a very early stage of these proceedings. The argument upon those exceptions resulted in allowing the managers to specify under it, the various acts which they held to constitute a habit; and they specify seven particular instances. I shall go through them very briefly because I really do not think any of them deserve any very serious, or if not serious, extended consideration.

As to the language which is said to have been addressed to Mr. McIntyre in the barn-yard, it seems to me a sufficient answer to say, that this Senate was not constituted by the constitution a court of impeachment to try judges for faults of conversations upon the street, in social intercourse and upon politics. The entire scope and result of that first specification under article ten, is that the respondent was opposed to Mr. Irgens as secretary of the State, and told Mr. McIntyre so, in pretty forcible language.

What if he did? What if he did? Has he no right to express his opinion upon politics to Mr. McIntyre or anybody else? No right to criticise a person who is a candidate for a public office? Is a judge decitizenized from the moment he is elevated to the bench? I say the respondent had a perfect right, so far as any imputation upon his judicial character is concerned, to speak of any public man as a candidate for office, in derogation, if such was his opinion of him, and this Senate will establish no such tyrannical censorship of that liberty as to adjudge that it will impeach a judge for doing that, in social intercourse, which the meanest citizen of this State, not holding an office, or holding any other office, has a right to do unquestioned.

The respondent denies that that conversation took place. You saw Mr. McIntyre upon the stand; you saw his hostility, his bitterness. He has his money staked upon this prosecution. He asserted that Judge Page has refused to speak to him for years; and yet when you read Mr. McIntyre's testimony, a peculiar perversion of vision or language appears. He says, that after this affront had passed from Judge Page to him, or from him to Judge Page, he met Judge Page on the street, and there was such an expression on the judge's face that Mr. McIntyre himself, would not speak to him. [Laughter.] The fact is that McIntyre is the aggressor, a hot-headed, bitter Gael, who, years ago, refused to speak to Judge Page.

Now, in regard to the second specification. The fact is that Mr. Greenman never took charge of Lafayette French's case. How different the situation appears in the light of the testimony of Mr. Murray, Mr. Greenman, and others present in the court room! Why, as Mr. French gave testimony under this article, it would seem that he had been insulted in the presence of everybody there; deposed from his office—prevented from trying the case. Now the whole sum and substance of that business is simply this: That Mr. French was interrupting the proceedings of the court by loud conversation; the court spoke to him three times before he answered; a jury was being empannelled; he either left the court room of his own motion, or upon the suggestion of the judge that if he wanted to talk to witnesses he ought to go out. He was gone a few moments; Mr. Greenman was put in to empannel the jury. The public business went on; everything was satisfactorily

done; Mr. French came back at or about the time the jury was finally empannelled; Mr. Greenman surrendered his chair; Mr. French went on with the case, and the State got a verdict. And that is so long ago that hardly any of the witnesses can identify the term. It does not appear that this matter was ever brought before the House of Representatives, and if it was, of course it was rejected, because it is not among the articles of impeachment.

I shall say little respecting that conversation with Mr. Baird for the reason that it is answered by the argument which I have addressed to the Senate in regard to the conversation with Mr. McIntyre. Furthermore, the Senate has said that it will strike out all the testimony in regard to that whiskey riot, and if it does that it ought in justice to strike out all the testimony of Mr. Baird, because that testimony relates to the riot, and we were entitled to all the facts if we were entitled to anything; and we are entitled to nothing concerning that riot, the whole testimony of Mr. Baird ought to go out. But it was not corruption in office. The judge was doing nothing judicially then. He had the right to talk to Mr. Baird. A judge cannot be impeached for violating any law of social decorum if you conclude it to be so. If everything he said there was true, it bears not at all upon the issue of corrupt conduct in office; it is not a crime; it is not a misdemeanor. He was doing nothing by virtue of his office then. He was on the street.

As to the venire in the Jaynes case, I have already treated that. The testimony of Mr. Severance bears most decisively upon the general credibility of sheriff Hall. The testimony of Mr. Severance corroborates the testimony of the respondent that the sheriff was delaying the trial of that case—was failing to subserve the interests of public justice by bringing to that panel man after man from the city of Austin whom he must have known was not competent. The judge then told him to go just outside the city, within reasonable limits, and summon jurors. But Mr. Hall desiring to make up his loss of *per capita* of jurors by his fees for mileage, goes to towns fifteen miles distant. So, as Mr. Severance says, it went on for two or three days, until it became a ridiculous farce. Mr. Severance was there and heard the entire conversation; heard the conversation from beginning to end. It was his business to be there; and that most eminent lawyer comes before this Senate, under his oath and says, that the respondent spoke no such words as those which Mr. Hall attributes to him and he is confirmed by other witnesses.

There is no testimony whatever in regard to the fifth specification, as to the turnkey West.

As to the Huntly case: That is another conversation between Mr. Hall and the respondent on the street. Huntly was a horse-thief. He was out on bail; a bench warrant had been issued for him the term before. The stealing of horses along the State line is a pretty serious offense. It is a matter of great public interest, that perpetrators of that particular crime shall be punished. This man Huntly was conveniently located for the purposes of horse-stealing, for he lived about a mile from the Iowa line. He was arrested but let out on bail; he made his escape, a bench warrant had been issued, as I said, for his arrest the term before, and this sheriff did nothing with it whatever. He said he

went down once to sue his bail bond. The county did not care anything about that; they wanted the man. The judge enquired of Mr. Hall on the street what had been done. Here is the statement of these two gentlemen. Mr. Hall, as usual, comes up with his chronic ulcer of abuse. The judge says he called his attention to the subject and asked him what he had done. Huntly, living there within a mile of the Iowa state line, could skip over at any time, and Mr. Hall never sent the warrant down to a deputy in that neighborhood, but carried it around in his pocket from one term to another.

The respondent had a right to address words of reproof or words of admonition to the sheriff, for the sheriff was an officer of his court. It surely was not out of the way for the respondent, in regard to a criminal under indictment, to call the attention of the sheriff to his duties, to ask him what had been done and perhaps to remonstrate with him after he had made such a showing as he made in reply to that question.

The seventh specification is that the respondent habitually refused to allow the sheriff to appoint his deputies. Now, even upon Mr. Hall's testimony, there is nothing in that. They sometimes talked together about it. Mr. Hall testified in substance that the judge would suggest a proper man. I venture to say that in any district court in this State you will find that the sheriff, out of deference to the judge, appoints some man as court deputy who is agreeable to him personally. It is right and proper that it should be so. The sheriff should not force upon the judge a man personally distasteful, and I have no doubt that they talked it over together and agreed upon some one who would be agreeable to the sheriff and agreeable to the judge. But the evidence shows that the sheriff did at one time appoint a person whom Judge Page preferred, and upon another occasion appointed a man whom he did not prefer. So there is nothing whatever in that charge.

There has been, may it please the Senate, a great deal of feeling and a great deal of misconception in regard to the relations of the respondent to the Ingmundson case, and what he did in connection with it. There has been a persistent attempt, in this court, and out of this court, commencing with the grand jury of 1876, to make Mr. Ingmundson out a martyr, and the respondent a persecutor. My associate showed, by that remarkably able effort in opening this case—in which he so vigorously lifted the entire case out of the mist of confusion by which it had been surrounded and placed it on an eminence where its proportions can be truly seen—that there is grave question whether Mr. Ingmundson stands fairly before the law; that it is less than a question whether, instead of being a martyr, he does not deserve punishment as a criminal; that it is less than questionable, as the case stands upon the testimony for the prosecution, whether the respondent has not fallen short of his duty instead of exceeding it in regard to that man.

It is my duty, and I deem it my privilege on this occasion, to demonstrate from the testimony, from the records which have been placed in evidence and from the statutes of this State, that Mr. Ingmundson is a manifold offender against the laws of this State. It is not my intention to indulge in any personal severity towards him. If I am betrayed, in the zeal of discussion, into intemperate words, they do not come from the heart, because I know, as every man on this floor knows, that the

vice in the administration of our financial affairs throughout the State, comes not so much from the fault of particular offenders as from a diseased and too delinquent laxity of public sentiment. Such is the fact from the State treasury down to the last defaulting county treasurer.

The articles in regard to this Ingmundson affair, are articles six and seven. As a substratum for the charges which they make against the respondent, and as a proof that his conduct was criminal, malicious, oppressive, and corrupt, they premise by asserting to this Senate as a solemn fact, that a full investigation was had by the grand jury in 1876, at the September term, by which Mr. Ingmundson was exonerated. I shall demonstate that that examination was not full; I shall show from surrounding events, that if it had been full, manifold abuses would have been discovered and corrected; and if I demonstrate that, then that allegation with which article six opens loses its force as a reason, why the respondent should not have charged the grand jury as he did in 1877. Proceeding from this prelude, this article goes on to allege, that at the March term of 1877, the respondent maliciously and without probable cause, and with the intent to injure and oppress Mr. Ingmundson, and to procure him to be indicted without cause, instructed the jury as to the Clayton order, and stated that if the jury ascertained the fact to be as stated, they would be warranted in finding an indictment.

I shall attempt to demonstrate that it was the duty of that grand jury, under the undoubted facts respecting the Clayton order, to find an indictment against Mr. Ingmundson. I shall prove, I hope, from the law, that it was the duty of this respondent to charge just as he did in the matter, and if he did right in so charging, and if such was the duty of the grand jury, then as I have endeavored to enforce, on many occa- occasions heretofore the question of malice or of feeling toward Mr. Ingmundson, if he had any, becomes wholly immaterial.

The article avers that afterwards and during the second week of the term, he again instructed the grand jury; that they presented a writing reporting that they found no irregularities, and that he stated to them that that was not what he wanted done, that he did not want their conclusions, he desired them to investigate and report the facts; that they afterwards presented a paper setting out the facts in regard to the Clayton order and two orders in regard to the town of Marshall. That well knowing that these did not constitute a criminal offense, he falsely instructed the jury that they did, and sent them back to consider. The grand jury found no indictment. He then ordered the county attorney to make complaint. It is charged that these proceedings were unlawful and malicious, and that he treated Mr. Ingmundson in an insulting manner, and accused him of having talked against him in a derogatory way.

Now, it is perfectly manifest that so far as the general outlines of these charges are concerned, if Mr. Ingmundson in 1876 was not a faithful public officer, if he had violated the law, if he deserved investigation, if the respondent rightfully called the attention of the grand jury to his delinquencies for the purpose of correcting and regulating the conduct of an unfaithful public officer the respondent's motives are entirely immaterial.

But it is perfectly apparent from the evidence that Mr. Ingmundson had violated his duties as a county treasurer. I shall attempt to show that in repeated instances he has transgressed statutes carefully and

anxiously framed for the safety of the public treasury. It is manifest that the county officers of this State are persons whose liabilities, duties and authority are strictly conferred and strictly limited by statute. Each one moves with entire liberty within the sphere of his action, but beyond that, such is our financial system, he cannot move without transgressing and disturbing the whole scheme. The financial system of this State and of its counties, has been the subject of years of legislation. It has been the aim of our Legislature to create a system of checks and balances, so that another officer than the treasurer shall at all times know how the treasury stands, and that the treasurer shall not pay out money except upon the authority of the auditor. That, in brief, is the whole purpose of our statutes. The same policy controls the State Auditor's office, and the State Treasurer's office, and the offices of county auditors and treasurers. It has always been considered that as to the administration of county finances, a grand jury is the guardian of the treasury and of the public property. But it has been found so inefficient in this State and so inadequate are its means of investigation, that last winter the Legislature, in its wisdom, under the suggestion of the Governor, created the office of Public Examiner, whose authority it is to call upon any treasurer in this State, and go through his books and papers with the particularity which is now alleged as a cause of impeachment against this respondent when he requested the grand jury themselves to do it We find the impeaching House of Representatives concurring in a bill for the more perfect doing of that which this respondent is impeached for requesting a grand jury to do.

As bearing upon the question of official responsibility, I desire to cite the 2d of Bissell, page 981, section 8:

"Where any duty is enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty, and every misbehavior in office where no special provision is made for the punishment of such delinquency or malfeasance is a misdemeanor punishable by fine and imprisonment."

Now, I propose to link Mr. Ingmundson, in instance after instance, to that general statute. It is my purpose to show that time after time, he has violated duties plainly enjoined by law. I shall not endeavor to follow my learned friend through the tangled labyrinth, which, it seems to me, he willingly and wilfully laid out here, because if I establish the propositions which I now assert, I shall have furnished a complete refutation of everything with which he endeavored to confuse the minds of the Senate.

We start with the general proposition, that the violation by a public officer, of a duty enjoined by law, is a crime. And turning to other propositions of the statute, we find that when a public officer has done that which the law, in its wisdom says that he shall not do, such an act immediately connects itself with this general statute, and becomes a misdemeanor in office.

I assert in the first instance, that Mr. Ingmundson embezzled the State funds by depositing them with Wilkin and others. Upon that I cite the 22d of Minnesota, State against Munch, page 71.

Section 12, article 9, of the constitution of the State provides that this act of Mr. Ingmundson is a felony. So important has this question been deemed, that the constitution has described as a crime, and made felonious those acts which Mr. Ingmundson committed from year to year:

SEC. 12. Suitable laws shall be passed by the Legislature for the safe keeping, transfer, and disbursement of State and school funds, and all officers and other persons charged with the same shall be required to give ample security, for all moneys and funds of any kind; to keep an accurate entry of each sum received, and of each payment and transfer, and if any of said officers or other persons shall convert to his own use in any form, or shall loan with or without interest, contrary to law, or shall deposit in banks, or exchange for other funds, any portion of the funds of the State, every such act shall be adjudged to be an embezzlement of so much of the State funds as shall be thus taken, and shall be declared a felony."

I admit that Mr. Ingmundson followed great but bad examples; but he continued to follow them long after this Senate, sitting as a court of impeachment, in the case of William Seeger, had announced to the officers of this State, that such precedents in high places should no longer be a safeguard for them. That the funds deposited in Wilkin's bank were State funds abundantly appears from the testimony of Ingmundson. He admits that he deposited State funds in banks, and I say upon his own statement, if the law had been applied to him in all its vigor, he would have been indicted and prosecuted as a felon.

What are the duties of a county treasurer? To receive money, credit it to the different funds, and pay it out only upon the order of the proper authority.

I cite the Laws of 1874, page 51, section 108. He has no more to do with the town treasurers than I have until they present the auditor's warrant. He does not officially know, until then, who the town treasurers are. His account is not kept with them, it is kept with the auditor of the county; and to the auditor of the county, all persons having any demand upon the county treasury, must resort, and from his presence they must go, with his warrant, except in rare exceptional cases, which do not cover the matters under present consideration.

Section 108 provides:

"The county treasurer shall open an account with the State, county, and with each township, city, incorporated village or school district, in his county, and immediately after each settlement with the county treasurer in each year, he shall credit the State, county and each township, city, or incorporated village or school district, with the amount so collected for the use of the State, county and any such township, village or school district; and upon application of any town, city, village or school district treasurer, the auditor shall give him an order on the county treasurer for the amount due such township, city, village or school district treasurer, and shall charge them, respectively, with the amount of such order."

Now, if that section of the statute of 1874, means anything, it means that the office of the county auditor is to be a check upon the disbursement of funds by the county treasurer. The county treasurer is required to open an account with the county auditor, or rather, the auditor is required to open an account with the treasurer. How, in heaven's name, Senators, can he open and keep such an account if the treasurer is at liberty to pay out moneys in the absence of the auditor's warrant? If, I repeat, he is required to open an account with the treasurer in which these towns shall be credited and debited, how can such an account ever be kept, if the treasurer has the authority to honor the word of mouth, or draft or order, of any town treasurer not made through the medium of the county auditor? Such a construction as that, if once admitted breaks down our whole system at once. I do not need to illustrate such a proposition to business men. If it is so the office of the auditor, which has been thought to be a protection to the public funds, is a delusion and a snare, and ought to be abolished.

Furthermore, after each town is credited upon the books of the auditor, after the settlement, with the amount due it, this statute provides how the town can draw the money out of the treasury:

"And upon application of any town, city, village or school district treasurer, the auditor shall give him an order on the county treasurer for the amount due each township, city, village, or school district treasurer, and shall charge *them* respectively, with the amount of such order."

So the system works both ways. The town is credited, an order is given, the county treasurer is credited with the amount, and the town is debited with the amount; and thus an entire and symmetrical system of finance and bookkeeping is established in each county in this State.

Furthermore, it has its roots in the office of the auditor of the State. It springs from the constitutional provision by analogy, which provides that no moneys shall be paid out of the treasury except by virtue of an appropriation, and the whole scheme is founded in symmetry, in common sense and upon business principles—every one of which will be violated if Mr. Ingmundson has the right to handle the funds of the county as he assumes he had the right to do.

I cite 1st Bissell, page 226, sec. 55:

"The county treasurer shall receive all moneys directed by law to be paid to him as such treasurer, and shall pay them out only upon the order of the proper authority."

Now, connect this statute with the general statutes of Minnesota, passed afterwards, in 1874, and we find that "the order of the proper authority" is the auditor of the county giving his warrant to the town treasurer, upon the faith of which the funds are drawn from the county treasury. This statute provides that he shall pay them out "*only* upon the order of the proper authority." The proper authority is the only authority for it, and a county treasurer who wilfully pays out funds in a manner different from that prescribed by the law which I have read, is guilty under the first statute cited of a misdemeanor in office. If the treasurer violates his duty in this respect, of what value are the books of the county auditor? And when I come to the consideration of the order which the town of Clayton paid twice, I shall show how the transgression practically worked in the little affairs of that town.

Again, the constitution of this State provides that any treasurer who shall convert to his own use the funds with which he is entrusted, is guilty of a felony, and so different statutes provide.

The couuty treasurer, it is true, by a statute of 1873, seems to be allowed by implication, to buy county and town orders. Although I think that construction is subject to controversy, I will assume, for the purposes of this branch of the discussion, that under the act of 1873, a county treasurer may deal in county or town orders. But he cannot pay them back or pass them back upon the town without an affidavit attached that he has not bought them at a discount. But that statute does not protect Mr. Ingmundson, and has nothing to do with this case. That statute simply authorizes (if it confers any authority at all) the county treasurer to deal in county orders and town orders with his own money. It leaves the law untouched, that he shall not convert the public funds—as Mr. Ingmundson unquestionably did in this case

when he drew those checks on the public funds in the Bank of Le Roy and bought town orders with them.

He committed another misdemeanor in refusing to honor the warrant of the auditor. The Senate will remember that after Quam had received this $114.52 out of the treasury of the county, before the settlement and without the warrant of the auditor, he ran away and was succeeded by Mr. Haralson. Mr. Haralson proceeds to the auditor of Mower county, asks him to turn to the books wherein the financial balances of the town of Clayton are registered; and it appears there that the town of Clayton is entitled to so much money. Manifestly this $114 had obtained no entry upon the auditors book, because Quam and Ingmundson had violated the law in making a payment out of the county treasury without the intervention and not upon the warrant of the auditor, so that the auditor of that county, taking his books as a guide, gives to Mr. Haralson, Quam's successor, a warrant for the exact amount of money that ought to have been and would have been in the hands of the treasurer of that county, had he done his duty

Under the law of 1874, the auditor must state the accounts between the treasurer and the towns, and when the auditor drew his warrant upon Mr. Ingmundson for that amount of money, he raised upon Mr. Ingmundson a conclusive presumption that the amount of the warrant was there, and it would have been there but for the default of the treasurer himself. Mr. Haralson presents that warrant to Mr. Ingmundson. It is not checked off by any other order issued by the auditor. It calls for so much money, and Mr. Ingmundson, although bound by law to have that money, as he would have had it he had obeyed the law, when Mr. Haralson produced the warrant, takes him, figuratively speaking, by the throat, and says, "I will not perform my duty in this case and pay you the amount which is justly and equitably due according to the accounts of that public book-keeper whom the law has placed over both of us, until you consent to refund to me that $114.52 which I paid to Sever O. Quam contrary to law."

Now, that is embezzlement by Mr. Ingmundson. Any court would charge it to be embezzlement if it honestly applied the statutes of Minnesota in that behalf.

I read from page 998 of the statutes of this State, section 95:

"If any person, having in his posession any money belonging to this state, or any county, town or city, or other municipal corporation or school district, or in which this state or any county, town, city or village or other municipal corporation or school district has any interest, or if any collector or treasurer of any town or county or incorporated city, town or village, or school district, or the treasurer or disbursing officer of the state, or any other person holding any office under any law of this state; or any officer of an incorporated company, who is by virtue of his office intrusted with the collection, safe keeping, transfer, or disbursement of any tax, revenue, fine or other money, converts to his own use, in any way or manner whatever, any part thereof or loans, with or without interest, any portion of the money intrusted to him as aforesaid, or improperly negiects or refuses to pay over the same or any part thereof, according to the provisions of law, *he is guilty of embezzlement.*"

Carry your minds right back for a moment to the law which ordains that any officer who neglects to perform any duty enjoined by law is guilty of a misdemeanor—carry your minds back to the law of 1874, which men whom I now see on this floor voted to pass, which ordains that the auditor shall open an account with the treasurer, and after the settlement shall give to each town treasurer a warrant for the amount which the county treasurer must pay; connect these two statutes and

these events with the general law which has existed, I think, from the beginning, upon our statute books, and you find that Mr. Ingmundson refused to pay over to Mr. Haralson money which, in the eye of the law, was in his hands, or would have been if he had not committed another crime, and you must conclude that he was guilty of an actual embezzlement. I wish to repeat here, that course of doing business is a corrupt product of the times in which we live. The Seeger case demonstrated how perfectly perverted public sentiment can become. I do not believe, and have never believed, that any particular amount of invective should be indulged in by the public in matters to which the public by its complaisance and time-service has made itself so deeply accessory. But at the time when these acts of the respondent were committed there had been a revolution in public sentiment in this State in this respect. Let the Senate take judicial notice of historic facts. In the county of Sibley, the treasurer was a defaulter; in the county of Blue Earth, the treasurer was a defaulter; in the county of Carver, the treasurer was a defaulter; in the county of McLeod, the treasurer was a defaulter. When the legislative committee opened the vaults of the State treasury beneath us, five years ago, it was found to be honey-combed with corruption and empty of cash. So well has it been known that treasurer after treasurer in this State has been technically and probably actually a defaulter, that thousands of dollars have been spent in county after county to perpetuate rings through fear of disgraceful exposure. And at the time when these charges were being given by the respondent to this grand jury, the public was determined that there should be a reform in those particulars, and it was the duty of the county commissioners, if they too had been transgressing the law under the diseased and sickly abstinence of a too complaisant public sentiment, to have corrected their own doings long before any movement in that behalf was made. I read from section 99:

"Whoever is mentioned in the ninety-fifth (twenty-sixth) section of this title (chapter), [that is the section I have just read] shall pay over the same money that he received in the discharge of his duties, *and shall not set up any amount as a set-off* against any money so received."

The Legislature went on to provide that the county treasurer shall not, with one hand hold the public money and with the other hand administer his private rights against a town. It is made his duty to pay over the same money that he has received, without off-sets, if he had them. Did Mr. Ingmundson obey that law? To say nothing of the other offenses, did he not force Mr. Haralson to take $114.52 less than his warrant called for? He does not dispute the facts.

Again, the investigation of 1876 was not full. The treasurer was not guiltless because, if a proper inquiry had been made, the facts I have stated would have abundantly appeared, as well as the other facts to which I now call attention of the court. The county treasurer violated the law in regard to the keeping of the public funds, in other respects. I cite from the 1st of Bissell, page 227, section 56:

"When any money is paid to the county treasurer, except that paid on account of taxes charged on duplicate, the treasurer shall give the person paying the same duplicate receipts therefor, one of which he shall forthwith deposit with the county auditor."

You see again how particular is the policy of this State to have every cent which the treasurer receives charged against him on the books of

the auditor. Of course, the treasurer is charged with the tax duplicate which comes from the auditor, but there are other sources of revenue, and in those cases he is required to give duplicate receipts, one of which he shall deposit at once with the auditor so that the auditor may keep on his books the exact condition of the treasury.

The statute also provides as follows:

"And there is hereby created a board of auditors for each of said counties in the State, which board shall consist of the county auditor, chairman of the board of county commissioners and clerk of the district court of either of said counties in this State, whose duty it shall be to carefully examine and audit the accounts, books and vouchers of the treasurer of their respective counties, and to count and ascertain the kind, description and amount of funds in the treasury of said county or belonging thereto, at least three times in each year, without previous notice to the treasurer.

"SECOND. All the funds of any of said counties in the State shall be deposited by the county treasurer in one or more designated national banks, or State or private bank, or banks, on or before the first day of each month, *in the name of the proper county* of which said board are officers. Such bank, or banks, or bankers, shall be designated by the said board of auditors, in their discretion, after advertising in one or more newspapers published in their respecctive counties, for at least two weeks, for proposals, and receiving proposals, stating what security would be given to said county for such funds so deposited, and what interest on monthly balances of the amount deposited upon condition that said funds with accrued interest shall be held subject to draft and payment at all times upon demand; *Provided*, That the amount deposited in any bank or banking house, shall not exceed the assessed capital stock of said bank or banking house, as shall appear upon the duplicate tax list. Every payment of the county treasurer shall be made on the warrant of the county auditor, or the chairman of the board of county commissioners, duly attested by the county auditor."

Before these banks are authorized to receive this money they must give a bond. It is made the duty of the county auditor and the county treasurer to comply with all the provisions of this act, except in counties where there are no such banks; and it is also provided that if any member of the board of auditors shall neglect to perform any duty imposed by this act, he shall be deemed guilty of a misdemeanor.

Not one of those provisions of law was ever obeyed or attempted to be complied with. The treasurer has deposited the money of that county in five different banks, one outside and four within that county, without even a colorable attempt on his part or on the part of the county commissioners to comply with the provisions of the act of 1873.

He has, in cumulation to his other offenses, violated the law which I read from page 997 of Bissell's Statutes, in that he has loaned this money out at interest. In other words, he has gone on, year after year, precisely as the State treasurer did in the bad old times, when the treasury was a machine which operated for the private benefit of a few banks in the city of St. Paul. He is expressly forbidden by the law, which denounces the act as a misdemeanor, to loan the public funds, and yet he does loan them. When I make a general deposit in the bank to be placed to my credit, I loan my funds to that bank. It is not a special deposit for the bank to keep specifically; the relation of debtor and creditor is created by the entry of the amount deposited in my pass-book.

Gentlemen, was the investigation in 1876 a full investigation, in which Mr. Ingmundson was rightfully exonerated? Bear in mind that the facts in regard to the town of Clayton order did not come out until after the investigation in 1876, according to the testimony of Mr. Cole-

man. That particular transaction was not investigated at that session of the grand jury. But was it a full investigation? Can it be said now that the exoneration of Ingmundson by that grand jury was deserved? I have shown that Mr. Ingmundson either violated every law for which Mr. Seeger was impeached, or that the judgment of your predecessors, by which Seeger was impeached, ought, if possible, to be set at naught and annulled. A good example had been set by the Senate before this respondent, and before all officers engaged in the administration of the penal laws. However weak or vacillating public sentiment may have been before, the House of Representatives, as the grand inquest of the State, the Senate of the State of Minnesota, as the highest court in the State, had solemnly declared in a judicial proceeding, that a State treasurer who had done from year to year the same things which Mr. Ingmundson is charged and is admitted to have done, should be impeached and removed from the office which he held. Mr. Seeger was not above the law, unoffending old man as he was, merely following a bad practice under which these statutes seemed to have grown obsolete. Mr. Ingmundson surely ought not to be above the law, with the precedent which was set before the respondent in the Seeger case. And hence the assumption upon which article is predicated, that the action of the respondent towards Mr. Ingmundson must have been malicious, because he was a law-abiding citizen, falls to the ground, for no man who does not shut his eyes with malice prepense against the fact can pretend that within the strict meaning of various laws of this State, Mr. Ingmundson was not a manifold offender. I tell you, gentlemen, if the district judges had, from the beginning pressed upon the attention of grand juries, the laws which have been enacted so carefully for the protection of the public funds, we should have been spared that sickening catalogue of defalcations which has been unfolded month after month in this State for the past six years. Conceding the liberties which county treasurers have taken with the laws, what member is there upon the floor of this house who knows whether the treasury of his own county is solvent? Only a year ago, the county of McLeod was boasting through its newspapers of being the tightest little county in the State, with $15,000 or $20,000 surplus in the treasury, and yet, when it was opened, it was found to be destitute of cash. The treasurer had been a defaulter for years. He had paid no attention to his duties as to the county auditor, and it followed that the money had been gone for years before any one missed it.

So powerful is the influence of these monetary responsibilities, so exalted does a man become in his own esteem, over the rest of his fellow citizens, when he lays his hands as a custodian upon large masses of the public pelf, that it does seem, that Mr. Ingumdson, as well as others in like condition, deem themselves superior to the law and its ministers, To call them to account, to bring to bear the investigating eye of the men who pay these taxes into his hands, for whom he is a mere trustee, is judicial persecution which renders the person who has the audacity to do it, under his sworn sense of duty, a criminal, instead of the man whom he undertakes to investigate.

Send out word to the treasurers of the State, send out word to the men who are carrying out their unlawful purposes—that no magistrate, however high, that no grand jury, however reputable,—that no amount of crimes though committed year after year and patent to the public gaze, is sufficient to warrant either judge, or jury, or public, in inves-

tigating their affairs, and you may as well throw open the doors of every treasury in the State for every thief who chooses to come in and pilfer, until he is surfeited with glut.

But it is said, (and that is a very wrong notion which prevails upon this subject,) that because a grand jury once investigated this matter therefore it should not have been repeated so soon. Gentlemen, how did that first grand jury investigate those crimes? That iron-jawed man, Ingmundson, placed himself in the grand jury room and dominated their investigation to such an extent that the grand jury dispersed and would not sign, and never did concur in, the written exoneration which was sent up to the court. The clerk drew it up after they had dispersed. It was denominated a burlesque. The clerk signed it without authority. Where a grand jury is dominated, circumvented, or overpowered, and it becomes apparent, that is so much more a reason why a succeeding grand jury should enquire diligently into the conduct of a man who had taken such extraordinary means to prevent public investigation.

This same question arose in a very interesting form in Ireland. In 1823 when the Marquis of Wellesley, I think, was the Lord Lieutenant of Ireland, a riot took place in the theater of Dublin. In the course of that riot the person of the Lord Lieutenant was assailed. Missiles were thrown at him, his life was endangered. It was a riot which grew out of the feuds which have distracted that island for so many centuries. When the offense was brought to the attention of the grand jury, so powerful was the influences in favor of the rioters, that the inquest were prevailed upon to report that they found no cause of indictment, and they threw out the bill. The offence was so clear and the offenders were so well known, that Mr. Plunkett, who was then the attorney general, filed an *ex officio* information, which is equivalent to an indictment, in the court of King's Bench. Instantly the cry went up, that because the rioters had just been absolved by the grand jury, the Attorney General was guilty of a grave violation of law in seeking to bring them before the courts for trial. And upon that occasion Mr. Plunkett with great eloquence and great power of thought, vindicated himself before the Irish Court of King's Bench, in the following lauguage which I quote so fully, because it is a most masterly exposition of the questions under present consideration:

"I am told that it has been alleged that this proceeding on the part of the Attorney General, by an *ex officio* information, is illegal. I do not know whether what has been said in respect to this has been rightfully reported; or whether it is meant, that the proceeding is in point of law invalid, or that the resorting to it, though a legal right, is not a fair exercise of discretion. I am led, naturally, without going out of the proceedings, to make a few observation upon this part of the subject; for, although all the traverse have put in pleas amounting to not guilty, yet two of them have thought proper to put upon the record what connot properly belong to that plea —a sort of preamble or inducement, in which they state that those informations have been filed against them after a grand jury had ignored bills for the same charge. My learned friends, who framed those defences, knew perfectly well that, on that allegation no issue could be joined, either of law or of fact. It amounts, therefore, to nothing else than a plea of not guilty. But I presume they thought it might be made use of (though scarcely to your lordships or the jury whom I address) to swell the cry, which amongst the vulgar of the public has been raised against the legality of this proceeding.

"I think upon that subject I need occupy but little time in addressing the court, before which I have now the honor to appear. What I am about to say is rather with a view to set right the public mind, and that it should be known that I have stated, in the presence of this enlightened court, what is the law upon this subject.

I assert then, that the ignoring of a bill by a grand jury is, according to the known and established principles of our law, no bar to any subsequent legal proceeding against the same individual for the same ofiense It is competent to the crown or prosecutor to send up another bill to the same or any other grand jury: and the same power belongs to that public authority in which is vested the right of filing an information. A party who has been already tried, may protect himself against a subsequent prosecution for the same offense. He may do so by plea; it is a principle of our law that no man shall be twice tried for the same offense; if he has already been acquitted there is a known legal form of pleading as old as the law itself, by which he can defend himself. But it is settled by authorities coeval with the law itself, that the plea of *autrefois acquit* is not supported by evidence, that a bill of indictment for the same offense has been preferred to a grand jury and ignored. It must be an acquittal by a petit jury. Your lordships would consider it a waste of time to refer to authorities in support of such a position. It is laid down by Lord Hale, Lord Coke, and every writer on the subject of crown law. Has it ever been heard of, that the court of King's Bench would refuse an information, because a grand jury had ignored the bill?

"So much trash has been circulated, and the public mind so much abused upon this subject, that I hope your lordships will excuse my calling your attention to it. So far from its being considered an objection, that the grand jury has ignored the bill, it is often a reason why the court of King's Bench grants an information. I have often applied for liberty to file an information, when I had the honor of practicing in this court; and the court has asked me whether I had tried a grand jury; saying, that if they refused to find a bill, they would then entertain the application. The court of King's Bench in England in the last term granted an information in a case where bills had been twice ignored by a grand jury, and because they had been ignored. So far, therefore, is that circumstance from being considered an objection to putting a party on his trial, that it is frequently insisted upon as a requisite condition. Thus it is where application is made to the court of King's Bench. This is an information filed by the sworn officer of the crown, in whom the law has vested that privilege. Were I to come in as Attorney General, and apply for liberty to file an information against these parties, what would be your lordship's answer?—the same as was given by my Lord Mansfield to DeGrey, and I think to Sir Fletcher Norton, namely: 'We will not file an information at your suit; the law has made you the sole judge of its propriety; if you think it proper, you have a right to file it; if not, why should we do so?' I am not now applying myself to the soundness of this exercise of discretion, but to the new-fangled notion of the illegality of this information."

He went a great length in that court, ably to enforce this position, going back to the authorities as far as the reign of Queen Anne, where a grand jury overawed or overpersuaded, as this grand jury in 1876 was by Mr. Ingmundson, threw out a bill, and because they did it the court of the King's Bench, allowed a criminal information to be filed immediately afterwards. I am reading from the works of Lord Plunkett, and I have cited this particular case because it stood not only the test of the judgment of the Irish Court of King's Bench, but because the political party which was influential enough to prevent an indictment, had power sufficient to bring the matter into the British Parliament and ask its censure upon Mr. Plunkett for his conduct in that behalf.

Mr. Plunkett said in continuation of his argument before the court:

"It is the privilege of the lowest subject in the realm, if by the error or impropriety of a grand jury he do not obtain justice, to apply to the court of the King's Bench for a criminal information, but the King, it is said, is to be in a totally different situation, and though for an offense indictable the court would grant an information because a grand jury has ignored the bill, the sovereign himself shall not have that redress which is open to the meanest of his subjects. A proposition too monstrous to need debate. I am asked for an authority; permit me to say, this is not quite a fair requisition; when a circumstance is totally immaterial it is not to be expected that it should be the subject of notice; and, therefore, we are not to be surprised if, in the greater number of reported cases of informations, it should not appear whether a grand jury had previously thrown out bills or not; such a fact would be totally immaterial. It cannot be stated in a plea, it could not be proved in evidence,

and therefore it would be too much to say, that because it is not mentioned, the case has been excused.

It has been my principle to hold in utter contempt the vile and scurrilous publications which have been circulated through the city in order to prejudge the matters to be tried, and effect the characters of the persons employed as public functionaries. But I have, by the generosity of some of their authors, been furnished with a case directly to the point, in which, by accident, the fact of bills having been ignored by the grand jury before the information filed does distinctly appear.

I shall state the facts as they appear in the Common's Journals. In the latter part of the reign of Queen Anne, in the year 1713, on King William's birth day, the play of Tamerlane was to be represented. King William, as your Lordships are aware, was compared to Tamerlane, and very deservedly so, if the possession of every virtue that could ennoble a monarch entitled him to the distinction. The name of Tamerlane had been connected with his A prologue to the play written by Dr. Garth, was very generously repeated at the time. The doctor it seems was more happy as poet than a courtier, and his reference for King William led him to compliment that monarch in terms not sufficiently guarded to avoid giving offense to Queen Anne. The government therefore thought it right that the prologue should not be repeated. When the play, therefore, came on for representation, the actor ommitted to repeat it, and by so-doing gave great offense to the audience. They were full of respect for the memory of William, and did not wish that attention to Queen Anne should break in on the ancient practice. Mr. Dubley Moore, a zealous Protestant, who was in the house, leaped upon the stage and repeated the prologue. This gave rise to something like a riot. The government indicted Mr. Moore for the riot. The bills were sent up to the grand jury, who returned a true bill, and were then dismissed. In about half an hour after the foreman came into court and made an affidavit that *'billa verd'* was a mistake, and they meant to return "ignoramus." The court refused to receive his affidavit; but then came in the three and twenty, and swore positively to the same fact to which their foreman had deposed. The party was, notwithstanding this, in my opinion, very unwisely put to plead to the indictment. But the attorney general, thinking it would be hard to compel him to plead when the bill had been, in fact, ignored, moved to quash the indictment, which was done. Do I overstate the matter when I say that things were then in the same situation as if the bill had been ignored by the grand jury? And yet under these circumstances, the attorney general though himself at liberty to file an *ex officio* information against the same person for the same offense. Sir Constantine Phipps, who was then Lord Chancellor, and one of the lords justices, was considered by many as a great Tory and Jacobite, and as a enemy to the Protestant interest. History has done more justice to him in that respect than is the head of that party he received from his contemporaries He interfered with the prosecution; he sent for the Lord Mayor, and lectured him as to the mode in which he was to conduct himself. He was even supposed to have interfered with the return of the jury. The whole matter was brought before the House of Commons, who addressed the throne to remove Sir Constantine Phipps for intermeddling in the trial. No fault was found with the information though directly before them, but the trial was treated as legally depending, and a petition presented against the chancellor for interfering with that trial. Do I not here show a case in which an *ex officio* information had been filed after a bill had been thrown out, and where, though the zeal of party generated an anxiety to lay hold of anything that could warrant an imputation on the proceedings, as the information filed was never questioned, but the chancellor and chief governor petitioned against for interfering with the proceeding."

The attack in the Parliament as Shiel states, was led by Mr. Brownlow, who, on the 15th of April, moved:

"That it appears to this house that the conduct of his majesty's attorney general for Ireland, with respect to the persons charged with a riot in the Dublin theatre, on the 14th of December last, particularly in bringing them to trial upon informations filed *ex officio* after bills of indictment against them for the same offense had been thrown out by a grand jury, was unwise; that it was contrary to the practice, and not congenial to the spirit of the British constitution: and that it ought not to be drawn into a precedent hereafter."

Mr. Plunkett in the House of Commons defended his conduct upon high legal and constitutional grounds, as he had done before the Court of King's Bench in Ireland, and he came forth in the same triumphant

manner that he had from the court in which his conduct was first called in question.

"Mr. Plunkett said ; The honorable member had contended, that the grand jury was the constitutional barrier between the prosecutions of the crown and the safety of the subject; but if it were essential to the safety of the subject that a party should in no case be put upon his trial without the intervention of a grand jury, the whole system of informations must fall to the ground. The honorable member has contended, that the functions and privileges of a grand jury were impeached by this proceeding. It was impossible that anything could be more eloquent, or more calculated to excite an auditory, than the observations of the honorable gentleman. He has touched a string which could not fail to vibrate. But to what extent did the honorable gentleman mean to lay down the principle. Did he mean to say, that no criminal proceeding could be instituted without the intervention of a grand jury?— He admitted that the functions of a grand jury ought not to be called in question, nor could any public functionary be guilty of a more gross breach of decorum than by vilifying a grand jury for the exercise of that discretion with which the constitution had invested him. But was there anything in his (Mr. P's) conduct which would justify a comparison with the odious Jeffries? When the grand jury returned their verdict, he was free to say, that he in common with the court and auditors, was filled with astonishment, and that he did say on that occasion— 'They have a duty to discharge with their province on their oaths, and they have exercised their discretion ; I also have a duty to discharge, and with the blessing of God, I will discharge it faithfully and honestly !'

"There was one thing to which he would entreat the attention of the house, and particularly that of the country gentlemen; and that was the state of the law and the practice in regard to grand juries. He trusted he should be able to satisfy the house that it was no novel, violent, or unconstitutional thing to question their decisions.— He hoped to be able to show that there was nothing in it so very hostile to freedom, or so adverse to the spirit of the constitution as had been alleged. In doing this, he would in the first place, point out that trials upon information were really the law. This was the more necessary, not only on account of what had been said by the honorable gentleman, but on account of what had been detailed in newspapers, and taken up and repeated till the ears of the country had rung again. On this account he felt it necessary to go at some length into the proof of the legality. In the first place there was no point of the law more clear than this, that the ignoring of a bill by a grand jury was no bar to subsequent proceedings by indictment. Nay. the bill might be again and again sent to the grand jury, and again and again ignored, *toties quoties*. It might be questioned by the same grand jury or another, and from this it was evident that the verdict of a grand jury was not a sacred thing.

"Now, the presentment before the grand jury was no trial; it was only a proceeding towards putting the defendant on his trial; and therefore he must show, not the decision of a grand jury, but the acquittal by a petit jury. He defied any lawyer to show that the application of the principle had ever admitted any distinction between proceedings by indictment and by information. Ignoring the bill was no bar to a new prosecution either way; nor anything short of an acquittal by a tribunal competent to try the information.

"To establish these points, he had recourse to that place where alone it was possible to come at the precedents which guided him; and he would now proceed to state what were the results of that investigation. The case had all along been treated as if it were something quite new to have recourse to an information after the ignoring of an indictment, and as if he had acted in a manner highly indecorous in making any remark on, or attempting any application to, the finding of the grand jury. The House would see how this assumption accorded with the fact. The crown office had been searched, and he was now to inform the House what was the result. The first case was, the 'King against Hope,' (Trinity Term, 8 and 9, George II) The motion was for an information on a charge of trespass and assault. It was insisted in the defense, among other things, that the prosecutor had already proceeded by indictment, which was ignored by the grand jury. This was the very case on which they were now at issue. Yet there was no condemnation on those who questioned the exercise of these functions by the grand jury—there was no complaint of throwing a slur or attempting to discredit them. It had been asked, was it not most unjust to impeach the conduct of those who, being sworn to secresy, could not be allowed to explain? This, if true, was equally applicable to the Court of King's Bench. But the fact was, that neither the court nor the grand jury were called on for a defense. The question was not between the court and the jury, but between the crim-

inal and the public—whether offenders should be allowed to escape through a failure in the exercise of the functions of grand jurors or not. The defendant in the case before named, pleaded that an indictment which had been presented had been ignored. The answer given by the court was that the ignoring of the bill was the very reason why the information should be granted, and that it was one of the great privileges of the subject to be secured, by this mode of proceeding, from the loss of his just remedy on cases where, from little party heats and local irritations, that was likely to happen; and this was assented to *per totam curiam*. It appeared from the report that the grand jury attempted to send the witnesses away; that they were unwilling to ask them any questions, and appeared to wish to turn the whole matter into ridicule. Here was not only the case of passing by the decision of the grand jury, but the particular grounds of conduct in the grand jury were alleged Here were reasons given which went beyond the statement just now made by the honorable member. And who said this? He could assure the House he was not using the words of Judge Jeffries, nor of Empson or Dudley; nor of any other of the odious authorities with whom he had been compared. This was the decision of Lord Hardwicke, in which it was declared that the attainment of justice was not to be frustrated through little party heats and local irritations. The next case to which he would allude was that of the King against Thorpe. This was a prosecution for a nuisance In this case it was alleged that an *ignoramus* had been returned by the grand jury. This was not a case in which there were political ferments and in which the jury had got into little party heats; yet Mr. Bearcroft said there was reason for filing information, and Lord Mansfield made the rule absolute, upon the ground that some of the grand jury had been influenced in favor of Thorpe. The next case was that of the present King against the inhabitants of Berks, in the matter of the repairing of a bridge From the affidavits it appeared that this case had been sent to the grand jury and been ignored; a second presentment was made, when Lord Folkestone was in the chair. This was again ignored; and it was presented a third time, when Mr. Dundas was in the chair, and it was a third time ignored; when an information was filed. He hoped he had now adduced cases enough to prevent the notion from becoming universal that the inoculation of this obnoxious right had not been communicated by him; that the taint to the constitution could not be of his giving; but that it was as old, at least, as the time of Lord Hardwicke. Now if in this country it was necessary to have a check over the local heats and the misconduct of grand juries; he would appeal to the House whether it would be safe that a similar check should be withdrawn in Ireland? He had looked over files of the records of the courts in that country, and he had found no fewer than thirteen cases since the year 1795, and these had had the sanction of Lord Clanwilliam, Lord Killwarden, and Chief Baron Downes. The first to which he would allude was in February, 1795, and it was for perjury. Some of the other cases were trivial, but if in the strong ones there was misconduct, that was sufficient to establish the necessity of the right. In another case the grand jury of Westmeath had thrown out the bill; and the affidavit stated that this had been done by the address of one of the grand jury. He would pass over the other cases, except two, which were valuable, inasmuch as the affidavits upon which the informations were filed contained no charge of misconduct. These cases were the King against Patterson, and the King against Crawford, and they were both for sending letters with a view to provoke challenges, and in neither of them was any accusation made against the grand jury, further than that they had ignored the bills by some influence unknown to the deponent. He should trouble the House with one more case, the more important as it referred to the very grand jury who had ignored the bills preferred by him. What would the House think when he informed them that at that very hour a conditional order of the Court of King's Bench of Ireland existed, to set aside the finding of that very grand jury, on the ground of misconduct at the very same sessions? He had the copies of the affidavits on which that conditional rule was granted; but as the case was still pending, he felt some difficulty as to the manner of expressing himself from a reluctance to mention names. The affidavits allege the misconduct of the grand jury as the ground for setting aside their finding. The bill on which they found *ignoramus* charged A and B with a conspiracy to defraud a third party. A got B to make oath that he had received a sum of money for the purpose of defeating the claim of C. Two witnesses were examined. The grounds of misconduct as alleged in the affidavits were, first, the refusal to receive a letter of one of the accused, because they would have nothing to do with a written document; and next, that they would not admit conspiracy, because the witnesses would not swear that the parties committed perjury. The interrogatories were curious: 'Did poor McMahon,' said the jury, (that was not the real name,) 'to your knowledge commit

perjury?' Witness—'No, the charge is for conspiracy.' The witness was then shown the door and the bill was ignored.

"After Plunket had withdrawn, Mr. W. Courtnay, with a brief and manly defense of his conduct, moved that the other orders of the day be read. In the course of the debate the English attorney general declared his opinion curtly that the proceeding had been perfectly legal and proper. Finally the original motion was withdrawn, on the undertaking of Sir Francis Burdett to move an enquiry *into the conduct of the sheriff* of Dublin."

I cite this historic case because, in a time of great public excitement a great court sustained a great lawyer, and both court and lawyer were thereafter sustained by the British House of Commons in doing substantially that which is charged against this respondent as blameworthy.

Let us resume the discussion of what took place at that term. By the laws of this State, a judge is required to read certain statutes in regard to the conduct of public officers, which direct the grand jury to enquire into every offense which I have been discussing for the last hour. If the Senators will take the statutes of this State and turn to the chapter in regard to grand juries, for I have not the time to read it, and my learned associate read it upon his argument, it will be seen that so important have the law makers deemed the attention of grand juries to public officers to be, that they require the district judges to read to them section after section, directing them to enquire into the manner in which the county offices have been conducted. The common law, also requires magistrates to bring to the attention of grand juries, any offenses known to the judge, which he thinks may require their attention. In the early days of the rebellion, we well recollect how the United States judges charged upon those subjects.

There was a case of alleged bribery in this legislature last year—a most astounding charge. There was some investigation had of the subject. Something about it was said, I believe, in the newspapers. The judge of this district has felt called upon to charge the grand jury in regard to that.

Now after the session of 1876, wherein Mr. Ingmundson was not investigated, Mr. Coleman, the payee of that town order, went into Mr. Ingmundson's office, and Mr. Ingmundson produced the order, and with a profane expression, wondered how it got into his possession. Mr. Coleman knew that he had been paid that order, and an examination of the facts, resulted in Mr. Coleman going to the judge and stating what the facts were; and they turned out to be the same state of facts under which Mr. Haralson, the treasurer, was taken by the throat by Ingmundson, and made to take $114.42 less than his auditor's warrant called for.

The grand jury met on that occasion, and the judge gave this matter to them in their charge. He directed them to investigate it. He charged them correctly, that if it was true, it constituted an indictable offense.

Now, what took place between Mr. Ingmundson and Sever Quam? I repeat that if Mr. Ingmundson had allowed the county auditor to keep his books, and had dealt with the county auditor, and with the town treasurer through the county auditor, this thing never would have happened. Mr. Haralson would have received his order for the correct

amount. The town of Clayton would have been paid this $114, which it never got through Haralson or through Ingmundson. Mr. Ingmundson was the drawee of that order; we find it in his hands. He has been here upon the stand and testified. I am guided now in my remarks, by the dates of those checks which were introduced here in evidence, and they probably fix the order of time more correctly than the mere memories of men derived from the influence of impressions and dispositions. I propose now, to prove that the town of Clayton has been deprived of $114.52 which belongs to it, by being compelled to pay that order twice. And I crave the careful attention of the Senators, because I think it is demonstrable in very few words. I say that we find that order in the possession of Mr. Coleman, who had been building a bridge for the town. Mr. Coleman testified that he went to Mr. Quam with this order for his pay. That Mr. Quam told him that he had not the money, but gave him to understand that his money was in Austin. Mr. Quam then paid to Mr. Coleman twenty dollars and took Mr. Coleman's receipt, informing him that he would have to go to Austin where his money was understood to be. He went to Austin and brought back the check of Mr. Ingmundson on the Bank of Le Roy for one hundred dollars, the order still being in Coleman's hands. That check is dated on the 6th of August. Mr. Coleman testifies that Mr. Quam handed him that check for one hundred dollars—making one hundred and twenty dollars paid Coleman, taking back from Coleman his change, making the amount $114.52; whereupon Mr. Coleman, on the 6th of August, delivers up the order to the town treasurer as paid.

This is a completed transaction, Senators. Mr. Coleman presents his order to the town treasurer; the town treasurer goes to some source, not material for the purposes of this discussion, and gets the money. He takes up the order thus drawn upon him. It amounted to a payment; he should have cancelled it immediately. Now, what happened? Mr. Quam, on the 2d of October, two months afterwards, with that paid order lying in his possession, and all obligation to the town under it extinguished if he and Ingmundson had done their duty, takes the order out of his files and sells it,—re-issues it to Ingmundson. That is what the transaction amounts to. This treasurer, by a breach of public trust, which he could not have perpetrated if Mr. Ingmundson had told him in the first place that he could not have any of the public moneyexcept upon the auditor's warrant, takes this paid order, upon which all liability of the town was at an end, and sells it to Mr. Ingmundson in exchange for the public moneys of the town of Clayton. The checks on the public funds were paid, for on the 2d of October of the same year, Mr. Ingmundson drew one check for $14.51 on the bank of Le Roy, and on the same day he drew another for $70, making $114.51, and thus Ingmundson, by payment of the public money, comes in possession of this order.

Mr. Ingmundson's explanation as to the one hundred dollar check is that Mr. Quam wanted it to pay town orders with. Mr. Quam has received the money of the town of Clayton upon one transaction, he has taken up this order and paid it, he has laid it aside, and two months afterwards he comes to Mr. Ingmundson and gets $114.51 more, by re-issuing it,—by a false token—by re-issuing to Mr. Ingmundson an order which he had no business with at all unless it were paid. The fact that the order was in Quam's possession was notice

to Ingmundson that Quam had paid it. Now this $114 paid August first, being gone from the town, this paid order being re-issued, Mr. Haralson comes upon the scene. Mr. Quam, in the meantime, was squaring himself, doubtless to run away. Mr. Haralson goes to the county auditor; he sees there ought to be the full amount upon the books. He receives a warrant for the full amount, and Mr. Ingmundson, drawing out this order which had no legal validity whatever (for it is not commercial paper), which had been paid once, says to Haralson: "No matter if this order has been paid by Quam, you pay it again." Hence, I say, the town of Clayton has been defrauded out of $114.51 by Mr. Ingmundson and Mr. Quam—a result which could not have followed if they had obeyed their duty and followed the requirements of the statute. The presumption was, when the town treasurer presented himself to Mr. Ingmundson with an order in his hands not payable to Mr. Ingmundson, nor to Mr. Quam, that he had received that order in the regular course of business which was by payment.

The grand jury were properly charged upon that state of facts. They went out. Two weeks rolled around. The first thing that this man Ingmundson did, was what he had done at the preceding term. He immediately did an act which would have quashed any indictment that the grand jury could have found against him. The grand jury had been instructed by the court that they must not admit as a witness to their presence any person whose conduct they were investigating. The supreme court of this State, in the case of the State of Minnesota against Froiseth, reported in the 16th Minnesota, has declared indictments void where the person accused of crime is summoned before the grand jury. And Mr. Ingmundson, exactly as he did in 1876, so in 1877, came before the grand jury, installed himself in the witness chair, was interrogated, and that grand jury might have piled indictment after indictment upon him so deep that he could not have been seen under them, and the court would have been bound by Ingmundson's own act to set every one of them aside. So that under these circumstances, the grand jury not being able to find an indictment, *could* find nothing else but a presentment of the facts. And yet this man who goes so imperiously to the grand jury room and demands that the door be thrown open to him, when he knows that the very act will vitiate any investigation which may be had of his doings, is an impeacher against the judge of that judicial district, for executing and doing no more than was his plain duty in the premises. After the grand jury had been in session a couple of weeks without touching this subject except to get Ingmundson in there—French, the county attorney, doing nothing whatever; Ingmundson insulting the court in every direction, using ribald and jeering terms to the jurors as they pass by, the judge inquired of the foreman, why are these matters delayed? It has not taken so long in other matters, what difficulty are you having? A very proper inquiry. And then it comes out that a majority of this grand jury will not investigate this matter; that this offender is greater than the law itself—the grand jury either will not or dare not investigate. They come in for instructions. They ask what they shall do; they present, first, a paper. It is not signed; it is informal. The court sends them back. Then they bring in a report of what Ingmundson had done in regard to this town of Clayton order, and the court tells the jury if these are the facts, it is an indictable offense. They request his views, and it is his duty to express them. They retire again to consider what they

shall do, and in a few moments, so great and overpowering has been the influence of this man during that session, that the good men of that jury in sheer despair give up—come into court with the others and say they have no further business.

Now, right here comes a conflict of testimony which I do not deem very materal. I do not deem it very materal in view of these facts, whether the respondent did roundly charge them with having violated their oaths, or hypothetically say that they might have done so, for, gentlemen, there was, on that occasion, by that jury, an undoubted violation of official duty, plain, clear and palpable. The weight of testimony in this case, juror after juror, the foreman, the county attorney, those who were present, (I cannot enumerate them all) prove that Judge Page told that jury that of course he could not dictate to their consciences, but that if the facts were as they had reported them, and they had disregarded them, they had certainly violated their oaths; words he had the right to say, words which it was his duty to say. It was a false verdict; it was a false finding. When they reported to him that they had no further business, with the ink not yet dry upon that paper wherein they had presented a state of facts which required an indictment, they stood there self-convicted of gross malversation in their duties, and it was the duty of any magistrate, who did not cower, as judges are too apt to do in these days of elective judiciary, before a diseased or complaisant public sentiment, to tell that jury, in the face of the public whose rights they had failed to vindicate, just what their conduct had been. If he had done less he would have failed in his duty, and that Sherman Page ever feared to do what he deemed to be his duty, no man has had the temerity here to charge.

It is no unusual thing, gentlemen of the Senate, for judges to treat the action of juries, in such a way as this. My learned friend, and I, tried a case before Judge Nelson, of the United States court, sometime ago, and one of us got a most outrageous verdict. The court, without waiting for any motion from either party, set that verdict aside in the very presence of the jury upon his own motion, with some remarks not very complimentary. A madder jury than that you never saw. They were a great deal madder than Mr. Clough or I was about it. They were very clear for a few moments that the judge had transgressed upon their province.

I witnessed a similar spectacle some years ago between Judge Dillon and a jury.

An ancedote is told of Justice Grier of the supreme court of the United States, a fearless judge, who passed a long life in the pure and upright administration of the law. An action of ejectment for a farm had been brought in his court. Technically the plaintiff might recover, but actually his claim was a most unrighteous one. The jury brought in an unrighteous verdict, stripping the defendant of his farm; and the old judge leaning over the bench said to the clerk in the presence of the jury: "Mr. Clerk, set aside that verdict, I want this jury to understand that it takes thirteen men in this court to steal a farm." [Laughter.] I have no doubt that plaintiff thought that judge ought to be impeached.

Great, fatherly Mr. Justice Davis, now Senator Davis of Illinois, perhaps, should have been impeached for a little performance of his some years ago, in protecting a defendant who was in court without his lawyer when his case was called. The court had been telegraphed that a certain train, upon which the defendant's lawyer was, would soon

arrive. But the case was ready for trial. The other attorney was sharp and eager to overreach, and the necessity of going to trial before the train arrived was great. Justice Davis told him such was his right, of course; he could go to trial, "but," said he, "we had just such a case as this down at Springfield the other day, the other lawyers were not there, and I was obliged to try the defendant's case for him, and, do you believe it, we beat!" [Great laughter.] I have no doubt that lawyer thought that Justice Davis ought to be impeached.

Judges have a paternal care over the interests of the public and the interests of suitors, and they have a wide latitude of discretion in their courts. To those persons who are at all familiar with the outside literature of our profession, such ancedotes as I have recounted are old and stale; they show what the power of the judge is to do right outside of any precedent which you may find laid down in the books.

In ancient times, the powers of judges over juries were very extraordinary, very extreme. In regard to a verdict of a petit jury, if it was corrupt there was a judgment of attaint against every member. It is a most extraordinary judgment, as I extract it from an old law book, and it reads like an apostolic anathema:

"Quod amittant liberam legem; quod forisfaciant bona et catalla; quod terrae et tenementa in manus regis capiantur; uxores et liberi ejicientur, domus prostrentur, arbores extirpentur, prata arentur et corpora sua carceri mancipentur."

A SENATOR. Translate it.

Mr. DAVIS. *It is adjudged that they lose the protection of that law which is the right of free men and be infamous forever: that they forfeit their goods and chattels; that their lands and tenements be taken into the hands of the king; that their wives and children be thrown out of doors; that their trees be uprooted, their meadows plowed up, and their bodies cast into prison.*

Such were the denunciations of the ancient law upon jurors in such a case as this; and yet, for rebuking a jury which had been made pliant to the will of a criminal who had found his way unauthorized into their presence, for doing what this judge ought to receive the thanks of any honest community for doing, he is is brought before the high court of impeachment of the State of Minnesota, with the demand by the this man Ingmundson, that this respondent, a born citizen of this country, shall cease in all effect, to be a citizen of the State of Minnesota and lose the honors which, after years of study and toil he has so justly won, so justly worn.

Where a jury cannot find an indictment, they are authorized to find a presentment; and a presentment is a report of the facts which the jury design to submit to the court. When a presentment is found, the court can perform one of two duties upon it. It can issue its warrant upon the presentment, or the facts detailed therein can be made the foundation of a criminal complaint. The grand jury did find a presentment, although they refused to find an indictment. The facts were not in dispute. The little town of Clayton had a right to have rectified a wrong which had been perpetrated against it. The prosecuting officer was there in court; the judge turned around and told him to prepare a complaint upon the basis of that presentment and have Ingmundson arrested.

If that presentment contained a statement of facts which con-

stituted a crime, what else could he, as an honest judge, have done? What else could any upright magistrate have done? Witnesses had been there, the public saw what had been done, the jury had expressed themselves,—there the facts were in court, and the question plainly presented in the sight of the best men of that county was, whether Ingmundson or the statutes of Minnesota were strongest. He had forced two grand juries into submission, and avoided any indictment which they might find. According to the testimony of Mr. Murray, he was in the basement of Felch's hotel during this session of 1877, interviewing a grand juror, and telling him he did not want to be indicted because the jury of 1876 had not indicted him. He sat like Jezebel by the window of his office cursing and damning this judge as the petit jury filed by; he used, respecting him, the most vile, opprobrious, and indecent language He felt towards the respondent, the hatred which all men feel for those whom they have injured; because, whatever you may think of the testimony of Mr. Ingmundson in other respects, it is perfectly apparent that until Ingmundson himself made his attack upon the absent judge in the convention at the court house, there had been no ill-feeling between them, and from that time Ingmundson, who had attacked Judge Page, ceased to recognize him.

Mr. Ingmundson is brought before the court. How patiently the judge heard that case! The county attorney could not be relied upon to prosecute it. He would not supoena a wifness; he did not do one act; he never was near the grand jury room when Mr. Ingmundson was under investigation. Mr. Coleman was there, Mr. French was there. the judge heard the testimony, took it down, turned around to Mr. Ingmundson and asked him to produce his testimony and clear the matter up. No man but French testified that Mr. Ingmundson wished to waive an examination. Mr. Cameron does not so testify, Ingmundson himself does not so testify. What was waived was the putting in of testimony on their defense. The judge did what he was under no obligation to do, he asked him to put in his testimony and clear the matter up. Mr. Ingmundson was still defiant, he would not do it. The testimony was uncontradicted ; this magistrate had to commit him and fix his bail.

Much has been said here in testimony upon an assertion that the judge told Mr. Ingmundson that he had been talking against him down in Le Roy. Lafayette French testifies that he did not understand that that conversation had anything to do with fixing the bail. My theory is that Judge Page's statement is correct. The judge says that after that transaction was over, after Ingmundson had refused to put in testimony, after the judge had fixed the bail, knowing Mr. Ingmundson's disposition, he said to him, "Mr. Ingmundson, I don't want you to think that there is anything personal in this. I am but performing my duty in the matter- I am doing that which I think ought to be done"—and such talk as a considerate magistrate, after he has performed his duties, may very properly indulge in. There is some assertion that French had told the judge that Mr. Ingmundson had been talking about him down in the town of Le Roy. My theory is that this took place after the trial. Now the respondent in this case has never been accused of being a fool. He never has been accused of having lost or lacked dignity in the administration of his judicial duties. and he never could have used that language in that connection. And if Senators have the patience to investigate a subject which has become merely a matter of ab-

stract curiosity, by turning to the cross examination of Mr. Ingmundson they will see that at one period he fixes this time of talking about the judge in the town of Le Roy, after the time when the names of Quam and Hanson had been mentioned, and that these were the names with which the defendant closed his remarks, in fixing the bail. But the judge stands fairly and squarely upon the record that he did not use those names at all in that connection, but that in conversation afterwards when Mr. Ingmundson wanted to ask a question, there was some talk there between the parties. The judge was not bound to stand mute.

There is a great mass of testimony upon the subject of what took place and what was said. I have not the time, you have not the patience to go through it. The witnesses have been here. So far as numbers are concerned, of the grand jurors who were present, of the by-standers and members of the bar, the testimony decidedly preponderates in the respondent's favor

I may without any impropriety, call the atttention of senators to one fact, that Mr. Richard Jones of Rochester, who was sworn as a witness in this case, does not testify a word of Judge Page having accused the grand jury of violating their oaths. Not a word of that in Mr. Jones' testimony.

Just as as a parting illustration of the manner in which Mr. Ingmundson conducted himself during this examination, I wish to call the attention of Senators to the testimony of W. L. Corbett, a grand juror, who testified that after the jury were sworn, Mr. Ingmundson told him (the witness) that the grand jury had investigated him in 1876 and found his office all right, and that he did not care to be investigated. So we find Mr. Ingmundson approaching the grand jury, holding out this proceeding in 1876 as a reason why he should not be investigated in 1877. The truth is, gentlemen, that Mr. Ingmundson is a man who has forgotten, in the fact that he holds official station, that he holds it *under* the law. He is evidently a lawless man. He evidently is bound to have his own way. He is a man of a great deal of determination and fierceness of disposition, as was perfectly manifest upon the stand here. He cannot brook that either court or grand jury shall assert the ascendency of the law over him and any of his official matters.

The PRESIDENT. The Senate will take a recess for five minutes.

AFTER RECESS.

Mr. DAVIS. [Resuming.] I am now brought to the consideration of the eighth and ninth articles, which involve the relations of the respondent to the matters growing out of the Stimson contempt case. I am somewhat admonished, may it please the Senate, by my own feelings of fatigue, that I have overexerted myself; and if I do not deliver my views upon this particular article with a force to which I feel myself now physically inadequate, I hope my own failure will be compensated by your careful attention. I am approaching the end of this discussion. I shall close this afternoon.

The respondent is charged in the eighth article, with wrongfully issuing a warrant for the arrest of Mr. Stimson, he, the respondent, knowing that no complaint, affidavit, or legal evidence had ever been laid before him as a judge, and that he maliciously caused Mr. Stimson to be brought before him, to give bail, and finally acquitted him.

The ninth article is that the respondent in that proceeding sub-

poenaed witnesses before him for the purpose of causing them to answer questions irrelevant to that investigation.

I desire to state, in the first place, Senators, in regard to this charge, that although courts from the beginning of time have laid a strong, severe and relentless hand upon persons guilty of contempt, that, so far as I know, this is the only attempt which has ever been made to impeach any judge except Judge Peck for asserting and upholding the dignity of his court. By common consent, as well as by legal precedent, the courts of this country, for the purpose of protecting their dignity of maintaining themselves in the confidence of the people, are invested with an arbitrary, direct and absolute power, not exercised through any jury, not exercised under any indictment—exercised frequently upon view. The necessities of the situation have also caused the introduction into this very narrow and restricted field of our jurisprudence, the converse of the maxim that no person shall judge in his own behalf. A contempt of court cannot well be punished by another court; because it is necessarily a contemptuous act toward the man in whom the court is embodied, and whose duty it is at once to protect himself and make an immediate example, and hence we find that, owing to the exigencies of the situation—the same necessity which suspends all law under certain circumstances, which establishes martial law in times of war—which abrogates all law in times of fire or riot,—also confides to the judges a certain power which might be called absolute—if that word were not an offensive one to an American ear—but a power which, I will say, is exercised differently from that entrusted to them in the ordinary routine of judicial proceedings. It is also a proposition in the law of contempt, that great and extensive as it is over all the citizens of the community, it is much more rigorous and exacting over the officers of the court.

When a person takes upon himself to become the ministerial officer of a court, he impliedly agrees, indeed he expressly stipulates, to assert its dignity, to preserve its decorum, to maintain its authority. In regard to the position of subordination to the judge in which he places himself, it is particularly to be said that he submits to certain rules of discipline, not indeed regulated by the discretion of the judge, but well defined by precedents. Mr. Stimson was such an officer of this court; he was a deputy sheriff; he was the ministerial and executive officer of this court. Through him the court acted. It is through the sheriff that the power of the court is made manifest to the people, through its writs and processes. The judge, in his seclusion, has no executive power. He is simply seen and heard; he is never felt except through the sheriff who executes his decrees, and hence the importance of the rule that the executive officer of the court shall always maintain, instead of derogating from its dignity; that he, being that presence or manifestation of the court most frequently seen, and which oftenest touches the community in the daily concerns of life, shall deport himself in such a manner as to certify to that community that the authority which he executes, the magistrate under whom he sits, is worthy of the confidence of the people upon whom and among whom the court administers justice and he executes it. It is unnecessary for me to say, with any elaboration of statement, that for any person, much more for a person occupying such confidential and intimate relations to the court and to the administration of justice, to publish a libel upon the court itself, is not only a crime indictable, but a very gross and flagrant con-

tempt. A sheriff who is so audacious as to strike a magistrate down upon the bench, would meet with instantaneous punishment at the hands of the court. The sheriff who should go out doors and make a noise in such a way as to distract the orderly and decent administration of justice, would be speedily stopped in his noisy manifestations. These would be most offensive acts of contempt. But the sheriff who inoculates the public through a newspaper or through a written document intended to be published in a newspaper with the virus of contempt, which the judge, from the dignity of his position, cannot contradict or controvert—who puts in motion an agency which no human power can recall—who sends forth into the air those spoken words which can no more be taken back than I can take back what I have been saying here for the last two days—who puts into execution processes of injury irremediable by any art known to man, to be remembered forever—commits a more lasting insult to the court than he who strikes down a magistrate in his seat of judgment.

Now that Mr. Stimson had had a libel in his possession, and had been conferring with certain conspirators in regard to it, is one of the facts in the case which has not been, and will not, be contradicted. That libel is as follows:

"To S. Page, Judge of the District Court, Tenth Judicial District, Minnesota:

"SIR—Knowing you, and believing that your prejudices are stronger than your sense of honor, that your determination to rule is more ardent than your desire to do right; that you will sacrifice private character, individual interests, and the public good to gratify your malice, that you are influenced by your ungovernable passions to abuse the power with which your position invests you, to make it a means of oppression rather than of administering justice; that you have disgraced the judiciary of the State, and the voters by whose suffrages you were elected; therefore, we the undersigned citizens of Mower county, hereby request you to resign the office of Judge of the District Court, one which you hold in violation of the spirit of the constitution if not of its express terms."

It is perfectly apparent, senators, from the appearance of Mr. Stimson upon the stand, that this stilted piece of malignity never proceeded from his brain. His pen never indited it. It is the offspring of the cowardly malice of some person who knew better than to identify himself with it in public. It is a rank, overgrown and crude imitation of a certain style of calumny made memorable by Junius, and never yet re-produced with any degree of likeness, by any of his imitators.

Furthermore, this document was never intended to be presented to this Judge; it never was presented to him as a matter of fact. After it had been circulated, the conspirators concluded, in the chaste language of one of them—"that there was too much hell in it"—and they concocted another. But the one which I just now read was intended to be published through the county of Mower for the purpose of prejudicing the public mind and bringing the administration of justice into contempt.

These men who conceived this project, knew well enough that the charges which it contains are arrant falsehoods; that no private suitor, except Riley, in all the length and breadth of his district, could be produced who would say that in regard to any suit, the conduct of this respondent had been other than most magisterial and just. They knew perfectly well that such men as Richard Jones, a man of magnanimity with all his hatred—and Mr. Cameron a man of character, although the bitter enemy of the respondent, not speaking to him from a time long antedating his accession to judicial position,—would state, as

they have stated under oath here, that a more impartial man never sat upon the judgment seat. This document is an emanation from that same band of conspirators whom I purpose to dissect by and by, who form this overpowering public sentiment of which we have heard so much, and which has resolved itself into so little as far as the number of its individual members is concerned.

The time chosen for the circulation of this document was during a term of court. It was circulated, not only during a term of court, but it had been circulated before, and the question arose before the respondent, and was propounded to him by the very logic of the situation, whether he should sustain the dignity of his court against attacks of which this was a sample of many, or whether he should say, I fear that this band of malefactors is too strong for me, too strong for the law, and therefore I will sit down and become contemptible and allow my court to become contemptible in the eyes of the people among whom I administer justice. His position was one of great delicacy, it was one of exceeding importance. Does any Senator suppose that if that libel had been circulated with impunity, other disgraces would not have followed? We have seen this respondent's house surrounded with these rioters whom this Senate has judicially determined it will know nothing about; we have seen him libelled by Mollison and Davidson and Bassford, in 1873; and that libel suffered to gnaw at his reputation like a vulture, for five years, And now, at this time, after having been goaded in his judicial capacity and outraged as a private citizen, this respondent was confronted, not only with the responsibilities, but with the duties of his position, under a libel more calumnious than its predecessor.

My learned friend says that this libel was not in regard to any case then pending in court. In a certain qualified and little sense, that is true; but in a larger sense it was a libel as to every case that had ever been pending, or that was then pending, or that was to be pending in the respondent's court. It was a libel upon his administration of justice throughout,—day in and day out, term in and term out, from one year's end to the other,—it covered and touched every case; it stigmatized every moment of his judicial life. It was a libel upon the tenure by which he held his office, upon his personal character, and it declared that "in no case are you fit to sit in judgment upon your fellow men."

That this was a contempt I cite the 2nd of Bissell, page 939, paragraph 3 of section 1:

"Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person appointed or elected to perform a judicial or ministerial service—"

"Violation of duty"—what is the duty of a sheriff to a court? Is it from the moment of his installation, to slander and libel the judge? While the American people are disposed to criticise very freely the acts of executives and of legislators, there is one feeling implanted in the spirit of our people noticed by all who visit among us, and appreciated by ourselves whenever we think of it, and that is that we have great respect for our judges. With what respect a judge is treated in the community in which he lives and wherever he goes! With what respect this respondent is treated as the evidence shows, in the great counties of Houston, Fillmore and Freeborn! In all this investigation not a voice of complaint has come from either of those three counties against him; and the only words of accusation that have come, are the last and expir-

ing echos of those ancient calumnies in Mower county which haunted him before he took the seat of magistracy.

My learned friend, or some one in this proceeding, seemed to have the idea that if a man wishes to libel a judge, although he cannot safely do it by a broadside, or in a newspaper, he may sneak under the right of petition and do it there unquestioned. Now, although the right of petition is a sacred right, yet when it is abused and made a cover for a wrong, then the wrong which it is made to cover becomes much more flagrant than if it were perpetrated openly and manfully.

I cite State vs. Burnham, 9th New Hampshire, page 34:

"Indictment for publishing a false, malicious, and defamatory libel upon Lyman B. Walker, at the time solicitor for the county of Strafford, in the form of an address, or petition to the Senate and House of Representatives, containing allegations that said Walker was intemperate, incompetent to discharge the duties of his said office, had misconducted in many instances, and that his character was notoriously immoral, and praying for his removal from office."

It appeared in that case that the petition to the legislature was merely a pretense; that the real design was to enable the bad men who composed it, to peddle it around among the neighbors, and come in and plead in court that they were getting up a petition. It never was presented to the legislature, as *this* petition was never presented to this judge, and the Supreme Court of New Hampshire, delivering its opinion through Chief Justice Parker, the most eminent magistrate who ever sat upon the bench of that State, declares:

"A libel is an offense, for which the party is liable to be indicted and punished."

"If a person publish defamatory matter of another, without any lawful occasion for making a publication, and where the only end to be attained is to gratify a spirit of detraction, or to bring the subject of it into contempt and disgrace, he cannot justify or excuse the publication; and in such case an indictment may be sustained, whether the allegations are true or false.

"If the end to be attained by a publication be justifiable, as, if the object of it is the removal of an incompetent officer, or to prevent the election of an unsuitable person to office, or to give useful information to the community, or to those who have a right and ought to know, in order that they may act upon such information, the occasion is lawful; and the occasion being one in which matter of such nature may be properly published, the party making the publication may either justify or excuse it. Where, however, there is merely color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end and merely as a pretense to publish and circulate defamatory matter, he is liable in the same manner as if no such pretense existed."

No one pretends here that it ever was intended to present this petition to this judge. Not only is the fact uncontradicted that it was not so presented, but no man has come forward to swear that it ever was intended to be presented to him. It was to be one of those missiles of newspaper defamation which are never thrown and whose passive office it is to stink, which have gone so far to prejudice the case of this respondent before the people of this State.

I was surprised to hear my learned friend apply to this case a provision of the constitution of this State against search warrants and seizures.

This is the section:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person and thing to be seized."

I cannot imagine that my learned friend, with his spirit of fairness and habits of research, is ignorant of the historic origin of that clause in the federal and state constitution. It has no relation whatever, and never did have, to the procedure in cases of contempt. It has its origin in the fact that from the earliest times the state department of Great Britain, (I cannot now recall its proper name), arrogated to itself the power, not as a judicial act, but as an executive act, to issue to sheriffs general warrants to search any place and seize any person, without any specific description of the place or the person. About the middle of the last century there arose a revolt against that absolutism, headed by Pratt, afterwards Lord Camden, which steadily progressed in force and efficiency until it became a cardinal principle of English law, and has embalmed itself in the federal and all state constitutions that the executive shall not issue a general warrant of that kind, but if the judicial power issues any search and seizure warrant, it must describe the places to be searched and the persons to be seized. In that view I am amply sustained by Professor Cooley, who says on page 300 in his work on Constitutional Limitations, where he treats the matter at much greater length than I read:

"If in English History we inquire into the original occasion for these constitutional provisions, we shall probably find their origin in the abuse of executive authority, and in the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals, in order to obtain evidence of political or intended political offenses. The final overthrow of this practice is so clearly and succinctly stated in a recent work on the constitutional history of England, that we cannot refrain from copying therefrom in the note."

It relates only, as any Senator may demonstrate for himself, who examines the constitution on that subject in the light of history to search warrants for property, where seizure of the person is also included as a part of the act to be performed by the officer; and it ordains that it shall not issue upon the mere will of any officer, executive or judicial, and that it must contain a description of the persons to be seized and the places to be searched. But it applies only to these warrants, leaving the other questions of the administration of criminal jurisprudence to other provisions of the constitution and to common law safe-guards. If my learned friend's view is correct, if a magistrate cannot arraign an offender guilty of contempt without complying with that provision, then the whole chapter of contempt, as found in the statutes of Minnesota, is void; because we both agree that if the chapter authorizes anything, it does authorize the judge to proceed against the offender in some cases without any affidavit, complaint, or process whatever. If his view is correct, then, also is void the provision which authorizes any person to arrest another whom he catches in the perpetration of a crime, or who is recent and warm from its perpetration. But the fact is that these provisions were never held to apply to judicial proceedings for the enforcement of the criminal law, except incidentally and in certain cases. They were never held to apply in cases of contempt, any more than in cases of contempt the provisions of the constitution were held to apply which provides that in all cases one accused of crime is entitled to a trial by a jury of his peers. Now, we all know that a person who is accused of contempt is not entitled to a trial by jury. He is tried summarily by the magistrate. The necessities of society require that the courts shall be rendered respectable, and that at the same time the wheels of justice shall not be stopped or clogged in punishing offenses of this kind by the ordinary

formal instrumentalities of judicial procedure. And I ask Senators upon this floor not of our profession, to appeal to other Senators who are of our profession, whether it is not the law, and has not always been the law, that in regard to contempts, these ordinary constitutional maxims, as to the right of trial by jury and as to process, have no application whatever, and I shall show you by authority that they do not, for a very grave constitutional reason, as I proceed.

I shall now assume, for the purposes of this discussion, that the statutes of Minnesota, upon this subject of contempt, are valid statutes, and I shall undertake to show from a fair construction of these statutes that this act with which Stimson was charged was not an act which, under the statutes, required any complaint to be made as a condition precedent to the issuing of a warrant.

I refer to 2d Bissell, page 940, section 2, and I ask the attention of the Senate for a few moments while I give my exposition of this statute. The statute goes on and describes what acts shall constitute contempts. It provides:

"Every court of justice, and every judicial officer, has power to punish contempts, by fines or imprisonment, or by both; but when the contempt is one of those mentioned in the first or second subdivisions of the last section, it must appear that the right or remedy of a party to an action or special proceeding was defeated or prejudiced thereby, before the contempt can be punished by imprisonment, or by a fine exceeding fifty dollars.

"Sec. 3. When a contempt is committed in the immediate presence of the court, or officer, it may be punished summarily, for which an order shall be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein described. When the contempt is not committed *in the immediate view and presence of the court*, an affidavit or other evidence shall be presented to the court or officer of the facts constituting the attempt.

"Sec. 4. In cases other than those mentioned in the last section, the court or officer may either issue a warrant of arrest, to bring the person charged to answer, or without a previous arrest, may upon notice."

Now, my exposition of that statute is this: That when a contempt is committed in the immediate presence of the court, the offense may be punished summarily *without a trial;* where it is not committed in the immediate view and presence of the court, he cannot be punished unless an affidavit *or other evidence* shall be presented to the court or officer of the facts constituting the contempt; and that in all other cases, viz.: cases "not in the view or presence of the court"—I am stating the exact language of the statute—in all other cases, which other cases are cases which are not in the view and presence of the court, as *this* was not, the magistrate has the right to do, under the statute, exactly what the Judge did—either issue a warrant of arrest, to bring the person charged to answer, or without a previous arrest upon notice or order to show cause, by the sheriff, grant a warrant. The affidavit or other evidence is not a condition precedent to arrest, but as condition precedent to punishment. Such is the statute of this State which the legislature has laid down for the guidance of this magistrate, and it told him plainly and distinctly that when the contempt is not committed in his immediate view or presence, he may either issuea warrant in the first instance, or he may, after an order to show cause, grant a warrant. Such is the statute; such is a fair construction of it, easily arrived at; laid down for the judges of the State, to be a shield to protect themselves and their courts, and not a snare in their paths.

This is the construction which this respondent testifies he put upon it after anxious and careful deliberation:

Section 11 provides:

"That when the person arrested has been brought up or appeared, the court or officer shall proceed to investigate the charge, by examining him and the witnesses for and against him."

After being brought before the court, the court is to proceed to investigate the charges.

Now, gentlemen of the Senate, here was a contempt not committed in the immediate view and presence of the court. The statute presented to this court two lines of action, either of which might be adopted. He could either issue a warrant to have Stimson brought up without a complaint, or he could issue an order to show cause and a warrant after citation. He adopted the first course, and Mr. Stimson appeared and went to trial without objection or exception. Mr. Cameron appeared for Stimson and asked the court if a complaint had been filed. The respondent informed him that he did not deem it necessary. Mr. Stimson made no objection, Mr. Cameron made no objection, took no exception; did not call the attention of the judge to the fact which is now adduced against him as impeachable error, but went on with the hearing, submitted to adjournments, gave bail and accepted the discharge.

As an illustration of the power of courts in cases of this kind, I desire to cite the 3rd volume of Minnesota Reports, page 274, to show with what tolerance the Supreme Court of this State has regarded the action of a judge who erroneously took extreme measures in a case where he deemed his court affronted by the action of an attorney:

"It seems from the statute that this court is to review the decisions of the district courts made in such matters as the one at bar, and it necessarily follows that our investigation must be confined to the record alone, which is sent up from the court below. It appears from the record herein, that the only act complained of, or charged by the judge to have been committed by the attorney, was the reading of an affidavit, and moving thereon for a change of venue. The affidavit was made under the act of 1858, which allows a change of venue when either party shall fear that he will not receive a fair trial on account that the judge is interested or prejudiced therein, &c. The affidavit used in this case was couched in the exact language of the statute, alleging that the judge was prejudiced, without stating any facts upon which the affiant based his charge of prejudice. We fully agree with the view taken by the court that the affidavit was insufficient to procure a change of venue in the case in which it was used, but should have set out the facts and circumstances upon which the prejudice was alleged to exist, and to have arisen from. Yet it does not by any means follow that the reading such an affidavit is *per se* a contempt of the court to which it is presented. It may be done innocently and in full faith that it was simply necessary to use the language of the act in making the application. While we are clear that the presentation of the affidavit is not *per se* a contempt, we can readily see how an act innocent in itself, may become a violation of the dignity and decorum of the court, by the manner in which it is done, or the motive which actuated the mover, and had any such thing been charged, we would have regarded the matter in a different light from the one we have been compelled to accept.

"The high estimation in which this court holds the judge who made this decision, as well for his legal attainments, as for his spotless honor, his integrity, and his universally conceded amiability of disposition and courtesy of deportment, we think there must have been some fact accompanying the reading of this affidavit, or circumstance attending it, which does not appear upon the record, which formed the gist of the contempt, although it has been attributed in the record to the simple

reading of the paper. We are strengthened in this view by the known ability of the attorney who has been suspended, who is not to be presumed to have ignorantly framed such a paper. Still, as we are confined to the record, such matters cannot one way or another influence our decision.

"While we will go as far as we can, to support that proper respect which is due the administration of justice in the courts, our first duty to entitle ourselves to receive that respect, is an adherence to well settled rules of decision.

"The suspension is vacated—not being sustained by the record."

Now, it happens that the judge who suspended that attorney for reading an affidavit to him for a change of venue, was no other than as cautious, temperate, upright and mild a man as judge, now Senator McMillan—a man who wrongfully, intentionally never harmed any person. He was compelled to choose what line of conduct he should pursue in regard to an attorney who read before him an affidavit for a change of venue, couched in the language of the statute. The Supreme Court held that he erred in the reason and the manner of his act, and yet no person ever thought of impeaching him.

I desire to cite some other authorities upon this point. First, the 16 of Arkansas, page 384. The substance of the decisions which I am about to cite is this: That the legislature of a State cannot by statute enact as to courts of justice, what acts and what acts only, shall constitute contempt. In other words, that the judiciary is an independent department of the government; that among its inherent powers it has the right of self-preservation, and that if a legislature is entitled to enact and limit the powers of the courts in regard to what shall or shall not be contempt in one respect it has in all, and can strike if it pleases decisive and overwhelming blows at the very existence of the courts. In all the cases which I am about to cite, parties have committed contempts which were not within the inhibition of the statute law, and the question has been fairly raised whether the statute can be a limitation upon the courts; and it has been fairly and fully decided that it cannot be for the reason that the legislative and judicial functions of the government are independent of each other, and that the legislature, by statute, has no more authority to say to the courts in what manner they shall preserve their existence, than the courts have the right by rule to say to the legislature in what manner it shall perpetuate itself. 16th Arkansas, page 384 reads:

"This court has the constitutional power to punish as for contempt, for the publication of a libel, made during a term of the court in reference to a case then decided, imputing to the court officially, *bribery* in making the decision—such power being inherent in courts of justice, springing into existence upon their creation as a necessary incident to the exercise of the powers conferred upon them.

"The legislature may regulate the exercise of, but cannot abridge the express, or necessarily implied powers granted to this court by the constitution.

"The statute, (*Digest, chap.* 36, *sec.* 1) so far as it sanctions the power of the courts to punish, as contempts, the acts therein enumerated, is merely declaratory of what the law was before its passage; the prohibitory clause is entitled to respect, as an opinion of the legislature, but is not binding on the courts."

"The publication thus having been brought directly to the notice of the court, by a member of the bar, expressing that interest in the preservation of public respect, for the decisions of a tribunal of final resort, which the worthier members of the profession, as well as all orderly and law abiding citizens, usually manifest, the court concluded that it was due to the honor and dignity of the State, and its own usefulness, not to pass the matter by without some official action, but to institute an enquiry whether its constitutional privileges had not been invaded by the publication aforesaid. Accordingly an order was made, reciting the publication, and directing that the defendant be summoned to appear before the court, at its present term, to show cause why proceedings should not be had against him, as for criminal con-

tempt. No attachment, but a mere summons, was issued in the outset, bacause the constitutional power of this court, to punish as for contempt in such cases, had not been determined and was supposed to be not altogether free of doubt.

"The language of the article would seem to indicate, by implication, that the court was induced by *bribery*, to make the decision referred to. It is not an attack upon the private character or conduct of the members of the court, as men, but seems to be an imputation against the purity of their motives while acting officially, as a court, in a specified case. Had the publication referred to them as individuals, or been confined to a legitimate discussion of the correctness of their decision, in that or any other case, no notice would have been taken of it officially,

"The statute on the subject of contempts, declares that Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts and no others:

"*First.* Disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. *Second.* Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings. *Third.*—Willful disobedience of any process or order lawfully issued, or made by it. *Fourth.* Resistance willfully offered, by any person, to the lawful order or process of the court. *Fifth.* The contumacious and unlawful refusal of any person to be sworn as a witness, and when so sworn, the like refusal to answer any legal and proper interrogatory."

"It is conceded that the act charged against the defendant in this case, is not embraced within either clause of this statute.

"It was argued by the counsel for the defendant that the court must look to the statute for its power to punish contempts, and not to any supposed inherent power of its own, springing from its constitutional organization. That it is controlled by the statute, and cannot go beyond its provisions In other words, that the will of a coordinate department of the government is to be the measure of its power, in the matter of contempts, and not the organic law, which carves out the land marks of the essential powers to be exercised by each of the several departments of the government.

"In response to this position, we say, in the language of *Mr. Justice* SCOTT in *Neil vs. The State*, 4 *Eng.*, 263, that: 'The right to punish for contempt, in a summary manner, has been long admitted as *inherent in all courts of justice*, and in legislative assemblies, founded upon great principles, which are coeval, and must be consistent with the administration of justice in every county, the power of self-protection. And it is where this right has been claimed to a greater extent than this, and the foundation sought to be laid for extensive classes of contempts not legitimately and necessarily sustained by these great principles, that it had been contested. It is a branch of the common law, brought from the mother country and *sanctioned by our constitution*. The discretion involved in the power is necessarily, in a great measure, arbitrary and undefinable, and yet, the experience of ages has demonstrated that it is compatible with civil liberty, and auxiliary to the purest ends of justice, and to a proper exercise of the legislative functions, especially when these functions are exerted by a legislative assembly.'

"And in the language of Chief Justice WATKINS in *Costart vs. The State*, 14 *Ark.*, Rep 541:—'The power of punishing summarily and upon its own motion, contempts to its dignity and lawful authority, is one inherent in every court of judicature. The offense is against the court itself, and if the tribunal have no power to punish in such case, in order to protect itself against insult, it becomes contemptible and powerless, also, in fulfillment of its important and responsible duties for the public good. It is no argument that the power is arbitrary, though indeed settled by precedents, or limited by them, as rules for the future guidance of the courts. While experience proves that the discretion, however arbitrary, has never been liable to any serious abuse, it would be a sufficient answer to say, that the power is a necessary one, and must be lodged somewhere; and it is properly confided to the tribunal against whose *authority* or *dignity* the offense is committed.'

"Had the legislature never passed the act above quoted, or any act at all on the subject, could it be doubted that this court would possess the constitutional power to preserve order and decorum, enforce obedience to its powers, and maintain respect for its judgments, orders and decrees, and as a necessary consequence, punish for contempts against its authority and dignity, without which it could never accomplish the useful purposes for which it was established by the framers of the constitution?

"If the General Assembly were to repeal the act, would any lawyer seriously contend that the courts were thereby deprived of the power to punish contempts? One of the counsel for the defendant frankly admitted that they would not, and the admission concedes the position to be here, that the power of this court to punish contempts, is inherent, springing into life along with, and as an incident to, those great judicial powers carved out for its exercise by the constitution.

"The legislature may regulate the exercise of, but cannot abridge the express or necessarily implied powers, granted to this court by the constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government; and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and State institutions, and a favorite theory in the government of the American people.

"As far as the act in question goes, in sanctioning the power of the courts to punish, as contempts, the "*acts*" therein enumerated, it is merely declaratory of what the law was before its passage. The *prohibitory* feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature, that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such it is entitled to great respect, but to say that it is absolutely binding upon the courts, would be to concede tha tthe courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the general assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and deprive them of power to punish any contempt.

"Mr. Blackstone (book 4, page 245) says: 'The contempts that are thus punished, are either *direct*, which openly insults or resists the powers of the courts, or the persons of the judges who preside there; or else *consequential*, which (without such gross insolence, or direct opposition) plainly tend to create an universal disregard of their authority.

"Some of these contempts may arise in the face of the court, as by rude and contemptuous behavior; by obstinacy, perverseness or prevarication; by breach of the peace, or any wilful disturbance whatever; others, in the absence of the party, as by disobeying or treating with disrespect the King's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion or injustice; by speaking *or writing contemptuously of the court or judges, acting in their judicial capacity;* by publishing false accounts (or even true ones, without proper permission) of causes then depending in judgment; and by anything in short, that *demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority* (so necessary for the good order of the kingdom) is entirely lost among the people.' "

The court considered this case, as I said before, upon the proposition that the judicial department of the government is independent and distinct. Because it is a department of the government, it has the power to preserve its existence; it has the right of self-preservation. It has that right to the full extent necessary for that object. The great weapon offensive and defensive of the court for that purpose is its power to punish for contempt.

By the constitution of this State the legislature is prohibited from impairing or interfering with the powers of either department. If the legislature can say what acts shall and what acts shall not constitute a contempt, it is perfectly apparent that it can annihilate the judiciary.

It can by insidious legislation, lopping off a prerogative here, abolishing a power there, make the courts its abject tools and slaves. I believe this decision to be a sound, as it certainly is a very logical piece of reasoning. I think it is based upon principles of which every man will recognize the force upon a moment's reflection.

In 3d New Jersey, page 403, is a general decision in point, but not sufficiently important to warrant more than citation. The question

was considered in 63 North Carolina Reports, page 397. I wish to read this for its special bearing upon the objection that there was no affidavit:

"The other objection, that the rule was made without affidavit, or other legal proof of the facts upon which it is based is clearly untenable. It is admitted that where the proof is furnished by the senses of the judges, it may be acted on. Here there was such proof. We know by our senses that a newspaper containing the paper referred to, purporting to be signed by Mr. Moore and others, had been extensively circulated and was then in the court room; and the want of a disavowal on his part that he had signed the paper, or consented to its publication, furnished *prima facie* proof, not for *final* action, but all sufficient as a ground for the rule. On his application he was at liberty to deny the fact without an oath, and the denial, like the plea of 'not guilty,' would simply have put the fact in issue, and he would have been entitled to have the rule discharged, unless the fact was proved by *direct testimony*. Instead of that he *admits* the fact. So this is no legitimate ground of complaint. In short, all the preliminary objections were waived and the reference to them can answer no useful purpose."

That was a case where certain officers of court proceeded against the Supreme Court of North Carolina, very much in the same way that the respondent was informed that Stimson was proceeding against him. They published a newspaper article, signed by the attorneys, reflecting upon the conduct of the court. The judges were informed that parties saw it in circulation if they did not see it in the hands of these men. They brought the offenders up, just as the respondent brought Stimson up, without a warrant. It was objected that there should have been a preliminary affidavit. The court announced that the statute did not apply to a fact so notorious and patent as that contempt was. And, furthermore, that if it did apply, it was waived by the party appearing in court, not objecting to the illegal defect, going to trial, putting in no plea and admitting the fact.

I cite also the 3d of McLean and the 7th of Cranch upon that subject.

But it may be urged that if the statute in this case does not solely govern, the power is illimitable. Not at all. It is a power well-settled, and definitely limited at common law. I appeal to the experience of every one of you, how rarely you have heard of courts being called into question for any unlawful exercise of their powers in matters of contempt. There is such a profound respect for judges, such a desire on the part of the entire community that they shall be permitted to exercise their judicial functions in dignity, peace and respect, that the community sustains, respects and admires a judge who has the courage to maintain the dignity of his tribunal.

Nearly all of these articles of impeachment are so trivial as to seem, at first view, scarcely to warrant the serious discussion they have received. But as we have proceeded in our duties we have become pursuaded that the danger in the charges is not what they allege, but lies in the principle upon which they are based; that the danger is not to this respondent but to the public itself—for the spirit which inspires them all is the spirit of revolt against constituted authority. It has appeared in that most dangerous form of an attack upon the judicial department of the State, upon its integrity, upon its independence. There is, after all, a wise conservatism in the people, and while they make and unmake with a breath the executive and the legislature, they instinctively re-

frain from subjecting the judiciary to the attacks of prejudice or disaffection. They do not require a judge to be popular. They require him to be honest and as firm as the system of law which he administers. They recognize the fact that there must exist in all forms of government an ultimate principle of absolutism and permanency, an impregnable barrier against the fitful mutations of the hour, an inexorable expounder of those laws of self preservation which precede the formation of states, which preserve property, which secure liberty, which bear with unintermittent force upon the concerns of society with all the power of gravitation. In our system the judiciary is this principle. It is this cohesive principle of our system which is this day attacked, in the person of a judge whose integrity has not been questioned even by his enemies. Our entire policy is thus assailed at its strongest point. If you destroy that which is most permanent, the efficacy and independence of the rest of the structure will fall in ruin without further attack, merely as the logical consequence of such a process. Is it not well for us to pause? Rude usurpers, aggressive kings have paused at this decisive point. Shall we be less wise than they?

It is the prerogative of Shakspeare that whatever he stoops to touch becomes authoritative in quotation. He is the magistrate of both imagination and reason. There is scarcely a topic in the universe of human thought which that marvelous mind has not compassed in its cometary sweep. He has walked in the abyss of human nature and seen the thousand fearful wrecks, the unvalued jewels, and all the lovely and the dreadful secrets which lie scattered in the bottom of that illimitable sea. The maxims of policy, the rules of war, the subtleties of love, the patient forecast of hate, the pangs of remorse, the ready wages which jealousy always pays to the miserable being it employs—all things over which the mind or the nature of man has jurisdiction, receive from him their definition and expression, excepting those awful topics of the hereafter, which, of all the children of men he, the greatest, has been too reverent to touch. He knew of the circulation of the blood. In instance after instance he has not only used the terms of the law with the strictest precision, but has stated its abstrusest principles with entire correctness. So wonderfully true is this assertion of his despotic empire, that conjecture in its baffled extremity, has declared that the hidden hemisphere of this world of thought, must be Francis Bacon, who, in his youth "took all knowledge for his province," as if it were his heritage. Shakspeare has created an immaterial universe which will, like him, survive the bands of Orion and Arcturus and his sons.

He peculiarly knew the limitations of power and authority, and enforced them by many constitutional illustrations. And in that respect he has presented no finer exposition than that one where he magnifies the sacredness of judicial authority in the scene between Henry V., lately become King, and the Chief Justice, who had formerly committed him for contempt.

The old magistrate stood trembling before the young King, whose life had given no warrant of wisdom or integrity; for he had in his reckless days been the boon companion of Falstaff and his disreputable associates.

Referring to his humiliation by the judge, the King asked,

"Can this be washed in Lethe and forgotten?"

The judge interposed this memorable defense:

> "I then did use the person of your father;
> The image of his power lay then in me;
> And, in the administration of his law,
> While I was busy for the commonwealth,
> Your highness pleased to forget my place,
> The majesty and power of law and justice,
> The image of the king whom I presented,
> And struck me in my very seat of judgment,
> Whereon, as an offender to your father,
> I gave bold way to my authority,
> And did commit you."

It prevailed, for the King replied:

> "You are right, justice, and you weigh this well;
> Therefore still bear the balance and the sword;
> And I do wish your honors may increase,
> Till I do live to see a son of mine
> Offend you, and obey you, as I did.
> So shall I leave to speak my father's words—
> Happy am I, that have a man so bold,
> That dares do justice on my proper son:
> And not less happy, having such a son,
> That would deliver up his greatness so
> Into the hands of Justice You did commit me
> For which I do commit into your hands
> The unstained sword that you have used to bear·
> With this remembrance: That you use the same
> With the like bold, just and impartial spirit
> As you have done 'gainst me."

Of all the illustrations which Shakespeare has given to authority, in its highest and best estate, I know of none finer than this. Not Richard sitting upon the ground and telling sad stories of the death of kings when all his fleeting glory seemed but a pompous shadow; not Prospero, the ruler of two realms, who by virtue of his sway over his immaterial kingdom looked upon the great globe itself as a phantasma merely, which would vanish with all its cloud-capped towers, and gorgeous palaces, and solemn temples; not Lear invoking from the elements themselves the abdicated regalities of his sovereignty, seem to me so imposing as this semi-barbarous youth respecting the majesty of the law in the person of its faithful servant.

You can bow before this mob. You can lead an attack which will be repeated upon every department of our government by all the blatant and riotous law-breakers of time to come, who may rise up in rebellion against statutes enacted for their condemnation, against magistrates who condemn them. Or you can can make enduring the endangered functions of the State. You can quell forever that arrogant spirit of insubordination, before which no judge is sacred, no constitutional provisions are obstacles. Say to this respondent—

> "Therefore still bear the balance and the sword;
> * * * * * * * *
> The unstained sword which you have used to bear
> With this remembrance: That you use the same
> With the like bold, just and impartial spirit
> As you have done."

and this proceeding will live memorable in our history as one of its preservative events.

Now, gentlemen, I have gone through these articles. I am loth to leave them even now, exhausted as I am, and late as the hour grows to be. Standing here and looking back over the path which I have trodden so wearily to me, and I know to you, I can see how a better man and a more attentive understanding might have grasped this case more vigorously than I have done. I have endeavored fairly, honestly, and conscientiously, with no legerdemain or jugglery of intellect, or sophistication of your understandings, to state the law as I honestly believe it to be, to state these facts, so far as my weak recollection serves me. If I have erred you will correct me. I besought your correction as to facts early in my argument. No Senator made any, and I presume I have been in the main correct. But there is one thing of which I do wish to treat before I take a last farewell of this case. Whence comes this prosecution? Are we not now in this stage of the proceedings, after we have torn to shreds calumny after calumny, entitled to ask the Senate of Minnesota and the public of this State, for whom these proceedings are instituted, and for whom this expense is made, whence comes this impeachment which has swallowed up so much of the public money to so little purpose? I have now ceased to speak for the acquittal of Sherman Page; I speak now for his vindication. I propose to bring into court the men not now in court. I cite before this bar Ingmundson, French, Cameron, Crandall, and the rest. I assert, and I propose to demonstrate within the short time which I have imposed upon myself, that this is a conspiracy to ruin and break down the character of a just and worthy man. I do not say that judge Page is the most lovable man in the world. He is a man of angular disposition of character. He never mixes much with men; he is a man of the closet and of books. That he is a man of strict integrity it is unnecessary for me to say; that, no man has come here to doubt or to dispute. Then whence, I say, comes this little angry cloud so full of thunder to blast him?

Permit me to go back over the testimony for a moment and show from the evidence in this case, whence it comes. It has transpired in the testimony, that before Judge Page went upon the bench, a man named Smith was treasurer of that county. It has come out in these proceedings that the respondent, while at the bar, in the name of the county, instituted a suit against him and his sureties for defalcation. The records of the supreme court have been referred to, and it appeared in evidence that the county in that suit, prosecuted by this respondent as attorney, recovered a judgment of $17,000 for moneys embezzled from the county treasury of Mower by this treasurer Smith—for whom, as Mr. Gilman pathetically remarked, "the silent grave has yawned." That case came up on a motion for a new trial before Judge Waite, and it was denied. It was removed to the supreme court of this State; it was reversed upon the mere technical fact that certain written memoranda were not evidence—not upon the merits; was sent back for a new trial, and during the time that these conspirators have held this man crucified that suit has aborted, under the administration of French. Mr. Cameron testifies "that the respondent has raised the devil ever since he came to Austin," to use his language. But when Mr. Cameron is interrogated as to what particular respects the devil was raised by this respondent, it is found that he attacked an old, rotten and corrupt ring which has existed in that county from the time they stole the records

from Frankford; from the time one man burned portions of those records in the stove and afterwards fled, a counterfeiter.

It appears that the respondent attacked one ot Mr. Cameron's friends, and that man resigned under charges preferred to the Governor. It appears that the respondent, leading an honest public sentiment then attacked for official malversation, another citizen of Austin, a county commissioner, and he resigned and got out of the way. To bring a suit against a defaulting treasurer in that county, is a crime, worthy of impeachment; and when the sureties of Smith saw that they might be compelled to disgorge the amount which the attorney general of this State felt warranted to call upon them for, they immediately arrayed themselves in opposition to the respondent. In the meantime he became judge. That he is an active, vigorous man, who hates a thief, and does not fear him, sufficiently appears. He never has been arraigned for tampering with the money of the public; so far as his conduct has passed under your scrutiny, he has always been on the side of right, and the only criticism that can be made is as to his manner of performance of his duty. In the meantime, as I have said, he became judge. He is placed in a status of legal monasticism. He cannot retaliate, he cannot keep up the fight. The suit which he has brought as an attorney he cannot try; it goes off into another district; it comes before my honored friend Judge Waite in an incidental way. He is placed with his hands tied by the proprieties of his position. He can no more strike back than a penitent can strike back when his hands are raised in prayer. He is in a sacred place and these men keep up that unholy war against him. I do not speak outside the record which they have given. It is so. He no sooner takes his seat upon the bench than this man Mollison, under the instruction of Davidson and Bassford and somebody else, accuse him of judicial corruption, in deciding a case in favor of the Southern Minnesota Railroad Company, and charged that he had given away $50,000 of the money of the county of Mower. Shortly afterwards, Mr. Ingmundson, Judge Page, it appearing, not having been in a convention or caucus since he was judge, goes into a county convention after he had received a nomination, and denounces the respondent to an excited people. In the meantime came up the whiskey riots at Austin, threatening the public peace, and the sheriff of that county and the others jeered at the man who by the laws of this State is the prime conservator of the peace over four counties. He left his home to attend to his judicial duties, and when the lion had gone the jackalls all came out and bayed around his house, calling forth that order to Baird that he should protect his property, his family, and the peace of the other citizens. In the meantime the voice of calumny, printed and written, is continually lifted up against him. The most outrageous charges are made, to go forth upon the wings of the wind. I have known Sherman Page for years, gentlemen. I know him well, probably better than any other man upon this floor; and I must confess that those charges were repeated with such an acerbity, presistence and reiteration, that I was afraid my friend might have gone astray. I knew he would not, unless goaded beyond the power of human endurance to resist. I am rejoiced to find that my own fears were untrue. He resorted to those remedies which the law gives every man. He invoked the process of the court. It only had the effect of widening the confederation against him, and of bringing to bear upon the legislature of this State those powers which were thought necessary for his final and effectual ruin.

What prejudices have not been adduced in his case? What miserable prejudice of nationality or caste or feeling or party has not been appealed to here? It has been particularly attempted to be made to appear that a man by the name of Riley was called an "ignorant Irishman;' that is for the benefit of somebody. Ingmundson has been paraded here as a martyr; that is for the benefit of somebody. It seems that Judge Page is a temperance man; that is lugged in for the benefit of somebody. Every prejudice that can move minds, however unworthy, has been industriously plied in his case. I know, and you know, senators, that some of you have been approached in a way in which no judge should be approached. You have not been able to shut your ears to this persistent clamor, that this man shall be wrecked and ruined forever in this world, and that the acts, the hopes, the ambitions of a life-time shall be made ashes and dust. The arguments of counsel have been belittled in advance; the character of men has been wantonly run down and crushed. It is assumed that this man must be guilty, because some one has accused him, and yet when you come to sum it up, who are the accusers?—Mollison, the libeler; Riley, the man who attempted that steal upon the treasury, subpoenaing ninety witnesses in a case which the defendants themselves said would never be tried. Mandeville, angry because of a decision made against him in a matter of some six or fifteen dollars, I forget which ; Stimson, a deputy sheriff caught in peculation ; Ingmundson, angry because a grand jury had the audacity to even inquire how he managed his office ; French, a man utterly unfit to be entrusted with any public duties in his profession, as his own testimony and that of Mr. Kinsman demonstrated. This man, who, before Judge Page, when Stimson was being examined in a contempt, volunteered those statements about a newspaper published in this city—volunteered the statements, and now says that the court extorted them from him !—Where is the man of substance in the county of Mower who represents this overpowering sentiment, as it is called? French, sitting here by the ear of counsel, like the toad "squat by the ear of Eve," (Great laughter.) Cameron, with his forehead of brass and unflinching eye; Harwood, flitting in and out of this hall like a disgusted ghost, fearing to be sworn(renewed laughter;) Ingmundson, with bis baleful glare; McIntyre, with his manly hate! Pooling in money! Pooling in money! One hundred dollars! Fifty dollars! They have levied assessments on each other for the purpose of private prosecution, through public processes. And the unparalleled spectacle has been presented to this court, never before known, of private prosecutors coming in with private counsel, paid by private means, and taking entire charge of a public case! Instances have occurred where the State has had managers with eminent counsel; but I say that this is an instance of unapproached and unprecedented infamy, where a private mob has been allowed to invade a proceeding like this, and conduct and direct the prosecution. This conspiracy finds its last expression here in that act. Why, what a community the town of Austin must be! What a community it has been from the beginning! When did you ever hear in this State since any of you have lived here, that the devil himself was not roaming up and down that town, "seeking whom he might devour?" (Laughter.) It has always been a contentious and troublesome place, full of turmoil. That community takes sides on every question. They are rancorous, senseless, hateful. Look at these witnesses that come here. Man after man—Hall, French and the rest, —one filling out where the other fails. If one of them goes out to get

his meal, the other takes his place. The everlasting and endless chain of misrepresentation runs smoothly on. It is a bad generation:

"They are all gone out of the way; they are together become unprofitable, there is none that doeth good. no, not one.
"Their throat is an open sepulcher; with their tongues they have used deceit; the poison of asps is under their lips;
"Whose mouth is full of cursing and bitterness;
"Their feet are swift to shed blood;
"Destruction and misery are in their way;
"And the way of peace they have not known;
"There is no fear of God before their eyes."

Gentlemen, from my earliest days I was brought up, as the respondent doubtless was from his early youth, to look forward to that time when I should enjoy the confidence and esteem of my fellow men in official station. It is the natural dream and aspiration of every American citizen, whether by birth or adoption.

Here we stand, all of us, some to the manner born, and some of you from the lands which you never more shall see. You may talk about the enjoyment of life, of riches, of social or domestic intercourse, of freedom of person—all of these yield to the wide unbounded and beautiful prospect which is spread out before every man worthy of it, of the esteem of his fellow citizens, and promotion at their hands. It is what we all live for, disguise it as you may; each of you occupies a seat here by virtue of some laudable ambition in that respect. I think I might be resigned to any one who would take my life—I certainly might be resigned to any one who might take my property, but if any man proposed to close before me forever the way to the honor and respect of my fellow citizens, so help me God, I would rather die. That is what is proposed to this man. I make no plea here for mercy. He would rebuke me if I did. He feels that he has done right in this matter. I have read somewhere, or heard some man say, that if you remove him from office you need not necessarily say that he shall be forever disqualified from holding office of trust or profit under the laws of this State. That is true—in a pettifogging sense that is true. But if you remove the respondent from office, because you judicially say, by a two-thirds vote, that he is a felon, does not the consequence follow from which the author of that evasion fears you will shrink? Indeed it does.

Is he a felon? Does he deserve, if he had been a common criminal, to wear manacles, and to be incarcerated for years? I say the same result will follow your simple vote that he be impeached and removed from his present office. There is no mountain top so high, no vale so secluded, no ocean's deep so unwhitened by a sail, that wherever he may go on this earth, the disqualifying and attainting consequence of conviction will not follow him.

Gentlemen, you yourselves are on trial here, or will be by posterity, as judges, as this man is on trial as a judge. This record will survive in imperishable print, to be read by your children and your children's children. You yourself, like Lord Bacon, must appeal to the foreign nations and the next ages for your vindication in this respect. You yourselves will be on trial long after you have passed away, and all concern in you and recollection of you will be lost, except as preserved in

precedent you are about to make. Place yourselves in the position of those who are to come after you. Endeavor, if you can, to read this record in the clear, calm light of after times. So reading it, can each of you, any of you, under the obligation of your oaths as judges sitting under the law of God, and accountable to God Himself, say that this respondent shall be deprived of the office which he has adorned and be fixed in the death in life of civic annihilation?

I thank you for your kind attention, and rely with most implicit faith upon your justice. [Great applause.]

On motion, the Senate adjourned until 10 A. M. to morrow morning.

Attest:

CHAS. W. JOHNSON,
Secretary of the Senate and Clerk of the Court of Impeachment.