

# Chapter LXVII.

## CONDUCT OF IMPEACHMENT TRIALS.<sup>1</sup>

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1. Appearance of respondent. Sections 2116–2118.
  2. Form of summons. Section 2119.<sup>2</sup>
  3. Answer of respondent, replication, etc. Sections 2120–2125.<sup>3</sup>
  4. Presentation of articles. Sections 2126, 2127.<sup>4</sup>
  5. Return on summons. Sections 2128, 2129.
  6. Counsel and motions. Sections 2130, 2131.
  7. Opening and final arguments. Sections 2132–2143.<sup>5</sup>
  8. Conduct and privilege of managers and counsel. Sections 2141–2154.
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**2116. Under the parliamentary law, if the party impeached at the bar of the Lords do not appear, proclamations are issued giving him a day to appear.**

**Provisions for rectification of an error in the process to secure attendance of respondent impeached by the Commons.**

**The party impeached at the bar of the Lords not appearing, his goods may be arrested and they may proceed.**

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<sup>1</sup> Other procedure illustrated by the conduct of the several trials relates to the following subjects:

Delivery of the impeachment at the bar of the Senate. Sections 2296, 2320, 2343, 2367, 2385, 2412, 2413, 2445, 2446, 2505 of this volume.

Drawing of articles. Sections 2297, 2299, 2300, 2323, 2343, 2344, 2368, 2387, 2412, 2415, 2416, 2418, 2444, 2448, 2472, 2506, 2514.

Form of articles in the following cases: Blount's (see. 2302), Pickering's (see. 2328), Chase's (sec. 2346), Peck's (see. 2370), Humphrey's (sec. 2390), Johnson's (sec. 2420), Belknap's (sec. 2449), Swayne (sec. 2476).

Organization for trial. Section 2328, 2349.

As to postponement of trial. Sections 2044, 2353, 2425, 2426, 2430, 2456.

Questions by Senators during testimony. Sections 2176–2183.

<sup>2</sup> Issuance of writ of summons. Sections 2304, 2307, 2322, 2329, 2347, 2391, 2423, 2451, 2479.

<sup>3</sup> Appearance and answer. Sections 2307–2310, 2332, 2333, 2349, 2351, 2371, 2374, 2392, 2393, 2424, 2428, 2431, 2452, 2453, 2461, 2480, 2481.

The replication. Sections 2311, 2352, 2375, 2431, 2432, 2454, 2482.

Managers file a brief on respondent's plea to jurisdiction. Section 2015.

<sup>4</sup> Presentation of articles in the Senate. Sections 2301, 2325, 2328, 2346, 2370, 2390, 2420, 2449, 2473, 2476.

As to presentation of before the Chief Justice takes his seat as presiding officer. Section 2057.

Precedent in Blount's case. Section 2295.

<sup>5</sup> See also Sections 2312, 2326, 2355, 2378, 2433, 2434, 2456, 2458, 2464, 2465, 2484.

As to admission of evidence during final arguments. Section 2166.

In Chapter LIII of Jefferson's Manual, the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments:

Process. If the party do not appear, proclamations are to be issued giving him a day to appear. On their return they are strictly examined. If any error be found in them, anew proclamation issues, giving a short day. If he appear not, his goods may be arrested, and they may proceed. (Seld.Jud., 98, 99.)

**2117. In the English usage the articles of impeachment are substituted for an indictment and distinguished from it by less particularity of specification.**—In Chapter LIII of Jefferson's Manual the following is given in the sketch of some of the principles and practices of England" on the subject of impeachments:

Articles. The accusation (articles) of the Commons is substituted in place of an indictment. Thus, by the usage of Parliament, in impeachment for writing or speaking, the particular words need not be specified. (Sach. Tr., 325; 2 Wood., 602, 605; Lords' Journ., 3 June, 1701; 1 Wms., 616.)

**2118. Articles of impeachment being presented against a Senator, he was sequestered from his seat and was ordered to and did recognize for his appearance.**

**Form of recognizance given by the respondent in an impeachment case for his appearance.**

**The Senate Journal included in full the bond given by a respondent for his appearance to answer articles of impeachment.**

On July 7, 1797,<sup>1</sup> when articles of impeachment from the House of Representatives were exhibited in the Senate against William Blount, a Senator, it was ordered that he be sequestered from his seat and enter into recognizance for his appearance to answer said impeachment.

Mr. Blount thereupon named his sureties, who were satisfactory to the Senate, and the recognizance was approved by the Senate and executed in its presence as follows:

*Be it remembered*, That on the 7th day of July, in the year of our Lord 1797, personally appeared before the President pro tempore and Senate of the United States William Blount, esq., Senator of the State of Tennessee; Thomas Blount, esq., Member of the House of Representatives of the United States from the State of North Carolina, and Pierce Butler, esq., of South Carolina, who severally acknowledged themselves to owe to the United States of America the following sums, that is to say: The said William Blount the sum of \$20,000, and the said Thomas Blount and Pierce Butler each the sum of \$15,000, to be levied on their respective goods and chattels, lands, and tenements, on the condition following, that is to say:

The condition of the foregoing recognizance is such that if the said William Blount shall appear before the Senate of the United States to answer to certain charges of impeachment to be exhibited against him by the House of Representatives of the United States, and not depart therefrom without leave, that then the above recognizance shall cease to exist, otherwise be and remain in full force and virtue.

Sealed and delivered in Senate of the United States this 7th day of July, 1797.

WILLIAM BLOUNT. [L. S.]

THOMAS BLOUNT. [L. S.]

PIERCE BUTLER. [L. S.]

ATTEST:

SAMUEL A. OTIS,

*Secretary of the Senate of the United States.*

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<sup>1</sup> First session Fifth Congress, Senate Journal, p. 389.

This bond appears in full in the Senate Journal.

**2119. Form of writ of summons issued to respondent in an impeachment case.**

**Form of precept indorsed on writ of summons in an impeachment case.**

**All processes in an impeachment trial are served by the Sergeant-at-Arms of the Senate unless otherwise ordered.**

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

FORM OF SUMMONS TO BE ISSUED AND SERVED UPON THE PERSON IMPEACHED.

THE UNITED STATES OF AMERICA, ss:

*The Senate of the United States to* ——— ———, *greeting:*

Whereas the House of Representatives of the United States of America did, on the ——— day of ———, exhibit to the Senate articles of impeachment against you, the said ——— ———, in the words following:

[Here insert the articles.]

And demand that you, the said ——— ———, should be put to answer the accusations as set forth in said articles, and that such proceeding, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice;

You, the said ——— ———, are therefore hereby summoned to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the ——— day of ———, at 12.30 o'clock p.m., then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders, directions, and judgments as the Senate of the United States shall make in the premises according to the Constitution and laws of the United States.

Hereof you are not to fail.

Witness ——— ———, and [Presiding Officer of the said Senate], at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

—————,  
*Presiding Officer of the Senate.*

FORM OF PRECEPT TO BE INDORSED ON SAID WRIT OF SUMMONS.

THE UNITED STATES OF AMERICA, ss:

*The Senate of the United States to* ——— ———, *greeting:*

You are hereby commanded to deliver to and leave with ——— ———, if conveniently to be found, or, if not, to leave at his usual place of abode, or at his usual place of business in some conspicuous place, a true and attested copy of the within writ of summons, together with a like copy of this precept; and in whichsoever way you perform the service, let it be done at least—days before the appearance day mentioned in the said writ of summons.

Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in the said writ of summons.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

—————,  
*Presiding Officer of the Senate.*

All process shall be served by the Sergeant-at-Arms of the Senate, unless otherwise ordered by the court.

This is the form agreed to in 1868.<sup>1</sup>

<sup>1</sup>Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 244–246; Globe, pp. 1590–1593.

**2120. Under the parliamentary law the respondent answers the summons in custody if the case be capital and the accusation be special, but not if it be general.**

The accusation being of misdemeanor only, the respondent, under the English usage, does not answer the summons in custody, but the Lords may commit him until he find sureties for his future appearance.

Under the parliamentary law the respondent, if a Lord, answers the summons in his place; if a Commoner, at the bar.

Under the English practice a copy of the articles is furnished to the respondent and a day is fixed for his answer.

According to the parliamentary law the respondent, on accusation for misdemeanor, may answer the articles by person or by writing or by attorney.

A respondent in a case of impeachment for misdemeanor answers the articles before the Lords in such a state of liberty or restraint as he was in when the Commons complained of him.

**In English impeachments the respondent has counsel in accusation for misdemeanor, but not in capital cases.**

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Appearance. If he appear, and the case be capital, he answers in custody; though not if the accusation be general. He is not to be committed but on special accusations. If it be for a misdemeanor only, he answers, a Lord in his place, a Commoner at the bar, and not in custody, unless on the answer the Lords find cause to commit him till he finds sureties to attend and lest he should fly. (Seld. Jud., 98, 99.) A copy of the articles is given him and a day fixed for his answer. (T. Ray.; 1 Rushw. 268; Fost., 232; 1 Clar. Hisft. of the Reb., 379.) On a misdemeanor his appearance may be in person or he may answer in writing or by attorney. (Seld. Jud., 100.) The general rule on accusation for a misdemeanor is that in such a state of liberty or restraint as the party is when the Commons complain of him, in such he is to answer. (Ib., 101.) If previously committed by the Commons, he answers as a prisoner. But this may be called in some sort *judicium parium suorum*. (Ib.) In misdemeanors the party has a right to counsel by the common law, but not in capital cases. (Seld. Jud., 102, 105.)

**2121. Under the parliamentary law the answer of the respondent to impeachment need not observe great strictness of form.**

**The respondent in an impeachment case may not, under the English law, plead in his answer a pardon as bar to the impeachment.**

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Answer. The answer need not observe great strictness of form. He may plead guilty as to part and defend as to the residue; or, saving all exceptions, deny the whole, or give a particular answer to each article separately. (1 Rush., 274; 2 Rush., 1374; 12 Parl. Hist., 442; 3 Lords' Journ., 13 Nov., 1643; 2 Wood., 607.) But he can not plead a pardon in bar to the impeachment. (2 Wood., 615; 2 St. Tr., 735.)

**2122. Under the parliamentary law of impeachments the pleadings may include a replication, rejoinder, etc.—**In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Replication, rejoinder, etc. There may be a replication, rejoinder, etc. (Seld. Jud., 114; 8 Grey's Deb., 233; Sach. Tr., 15; Journ. House of Commons, 6 March, 1640–41.)

**2123. The pleadings were the subject of full discussion during the Belknap trial.**

**The extent of dilatory pleadings in the Belknap trial was commented on as an innovation on American and English precedents.**

**In the Belknap trial the House was sustained in averring in pleadings as to jurisdiction matters not averred in the articles.**

**The articles of impeachment in the Belknap case were held sufficient although attacked for not describing the respondent as one subject to impeachment.**

**The Senate having assumed jurisdiction in the Belknap impeachment, declined to permit the respondent to plead further, but gave leave to answer the articles.**

On May 4, 1876,<sup>1</sup> in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore announced that the Senate had adopted the following:

That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office; and that the managers and counsel in such arguments discuss the question whether the issues of fact are material, and whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

As to the second question referred to, Mr. Matt H. Carpenter, of counsel for the respondent, summarized thus:<sup>2</sup>

Briefly, the attitude of the case is this:

The articles of impeachment charge that the respondent, Belknap, was at one time Secretary of War, and while holding that office did certain things which are declared by said articles to be high crimes and misdemeanors.

The respondent pleads to the jurisdiction of the court that when this proceeding was commenced he was not an officer of the United States, but was a private citizen.

The first replication avers that he was Secretary of War when he committed the acts complained of, and the respondent has demurred.

A second replication by the House charges that after the acts were committed the House had commenced an investigation, with a view to impeachment, and that the respondent with full knowledge of the fact resigned his office, with intent to evade impeachment. This replication has closed in issues of fact which are pending for trial.

The court has ordered an argument in regard to the sufficiency of the plea in abatement, the materiality of the issues of fact, and also whether the House can support the jurisdiction by matters alleged in subsequent pleadings, but not alleged in the articles of impeachment.

**Mr. Manager Scott Lord summarized<sup>3</sup> more at length:**

For the proper consideration of these questions it is expedient that at this stage of the case I call your attention precisely to what the issues are. I do not intend to read the pleadings in full, but only such parts of them as may be necessary for the understanding of this point. Article 1 presents as follows:

"That William W. Belknap, while he was in office as Secretary of War of the United States of America, to wit, on the 8th day of October, 1870, had the power and authority, under the laws of the United States, as Secretary of War as aforesaid, to appoint a person to maintain a trading establishment

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<sup>1</sup> First session Forty-fourth Congress, Senate Journal, p. 928; Record of trial, p. 27.

<sup>2</sup> Record of trial, p. 37.

<sup>3</sup> Pages 31, 32.

at Fort Sill, a military post of the United States; that said Belknap, as Secretary of War as aforesaid, on the day and year aforesaid, promised to appoint one Caleb P. Marsh to maintain said trading establishment at said military post.

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“That thereafter, to wit, on the 10th day of October, 1870, said Belknap, as Secretary of War aforesaid, did, at the instance and request of said Marsh, at the city of Washington, in the District of Columbia, appoint said John S. Evans to maintain said trading establishment at Fort Sill, the military post aforesaid, and in consideration of said appointment of said Evans, so made by him as Secretary of War as aforesaid, the said Belknap did, on or about the 2d day of November, 1870, unlawfully and corruptly receive from said Caleb P. Marsh the sum of \$1,500, and that at divers times thereafter, to wit, on or about the 17th day of January, 1871, and at or about the end of each three months during the term of one whole year, the said William W. Belknap, while still in office as Secretary of War as aforesaid, did unlawfully receive from said Caleb P. Marsh like sum of \$1,500 in consideration of the appointment of said John S. Evans by him, the said Belknap, as Secretary of War as aforesaid, and in consideration of his permitting said Evans to continue to maintain the said trading establishment at said military post during that time.”

Then in article 3:

“Yet the said Belknap, well knowing these facts, and having the power to remove said Evans from said position at any time and to appoint some other person to maintain said trading establishment, but criminally disregarding his duty as Secretary of War and basely prostituting his high office to his lust for private gain, did unlawfully and corruptly continue said Evans in said position and permit him to maintain said establishment at said military post during all of said time, to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States, against public policy, and to the great disgrace and detriment of the public service.

“Whereby the said William W. Belknap was, as Secretary of War as aforesaid, guilty of high crimes and misdemeanors in office.”

The defendant in this case answered to these articles:

“And the said William W. Belknap, etc., says, that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him, the said Belknap, by the said House of Representatives, he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States.”

The House of Representatives duly adopted and filed a general and special replication. A part of the latter is as follows:

“The House of Representatives of the United States say that the said William W. Belknap, after the commission of each one of the acts alleged in the said articles, was and continued to be such officer, as alleged in said articles, until and including the 2d day of March, A. D. 1876, and until the House of Representatives, by its proper committee, had completed its investigation of his official conduct as such officer in regard to the matters and things set forth as official misconduct in the said articles, and the said committee was considering the report it should make to the House of Representatives upon the same, the said Belknap being at the time aware of such investigation and of the evidence taken and of such proposed report.

“And the House of Representatives further say that while its said committee was considering and preparing its said report to the House of Representatives recommending the impeachment of the said William W. Belknap for the matters and things set forth in the said articles, the said William W. Belknap, with full knowledge thereof, resigned his position as such officer on the said 2d day of March A. D. 1876, with intent to evade the proceedings of impeachment against him. And the House of Representatives resolved to impeach the said William W. Belknap for said matters as in said articles set forth on said 2d day of March, A. D. 1876.”

To this replication the defendant rejoins, among other things, that the—

“Chairman of said committee then declared to said Belknap that he, said Clymer, should move in the said House of Representatives, upon the statement of said Marsh, for the impeachment of him, said Belknap, unless the said Belknap should resign his position as Secretary of War before noon of the next day, to wit, March the 2d, A. D. 1876; and said Belknap regarding this statement of said Clymer,

chairman as aforesaid, as an intimation that he, said Belknap, could, by thus resigning, avoid the affliction inseparable from a protracted trial in a forum which would attract the greatest degree of public attention and the humiliation of availing himself of the defense disclosed in said statement itself which would cast blame upon said other persons, he yielded to the suggestion made by said Clymer, chairman as aforesaid."

There is a joinder in demurrer and a surrejoinder by the House of Representatives, a portion of which surrejoinder I will read:

"And the said House of Representatives, as to the first and second subdivisions of the rejoinder to the second replication of the House of Representatives to the plea of the defendant to the said articles of impeachment, wherein the said defendant demands trial according to law, the said House of Representatives, in behalf of themselves and all the people of the United States, do the like."

Now, I call the attention of this court to the fact that in regard to two of the allegations made in the second replication by the House the defendant tendered issues and the House of Representatives joined in such issues, and I shall argue to this court and produce authorities presently to show that the defendant, having thus tendered issues joined in by the House, he can not go behind them, and can not question the right of this tribunal to hear and determine the matters thus brought before it.

Then there are four special rejoinders which the defendant made. One of them I have read to this court. In regard to each of the other three not read, the House of Representatives tendered an issue to be tried by this court; and what does the defendant do? Does he say that these matters are improperly before this court? Does he say that any injury will result to him in having these facts fully and fairly and truthfully investigated by this tribunal? Not at all. So far from it, with great formality he tenders a similitur in the following words:

"And the said Belknap, as the surrejoinders of said House of Representatives to the third, fourth, fifth, and sixth rejoinders of the said Belknap to the second replication of said House of Representatives above pleaded, whereof said House of Representatives have demanded trial, the said Belknap doth the like."

We say that they are estopped upon every principle known to legal proceedings, known to the trial of cases in court, from attempting now to evade these issues. It was very proper on the part of this tribunal to raise this question, if it saw fit; but I apprehend, when the authorities are reviewed upon this point it will be seen that it was too late for anybody to raise this question. Of course any question involving the jurisdiction of this court may be raised at any time; but on questions which do not involve its jurisdiction, but only facts pertaining thereto, no matter in what form of pleading these facts get before it, it is too late, when both parties have so tendered issues to be tried by this tribunal, for the defendant or for any member of this court to prevent such trial; and this I shall show abundantly by the authorities. If otherwise this tribunal, the most august in the land, supposed above all others capable of reaching to the direct truth regardless of forms and ceremonies, has not the power of a court of a justice of the peace; for I affirm that on the other side not one authority can be found, in the whole range of authorities, showing that when issues are joined on questions of fact before the most inferior court it has not the power to try and determine them; and therefore the question amounts to this: Has this tribunal less authority than the most inferior court in the United States or in any other land?

The first authority I introduce upon this point affirms this doctrine, that the plaintiff in his replication may introduce new matter to fortify his declaration. Now what is the question before this court? The very resolution gives us the victory in this regard; it assumes that such facts are in aid of a pertinent question before this court in support of its jurisdiction. I admit we could allege no new offense in this way; we could tender no new or distinct issue upon the merits as to the crime or misdemeanor which this defendant committed; but the question which he raises is a dilatory one, it is not one relating at all to his guilt or his innocence. It is a question of jurisdiction. He raises that question and affirms certain facts relating thereto; and we, in aid of that jurisdiction, bring in certain other facts relating thereto. This is the true statement of the case; we did what we have done in aid of the jurisdiction, and this the pleader may always do.

After the citation of various authorities, Mr. Manager Lord continued:<sup>1</sup>

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<sup>1</sup>Page 33.

I call the attention of the court now to the report of a committee of the British House of Commons, a learned and intelligent committee, a committee which has made a report that win go down with the ages, and I apprehend be received as the law on this subject so long as civilization exists. I call attention to Burke's Works, seventh volume, page 490, where the committee consider the "rules of pleading in courts of impeachment." I never have heard yet of any rule as to pleadings in a criminal court besides the indictment and the plea. Sometimes a defendant puts in what we call a special plea. If a question of jurisdiction is raised it is usually raised *ore tenus*. But what are the rules of pleading in this court? Such committee say:

"Your committee do not find that any rules of pleading, as observed in the inferior courts, have ever obtained in the proceedings of the high court of Parliament, in a cause or matter in which the whole procedure has been within their original jurisdiction. Nor does your committee find that any demurrer or exception as of false or erroneous pleading hath been ever admitted to any impeachment in Parliament as not coming within the form of the pleading."

The members of this court know the distinguished character of Mr. Walpole not only as a lawyer but as a statesman.

Mr. Walpole said—

Page 497—

"Those learned gentlemen (Lord Wintoun's counsel) seem to forget in what court they are. The have taken up so much of your lordship's time in quoting of authorities and using arguments to show your lordships what would quash an indictment in the courts below that they seem to forget they are now in a court of Parliament and on an impeachment of the Commons of Great Britain."

And page 501—

"A great writer on the criminal law, Justice Foster, in one of his discourses, fully recognizes those principles for which your managers have contended, and which have to this time been uniformly observed in Parliament. In a very elaborate reasoning on the case of a trial in Parliament (the trial of those who had murdered Edward the II) he observes this: 'It is well known that in parliamentary proceedings of this kind it is, and ever was, sufficient that matters appear with proper light and certainly to a common understanding, without that minute exactness which is required in criminal proceedings in Westminster Hall. In these cues the rule has always been *loquendum et vulgus*.'"

We say, therefore, if the articles are defective and the second replication not of strict right, all is cured by rejoinder, surrejoinder, and similitur. And in regard to the main question presented by the second replication—not the most conclusive question perhaps, but it may be called the main question of the second replication—namely, whether this defendant has the right to evade the Constitution and defeat its operations by his own will, he confesses and avoids. He admits on the record that he resigned for the purpose of evading this impeachment. It is true he says he was not guilty, and resigned for other purposes; but that is utterly immaterial to this question, because he does admit, I repeat, that he resigned for the purpose of defeating this impeachment.

<sup>1</sup>I will not stop, Senators, to answer the suggestion of counsel that the chairman of that committee had the right, in behalf of this nation, and in behalf of the House of Representatives of the United States of America, to make a contract with the defendant that if he would get out of the office of Secretary of War before a certain hour he should not be impeached for these high crimes and misdemeanors, which, if these articles are true, had polluted him for years, and made him of all men that have ever appeared in a court of impeachment the most unfit to hold civil office. I deny such a right. I am astonished that counsel of respectability and of high standing should stand in this court and assume for a moment that the chairman of a committee had a right to make any such infamous contract; but that is one of the issues. I was surprised the more to hear it stated here, because it is one of the issues. The allegation of such agreement we absolutely deny; we deny that any such contract was made. By our surrejoinder we tender an issue upon that question, and it is accepted by the other side by filing their similitur.

Reference has been made also to the fact that the Constitution leaves the defendant subject to an indictment, and that an indictment may be found against him. The two proceedings, Senators, are entirely and absolutely distinct. One has nothing to do with the other, for the statute to which the counsel referred (sec. 1781 of the Revised Statutes) does not pretend to change the law or rules of impeachment.

Now I wish to call the attention of this tribunal to another consideration, and that is that on this question you are not to give the defendant the benefit of any of those rules which are provided for criminal cases. Assuming, for the sake of the argument, that he is accused as a criminal, and that this proceeding is a criminal proceeding, so that when we get to the merits he may say that he is entitled to the presumption of innocence, that he is entitled to be defended by counsel—and certainly he has illustrious counsel—that he would be entitled to the right of challenge before a jury, and is entitled to confront the witnesses; assuming that this was an indictment and he was before one of the courts of the land and should stand up and claim all these privileges, they of course would be given to him, and we do not care about challenging them here. For the sake of the argument, we admit that here upon the merits he has all these privileges, so far as applicable in this court. What I say is that on this question of jurisdiction he has no such privilege; on the contrary, he has not as many privileges, as the authorities will show, as he would have in a civil action.

This is not one of the questions over which the law watches with such jealousy to guard the rights of a defendant. So long as it is true that no case of fact can be made, no evidence can be offered under which speculation may not peer: so long as it is true that sometimes innocent man suffer; so long as that maxim exists in our law that it is better that ninety-nine guilty men go free than that one innocent have suffer, the common law will allow a person accused of crime the presumption and privileges we have referred to. But what have these questions to do with a mere abstract question of law? The question now presented to you has nothing to do with his guilt or innocence; it has nothing to do with his imprisonment; it has nothing to do with any question personal to himself. It is purely a legal one, and must be considered precisely as though it arose in a civil action, excepting, as before suggested, that he has not all the privileges in this regard that he would have in a civil action. When a defendant in a criminal action raises a dilatory plea it does not receive the consideration which it does in a civil action.

What is the object in pleading in criminal actions? Allow me to call the attention of the court to 2 Archbold's Criminal Practice and Pleadings, sixth edition, volume 2, page 206:

"The object of pleading, whether in civil or criminal actions, is to inform the parties of the facts alleged by each against the other with such clearness and distinctness as to enable them to prepare for the trial of disputed facts or for the application of the law to those which are admitted. In its application to criminal cases it is a statement of a crime imputed to the prisoner with such a particularity of circumstances only as will enable him to understand the charge and prepare for his defense, and as will authorize the court to give the appropriate judgment upon conviction."

At common law a defendant in a criminal action was not allowed to plead in abatement as in civil action (1 Archbold, p. 110; Barber's Criminal Law, p. 343), and can not tender a bill of exceptions. (Garbett's Criminal Law, vol. 2, p. 521.) Therefore you see, Senators, that while the law has always been watchful to protect life and liberty, intending that no innocent man should be falsely accused of crime, yet in regard to the surroundings of the case, in regard to the mere question of pleadings, he has certainly had no more privilege, and certainly has now no more privilege, than in a civil action.

Mr. Montgomery Blair, of counsel for the respondent, said:<sup>1</sup>

I pass now to the second branch of the question presented by the order of the Senate, and that is on the materiality of the allegations of the second replication and of our rejoinder. We did not regard the replication as tendering a material issue, and for that reason we might, and perhaps ought to have, demurred; but having, as we believed, a conclusive answer to it in the rejoinder which we made, we chose that course, preferring that in this maneuvering for position—that is all it amounts to—our friends on the other side should not have the advantage of us.

It needs no argument to show that if only persons holding office are amenable to impeachment it must be charged in the articles that they hold office; and describing the defendant as "late Secretary of War" does not bring him within the description of persons given in the Constitution as amenable to impeachment. It would not be sufficient for them to have alleged that "the defendant does not now hold office, but was an officer a tone time, and resigned in order to avoid impeachment." That would not have been sufficient certainly, for, if so, an ordinary court of justice might entertain jurisdiction of a person who had not been served with process upon an allegation that the defendant, hearing that

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<sup>1</sup>Page 31.

it was intended to serve process upon him, had incontinently taken himself out of the jurisdiction of the court. There is no imaginable difference between the cases. We heard that they intended to impeach us, and, as the Constitution limited the prosecution to persons in office, we stepped over the line, just as a citizen of the United States who happens to be in New York, and learns that somebody there wants to serve him with a writ, betakes himself to New Jersey.

A man has a right to avoid lawsuits. The defendant here had a right, however innocent he might have been, to avoid the ruin which the law-books tell him attend invariably the prosecution of a private person by this overwhelming power. No sensible man, unless he had ample means, would undertake a conflict of that sort if he could avoid it and character enough to stand before the country to justify his action. But the Supreme Court of the United States have settled again and again an analogous question, that a man residing in one State may convey his property to persons outside of it to give a court jurisdiction, provided he does it in good faith. That principle was decided in the case of *McDonald v. Smalley* (1 Peters, 120); also *Smith v. Kernochen* (7 Howard, 198); *Jones v. Lee* (18 Howard, 76); *Briggs v. French* (2 Sumner, 252).

The court also holds in those cases that a man may change his residence from a State in order to assert his title to property within that State in the Federal courts against persons holding it adversely provided he changes his residence in good faith. Does anybody doubt that we resigned in good faith? Does anybody suppose or suspect that the defendant's was a colorable resignation; that he is to be restored to office when this prosecution ceases? Certainly not. And therefore the case corresponds entirely in principle to the decision I have cited. If jurisdiction may be obtained by the voluntary act of a party done in good faith, no reason can be suggested why a jurisdiction may not be avoided by a voluntary act done also in good faith. We were inclined to demur to the original pleading, and the original pleading is defective in the point that I have already brought to the attention of the court in not describing this defendant as one subject to impeachment, and in describing him in fact as a person who is not subject to impeachment, because it says that he was "late Secretary of War."

On the third question which is presented for consideration by the order of the Senate I think little need be said. They can not amend their articles by a new assignment in a replication. Nobody ever heard of an amendment of an indictment; and I may add that the court in the case of *Barnard* held that articles of impeachment were not amendable. I could, by looking over the books, perhaps find some accidental decision of a refusal of a court to allow an indictment to be amended. Indictments are quashed for defects which could be amended at any stage of a civil action as of course, and a new indictment must be found before further proceedings can be had. This, with the decision in the case of *Barnard*, at page 192, volume 1, that there could be no amendment of articles of impeachment, will dispose of the question suggested by the order of the Senate as to whether a necessary allegation not made in the articles could be supplied in the subsequent pleadings.

Mr. Matt. H. Carpenter, also of counsel for respondent, said:<sup>1</sup>

This court can only acquire jurisdiction, in a proceeding of impeachment, by articles presented by the House, showing a case of impeachable criminality; that is, a case where the act complained of is impeachable, and the actor subject to impeachment. In other words, the articles must be such as to require no aid from subsequent pleadings. In this case the articles describe the respondent as "late Secretary of War." Within the strictness of allegation required by common law criminal courts such *descriptio personae* would not be equivalent to an allegation that he was no longer in that office. Therefore, and to meet the view sometimes entertained that a citizen holding one office may be impeached for misconduct in another, we interposed the plea to the jurisdiction, stating affirmatively that at the time of impeachment the respondent was not any officer of the United States. He was impeached at the bar of the Senate—if formal announcement that articles would be presented against him is an impeachment—on the 2d day of March, A. D. 1876. Some of the articles charge that he continued to be Secretary of War to or until (I forget which) the 2d day of March. This excludes the 2d day of March from his holding office; therefore, if we are right in contending that only a person holding office can be impeached, the articles fail to show a case within jurisdiction.

And I think it would have been safe for us to demur to the articles. But not wishing to take risks upon a technical construction, we thought it safer to plead affirmatively the fact that the respondent

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<sup>1</sup>Page 45.

was not holding any office at the time of impeachment. Undoubtedly, to any plea of the respondent in confession and avoidance of the articles, the prosecution might have replied in confession and avoidance; but not so to a plea which, in substance, is a denial of any fact which should have been stated in the articles, to show jurisdiction. If the articles themselves are deficient in not stating any fact necessary to entire jurisdiction—jurisdiction of the offense and the offender—then this court never acquired jurisdiction.

It results from the fact that this court has only a special jurisdiction, that the first pleading must show a case within the jurisdiction. This was held with regard to jurisdiction of circuit courts of the United States in *Brown v. Keene* (8 Peters, 112); *Jackson v. Ashton* (8 Peters, 148); *Hodgson v. Bowerbank* (5 Cranch, 303); *Mossman v. Higginson* (4 Dallas, 12), and *Jackson v. Twentyman* (2 Peters 136).

The honorable manager [Mr. Lord] yesterday referred us to two cases—2 Chitty's Reports, 367, and 2 Maule & Selwyn, 75. These were actions of quo warranto—that is, civil suits to try the title to an office, to be followed by a judgment for damages and costs. The court held, what everybody would concede, that resignation did not preclude final judgment.

One Senator at least—Senator Howe—will remember a somewhat remarkable case of this kind in our own State, where he happened to be on the winning and myself on the losing side. I refer to the case State on the relation of *Bashford v. Barstow*. In this case, after the court had declared its jurisdiction, the attorney-general came into court and filed a discontinuance.

But the court held that the case was really a civil cause, in favor of the relator, against Barstow, who was in possession of the office; that the State had no interest in the question, and was only a formal party.

The learned manager also asserted that in a criminal cause there could be no such thing as a replication and rejoinder. If he will take the trouble to examine Wentworth's Pleadings he will find that he is in error; and if he will examine Archbold's Criminal Pleadings he will find the very forms from which we have drawn our pleadings subsequent to the plea in abatement.

On May 29<sup>1</sup> the Senate, after several days of deliberation, agreed to these resolutions, the first by a vote of yeas 37, nays 29, and the second by a vote of yeas 35, nays 22.

1 *Resolved*, That in the opinion of the Senate, William W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached.

2. *Resolved*, That at the time specified in the foregoing resolution [fixing the time for delivering this judgment] the President of the Senate shall pronounce the judgment of the Senate as follows: "It is ordered by the Senate sitting for the trial of the articles of impeachment preferred by the House of Representatives against William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the game hereby is, overruled; and it being the opinion of the Senate that said plea is insufficient in law, and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught, which judgment thus pronounced shall be entered upon the Journal of the Senate sitting as aforesaid.

On June 1,<sup>2</sup> after the announcement of the decision, Mr. Matt H. Carpenter, of counsel for the respondent, commented on the effect of the findings:

The defendant first pleaded to the jurisdiction of this court. The managers filed a replication, to which the respondent demurred; and the managers joined in the demurrer.

The rule is that each pleading must answer the preceding one. The replication, if sufficient in law, was a valid answer to the plea. The validity of the replication in matter of law was put in issue by our demurrer. And had the court upon the demurrer held the replication bad, then the court would have looked back to the plea itself to see whether or not it was sufficient in law; and if it had found the plea to be bad, then the court would have held in favor of the prosecution; upon the principle that a bad replication is as good as the bad plea to which it is a response. But in this case the court overruled our demurrer to the replication, thus holding the replication a sufficient answer to the plea.

<sup>1</sup> Senate Journal, pp. 944–947; Record of trial, p. 76.

<sup>2</sup> Record of trial, pp. 159, 160, 163.

Was there therefore any necessity for the court to go back through the record and pass upon the sufficiency of prior pleadings? The plea to the jurisdiction having been answered by a replication which the court held good by overruling our demurrer to it, what was the necessity for the court to go back through the record? The only question raised by the plea was the jurisdiction of this court over the respondent; and whether or not the prosecution was entitled to a final judgment, or whether the judgment should be respondent ouster, is a question to be examined.

But I submit with great confidence that the question of sufficiency in law of the articles of impeachment was not before the court; and that after judgment upon the question of jurisdiction, of respondent ouster, the respondent was at liberty to begin his defense, as he might have done without questioning the jurisdiction.

In case on indictment, when the defendant challenges the jurisdiction of the court, and fails to make good his objection, he is remitted to every privilege he would have possessed if he had commenced his defense with questioning the jurisdiction; that is, he may move to quash, or he may plead in bar, or plead the general issue.

If I were compelled alone to take the responsibility in this case I should plead no further, but leave the managers to their own course; and in that case would not the managers be entitled to move for final judgment? This would be so, I think, had the issue been one of fact only. But here there was an issue of law and several issues of fact, all of which the court has disposed of by the order just entered.

We have appeared and pleaded, and if the court have held our defense insufficient, may we not stand upon it, without filing further pleadings? My impression is that the next step to be taken is for the managers to move for judgment, after which we could move for leave to plead further, which I have no doubt the court would grant.

All this, of course, is upon the supposition that the court has overruled the plea to the jurisdiction. The order declaring the jurisdiction was not concurred in by two-thirds of the Senators present. That is, less than two-thirds of the Senate think there is jurisdiction to convict the respondent.

Manifestly a court which has not jurisdiction to convict has no jurisdiction to try the respondent; and such pretended trial would be wholly extrajudicial. No witness could be indicted for false swearing at such trial, nor punished for contempt for not obeying a subpoena.

It therefore becomes a very important question to be settled by the respondent's counsel, whether any, and if any what, further steps should be taken on the part of the respondent. An order has been entered in the record, as an order of the court, overruling the plea to the jurisdiction. But the journal of the proceedings shows that thirty-five Senators concurred in the order, and twenty-two dissented.

Speaking for myself only (not having consulted with my colleagues), I maintain that upon the whole record the order is void, for the reason that it was not concurred in by two-thirds of the Senators.

Mr. Manager Scott Lord said:

One question which the learned counsel has discussed before you the managers do not feel authorized to discuss while the order of this Senate remains. By its order the demurrer to the replication of the House of Representatives is overruled, the plea of the defendant is overruled and held for naught, and the articles of impeachment are held sufficient. Now, apprehending that this order has been made upon due consideration, that the Senators understood all these pleadings and made this order in that view, we do not feel called upon, I repeat, to discuss the questions pertaining thereto until some motion is made to change the order; and if such a motion should be made, if the Senate, after this deliberation and after this carefully prepared order, takes into consideration the question whether it will change its order, then the managers will desire to be heard.

And on June 6,<sup>1</sup> when the Senate was determining the length of time to be allowed to the respondent to answer on the merits, Mr. Manager William P. Lynde said:

We have already been occupied for several weeks with dilatory pleadings. We have had a plea to the jurisdiction of the Senate. It has been suggested by the counsel for the respondent that they would yet demur, or ask leave of the Senate to demur, to the articles of impeachment. The managers

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<sup>1</sup>Record of trial, p. 163.

believe that these dilatory pleadings have been indulged in by this Senate quite too long and without a precedent. I find no precedent either in England or in this country for dilatory pleadings on impeachment. In the first case tried under our Constitution against Senator Blount, it is true, the respondent filed a plea to the jurisdiction which is regarded as a dilatory pleading; but that was without authority and without precedent. There never had been a case in England where a plea of that kind had been allowed to be put into articles of impeachment, and it stands alone in this country.

The time which has already been occupied in this case must satisfy the Senate that it is not right that these dilatory pleadings should be introduced or allowed. In the case of Judge Barnard in New York, where the counsel for the respondent applied to the court for leave to file a demurrer or leave to move to quash certain articles of impeachment, the court refused the request and required the defendant to plead to the merits, stating that in the course of the trial of the case all those questions of law could be availed of by the parties and would be decided by the court.

Now, we think that if a precedent of this kind is established, if this Senate will go on and hear dilatory plea after dilatory plea, first a plea to the jurisdiction, a plea in abatement, then a demurrer to the form, there is no end; and when shall we arrive at a trial of this case upon the merits? If there was an officer of this Government now in office who endangered the liberties of the people, who was engaged in a conspiracy against the Government, and he stood impeached before the Senate, if these dilatory pleas were allowed, the evil to be apprehended from his action might be carried into effect and realized. And yet it is claimed that it is a matter of right by the respondent, on the other side, and the courts of impeachment of this country have, by precedent at least if not by direct vote, decided that when an officer of the Government is impeached he can not be suspended from the functions of his office while the trial is progressing. No; it has been the aim and intention of the courts in all cases of impeachment that a speedy trial should be had, that the respondent should be required to answer to the merits, and then the court would consider the question, and the whole question, and protect and save the country.

Mr. Carpenter also raised another question: <sup>1</sup>

The question of the sufficiency in law of the articles themselves has not been raised by a demurrer thereto, has not been argued by either side, nor submitted to the court. The only question raised, argued, or submitted was the question of jurisdiction of the defendant; that is, whether the court had power to pass upon the sufficiency of the articles, or take any other step whatever in the cause. Had the court affirmed jurisdiction (as I claim it has not), then we could have moved to quash the articles, or demurred to them, or joined issue for trial. I do not hesitate to affirm that none of these articles, with possibly one exception, state the necessary facts to constitute a good indictment. Mere rhetoric and denunciation will not do. It is not enough to say that the defendant has been guilty of high crimes and misdemeanors; but the articles must state every fact which is an element of crime. And although the same strictness of pleading has not been required in cases of impeachment as in ordinary criminal causes, yet every fact relied upon to constitute the crime must be stated; and on the trial the proof can not go beyond the averments of the articles. In the several impeachment trials in this country defendants have not resorted to formal pleadings. In Blount's case his response was more like an answer to a bill in chancery than a pleading in a criminal cause. It was a plea to the jurisdiction, a demurrer, and answer, all in one.

But I assume that where the respondent chooses to avail himself of formal and particular pleading, which the experience of a thousand years has shown to be essential to the protection of innocence, this court will not deny the right, at least without a hearing.

I therefore assume that the court, on its attention being called to the very sweeping terms of this order, will, of its own motion, vacate so much of it as holds that the articles of impeachment are sufficient in law.

The sufficiency in law of the articles is as material to the conviction of the respondent as is the truth in point of fact of the matters therein charged. Before there can be a conviction several things must be established:

- First. That the defendant, in fact, has done, or omitted to do, certain things;
- Second. That the things he has done or omitted constitute a crime;
- Third. And not merely a crime, but a high crime or misdemeanor, meriting impeachment; and

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<sup>1</sup>Record of trial, page 159.

Fourth. That the respondent is subject to impeachment, and this court has jurisdiction over him for the hearing and determination of this cause.

If any one of these elements be wanting, there can be no conviction. And of course, as soon as any one of these propositions is established in favor of the respondent he is entitled to an acquittal. I thin the point as to jurisdiction has been determined in his favor, inasmuch as more than one-third of the Senate has declared against jurisdiction. But what course we ought to take as a matter of expediency—whether we should move to vacate the order altogether and that the respondent be dismissed; or demur to the articles; and if the demurrer is overruled, answer to the merits and go to trial—should only be determined after consultation of the respondent's counsel.

To this Mr. Manager Scott Lord replied: <sup>1</sup>

One other suggestion. We apprehend that the true object of all trials, civil or criminal, is to reach the merits at the earliest moment. The defendant here stands accused by impeachment, having been a high officer of the Government, of certain crimes and misdemeanors. He has put in one dilatory plea, and that has occupied all his time. He now proposes, after this Senate has so deliberately entered this order; after it, having examined all the pleadings, has found these articles of impeachment sufficient, to try again in that direction. He proposes to demur to the articles of impeachment; and while I can not, perhaps, strictly call a demurrer a plea, yet, in a broader sense, it is. The defendant proposes another dilatory proceeding; I may call it properly another dilatory plea. And how many shall he have? It is absolutely in the discretion of the Senate whether to give him this privilege or not. It is in the discretion of any court of civil or criminal jurisdiction, unless controlled by statutory law.

This defendant accused of these high crimes, after having by his dilatory plea occupied weeks of time, seeks further delay. After this court, under rules which are broader and more liberal than in other courts in regard to pleadings, has deliberately overruled his demurrer, deliberately held his plea for naught, and that the only pleading before this tribunal is the pleading called the "articles of impeachment," and after this court has solemnly adjudged that these articles are sufficient, the defendant by his learned counsel asks you to go back into the courts of law, for rules not binding even there. He wants you to adopt the rules which he says are held in criminal courts, and give him the right, under all the circumstances of this case, to put in this further dilatory plea, because he says what? That he could go into a criminal court and take up these articles of impeachment, and one by one satisfy the tribunal that the pleading would not be good as an indictment. What if he could, and what if the technical rule availed here? It nevertheless is in the discretion of this court whether it will allow him again to stand on a technical point instead of proceeding to the merits. I apprehend it is an application which will not be favored by the Senate. I apprehend this Senate sitting as a court of impeachment will hardly take the position, after this deliberate order, that it will open the whole case again, and for what? Not from a sense of justice to the defendant; not for the purpose of ascertaining the truth; but simply that learned counsel skilled in the criminal courts may stand in this august tribunal and urge that these articles of impeachment have not all the words and phraseology which he thinks would be necessary in a court of criminal jurisdiction to maintain an indictment.

I will not now discuss the question whether the articles of impeachment are sufficient. The Counsel himself has confessed the rule that pleadings in this court are entirely distinct and separate as to mere technical rules from pleadings in ordinary criminal proceedings. This court has a broader range; it has an easier path in its high jurisdiction to reach the merits, and therefore I may say, with all respect to this tribunal, that it would be a most extraordinary proceeding, in the judgment of the managers, for this court, without claim of any possible injustice to the defendant, to open this case for another dilatory plea instead of requiring him to go to trial upon the merits.

The Senate finally<sup>2</sup> discarded an order providing that the respondent "have leave to plead further or answer the articles of impeachment within ten days," and agreed to the following:

*Ordered*, That W. W. Belknap have leave to answer the articles of impeachment within ten days from this date; and that in default of an answer to the merits within ten days, by respondent, to the articles of impeachment, the trial shall proceed as upon a plea of not guilty.

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<sup>1</sup>Record of trial, page 160.

<sup>2</sup>Senate Journal, p. 949; Record of trial, pp. 164, 165.

This question of pleadings was touched upon also in the final arguments, Mr. Matt H. Carpenter, speaking<sup>1</sup> at length on the view already advanced by him, and Mr. Manager Scott Lord opposing.<sup>2</sup>

**2124. The answer of respondent is part of the pleadings of an impeachment trial, and exhibits in the nature of evidence may not properly be attached thereto.**—On February 3, 1905,<sup>3</sup> in the Senate, sitting for the trial of Judge Charles Swayne, at the end of the portion of respondent's answer relating to the first article of impeachment, certain exhibits were attached to show the practice of other Federal judges in certifying their expense accounts to the Department at Washington. Judge Swayne was accused in the first article of rendering false accounts.

At the conclusion of the reading of this portion of the answer, Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, we have attached as exhibits to this answer to the first article three certificates, one from the fifth, one from the seventh, and one from the ninth judicial circuits of the United States, which show that, almost without exception, the amount of \$10 per diem was drawn by each and all of the judges, both of the circuit and district courts of those circuits, in their attendance outside of their districts, under the provisions of these laws. We have been unable up to the present time to secure from the Secretary of the Treasury the additional certificates for the other districts.

After concluding the reading of the entire answer of the respondent, Mr. Thurston said:

Now, Mr. President, referring to the fact that certain exhibits which we desired to attach to our answer to article No. 1 had not been attached because of the fact that the Secretary of the Treasury in the short space of time has been unable to furnish it to us, we move as follows:

Counsel for respondent move on order giving them leave to hereafter attach to the answer herein to article 1, as exhibits, additional copies of certificates of the Secretary of the Treasury, showing the amounts certified to and received from the United States by the judges of the first, second, third, fourth, sixth, and eighth judicial circuits, as their reasonable expenses for travel and attendance while holding court away from the places of their residences, and outside of their respective districts, in the year 1903, it having been impossible for the Secretary of the Treasury to prepare and furnish the same to respondent up to the present time.

Mr. Manager Palmer said that the managers did not admit that these exhibits were material,<sup>4</sup> but that they would not object except on the question of delay that might be caused.

Mr. Charles W. Fairbanks, of Indiana, offered this order:

*Ordered*, That the respondent, Charles Swayne, have leave to hereafter, not later than the 10th instant, attach as further exhibits to his answer to article 1 of the articles of impeachment copies of the certificates of the Secretary of the Treasury, referred to in said answer, showing the amounts certified to and received from the United States by the judges of the first, second, third, fourth, sixth, and eighth judicial circuits as their reasonable expenses for travel and attendance while holding court away from the place of their residence, and outside of their respective districts, in the year 1903.

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<sup>1</sup>Record of trial, pp. 330–334.

<sup>2</sup>Pages 334, 335.

<sup>3</sup>Third session Fifty-eighth Congress, Record, pp. 1820, 1830–1832.

<sup>4</sup>They had been excluded in the examination before the committee of the House of Representatives, with the assent of the minority as well as majority of the committee. See minority views, House Report No. 3021, third session Fifty-eighth Congress.

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

Mr. President, as a matter of good practice—and I presume we are to conduct this trial according to good practice—it seems to me that this is a request for time in which to exhibit evidence as a part of the pleadings. If this matter is admissible before this court at all, it is admissible as evidence. It does not occur to me as an appropriate proceeding to be giving time in which counsel for the respondent may file evidence with their pleadings. That is as I look at it. If it were desirable to give the counsel time to prepare new allegations I should not object to an order for that; but I do object to having this court put into the attitude of expressly and by order providing for delay, in producing as a part of the pleadings, what properly, as it seems to me, belongs only to the production of evidence.

Mr. Manager Palmer also said:

If, as suggested by the Senator from Texas [Mr. Bailey], it is true that these exhibits are to be considered as evidence, then certainly they ought to be attached before the managers are asked to reply. We had expected to ask until next Monday to reply or to demur or to except to this answer, and the answer ought to be complete before we are asked to reply to it. If this time is postponed until the 10th of February our answer will have been in, and if these matters are matters of evidence it might be quite a serious consideration. Therefore we object to the extension of the time until the 10th of February.

Mr. Thurston then said:

Mr. President, the respondent and his counsel are so anxious to interpose no obstruction to the speedy trial of this case that if, as suggested, our motion would be taken as a ground for asking delay we here and now withdraw it.

The Presiding Officer announced:

The motion is withdrawn, and the Chair supposes the order proposed by the Senator from Indiana is also withdrawn.

So the subject was dropped.

**2125. Counsel for respondent in the Swayne trial interposed a plea as to jurisdiction of offenses charged in certain articles, but declined to admit that it was a demurrer with the admissions pertinent thereto.**

**During time of presentation of testimony in the Swayne trial counsel of respondent were permitted to file a brief on their pleas to jurisdiction.**

**Form of brief on plea to jurisdiction filed by counsel for respondent in Swayne trial.**

On February 22, 1905,<sup>1</sup> in the Senate sitting for the impeachment trial of Judge Charles Swayne, after the counsel for the respondent had begun to present testimony, but before they had concluded, Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, the respondent has at all times insisted, and still does insist, upon the pleas to the jurisdiction as to the first seven counts. It had been the purpose of my associate, Mr. Higgins, to present our statement and arguments with respect to those pleas as apart of his opening statement. In deference to the evident wish of the Senate and to the imperative demand for the completion of the legislative duties of the Senate, he decided to waive that privilege.

We have prepared a statement and argument as to those pleas to the jurisdiction which we could, of course, use on the final arguments in the case. But we feel it would be fairer to the Senate and to the managers to present those now, and as our position upon the pleas to the jurisdiction and as a part of our presentation of the case we now ask to present our statement and argument and have it printed in the Record, so that the Senate and the managers may have an opportunity before the close of the case to consider it. [To the managers on the part of the House.] Is there any objection?

<sup>1</sup>Third session Fifty-eighth Congress, Record, pp. 3026–3035.

Mr. Manager Henry W. Palmer, of Pennsylvania, replied that the managers did not object.

The Presiding Officer<sup>1</sup> said:

The brief prepared by counsel on the question of jurisdiction as to the first seven articles will be inserted in the Record unless there be objection on the part of the managers or of Senators.

Mr. Thurston then said:

Mr. President, I feel it is our duty to state that this presentation of the historical, constitutional and parliamentary procedure in impeachment proceedings has been prepared not by counsel for respondent, whose names are attached to it, but by a gentleman who is renowned as a scholar along constitutional lines and a lawyer of great ability, and without naming him we wish to disclaim any credit that may attach to the preparation of this document.

Mr. Manager Palmer then stated a question, and the following occurred:

Mr. Manager PALMER. Are you demurring to the first seven articles of impeachment upon the ground that they do not charge an impeachable offense? Is that the idea?

Mr. THURSTON. Our pleas are in to that effect, if the manager has read them.

Mr. Manager PALMER. Exactly. I understand you are filing a demurrer to the first seven articles on the ground that they do not charge impeachable offenses.

Mr. THURSTON. We did interpose special pleas to those articles.

Mr. Manager PALMER. And this argument is intended to support those pleas?

Mr. THURSTON. Yes, Sir.

Mr. Manager PALMER. Of course your demurrer admits the truth of all that is stated in those articles. Mr. THURSTON. I beg pardon.

Mr. Manager PALMER. It could not be a demurrer if it did not.

Mr. THURSTON. I beg pardon, Mr. President. We have not demurred. Our pleas stand, and the manager can take any legal view of them that he chooses to present.

The heading and signatures of the document were as follows:

IN THE SENATE OF THE UNITED STATES SITTING AS A COURT OF IMPEACHMENT. THE UNITED STATES OF AMERICA AGAINST CHARLES SWAYNE, A JUDGE OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF FLORIDA. UPON ARTICLES OF IMPEACHMENT PRESENTED BY THE HOUSE OF REPRESENTATIVES.

*Argument in support of the pleas to the jurisdiction interposed in behalf of the respondent to articles 1, 2, 3, 4, 5, 6, and 7, such pleas presenting the contention that the facts set forth in said articles, even if true, do not constitute impeachable high crimes and misdemeanors as defined in the Constitution of the United States.*

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The pleas to the jurisdiction interposed in behalf of respondent to articles 1, 2, 3, 4, 5, 6, and 7 should be sustained, because the facts set forth in said articles, even if true, do not constitute "high crimes and misdemeanors," as defined in Article II, section 4, of the Constitution of the United States.

ANTHONY HIGGINS,

JOHN M. THURSTON,

*Counsel for Respondent.*

**2126. The managers being introduced in the Senate and having signified their readiness to exhibit articles of impeachment, the Presiding Officer directs proclamation to be made.**

**Form of proclamation made by the Sergeant-at-Arms when managers bring articles of impeachment to the Senate.**

**Articles of impeachment being exhibited by the managers, the Presiding Officer says that the Senate will take proper order and inform the House thereof.**

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<sup>1</sup> Orville H. Platt, of Connecticut, Presiding Officer.

**In 1868 the Senate ceased in its rules to describe the House of Representatives while acting in impeachment cases as the grand inquest of the nation.**

**Present form and history of Rule II of the Senate rules for impeachments.**

Rule II of the “Rules of procedure and practice in the Senate when sitting on impeachment trials” is as follows:

When the managers of an impeachment shall be introduced at the bar of the Senate and shall signify that they are ready to exhibit articles of impeachment against any person, the [Presiding Officer] of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words, viz: “All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against———;” after which the articles shall be exhibited, and then the Presiding Officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

The origin of this rule is found in the trial of William Blount in 1797.<sup>1</sup> In 1804<sup>2</sup> at the impeachment of Judge Pickering, the committee having charge of the rules—Messrs. Uriah Tracy, of Connecticut, Stephen R. Bradley, of Vermont, Abraham Baldwin, of Georgia, Robert Wright, of Maryland, and William Cocke, of Tennessee—made a new draft of the words to be repeated after proclamation. At the trial of Blount they had been:

All persons are commanded to keep silence while the Senate of the United States are receiving articles of impeachment against———, on pain of imprisonment.

Mr. Tracy’s committee modified this to this form:

All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States, sitting as a court of impeachments, articles of impeachment against——

For the trial of Judge Chase, in 1805, the rule was adopted in practically the identical form agreed to by Mr. Tracy’s committee, except that the words “sitting as a court of impeachments” were omitted.<sup>3</sup> There does not seem to have been significance in the omission of these words, since the articles of impeachment against Judge Chase were received by the Senate sitting as a high court of impeachment. In 1868, during the proceedings against President Johnson, the rules were revised, but the committee reported<sup>4</sup> this rule in the form as used since 1805. While the rules were under debate on February 29, Mr. Thomas A. Hendricks, of Indiana, said as to the language of the announcement:

In the Constitution which the fathers adopted, after grave consideration, they said that the House of Representatives should impeach an officer. We say that “the grand inquest of the nation” shall impeach. Where is the advantage of this new language? Why not make proclamation in the Senate here that “the House of Representatives impeaches the President of the United States?” It is not sufficiently high sounding is all the trouble about it. It expresses exactly the thought that the Constitution does, truly and correctly, and does not refer us to some body of men not known to our system of government.

<sup>1</sup> First session Fifth Congress, Senate Journal, p. 433; Annals, p. 498.

<sup>2</sup> First session Eighth Congress, Senate Journal, pp. 382, 383; Annals, p. 225.

<sup>3</sup> Second session Eighth Congress, Senate Journal, pp. 509, 510.

<sup>4</sup> Second session Fortieth Congress, Senate Report No. 59, Senate Journal, pp. 246, 248, 811; Globe, pp. 1521, 1522, 1594.

The matter was not further discussed, and on March 2,<sup>1</sup> on motion of Mr. Hendricks, without further debate or division, the words “grand inquest of the nation” were stricken out and “House of Representatives” inserted. So the rule came to its present form.

**2127. Upon presentation of articles of impeachment and the organization of the Senate for the trial, a writ of summons is issued to the accused.**

**The writ of summons to one accused in articles of impeachment recites the articles and notifies him to appear at a fixed time and place and file his answer.**

**The rule specifying the method of serving writs of summons to one accused in articles of impeachment.**

**The person accused in articles of impeachment failing to appear or to answer, the trial proceeds as on a plea of not guilty.**

**The person accused in articles of impeachment may appear in person or by attorney.**

**If a plea of guilty be entered in answer to articles of impeachment, judgment may be entered without further proceedings.**

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

Rule VIII of the “Rules of procedure and practice in the Senate when sitting on impeachment trials” is as follows:

Upon the presentation of articles of impeachment and the organization of the Senate as hereinbefore provided, a writ of summons shall issue to the accused, reciting said articles, and notifying him to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his answer to said articles of impeachment, and to stand to and abide the orders and judgments of the Senate thereon; which writ shall be served by such officer or person as shall be named in the precept thereof, such number of days prior to the day fixed for such appearance as shall be named in such precept either by the delivery of an attested copy thereof to the person accused, or if that can not conveniently be done, by leaving such copy at the last known place of abode of such person, or at his usual place of business in some conspicuous place therein; or if such service shall be, in the judgment of the Senate, impracticable, notice to the accused to appear shall be given in such other manner, by publication or otherwise, as shall be deemed just; and if the writ aforesaid shall fail of service in the manner aforesaid, the proceedings shall not thereby abate, but further service may be made in such manner as the Senate shall direct. If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or, appearing, shall fail to file his answer to such articles of impeachment, the trial shall proceed, nevertheless, as upon a plea of not guilty. If a plea of guilty shall be entered, judgment may be entered thereon without further proceedings.

This rule dates from 1868,<sup>2</sup> when it was adopted preliminary to the trial of President Johnson. It was reported from a committee of which Mr. Jacob M. Howard, of Michigan, was chairman, in its present general form; but during consideration in the Senate the word “court” was stricken out wherever it occurred, and the word “Senate” substituted, to conform to a general decision of the Senate.

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<sup>1</sup> Senate Journal, p. 246; Globe, p. 1594.

<sup>2</sup> Second session Fortieth Congress, Senate Journal, pp. 238, 812; Globe, pp. 1533, 1534, 1602; Senate Report No. 59.

**2128. At 12.30 p. m. on the day of the return of the summons against a person impeached, the Senate suspends business and the Secretary administers an oath to the returning officer.**

**Form of oath administered to the returning officer in an impeachment case.**

**The oath taken by the returning officer in an impeachment case is spread on the records.**

**Present form and history of Rule IX of the Senate in impeachment cases.**

Rule IX of the “Rules of procedure and practice in the Senate when sitting on impeachment trials” is as follows:

At 12.30 o'clock afternoon of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer in the form following, viz: “I, \_\_\_\_\_, do solemnly swear that the return made by me upon the process issued on the \_\_\_\_ day of \_\_\_\_\_, by the Senate of the United States, against \_\_\_\_\_, is truly made, and that I have performed such service as therein described: So help me God.” Which oath shall be entered at large on the records.

This rule, with slight changes, dates from the Chase trial in 1805.<sup>1</sup> In 1868<sup>2</sup> in preparation for the trial of President Johnson, it was adopted in exactly its present form.

**2129. In an impeachment case the writ of summons being returned, the accused is called to appear and answer the articles.**

**The person impeached being called to appear and answer, a record is made as to appearance or nonappearance.**

**The person impeached may appear to answer the articles in person or by attorney, and a record is made as to the mode of appearance.**

**When the person accused in articles of impeachment appears by agent or attorney, a record is made naming the person appearing and the capacity in which he appears.**

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

Rule X of the “Rules of procedure and practice in the Senate when sitting on impeachment trials” provides:

The person impeached shall then be called to appear and answer the articles of impeachment against him. If he appear, or any person for him, the appearance shall be recorded, stating particularly if by himself, or by agent or attorney, naming the person appearing and the capacity in which he appears. If he do not appear, either personally or by agent or attorney, the same shall be recorded.

This rule was first adopted in 1805,<sup>3</sup> for the Chase trial. In 1868,<sup>4</sup> during proceedings for the impeachment of President Johnson, the rules were generally revised, but this rule was changed only by dropping out the word “exhibited” after “articles of impeachment.” It was then agreed to in the present form.

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<sup>1</sup> Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

<sup>2</sup> Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 134.

<sup>3</sup> Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

<sup>4</sup> Second session Fortieth Congress, Senate Journal, p. 813; Globe, p. 1534; Senate Report No. 59.

**2130. In impeachment proceedings before the Senate counsel for the respondent is admitted and heard.**

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

Rule XIV of the “Rules of procedure and practice for the Senate when sitting in impeachment trials” is as follows:

Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

This rule in identically its present form dates from the Chase trial in 1805.<sup>1</sup> It then embodied what had been the practice in preceding trials.

**2131. In impeachment trials all motions made by the parties or counsel are addressed to the Presiding Officer, and must be in writing, if required.**

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

Rule XV of the “Rules of procedure and practice for the Senate when sitting in impeachment trials” is as follows:

All motions made by the parties or their counsel shall be addressed to the Presiding Officer, and if he, or any Senator, shall require it, they shall be committed to writing, and read at the Secretary’s table.

This rule was first drafted in 1805,<sup>1</sup> for the trial of Judge Chase. It had then an additional clause providing how the vote should be taken on such motions. In 1868,<sup>2</sup> when the rules were revised, it was given its present form, the words “presiding officer” being substituted for “President of the Senate,” and the clause relating to voting being stricken out. The words “or any Senator” were also inserted at this time.

**2132. In an impeachment trial the case is opened by one person on each side.**

**The final arguments on the merits in an impeachment trial are made by two persons on each side, unless ordered otherwise upon application.**

**The final argument on the merits in an impeachment trial is opened and closed by the House of Representatives.**

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

Rule XXI of the “Rules of proceeding and practice for the Senate when sitting in impeachment trials” is as follows:

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

This rule dates from 1868<sup>3</sup> when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a revision of the rules, in view of the approaching trial of President Andrew Johnson. The rule as reported was in this form:

XXI. The final argument on the merits may be made by two persons on each side, and the argument shall be opened and closed on the part of the House of Representatives.

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<sup>1</sup> Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

<sup>2</sup> Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1568.

<sup>3</sup> Second session Fortieth Congress, Senate Report No. 59.

On March 2,<sup>1</sup> this rule was debated fully, and amended so as to stand in its present form. Mr. Charles Sumner, of Massachusetts, proposed an amendment which, after discussion, was adopted in form as follows:

The case, on each side, shall be opened by one person.

During the debate Mr. Roscoe Conkling explained this amendment on behalf of Mr. Sumner, who had been called away:

The Senator from Massachusetts thought that when the managers came here and rose to open their case and had proceeded an hour perhaps the Senator from Indiana or some other Senator would say, "This now is a proceeding, a question falling within the first of these two rules; it is a preliminary or interlocutory matter, and therefore to be restricted to an hour." That there might be no question about it, the Senator from Massachusetts proposes that the two rules shall stand precisely as they are now, the latter of which rules gives to counsel the right to sum up the evidence at any length they please, be it a day or four days or ten days each; but that before the evidence has been delivered, before the witnesses are called, that explanatory statement which is called "an opening" shall be made by one person on each side, one manager on the part of the House of Representatives in the beginning, and one counsel on the part of the respondent after the evidence for the prosecution is closed and the respondent comes to make his case. To cover that, the Senator from Massachusetts interposes this rule between the two (leaving the previous rule to operate upon interlocutory matters, as it does), to provide for the opening of the case on each side respectively before the evidence is delivered, and then to leave to counsel to sum up, or close the case, or, in the language of the rule, to make the "final argument on the merits" at any length they please. That is the meaning of it, as I understand it.

A question having been raised by Mr. Thomas A. Hendricks, of Indiana, Mr. Conkling said further:

The idea is that the practice is to be precisely as it is in Indiana—not the practice in Westminster Hall, but the practice as we know it in this country. The plaintiff, for illustration, opens his case and gives his evidence and finishes it; then the defendant opens his case and gives his evidence and finishes it; and then the summing up occurs. That is the design here—that the prosecutors for the House of Representatives open their case and prove it as far as they can; then the respondent opens his case and proves it as far as he can. That is precisely what the amendment means, I submit. I know that is the design of the mover.

The amendment was agreed to without division.

A more serious question arose as to the number of persons who should be permitted to sum up on each side. Mr. James W. Grimes, of Iowa, objected that the number should not be restricted, saying:

If I remember rightly the history of impeachment trials in England, the members of the managers and the counsel on the part of the defense have addressed their arguments to a particular issue that was involved in a particular specification; and I think that was the case in this country in the celebrated Chase trial, and in the Peck trial. There were divers and sundry specifications, to each of which the defendant pleaded not guilty. One manager argued each particular specification; and one of the counsel on the part of the defense replied to him. Each article was one of the points upon which the court had to pronounce that the defendant was either guilty or not guilty, and each was argued separately.

Now, had we not better leave this whole matter to be settled by a conference between the attorneys of the respective sides when they shall reach the argument than to say now peremptorily that ten or twenty articles shall all be combined in the speech of the counsel instead of being severed, as they have been in previous trials, and limiting them to two speeches on each side? My own opinion is that a question of practice of that kind belongs purely to the court; and if we are to resolve ourselves from a Senate into a court, it ought to be settled by the court itself, when the Chief Justice, who is to preside over us, is present to give us the aid of his counsel.

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<sup>1</sup> Senate Journal, pp. 242, 243, 814; Globe, pp. 1580–1585.

Mr. Garrett Davis, of Kentucky, speaking in the same line, said:

I can state to the honorable Senator from Vermont and to the Senate that in every case of crime of any great interest, and especially a capital crime, I have never known the argument of the case on the part of the defense by a less number of counsel than three, and it is often by five. I agree with the Senator from Indiana that in the management of the case, if you introduce more than two counsel, if they are competent counsel, you embarrass the case and you weaken the prosecution or the defense. But it is not so always in the argument of cases of importance. It is a universal practice in the criminal courts of Kentucky that where a case of interest involving capital punishment is under trial, and the accused desires it, he is heard by at least three counsel in his defense.

Mr. President, I have learned this fact in relation to impeachments—that they are to be treated with more liberality on both sides than the stringent practice and forms and rules of proceeding in criminal cases, and that those rules which are introduced into criminal cases to economize time have never been resorted to as a general rule in the trial of impeachments. It seems to me that all the modes of proceeding and all the practice in cases of impeachment ought to be more liberal, ought to be more free from restrictions, and especially technical restrictions, and restrictions simply to save time, than criminal prosecutions. And yet the honorable committee that have reported these rules of proceeding and practice are restricting the proceedings in this and all future cases of impeachment much more rigorously than is known in the criminal practice in the courts of Kentucky.

Mr. James Dixon, of Connecticut, said:

I most deeply regret to see what I think I see, what I can not help seeing, in the remarks of the Senator from Massachusetts and some other Senators. That Senator speaks as if the consumption of a day or two days or three days or even four days, taken up in the defense of this great trial, was to be regretted, a thing to be deprecated and avoided; and he points out as something to be shunned that Mr. Burke spoke four days in the great trial of Warren Hastings. I confess I have not that feeling. I regret that the Senator has it; I regret that any Senator has it. I do not think it is to the credit of this body when entering upon this great trial, impartial as undoubtedly we all are, wishing to do justice in a solemn case of this kind, bringing before us the President of the United States, that gentlemen are disposed to deny him on the final argument upon ten charges the privilege of being heard by as many counsel as he wishes.

In behalf of the restriction, Mr. Sumner said:

The Senator forgets that on the trial of Judge Peck Mr. Wirt, in a speech which I have sometimes thought was the most masterly forensic effort in the history of our country, occupied the attention of the Senate two full days. The Senator will also remember that on the trial of Warren Hastings, Mr. Burke occupied the attention of the court of impeachment for four successive days, and there were other gentlemen on both sides, managers, and also counselors for the defense, who occupied the attention of the court each for several days.

I merely refer to these historical precedents that we may be reminded in advance of the possibilities of a trial like this; and a Senator near me says, the probabilities. Perhaps that is a better word; but I prefer to express myself in the most moderate manner, and I therefore said simply “the possibilities.” It seems to me that it is our duty to provide against probabilities or possibilities even.

And Mr. George F. Edmunds, of Vermont, said:

Now, as to the propriety of this rule as a general rule. Is there a Senator on this floor who would stand up and say of his own personal knowledge of criminal practice in his own State that this rule does not exist in all their courts? I do not mean as a written rule necessarily; but is it not a general rule in every court in the United States of America, either State or national, that only two counsel are heard on a side in the summing up of a cause? A man is tried for his life, and, as a general rule—there may be exceptions, but I never heard of them in that case—only two counsel are heard in his defense, and only two for the prosecution. So all civil rights and questions involving the operations of law over vast sections of country are determined in the same way. This very day, in another Chamber of this building, before the Supreme Court of the United States, a cause is argued which may involve the peace and safety of the inhabitants of ten States, and of millions of persons, and it is confined, by the rules of that court, to two counsel on a side, and nobody complains that any injustice is being done to any one.

After the debate had continued for some time, Mr. Edmunds proposed the following amendment, which was agreed to without division:

Insert, after the words "on each side," the words "unless otherwise ordered by the court upon application for that purpose."

The word "court" was afterwards changed to "Senate" in accordance with a general conclusion to which the Senate had arrived.

Mr. Dixon, referring to the law of Connecticut as a precedent, then proposed the addition of the following clause:

And the counsel of the party accused in all trials to which these rules are to apply shall be allowed the closing turn in the final argument.

Mr. Orris S. Ferry, of Connecticut, said it had been the law of Connecticut since 1848, but had worked badly. The amendment was rejected without division.

**2133. In the opening address in an impeachment trial it is proper to outline what it is expected to prove; but it is not proper to quote evidence which may or may not be admissible later.**—On February 10, 1905,<sup>1</sup> in the Senate sitting for the trial of Charles Swayne, Mr. Henry W. Palmer, of Pennsylvania, was making the opening address on behalf of the managers, and had outlined what they expected to prove in support of the article charging the improper use of a private railway car. Mr. Palmer went on to say:

The respondent acknowledged the facts, as above stated, but defended his action upon the ground that the property of the railroad company being in the hands of the court, he, the judge of the court, had a right to use it without making compensation to the railroad company.

When questioned on the subject, we shall prove that he said, in answer to this question:

"Q. You said this car was one of the cars in possession of the court, because the road was in the hands of a receiver?—A. Yes.

"Q. You said that it was the privilege of the court to use that car, because the road was in the hands of a receiver?—A. Yes."

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

Mr. President, the statement that is now being read, as the record shows, is a part of the testimony of Judge Swayne taken before the committee of the House of Representatives, which, under the acts of Congress, can not be used against him in any criminal prosecution; and therefore it is improper to make the statement that the chairman of the managers is now proceeding to make. We object to the presentation here, by statement or otherwise, of any testimony that was given by Judge Swayne, the respondent, before the House committee, claiming his right, under the law of the Congress of the United States, that it can not be used against him in any criminal prosecution, of which this certainly is one.

After brief argument the Presiding Officer<sup>2</sup> said:

Of course, the managers on the part of the House and the counsel on the part of the respondent have somewhat wide latitude in their opening statements, but the Presiding Officer is of opinion that testimony which has been given by Judge Swayne on the occasion referred to ought not to be cited at length. He has a right to plead his privilege. He can not be obliged to criminate himself. \* \* \* It seems to the Presiding Officer to be an indirect way of getting before the Senate the fact that Judge Swayne had testified to this. The Presiding Officer suggests to the manager that he may properly omit the reading of testimony which has been given on another occasion by Judge Swayne.

<sup>1</sup> Third session Fifty-eighth Congress, Record, pp. 2232, 2233.

<sup>2</sup> Orville H. Platt, of Connecticut, Presiding Officer.

Very soon after, in outlining the case as to the charge of nonresidence, Mr. Palmer said:

The facts, as they will appear in the testimony, are that after his confirmation as judge in 1890 he established his residence at St. Augustine, in a house rented from Mr. Flagler, and lived there with his family until the boundaries of his district were changed by the act of Congress in the year 1894. Judge Swayne states that he was urged by his friends not to move his family or furniture, that the next Congress would probably restore his district, and therefore his furniture was allowed to remain in St. Augustine until the year 1900, when he rented the Simmons cottage in Pensacola and lived there at intervals until 1903, when his wife bought a home. During the six years—

Mr. Higgins objected.

Mr. President, I wish to say that that statement is again contrary to the rule we have invoked as to the statute.

The Presiding Officer<sup>1</sup> held—

The Presiding Officer thinks that the manager has a right to state what he expects to prove, but that he ought not to go further by citing any testimony which has been given by Judge Swayne on another occasion as the means by which he expects to prove it.

**2134. The opening address in an impeachment trial should be confined to what is to be proven, and how it is to be proven, and should not include extended argument on the whole case.**—On February 21, 1905<sup>2</sup> in the Senate sitting for the impeachment trial of Judge Charles Swayne Mr. Anthony Higgins, of counsel for the respondent, was making the opening address preliminary to the introduction of testimony for the respondent, and in the course of his remarks made various citations which he asked the Secretary to read. Thus he had read extracts from the decisions of the Supreme Court of the United States in the cases of *Bradley v. Fisher*; *In re Cuddy*, petitioner; *In re Savin*, and an extract from the answer of one O'Neal in a lawsuit out of which arose one of the causes of Judge Swayne's impeachment.

After the reading of this extract the Presiding Officer<sup>1</sup> interrupted saying:

The Secretary will suspend for a moment. Why does the counsel claim that this is proper in an opening? The Presiding Officer supposed that the opening of a case on the part of the managers or on the part of counsel should be limited to a statement of the issues raised in the case, and what the parties propose to prove either for the prosecution or the defense. How do these extracts which the Secretary has been asked to read fall within what the Presiding Officer supposes to be the proper line of an opening on behalf of the respondent?

Mr. Higgins replied:

I will state, Mr. President, in the first instance, that a perusal of the statement of counsel in the Peck case shows that the managers went very fully into the merits of the case on the argument. Mr. Meredith, in opening for the respondent, did not. I thought, therefore, that I was entirely within the rules of this anomalous proceeding, which is not by common law, is not in equity, but is according to the *lex et consuetudo parliamenti*. The articles and answers are drawn from the civil law. They are not known to our own practice, and therefore I have supposed that it was a proceeding where the largest latitude was given to counsel in the first instance.

In the second place I desire to say, Mr. President, on this interesting point that the Greenhut testimony has not been read, and it is impossible to get a statement of the issues without it. I could have

<sup>1</sup> Orville H. Platt, of Connecticut, Presiding Officer.

<sup>2</sup> Third session Fifty-eighth Congress, Record, p. 2977.

had read the affidavit of Greenhut, I could have read Greenhut's testimony, so as to get them before the court as to what they would show, but I have elected to leave them out, and was stating what O'Neal's was. Moreover, I thought it was the shortest way in which I could proceed.

The Presiding Officer then said:

The Presiding Officer, of course, does not wish to limit counsel for respondent as to any of their just rights, but as was suggested a moment ago the Presiding Officer supposed that an opening on behalf of the person accused was to be confined strictly to the issues raised and what the counsel expected to prove, and how they expected to be able to prove it. This opening seems to have taken the form of an extended argument on the whole case, which the Presiding Officer had supposed would be more proper, to say the least, when the case came to be finally argued. Perhaps the Presiding Officer is only expressing a little the impatience of the Senate, and without attempting to fix limits, he wants to suggest that the opening should be concluded as quickly and as rapidly as counsel feel that it can be in presenting their case to the Senate.

**2135. At the trial of President Johnson both managers and counsel for respondent objected successfully to the rule limiting the number speaking in final argument.**

**In the final argument in the Johnson trial the conclusion was required to be by one manager.**

**The privilege of submitting a written instead of an oral argument in the final summing up was allowed in the Johnson trial.**

**In the Johnson trial the Senate declined to limit the time of the final arguments.**

**The Chief Justice ruled during the Johnson trial that a proposed order should, under the Senate practice, lie over one day before consideration.**

On April 11, 1868,<sup>1</sup> in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Frederick T. Frelinghuysen, Senator from New Jersey, proposed the following:

*Ordered,* That as many of the managers and of the counsel for the respondent be permitted to speak on the final argument as shall choose to do so.

The Chief Justice<sup>2</sup> held that under the rules of the Senate the order would not be considered until the next day.

On April 13,<sup>3</sup> the order came up in the Senate sitting for the trial, and Mr. Charles Sumner, of Massachusetts, at once proposed the following to come in at the end:

*Provided,* That the trial shall proceed without any further delay or postponement on this account.

Mr. Manager Thomas Williams, of Pennsylvania, referred to the rule of the Senate (Rule XXI), which provided that the final arguments "may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives," and said that the rule as it stood was calculated to embarrass the managers, whose number had been fixed by the House at seven. In the preceding impeachment cases wherein a defense had been made, the cases of

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<sup>1</sup> Second session Fortieth Congress, Senate Journal, p. 887; Globe Supplement, p. 147.

<sup>2</sup> Salmon P. Chase, of Ohio, Chief Justice.

<sup>3</sup> Senate Journal, p. 891; Globe Supplement, pp. 160-163.

Judges Chase and Peck, the numbers of managers were, respectively, seven and five, and in the one case six of the seven managers were heard in concluding argument, and in the other all five were heard. In neither of those cases did there seem to have been any question as to the right of the House to be heard through all its managers. And going to the English precedents, in the famous case of Warren Hastings all the managers were heard in argument.

After further debate Mr. Frelinghuysen modified his order as follows:

*Ordered*, That as many of the managers and of the counsel for the President be permitted to speak on the final argument as shall choose to do so: *Provided*, That the trial shall proceed without any further delay or postponement on this account: *And provided further*, That only one manager shall be heard in the close.

Mr. Manager George S. Boutwell objected to the proposition to limit the close to one manager. He recited that in the trial of Judge Peck the case was first summed up by two managers on the part of the House, then the case of the respondent was argued by two of his counsel, and then the case was closed by the arguments of two managers. And in the case of Judge Peck, after the, counsel for the respondent had concluded, the case was closed by three managers. He also cited the ably conducted trial of Judge Prescott, in Massachusetts, wherein two arguments were made by the managers after the close of the argument for the respondent.

Mr. Sumner then proposed to amend by striking out the last proviso and inserting:

*And provided*, That according to the practice in cases of impeachment the several managers who speak shall close.

Mr. George H. Williams, of Oregon, in order to test the sense of the Senate as to the desirability of changing the existing rule, moved that the order and pending amendment be laid on the table. This motion was agreed to, yeas 38, nays 10.

On April 14,<sup>1</sup> Mr. Sumner offered this order:

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

This order going over for consideration until the next day a discussion arose as to the time of submitting the written arguments, and Mr. John Conness, of California, proposed this amendment:

Strike out all after the word "ordered" and insert:

"That the twenty-first rule be so amended as to allow as many of the managers and of the counsel for the President to speak on the final argument as shall choose to do so: *Provided*, That not more than four days on each side shall be allowed; but the managers shall make the opening and the closing argument."

The question being taken, the substitute was disagreed to, yeas 19, nays 27.

Thereupon Mr. Jonathan Doolittle, of Wisconsin, proposed an amendment:

Strike out all after the word "ordered" and insert:

"That upon the final argument two managers of the House open, two counsel for the respondent reply; that two other managers rejoin, to be followed by two other counsel for the respondent; and they, in turn, to be followed by two other managers of the House, who shall conclude the argument."

<sup>1</sup> Senate Journal, pp. 896, 897; Globe Supplement, pp. 174, 175.

Thereupon Mr. Charles D. Drake, of Missouri, moved that the proposed order and pending amendment be postponed indefinitely. This motion was agreed to, yeas 34, nays 15.

On April 20,<sup>1</sup> after the introduction of evidence had been concluded, Mr. Manager John A. Logan asked of the Senate sitting for the impeachment trial, that he be permitted to file a printed argument instead of arguing orally. After some discussion Mr. William M. Stewart, a Senator from Nevada, offered this order:

*Ordered*, That the honorable Manager Logan have leave to file his written argument to-day and furnish a copy to each of the counsel for the respondent.

To this Mr. John Sherman, a Senator from Ohio, offered the following as a substitute:

That the managers on the part of the House of Representatives and the counsel for the respondent have leave to file written or printed arguments before the oral argument commences.

Mr. Stewart accepted the substitute as an amendment, and it was considered by the Senate in lieu of the original resolution offered by Mr. Stewart.

On April 22 the amendment of Mr. Stewart, in its modified form, was considered, and Mr. George Vickers, a Senator from Maryland, proposed as a substitute:

As the counsel for the President have signified to the Senate sitting as a court for the trial of the impeachment, that they did not desire to file written or printed arguments, but preferred to argue orally, if allowed to do so: Therefore,

*Resolved*, That any two of the managers other than those who under the present rule are to open and close the discussion, and who have not already addressed the Senate, be permitted to file written arguments at or before the adjournment of to-day, or to make oral addresses after the opening by one of the managers and the first reply of the President's counsel, and that other two of the counsel for the President who have not spoken may have the privilege of reply, but alternating with the said two managers, leaving the closing argument for the President and the managers' final reply to be made under the original rule.

This proposed substitute was agreed to, yeas 26, nays 20; but immediately thereafter the order as amended by the substitute was disagreed to, yeas 20, nays 26.

Thereupon Mr. Vickers offered the following:

*Ordered*, That one of the managers on the part of the House be permitted to file his printed argument before the adjournment of to-day, and that after an oral opening by a manager, and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or of making an oral address, to be followed by the closing speech of one of the President's counsel, and the final reply of a manager under the existing rule.

Mr. John Conness, a Senator from California, thereupon moved to amend by striking out all after the word "ordered" and inserting:

That such of the managers and counsel for the President as may choose to do so have leave to file arguments on or before Friday, April 24.

The amendment of Mr. Conness was disagreed to, yeas 24, nays 25.

The original order as proposed by Mr. Vickers being under consideration, it was, on motion of Mr. Reverdy Johnson, of Maryland, amended by striking out the word "one" in the first line and inserting "two." Then, on motion of Mr. John Sherman, of Ohio, the words "or written" were inserted between the words

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<sup>1</sup> Senate Journal, p. 916; Globe Supplement, pp. 247-251.

“printed” and “arguments.” And on motion of Mr. John Conness, of California, the time was lengthened from “adjournment of to-day” to “before to-morrow noon.”

Thereupon Mr. John B. Henderson, of Missouri, offered an amendment subsequently modified to read as follows:

Amend by striking out all after the word “ordered” and inserting:

“That subject to the twenty-first rule all the managers not delivering oral arguments may be permitted to file written arguments at any time before the 24th instant, and the counsel for the President not making oral arguments may file written arguments at any time before 11 o'clock of Monday, the 27th instant.”

A motion to lay the whole subject on the table was disagreed to, yeas 13, nays 37.

At this stage of the proceedings Mr. Thomas A. R. Nelson, of Tennessee, of counsel for the President, addressed the Senate, asking that all the counsel for the President who should be able to participate—Mr. Stanbery being ill—should have leave to address the Senate either orally or in writing, as they should elect. He concluded:

I may say, although I am not expressly authorized to do so, that I am satisfied the President desires that his cause shall be argued by the two additional counsel whom he has provided in the case, besides the three counsel who were heretofore selected for that purpose; and I trust you will not deny us this right. I trust that you will feel at liberty to extend it to all the counsel in the case. If we choose to avail ourselves of it we will do so. I have no sort of objection, so far as I am concerned, that the same right shall be extended to all or to more than an equal number of the managers on the other side. I trust that the resolution will be so shaped as to embrace all the counsel who are engaged in the cause in behalf of the President.

Mr. Nelson also cited the precedent of Judge Chase's trial, when six of the managers and five of counsel for the respondent were permitted to address the Senate.

After consideration of suggested amendments, Mr. Lyman Trumbull, of Illinois, proposed to amend Mr. Henderson's amendment by striking out all after the word “that” and inserting:

As many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally.

And this amendment was agreed to, yeas 29, nays 20.

Then, on motion of Mr. Charles R. Buckalew, of Pennsylvania, these words were added:

But the conclusion of the oral argument shall be by one manager, as provided in the twenty-first rule.

Mr. Richard Yates moved to amend by striking out all after the word “that” and inserting:

Four of the managers and four of the counsel for the respondent be permitted to make printed or written or oral arguments, the managers to have the opening and closing, subject to the limitation of the twenty-first rule.

This amendment to the amendment was disagreed to, yeas 18, nays 31.

Then by a vote of yeas 28, nays 22 the substitute of Mr. Henderson, as amended by the propositions of Messrs. Trumbull and Buckalew, was agreed to, and then the order as amended was agreed to. So it was—

*Ordered,* That as many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally, but the conclusion of the oral argument shall be by one manager as provided in the twenty-first rule.

**2136. After elaborate investigation it was held that the opening and closing arguments on incidental questions in impeachment trials belong to the side making the motion or objection.**

**The claim of the managers to the closing of all arguments arising in course of an impeachment trial has been denied after examination of American and English precedents.**

**Discussion of the technical forms of pleading in an impeachment trial, as related to right of opening and closing arguments on an incidental question.**

**Instance wherein the Senate sitting for an impeachment trial fixed the number of managers and counsel to argue on an incidental question.**

**One of the managers in an impeachment trial may not move to rescind an order of the Senate as to the conduct of the trial.**

On March 23, 1868,<sup>1</sup> in the Senate while sitting for the trial of the impeachment of President Johnson, the counsel for the President offered an application that thirty days be allowed the President and his counsel for the preparation of his case.

The managers for the House of Representatives were first heard, Mr. Manager John A. Logan opposing the request. Then Mr. William M. Evarts, of counsel for the President, was heard in favor. Mr. Manager James F. Wilson next opposed, and was followed by Mr. Henry Stanbery, counsel for the President, who favored the application.

Then Mr. Manager John A. Bingham proposed to reply on behalf of the House of Representatives.

The Chief Justice,<sup>2</sup> who was the Presiding Officer under the Constitution, said:

The Chair announced at the last sitting that he would not undertake to restrict counsel as to number without the further order of the Senate, the rule not being very intelligible to him. He will state further that when counsel make a motion to the court the counsel who makes the motion has invariably the right to close the argument upon it.

Thereupon Mr. Manager Bingham asked the decision of the Senate, saying:

Mr. President, with all respect touching the suggestion just made by the Presiding Officer of the Senate, I beg leave to remind the Senate, and I am instructed to do so by my associate managers, that from time immemorial in proceedings of this kind the right of the Commons in England and of the Representatives of the people in the United States to close the debate has not been, by any rule, settled against them. On the contrary, in Lord Melville's case, if I may be allowed and pardoned for making reference to it, the last case, I believe, reported in England, Lord Erskine presiding, when the very question was made which has now been submitted by the Presiding Officer to the Senate, one of the managers of the House of Commons arose in his place and said that he owed it to the Commons to protest against the immemorial usage being denied to the Commons of England to be heard in reply to whatever

<sup>1</sup>Second session Fortieth Congress, Globe Supplement, pp. 23–27.

<sup>2</sup>Salmon P. Chase, of Ohio, Chief Justice of the United States.

might be said on behalf of the accused at the bar of the Peers. In that case the language of the manager, Mr. Giles, was:

“My Lords, it was not my intention to trouble your lordships with any observations upon the arguments you have heard; and if I now do so it is only for the sake of insisting upon and maintaining that right which the Commons contend is their acknowledged and undoubted privilege—the right of being heard after the counsel for the defendant has made his observations in reply. It has been invariably admitted when required.”—(State Trials, vol. 29, p. 762; 44 to 46 George III.)

Lord Erskine “responded the right of the Commons to reply was never doubted or disputed.”

Following the suggestion of the learned gentleman who has just taken his seat, I believe that when that utterance was made it had been the continued rule in England for nearly five hundred years.

In this tribunal, in the first case of impeachment that ever was tried before the Senate of the United States under the Constitution (I refer to the case of Blount), the Senate will see by a reference to it that although the accused had the affirmative of the issue, although he interposed a plea to the jurisdiction, the argument was closed in the case by the manager of the House, Mr. Harper. (Wharton's State Trials of the United States, pp. 314–315.)

When I rose, however, at the time the honorable Senator spoke, I rose for the purpose of making some response to the remarks last made for the accused; but as the Presiding Officer has interposed the suggestion to the Senate whether the managers can further reply I do not deem it proper for me to proceed further until the Senate shall pass upon this question.

Some discussion arising, Mr. Reverdy Johnson, of Maryland, called for the reading of this rule:

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

Mr. Manager Bingham thereupon stated that the managers had used but thirty-five minutes of their time.

Thereupon Mr. Bingham was allowed to proceed.

At the close of his remarks there was no claim for recognition from the counsel for the President, and a vote was taken.

**2137.** On April 1, 1868,<sup>1</sup> in the Senate during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, a witness called by the managers, was being examined, when counsel for the President objected to the competency of a certain question. After arguments had proceeded for some time, the following colloquy occurred between Messrs. Managers John A. Bingham and Benjamin F. Butler on the one side and Mr. Henry Stanbery, of counsel for the President, on the other:

Mr. Manager BINGHAM. I rise to a question here. I understand that we speak here under a rule of the Senate, as yet at least, that requires us to be restricted to an hour on each side.

Mr. STANBERRY. And one counsel, if you go according to the rule.

Mr. Manager BINGHAM. No; I do not understand that. I understand, on the contrary, that the practice heretofore thus far in the progress of this trial has been to allow the counsel to divide their time as they pleased, within but one hour on each side. The point to which I rise now, however, is this: That we understand that in a proceeding of this sort the managers have always claimed and asserted, where the point was raised at all, the right to conclude upon all questions that were raised in the progress of the trial. The hour has been well nigh expended in this instance on each side, as I am told, though I have not taken any special note of the time. But we raise the question; and I state that the fact that our time has been exhausted, as I am advised, is the only reason why I raise it now; and thus we are cut off from any further reply. Our only object in raising the question is that we shall not be deemed to have waived it, because we are advised that it was settled years ago in Melville's case by the Lord Chancellor presiding and by the Peers that the managers might waive their privilege by their silence.

Mr. Manager BUTLER. We have the affirmative.

Mr. STANBERRY. On this question? Oh, no.

<sup>1</sup>Second session Fortieth Congress, Globe Supplement, p. 70.

**2138.** On April 28, 1876,<sup>1</sup> in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the following order was made in a secret session of the Senate, which had retired for consultation, and was reported:

*Ordered,* That the hearing proceed on the 4th of May, 1876, at 12 o'clock and 30 minutes p. m.; that the opening and close of the argument be given to the respondent; that three counsel and three managers may be heard in such order as may be agreed on between themselves, and that such time be allowed for argument as the managers and counsel may desire.

The argument here referred to was on a question in the nature of a demurrer raised by the plea of the respondent that he was not amenable to impeachment for acts done as Secretary of War because of his resignation of said office.

The order having been read in the Senate sitting publicly for the impeachment, Mr. Manager Scott Lord, on behalf of the House of Representatives, announced that the managers requested to be heard on the question of the opening and closing arguments, and also in regard to the number of managers who should be allowed to speak.

Then Mr. Manager Lord proposed a motion<sup>2</sup> to rescind the order.

The President pro tempore<sup>3</sup> said:

The Chair would state to the manager that a motion by him to rescind the order of the Senate would not be in order; but the manager is permitted to address the Senate.

The question being thrown open to argument, three main points were involved:

1. The rule suggested by the state of the question.
2. The American precedents.
3. The effect of English usage.

(1) As to the rule suggested by the state of the question, Mr. Matt. H. Carpenter, of counsel for the respondent, stated, in support of their claim to the opening and closing, the conditions under which the question presented itself:

Now let me briefly state the condition of the pleadings in this case.

To the articles of impeachment the respondent interposed a plea to the jurisdiction, averring that, when the House ordered the impeachment, and when the articles were exhibited, he was not an officer of the United States, but was a private citizen, etc.

It is contended by some that a citizen holding one office may be removed by impeachment for prior misdemeanors in another office. If this be sound, then the plea to the jurisdiction set up new matter; that is, that he was not in any office. Some of the articles of impeachment did not show that he was out of office as Secretary of War, and none of them averred that he was a private citizen. To this plea the House of Representatives replied double; first, that he was Secretary of War when the acts complained of were done, and continued in such office "down to the 2d of March, 1876;" second, that he was in such office "until and including the 2d day of March, 1876," and until the House, by its committee, had completed an investigation, etc.

At this point Mr. Roscoe Conkling, of New York, interposed to say that this reply of the House was a replication.

Mr. Carpenter (continuing) said:

Certainly, and so they call it.

To the first replication the respondent interposed a demurrer; found on page 8 of printed proceedings. And the managers filed a joinder in demurrer; found on page 9.

The honorable manager [Mr. Hoar] now claims that the first replication was a demurrer. An

<sup>1</sup> First session Forty-fourth Congress, Senate Journal, pp. 925—927; Record of trial, pp. 19—27.

<sup>2</sup> Record of trial, p. 19.

<sup>3</sup> T. W. Ferry, of Michigan, President pro tempore.

inspection will show that it was not. It does not object to the plea as insufficient in matter of law, but because of certain facts therein set forth. We demurred to this replication, and they joined in demurrer.

If all the pleadings subsequent to the articles of impeachment are regarded as immaterial, then the substance of the matter is, we have demurred to the articles. And a demurrer to the articles is an affirmative assertion that, conceding the truth of the matters therein contained, they are insufficient in law; and upon this proposition we hold the affirmative.

**Mr. Carpenter also said:**

There is no question as to what is the rule in the courts of law. There it is well settled that the party demurring has the right to open and close the argument. The rules of pleading and proceeding in the ordinary courts of justice, no less than the great canons of the common law, have resulted from centuries of practical experience in the administration of justice, and have been approved by the sages of the law as the best methods to elicit truth and administer justice. If these rules are wisely devised to insure these ends, why should they be departed from in this trial? Is there other motive here than to ascertain the truth and do justice? One of two things is clear; those rules should be observed here or abolished there. It is impossible to maintain that one system of procedure will secure justice in one tribunal and produce injustice in another. And the question is whether the methods which have been established, and from time to time improved, in the courts of law, which are in almost continuous session and dealing with endless variety of causes, are less reliable than rules which might be adopted in a court like this which sits only occasionally after long intervals, and where the personnel of the court is likely to be wholly changed between one trial and another.

**Mr. Montgomery Blair, also of counsel for the respondent, said:**

The first to which I will call the attention of the Senate is the case of Barnard, with which the managers have shown their familiarity, having referred to it in connection with this plea in abatement. Throughout that case the rule which obtains in courts of justice was adhered to, that counsel who maintained the affirmative of the issue had the opening and reply upon such issue. I would also say—and I am making my remarks very brief—in regard to the affirmative of the issue that this is substantially a demurrer to the articles, because every lawyer knows that in a proceeding like this the articles themselves must allege all the facts necessary to give the jurisdiction in the case alleged and proved. This court of impeachment is a court of limited jurisdiction under the Constitution, and in every court of that character the facts upon which the jurisdiction rests must appear on the complaint by which the case is initiated and inviting the action of the court.

Now, every party demurring has the opening and closing, and the argument which is addressed to the court on the other side, that, as they have the affirmative of the general issue, therefore they ought to be heard in opening and replying upon all the questions arising in the progress of the case, would with equal propriety give the plaintiff in every other court the reply on all such questions, whether applied to a question of law or a question of fact. But that is not the rule. In this case we demur, and thus say that, assuming all the facts alleged to be true, the House of Representatives has no case. That is an affirmative proposition that no impeachment can be maintained on the facts charged, and therefore we are entitled to the opening and conclusion of the argument.

**Mr. Manager George F. Hoar, on the other hand, contended:**

I desire for one moment to call the attention of the Senate to the fact that the managers undertake here the affirmative of this issue. It is true that the respondent has interposed what he calls a plea to the jurisdiction, and that the jurisdictional question has been raised by making an issue upon that plea; but that is a matter of form and not of substance. If the counsel for the respondent had seen fit to enter a general plea of “not guilty,” the question of the jurisdiction of the Senate to try and convict would have been involved in the final vote upon that question. To show the jurisdiction of the court over the subject-matter of the inquiry is a part of the affirmative issue involved in the presentment of articles. So that by the logic of ordinary practice we are brought to the same result as we should be if it were not a question of the prerogative of the House, and the accustomed and well-settled methods of proceeding in impeachment.

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The substance of this issue is this: The House of Representatives say the defendant did certain acts as Secretary of War, and remained Secretary of War until the 2d day of March. The defendant replies, “I was not Secretary of War when you presented your articles, or before,” leaving it ambiguous whether he means never before, or that there was a time before when he did not hold the office. In order not to be entangled by that ambiguity, the House of Representatives say, “We mean to assert, as we said before, that you were Secretary of War down to the 2d day of March; and the fact that

you have gone out since (which is the only fact, as we understand the pleadings, now newly set up by you) is not a sufficient answer to our original article.”

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I understand that the question which the Senate ought to determine is this—this is the substance of the whole thing: Is the fact newly affirmed, and first affirmed by this respondent, to wit, the fact that he had ceased to be Secretary of War when these articles were presented, a sufficient answer to the charge? You can not escape that simple proposition. That is what you have got to try: Is the fact newly set up by the defendant, that he had ceased to be Secretary of War when these articles were presented, a sufficient answer to this charge? He sets that up and the House of Representatives say that is no sufficient answer; and that is a demurrer in substance and in fact; and on the question whether a fact so set up by my antagonist newly, for the first time in the case, is a sufficient answer to what I have said, I am always entitled to the opening and close.

The House of Representatives, in the first instance, allege in the original articles:

“ART. 3. That said William W. Belknap was Secretary of War of the United States of America before and during the month of October, 1870, and continued in office as such Secretary of War until the 2d day of March, 1876.”

Now, if the Senate will be good enough to observe the plea, which was put in by the honorable counsel, it is this:

“That this honorable court ought not to have or take further cognizance of the said articles of impeachment exhibited and presented against him by the House of Representatives of the United States, because he says that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him, the said Belknap, by the said House of Representatives, he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States.”

In that replication there is an ambiguity. If the respondent had said that at the time of the presentment of the articles of impeachment he was not a civil officer, it would have presented the naked question of jurisdiction without ambiguity or difficulty, and the House would have demurred; but he inserts the word “before.” That may have one of two meanings. It may amount to an allegation that he was never, before the original articles of impeachment were presented, a civil officer of the United States. I do not say that that astute purpose was in the mind of the counsel who drew the pleading. If we had demurred simply, if we had made a simple demurrer, the respondent might then have come before the Senate and argued that he had responded to the articles that he never was a civil officer of the United States at any time before they were presented, and we should have been left to a discussion upon the verbiage of the article and to the danger of being excluded from court by a blunder in not giving the proper construction to the defendant’s language. Accordingly we set up no new matter, but we simply reassign, in regard to the fact which is left doubtful on the expression of the defendant’s plea, what we said in our original articles; in other words, we say, “We mean to say that you were a civil officer of the United States until the 2d of March; and therefore, that being the meaning of our original article, your plea presents no legal or proper response.” It is a case, therefore, of a reassignment or a reaffirmation of a fact originally set forth in a mode in which the meaning of the original allegation can not be questioned, and saying that, therefore, that fact being considered, the plea of the respondent shows no answer in law. Thus we have presented to the Senate in substance an issue made here in this way—a statement of the original articles that the defendant was a civil officer of the United States down to the 2d day of March, reaffirmed in the replication; a statement by the defendant that before these articles were presented he had ceased to be such civil officer; and a statement on the part of the House of Representatives that that last allegation is no defense to the charge; in other words, a simple demurrer to what is pleaded and well pleaded in the original article; and on such demurrer by the invariable rule of courts both of law and equity the party sustaining the demurrer has the affirmative.

Upon the larger question (setting aside now the pleadings and taking the substance of the issue upon the question of jurisdiction) the plaintiff always has the affirmative. If the respondent had contented himself with introducing a naked plea of "not guilty," he could have availed himself of his objection to the jurisdiction upon that plea, and it would have required the judgment of the court to be given against him or in his favor, without setting up the fact at all, because the original articles do not allege that at the time of the presenting of the articles he was a civil officer of the United States.

And it may be proper to say one further word in conclusion. I understand, in accordance, as was suggested in the very significant question put I think by the honorable Senator from New York, that the true rule of pleading in impeachment cases is this: The House of Representatives present articles setting up the substance of the transaction on which they rely, not in the form of an indictment or of a bill in equity or of a civil declaration certain to a certain intent in general, but setting forth the substance of a transaction. It is not necessary to give dates. You may say "on or about the time." It is not necessary to give legal results or intendments. Then the defendant comes in and in his answer either denies the whole matter if there was no such transaction as is set up, or if there was a transaction of the kind, but an innocent and not a guilty one, with certain different and other circumstances, he tells the story as he alleges it to be, setting up at the same time all special suggestions of law or of defense of fact on which he relies; and the pleadings are made up in that way by a joinder of issue. I do not think it is in the power of parties by pleadings of fact such as take place in ordinary courts of law to compel the Senate to determine, except in its discretion, several issues of fact in succession. Suppose an issue of fact were made up on this question of jurisdiction, is the Senate to be compelled to lay aside its legislative business and determine that, and then the defendant answer over, perhaps setting up some other matter strictly in bar, and have that determined, and so the Senate put to a trial of half a dozen successive issues of fact? I respectfully submit that that is not the rule, but that the proper method of pleading is the one which I have first stated.

Undoubtedly it would have been very proper that the matter set up in this second replication should have been set up in the original articles; but it is also well settled in matters of impeachment that the House of Representatives has in its discretion the right at any time to file additional articles if it see fit. It is also true that this new matter set up in the second replication has been pleaded to without objection on the part of the defendant; that it is before the Senate as an allegation in the cause presented by the authority of the House; and whether it should or should not have been originally inserted in the articles becomes now of no consequence.

(2) As to the American precedents, Mr. Manager Hoar said:

This question arose in the trial of President Johnson, and with the leave of the Senate I will cite that authority and the English authority on which the Senate then based its action. After a discussion of a question of practice which came up, as to the course of proceeding in the trial, the Chief Justice, then presiding in the Senate, after the managers for the House had closed what they had to say, inquired of the counsel for the President respondent whether they desired to reply to what had been said by the managers, and the managers representing the House interposed with this suggestion:

"Mr. Manager BINGHAM. Mr. President, with all respect touching the suggestion just made by the Presiding Officer of the Senate, I beg leave to remind the Senate, and I am instructed to do so by my associate managers, that from time immemorial in proceedings of this kind the right of the Commons in England, and of the Representatives of the people in the United States, to close the debate has not been by any rule settled against them. On the contrary, in Lord Melville's case—"

And this, I believe, is the last case of impeachment which has taken place in England—"if I may be allowed and pardoned for making reference to it, the last case, I believe, reported in England, Lord Erskine presiding, when the very question was made which has now been submitted by the Presiding Officer to the Senate, one of the managers of the House of Commons arose in his place and said that he owed it to the Commons to protest against the immemorial usage being denied to the Commons of England to be heard in reply to whatever might be said on behalf of the accused at the bar of the Peers. In that case the language of the manager, Mr. Giles, was:

"My lords, it was not my intention to trouble your lordships with any observations upon the arguments you have heard; and if I now do so, it is only for the sake of insisting upon and maintaining that right which the Commons contend is their acknowledged and undoubted privilege, the right of being

heard after the counsel for the defendant has made his observations in reply. It has been invariably admitted when required.' (29 State Trials, p. 762, 44–46 George III.)

"Lord Erskine 'responded the right of the Commons to reply was never doubted or disputed.'

"Following the suggestion of the learned gentleman who has just taken his seat, I believe that when that utterance was made it had been the continued rule in England for nearly five hundred years.

"In this tribunal, in the first case of impeachment that ever was tried before the Senate of the United States under the Constitution (I refer to the case of Blount), the Senate will see by a reference to it that although the accused had the affirmative of the issue, although he interposed a plea to the jurisdiction, the argument was closed in the case by the manager of the House, Mr. Harper."

In response to that claim, the distinguished and able counsel for the President, who, I need not remind many of the most distinguished Members of this body, fought every inch of ground, yielded to the demand; and throughout the President's trial, from that time, the House of Representatives was heard in reply upon every question that arose, whether a question of the admission of evidence, of the proceedings, or the final question, following therein the English precedents for five hundred years and the precedent adopted in the first case of impeachment in the Senate, and acting therein also in accordance with what, so far as I have been able to examine, has been the proceeding in every case of impeachment in a State tribunal in this country.

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In the Blount trial, I believe I have stated with sufficient distinctness, the plea being that William Blount was a Senator of the United States, and therefore not an impeachable civil officer, and also that he had laid down his office before the proceedings were instituted—upon that issue, which presented simply the question of jurisdiction, the opening and close were with the House.

\* \* \* \* \*

Blount's case was the case to which I referred. In the haste of replying to the learned counsel I used the phrase, "the rule settled by itself for the Senate in the first case which came before them." In point of fact, it appears upon the report that the order of proceeding was settled by the four distinguished counselors who took part in it by an agreement, and there is no vote or other express action of the Senate to be found; and it was my purpose, on the suggestion of one of my honored associates, to have made that explanation to the Senate at this time, but it passed from my mind. But Blount's case seems to me to be a very significant and important authority, for it is not credible that those four lawyers, four as able lawyers as the bar of the United States afforded at that time, Mr. Jared Ingersoll, Mr. Bayard, Mr. Harper, and Mr. Dallas, would have conceded so important an advantage to the managers on the part of the House of Representatives without any equivalent, unless they had understood the practice to be so.

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I speak at this moment only from memory, but I do not understand that the learned counsel correctly states the only American precedent to which he has referred—the case of Barnard. In Barnard's case a plea was interposed to the jurisdiction, in substance the same plea which is interposed here, applying to several of the articles. That plea was argued by itself, and upon that argument the counsel for the State had the opening and the close.

On the other hand, Mr. Carpenter said:

In Blount's trial the House of Representatives had interposed the first demurrer, and therefore the managers were entitled to open and close the argument. In the report of that case (2 Annal of Congress, p. 2248), it is said:

"Mr. Bayard, the chairman, having communicated with Mr. Ingersoll, the leading counsel for the defendant, it was agreed between them that the managers should proceed in the argument first on the part of the prosecution, and that the right to reply should belong to the managers."

That is, the managers and the counsel for the defendant, being good lawyers, were agreed that the managers were entitled to open and close the argument upon the demurrer interposed by them. Such is the rule in all courts of justice. And yet the honorable manager [Mr. Hoar] refers to this understanding between counsel as to the rights of the managers, in that case, to show that the managers, in all cases, are entitled to open and close the argument upon a demurrer interposed by the defendant; which would be exactly the reverse of the rule in courts of law.

Indeed, the broad proposition is maintained by the honorable manager that in the argument of every question to arise in this case, upon every motion made by either side, and upon every demurrer,

no matter by which side interposed, the managers are entitled to the opening and close. And I understood him to contend at your last sitting that this was conceded by the eminent counsel who defended the impeachment against President Johnson, when the question was first raised by Mr. Manager Bingham; and that the court and counsel on both sides thereafter proceeded on that hypothesis.

But an examination of the report of that trial shows that the honorable manager was under a total misapprehension. I read from page 77 of the first volume of the Congressional edition of that trial:

“Mr. Howard and Mr. Manager Bingham rose at the same time.

“The CHIEF JUSTICE. The Senator from Michigan.

“Mr. MANAGER BINGHAM. On the part of the managers I beg to respond to what has just been said.

“Mr. HOWARD. I beg to call the attention of the President to the rules that govern the body.

“Mr. MANAGER BINGHAM. I will only say that we have used but thirty-five of the minutes of the time allowed us under the rule.

“The *Chief Justice*. The Chair announced at the last sitting that he would not undertake to restrict counsel as to number—

They had been restricted as to time—

“without the further order of the Senate, the rule not being very intelligible to him. He will state further that when counsel make a motion to the court, the counsel who makes the motion has invariably the right to close the argument upon it.

“Several SENATORS. Certainly.”

Mr. Bingham, however, wished to be heard, and by unanimous consent was heard, just as this body, unquestionably, by unanimous consent would hear any manager on this honorable board who might ask such indulgence. So Mr. Bingham was heard. It is true that in his remarks he set up this unwarrantable claim, which has been repeated by his successor, that the House of Representatives had the right to close every argument whether they had the affirmative of the particular issue or not; but the silence with which the Senate listened leads me to infer that they were perfectly satisfied with the ruling of the Chief Justice, made before Mr. Bingham took the floor, and never recalled, and which was supported by “several Senators” answering from their places “certainly.” No vote was taken on the question. It was an interlocutory question; I believe, a motion by the defendant for additional time to answer.

The Chief Justice ruled emphatically that whichever party made a motion, the counsel who made it had invariably the right to close the argument upon it, and several Senators responded “certainly.” And nothing occurred to show that the remarks of Mr. Bingham affected the opinion of the Chief Justice or of the Senators who responded in approval. Certainly the ruling was not changed.

### (3) As to the English precedents, Mr. Manager Hoar said:

I understand that the rules of proceedings upon impeachment are not governed by the principles or precedents of ordinary criminal courts. The House of Lords or the Senate sitting as a court of impeachment undoubtedly derives great light in the application of the principles of common justice and of law from the sages of the law; but nevertheless impeachment is a proceeding which stands on its own constitutional ground. It is an investigation into the guilt of great public offenders abusing official trusts by the legislative bodies of the country where that practice prevails. In that investigation, as everywhere else, those legislative bodies are equals. Neither branch of the American Congress stands as a suitor at the bar of the other; neither branch of the British Parliament stands as a suitor at the bar of the other; but the concurrent judgment of the two branches is necessary to an impeachment, just as the concurrent judgment of the two branches is necessary to an act of legislation. In the English Parliament the House of Commons brings to the bar of the Lords every bill which it passes, and requests the assent of the Lords thereto, just as in the English Parliament the House of Commons brings to the bar of the House of Lords the fact that it has ascertained the guilt of a great public offender in the course of its official duty, and asks the judgment of the House of Lords as to his guilt and his punishment.

It is an absolutely settled principle of right that upon all questions which arise in the trial of an impeachment the House of Commons has the right to reply. It is a principle which has existed in England for four hundred years, which, when the term “impeachment” is used in our Constitution in clothing this body with one of its highest functions, was imported, as all the other constitutional attendants of an impeachment were imported, except where they are expressly varied by the Constitution itself. party demurring has the affirmative and the reply in support of his demurrer. except where they are expressly varied by the Constitution itself.

But the burden and the duty is on us of proving that charge according to the precedents of this Senate and of all senates, according to the precedents of the House of Lords in England sitting as a court of impeachment, and not according to the precedents of police courts or inferior courts of any other kind sitting anywhere. And the precedents of this Senate and of all senates sitting as a court of impeachment have adopted the rule practiced upon in the English House of Lords, from which impeachments come, for five hundred years, that on all questions the party instituting the proceeding and having the burden of proof throughout the whole issue has the right to reply. That is the proposition, and to that proposition no answer whatever has been vouchsafed or suggested by the honorable counsel for the defendant.

The further proposition, to which no reply has been suggested, was that in this particular on this special issue now made up, the precedent of this Senate and of all senates sitting as a court of impeachment precisely corresponds and agrees with the precedents of all courts whatever, that where a plea to the jurisdiction is interposed and to that plea a demurrer is filed, which—leaving out now this second matter of fact—is the question here, the party demurring has the affirmative and the reply in support of his demurrer.

\* \* \* \* \*

In regard to the English precedent, I beg leave respectfully to refer honorable Senators to a report of which Mr. Burke is the author from a committee appointed by the House of Commons to inspect the journals of the Lords with a view of ascertaining the occasion of the great delay which had happened in the trial of Warren Hastings. This inspection and report were made in the seventh year of that trial. Mr. Burke makes in this report a most ample and thorough discussion of the entire procedure in cases of impeachment in Parliament. He begins by considering the matter of pleadings and the matter of evidence and other matters of procedure, and states in the fullest manner the principle upon which the claim of the managers rested. I do not mean to say that he states anything in regard to this particular question of the opening and close. The report is silent upon that particular subject, but he states the doctrine. He begins by saying:

“Your committee finds that the Lords, in matter of appeal or impeachment in Parliament, are not of right obliged to proceed according to the courts or rules of the Roman civil law, or by those of the law or usage of any of the inferior courts in Westminster Hall, but by the law and usage of Parliament.”

Then he cites various precedents from the earliest times, and finds that always the court proceed according to the law and usage of Parliament. Then he cites Lord Coke:

“As every court of justice hath laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, etc., so the high court of Parliament, *suis propriis legibus et consuetudinibus* subsistit. It is by the *lex et consuetudo* parliamenti that all weighty matters in any parliament moved, concerning the peers of the realm, or Commons in Parliament assembled, ought to be determined, adjudged, and discussed by the course of the Parliament and not by the civil law, nor yet by the common laws of this realm used in more inferior courts.

“This is the reason that judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws, but *secundum legem. et consuetudinem* parliamenti; and so the judges in divers Parliaments have confessed.”

Then he goes on under the “rule of pleading:”

“Your committee do not find that any rules of pleading as observed in the inferior course have ever obtained in the proceedings of the high court of Parliament in a cause or matter in which the whole procedure has been within their original jurisdiction. Nor does your committee find that any demurrer or exception, as of false or erroneous pleading, hath been ever admitted to any impeachment in Parliament, as not coming within the form of the pleading; and, although a reservation or protest is made by the defendant—matter of form, as we conceive—‘to the generality, uncertainty, and insufficiency of the articles of impeachment,’ yet no objections have in fact been ever made in any part of the record.”

I do not think it is worth while to detain the Senate with reading very full and copious extracts from this report. I will take the liberty of placing the book where it will be reached by Senators when they discuss this question.

Taking the other view, Mr. Carpenter said:

In the next place, whatever may be the precedents in the House of Lords in trying an impeachment, we have the authority of the honorable manager himself who has just taken his seat that they are not binding at all in a trial of impeachment under our Constitution. In the debate which took place in

the House (if it can be called a debate where nobody was allowed to speak) as to the ordering of the impeachment, the honorable manager himself stated that the British rules were not applicable, and consequently no aid could be drawn from the trial of Warren Hastings. Now I submit that whatever may have been the rule in the trial of impeachments in England this court should make its own rule, and that should be the rule of right and justice.

I deny, as respectfully as a man may deny anything that comes from a coordinate branch of this Congress, that the House appears here in any other attitude than we appear here, a suitor in this cause. Is it possible, where the Constitution says we are to have a trial, and the House of Representatives presents itself here as the accuser, that it is a part of the court; that it is entitled to any favor here that we are not entitled to? The rule uniformly adopted by the courts of law is a rule which the experience of hundreds of years has determined to be wise and proper, and that is the rule which I understand this Senate has ordered for this trial.

And Mr. Montgomery Blair argued:

It is altogether a mistake, also, that this proceeding was ever otherwise considered here or in England as standing upon any different footing in its general principles than any other proceedings at law. Woodeson, in his lecture on the subject of impeachment (volume 2, page 596), treats it as a suit. His language is that "the House of Commons, as the grand inquest of the nation, become suitors for penal justice." Wilson in his Parliamentary Law speaks of the articles as analogous to an indictment, and hence the rules of practice ought to conform to those of the courts in analogous circumstances, and if they vary from them in England, it does not follow a practice there which does not conform to the general principles recognized here. We have greatly restricted the impeachment proceeding; it is not the proceeding here as there in many of its essential features.

In conclusion, Mr. Carpenter quoted from Cushing's Law and Practice of Legislative Assemblies.

Mr. Joseph E. McDonald, of Indiana, moved to rescind the order giving the opening and closing to the counsel for the respondent.

Mr. A. S. Merrimon, of North Carolina, asked this question:

Do the managers claim to reply in the discussion of all questions, as a matter of right, or only on the ground of practice, which the court may in its sound discretion rightfully change?

Mr. Manager Hoar replied:

I respectfully reply to that question that we do not concede that whatever be the constitutional and lawful prerogatives of the House of Representatives in this regard can be rightfully changed without the assent of the House itself.

The Senate, by a vote of 40 yeas, 18 nays, voted to retire for consultation.

Having retired, the question recurred on the motion of Mr. McDonald, which was decided in the negative; yeas 20, nays 34.

Thereupon, on motion of Mr. George S. Boutwell, of Massachusetts, it was—

*Ordered*, That four managers on the part of the House of Representatives may be allowed to submit arguments upon the question whether the respondent is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office, and whether the issues of the fact presented in the pleadings are material, and also whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

And then, the Senate having returned to its chamber, the President pro tempore said:

The presiding officer is directed to state that the motion to reconsider the vote by which the order of argument was made is overruled, and also to state that an order is made granting the request of the managers on the part of the House that four of the managers be permitted to argue the case.

**2139. On July 7, 1876,<sup>1</sup> in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question arose as to the admissibility of certain testimony.**

Mr. Manager John A. McMahan, who had objected to the testimony, claimed the right as the objector to the opening and closing of the argument, but offered to waive the opening.

Mr. Matt. H. Carpenter, of counsel for the respondent, admitted the right claimed, and insisted that the managers should exercise it.

Thereupon Mr. McMahan argued, and was followed by Mr. Carpenter. Then Mr. Manager George A. Jenks closed.

**2140. Instance of action by the Senate as to improper language used by counsel for respondent in an impeachment trial.**

**The presiding officer at an impeachment trial exercises authority to call to order counsel using improper language.**

On April 29, 1868,<sup>2</sup> in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, and during the final arguments in the case, Mr. Charles Sumner, a Senator from Massachusetts, offered the following:

Whereas Mr. Nelson, one of the counsel for the President, in addressing the Senate, has used disorderly words, as follows, namely: Beginning with personalities directed to one of the managers he proceeded to say, "So far as any question that the gentleman desires to make of a personal character with me is concerned, this is not the place to make it. Let him make it elsewhere if he desires to do it" and whereas such language, besides being discreditable to these proceedings, is apparently intended to provoke a duel or to signify a willingness to fight a duel, contrary to law and good morals: Therefore, *Ordered*, That Mr. Nelson, one of the counsel of the President, has justly deserved the disapprobation of the Senate.

The Chief Justice<sup>3</sup> said that the proposition of Mr. Sumner was not before the Senate if objected to.

Mr. John Sherman, of Ohio, thereupon objected.

Mr. Manager Benjamin F. Butler, who was the manager referred to, asked that no further action be taken in regard to the language referred to.

On April 30,<sup>3</sup> the proposition came before the Senate sitting for the trial.

Pending consideration, Mr. Henry B. Anthony, of Rhode Island, asked Mr. Nelson if he intended by the language to challenge the manager to a duel.

Mr. Nelson said that he did not particularly have a duel in mind. He simply resented a charge by the manager, and he had no idea of insulting the Senate.

Mr. Reverdy Johnson, of Maryland, moved that the proposition lie on the table, and the motion was agreed to; yeas 35, nays 10.

**2141. On June 16, 1876,<sup>4</sup> in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, offered a paper in the nature of a plea that the proceeding be dismissed because the Senate had affirmed its jurisdiction of the case by less than a two-thirds vote.**

<sup>1</sup> First session Forty-fourth Congress, Record of trial, pp. 192, 193.

<sup>2</sup> Second session Fortieth Congress, Senate Journal, p. 927; Globe supplement, p. 341.

<sup>3</sup> Senate Journal, p. 928; Globe Supplement, pp. 350, 351.

<sup>4</sup> First session Forty-fourth Congress, Record of trial, p. 170.

Objection arose to placing the paper on file, whereupon Mr. Black said:

Mr. President, we offer a paper asserting our legal and constitutional rights, as we understand them. A Senator rises and says he objects; a manager rises and says he objects. Is that a reason for simply throwing it under the table? Is there not to be some reason given for such a thing as that? What is to be done with this? Walk over us I admit you can, if a majority see proper to do so. They can do as they please; they can order it to be thrown under the table; but some little respect ought to be shown a man who is struggling for his liberty and his reputation—

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

I call the counsel to order. I do not think, that the language he is addressing to the Chair is fit to be addressed to this court.

The President pro tempore<sup>1</sup> said:

Counsel will use language which is proper and decorous. \* \* \* The counsel win proceed, using proper language. The Chair will call him to order if he does, not use proper language.

**2142. It was held that a motion relating to the sitting of the Senate in an impeachment trial might be argued by counsel.**—On July 7, 1876,<sup>2</sup> in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, a Senator from Vermont, moved that the Senate take a recess until 7.30 p.m. for the purpose of an evening session.

Mr. Matt H. Carpenter, of counsel for the respondent, was making an appeal against an evening session, when Mr. Edmunds raised the question of order that on a question of this kind counsel were not entitled to be heard.

The President pro tempore<sup>1</sup> overruled the point of order.

Thereupon Mr. Carpenter made his protest, and the Senate decided the motion of Mr. Edmunds in the negative.

**2143. In arguing in an impeachment trial counsel take position under direction of the Senate.**—On July 25, 1876,<sup>3</sup> in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, was about to address the Senate in the final summing up, when Mr. John A. Logan, a Senator from Illinois, said:

Before the counsel proceeds, I will state that I have heard some complaints made about the position that the counsel and managers have to occupy in the presence of the Senate. I therefore suggest that the counsel be allowed to occupy any position he desires from which to address the Senate.

Thereupon, by unanimous consent, Mr. Carpenter was permitted to stand in the outer tier of seats.

**2144. Instance wherein a manager was permitted to move a change of the rules governing the Senate in impeachment trials.**—On April 11, 1868,<sup>1</sup> in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager John A. Bingham, on behalf of the managers, moved in the Senate for a change in one of the rules governing the trial.

This motion was entertained.

<sup>1</sup>T. W. Ferry, of Michigan, President pro tempore.

<sup>2</sup>First session Forty-fourth Congress, Record of trial, p. 202.

<sup>3</sup>First session Forty-fourth Congress, Record of trial, pp. 318, 319.

<sup>4</sup>Second session Fortieth Congress, Globe supplement, p. 147.

**2145. Instance wherein the managers of an impeachment declined to answer a question propounded by a Senator during the trial.**—On April 1, 1868,<sup>1</sup> in the Senate, during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, was under examination. Counsel for the President objected to a question tending to elicit from witness the substance of a conversation with General Thomas, and statements of the latter as to the means by which the President proposed to obtain possession of the war office.

In the course of the discussion as to the admissibility of the question, Mr. Reverdy Johnson, Senator from Maryland, propounded the following:

The honorable managers are requested to say whether evidence hereafter will be produced to show—

*First*, That the President, before the time when the declarations of Thomas, which they propose to prove, were made, authorized him to obtain possession of the office by force or threats, or intimidation, if necessary; or,

*Secondly*, If not, that the President had knowledge that such declarations had been made and approved of them.

To which Mr. Manager John A. Bingham replied:

I am instructed by my associates to say—and I am in accord in judgment with them, Mr. President—that we do not deem it our duty to make answer to so general a question as that; and it will certainly occur to the Senate why we should not make answer to it.

**2146. During an impeachment trial the managers and counsel for the respondent are required to rise and address the Chair before speaking.**—On July 7, 1876,<sup>2</sup> in the Senate sitting for the impeachment of trial of William W. Belknap, late Secretary of War, Mr. Manager John A. McMahon, and Mr. Matt. H. Carpenter, of counsel for the respondent, were engaged in a colloquy, when the President pro tempore<sup>3</sup> said:

The Chair will remind the gentlemen that they must rise to speak, and address the Chair. The Chair will insist upon it. \* \* \* The Chair will again remind gentlemen, and hopes he does it for the last time, that the counsel as well as the managers should address the Presiding Officer, that he may maintain the rights of the parties. It is due to the Senate that it should be done; and the duty of the Chair demands it to protect the respect due to the Senate. The Chair will state, also, that he will not recognize a gentleman on either side unless he does rise and address the Presiding Officer.

**2147. During an impeachment trial a proposition by managers or counsel is not amendable by Senators, but yields precedence to one made by a Senator.**

**A proposition offered by a Senator during an impeachment trial is amendable by Senators, but not by managers or counsel.**

On June 6, 1876,<sup>4</sup> in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a proposition fixing the time for the hearing of evidence on the merits was under discussion, and motions were offered by the managers for the House of Representatives, by the counsel for the respondent, and

<sup>1</sup> Second session Fortieth Congress, Globe supplement, pp. 70, 71.

<sup>2</sup> First session Forty-fourth Congress, Record of trial, pp. 190, 191.

<sup>3</sup> T. W. Ferry, of Michigan, President pro tempore.

<sup>4</sup> First session Forty-fourth Congress, Record of trial, p. 166.

by Senators. A question arising as to amendment and precedence the President pro tempore<sup>1</sup> said:

The Chair has ruled that a proposition made by managers or counsel is not amendable by Senators; but any proposition made by a Senator is amendable by a Senator, nor can the proposition made by Senators be amended by the counsel or managers. A motion made by a Senator has priority of one offered by the managers or the counsel.

**2148. During an impeachment trial an order proposed by a Senator is debatable by managers and counsel, but not by Senators.**—On June 1, 1876,<sup>2</sup> in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. William Pinckney Whyte, a Senator from Maryland, offered an order fixing the time for further pleadings on behalf of the respondent. Mr. Matt. H. Carpenter, of counsel for the respondent, and Mr. Manager Scott Lord, on behalf of the House of Representatives, discussed the proposed order at some length.

Thereupon Mr. Allen G. Thurman, a Senator from Ohio, proposed to address the Senate.

The President pro tempore<sup>1</sup> reminded him that debate was not in order:

Mr. Thurman said:

I do not wish to debate, but I want to know the rule of the Senate on this subject. I want to know whether there is to be an unlimited discussion of counsel and managers on every order that is offered by a Senator. In my judgment it is all irregular.

The President pro tempore said:

The Chair will state in reply to the Senator from Ohio that the Chair was holding under the rule that each of the parties is entitled to one hour's debate on any motion or order submitted.

**2149. During the Peck impeachment trial the respondent assisted his counsel in examining witnesses, in argument on incidental questions, etc.**—On January 11, 1831,<sup>3</sup> in the high court of impeachment during the trial of the cause of the United States *v.* James H. Peck, the respondent, who was United States district judge of Missouri, assisted his counsel, personally addressing the court to offer documentary evidence, to explain testimony which he proposed to offer, to propound questions to the witness, to make a statement supplementary to the testimony of a witness, and to argue as to the admissibility of certain testimony.

**2150. Delays in the Johnson trial caused by illness of counsel for respondent were the occasion of protest on the part of the managers and of action by the Senate.**—On April 16, 1868,<sup>4</sup> in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. William M. Evarts, of counsel for the President, announced that the defense had reached a point where it would not be convenient to produce any more testimony on this day. On April 14 the Senate had adjourned because of the illness of Mr. Henry Stanbery, of counsel for the respondent, and on April 15 the proceedings had been modified somewhat because of his continued illness. He was still absent on the

<sup>1</sup>T. W. Ferry, of Michigan, President pro tempore.

<sup>2</sup>First session Forty-fourth Congress, Record of trial, p. 160.

<sup>3</sup>Second session Twenty-first Congress, Report of trial of James H. Peck, pp. 267–272.

<sup>4</sup>Second session Fortieth Congress, Globe Supplement, pp. 208, 209; Senate Journal, pp. 906, 907.

16th, when Mr. Evarts, after introducing considerable testimony made announcement as above stated.

This caused a protest from Mr. Manager Benjamin F. Butler, in the course of which he said:

We adjourned early on Monday, as you remember, and on the next day there was an adjournment almost immediately after the Senate met because of the learned Attorney-General. Now, all we ask is that this case may go on.

If it be said that we are hard in our demands that this trial go on, let me contrast for a moment this case with a great State trial in England, at which were present Lord Chief Justice Eyre, Lord Chief Baron McDonald, Baron Hotham, Mr. Justice Buller, Sir Nash Grose, Mr. Justice Lawrence, and others of Her Majesty's judges in the trial of Thomas Hardy for treason. There the court sat from 9 o'clock in the morning until 1 o'clock at night, and they thus sat there from Tuesday until Friday night at 1 o'clock, and then, when Mr. Erskine, afterwards Lord Chancellor Erskine, asked of that court that they would not come in so early by an hour the next day because he was unwell and wanted time, the court after argument refused it, and would not give him even that hour in which to reflect upon his opening which he was to make, and which occupied nine hours in its delivery, until the jury asked it, and then they gave him but a single hour, although he said upon his honor to the court that every night he had not got to his house until between 2 and 3 o'clock in the morning, and he was regularly in court at 9 o'clock on the following morning.

That is the way cases of great consequence are tried in England. That is the way other courts sit. I am not complaining here, Senators, understand me. I am only contrasting the delays given, the kindnesses shown, the courtesies extended in this greatest of all cases, and where the greatest interests are at stake, compared with every other case ever tried elsewhere. The managers are ready. We have been ready; at all hazards and sacrifices we would be ready. We only ask that now the counsel for the President shall be likewise ready, and go on without these interminable delays with which when the House began this impeachment the friends of the President there rose up and threatened.

At the conclusion of Mr. Butler's remarks, Mr. John Conness, Senator from California, offered this order:

*Ordered*, That on each day hereafter the Senate sitting as a court of impeachment shall meet at 11 o'clock a. m.

Mr. Charles Sumner proposed the following as a substitute therefor:

That, considering the public interests which suffer from the delay of this trial, and in pursuance of the order already adopted to proceed with all convenient dispatch, the Senate will sit from 10 o'clock in the forenoon to 6 o'clock in the afternoon, with such brief recess as may be ordered.

Under the ruling the proposed order went over to April 17 for consideration, when Mr. Sumner's proposed substitute was disagreed to, yeas 13, nays 30. The original order offered by Mr. Conness was then agreed to, yeas 29, nays 14.

The Senate had heretofore met at 12 m. under the rule.

**2151. Instance during an impeachment trial wherein the Presiding Officer admonished managers and counsel not to waste time.**—On February 15, 1905,<sup>1</sup> in the Senate sitting for the impeachment trial of Judge Charles Swayne, in the course of the introduction of testimony, the Presiding Officer<sup>2</sup> said:

While the Presiding Officer makes no criticism on the course of the examination and cross-examination, he desires to say that the time of the Senate is very precious, and he hopes that there will be as little time taken by immaterial questions, either by the managers or by counsel, as possible, and that we may get along with this case.

<sup>1</sup>Third session Fifty-eighth Congress, Record, p. 2625.

<sup>2</sup>Orville H. Platt, of Connecticut, Presiding Officer.

**2152. The Senate, and not the Presiding Officer, decides on a motion for attachment of a witness.**

**Instance wherein, during the Swayne trial, testimony was introduced to show the propriety of an attachment against an absent witness.**

On February 10, 1905,<sup>1</sup> in the Senate sitting for the trial of Judge Charles Swayne, after the pleadings had been concluded and when the witnesses were called, Mr. Henry W. Palmer, of Pennsylvania, manager on behalf of the House of Representatives, said:

Mr. President, in the case of Joseph H. Durkee, of Jacksonville, Fla., we have a certificate of a physician stating that he is not able to attend. The certificate was sent to the Presiding Officer and by him handed to me, and it has been exhibited to counsel on the other side.

Mr. Durkee is a witness who has been subpoenaed by both sides, and is a material and important witness. I have a witness present who will testify with respect to Mr. Durkee's present condition, and I ask that Mr. B. S. Liddon be summoned to testify what Mr. Durkee's present condition is, for the purpose of moving for an attachment.

Mr. Liddon was then sworn and examined, giving testimony indicating that Mr. Durkee was able to attend.

The testimony being concluded, Mr. Palmer announced that on that showing the managers would ask for an attachment. He suggested, however, that if the counsel for respondent would consent, it could be arranged to take the deposition of the witness at his home. The counsel declined to agree to this.

Then the Presiding Officer<sup>2</sup> said:

The Senate will take into consideration the motion for an attachment, and decide it later on. The Presiding Officer will merely say at the present time that it seems to be understood that the witness is suffering from a serious disease, which makes it very difficult for him to travel, certainly without an attendant, and that for that reason his son, who is a physician, has been summoned. It would seem as if it were hardly required to issue an attachment until information is communicated to the Senate as to whether there is a real refusal on the part of the witness to come or whether the witness will come with his son as an attendant.

For that reason the Presiding Officer suggests that a decision of the motion be postponed, and the Sergeant-at-Arms will be instructed to ascertain whether the witness will come under the circumstances.

Later on this day, however, on a question relating to another witness, the Presiding Officer said<sup>3</sup>:

The rules require that a motion for an attachment shall be decided by the Senate rather than by the Presiding Officer. The Presiding Officer, however, will suggest that the motion being now made, a decision upon it can be delayed for a little time. There may be some further information. So it is not necessary to submit the question at this time to the Senate, unless it be desired.

**2153.** On February 13, 1905,<sup>4</sup> in the Senate sitting for the trial of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, in respect to the application made by counsel for the respondent for an attachment against Louis P. Paquet, we desire to have the matter properly investigated as to whether the witness is really able to attend or not, and to that end we ask that the attachment may issue, and that the officer or the Sergeant-at-Arms serving the same may be charged with the discretion of determining whether the

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<sup>1</sup>Third session Fifty-eighth Congress, Record, pp. 2229, 2230.

<sup>2</sup>Orville H. Platt, of Connecticut, Presiding Officer.

<sup>3</sup>Record, p. 2242.

<sup>4</sup>Third session Fifty-eighth Congress, Record, pp. 2459, 2460.

witness is able to attend or not. That is the course which has been pursued in practice with which I am familiar. In other words, where there is doubt in the mind of the court or of counsel as to whether a witness is able to attend or not, the court awaits the return of the sheriff or the marshal in the premises.

The Presiding Officer<sup>1</sup> said:

The sixth rule of the Senate for impeachment trials provides that motions for attachment must be decided by the Senate rather than the Presiding Officer. Whether it be necessary for the Senate to retire to consult upon this matter the Presiding Officer does not know, but he will state the motion to the Senate.

Mr. Paquet, a witness summoned for the respondent, has furnished the certificate of a physician that he has been ill since January 31, and is still ill, confined to his bed, and probably will not be able to travel for two or three weeks. Counsel for respondent now moves that an attachment may issue, and that the Sergeant-at-Arms in serving the same be authorized to use his discretion to determine whether the witness is or is not able to travel. Unless there be some motion made to retire for the consideration of this question, the Presiding Officer will submit the motion to the Senate.

Mr. John C. Spooner, a Senator from Wisconsin, said:

Mr. President, whether a witness shall be brought by an attachment or not is for the judgment of the Senate as a court, I should think, and I should like to hear it somewhat discussed, if there are authorities sustaining the proposition, that a court issues an attachment for a witness leaving it to the sheriff to determine whether the judgment of the court or the writ shall be executed or not. I should like to have the authorities produced.

After this suggestion the motion for process was temporarily withdrawn.

**2154. Rule in the Swayne trial governing Senators as to colloquies and questions addressed by them to managers, counsel, or other Senators.**

**In the Swayne trial Senators were permitted a freedom of debate greater than usual.**

On January 27, 1905,<sup>2</sup> in the Senate sitting for the impeachment of Judge Charles Swayne, a debate arose between Mr. Henry W. Palmer, of the managers for the House of Representatives, and Mr. J. C. S. Blackburn, a Senator from Kentucky.

The Presiding Officer said:

The Chair wishes to observe at this point that he doubts the propriety of debate between Senators and the managers of the impeachment on the part of the House. He does not speak positively upon that question, not having had an opportunity to examine the precedents.

On February 3,<sup>3</sup> in the Senate sitting for the trial, Mr. Augustus O. Bacon, of Georgia, offered and the Senate agreed to an order containing the following rule:

It shall not be in order for any Senator to engage in colloquy, or to address questions either to the managers on the part of the House or the counsel for the respondent, nor shall it be in order for Senators to address each other, but they shall address their remarks directly to the Presiding Officer.

The effect of this rule seems to have been to permit debate and suggestions by Senators. Thus on February 10<sup>4</sup> Mr. Joseph W. Bailey, of Texas, suggested as to testimony and debated. On February 13<sup>5</sup> there was extended debate of Senators on the subject of issuing processes for witnesses. On February 14<sup>6</sup> Mr. Porter J. McCumber, of North Dakota, and others, discussed evidence. Also on February

<sup>1</sup> Orville H. Platt, of Connecticut, Presiding Officer.

<sup>2</sup> Third session Fifty-eighth Congress, Record, pp. 1450, 1451.

<sup>3</sup> Record, p. 1819.

<sup>4</sup> Record, p. 2240.

<sup>5</sup> Record, pp. 2459, 2460.

<sup>6</sup> Record, p. 2532.

23,<sup>1</sup> on an order relating to the printing of arguments of managers, there was free debate by the Senators. Yet on an important question relating to the admissibility of testimony, arising on February 14<sup>2</sup> and 16, the Senate, after some debate, decided to enforce the rule providing for secret sessions. In other cases, also, the doors were closed. But during this trial Senators were permitted a greater freedom of debate than in other trials.

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<sup>1</sup>Record, pp. 3142–3145.

<sup>2</sup>Record, pp. 2536–2540, 2720, 2721, 2899.