PROCEEDINGS OF THE SENATE WHEN SITTING AS A COURT OF IMPEACHMENT.

WEDNESDAY, March 2, 1870.

Argument of Mr. Semmes, of Counsel for the Defendant.

Mr. Chief Justice and Senators: I must, in the name of my client, thank this tribunal, or whatever it may be, or whatever may be its nature, for the kindness and courtesy which have been extended throughout this trial to the accused and to those who represent him. We have nothing to complain of, and all we ask in bringing this trial to a final determination is a calm investigation into the facts, combined with the law, for the purpose of arriving at a correct conclusion. If, after having given us that fair impartial consideration, you should come to the conclusion that the Auditor of Public Accounts has been guilty of crimes and misdemeanors, which will justify you upon your oaths in punishing him, not only by removal from office, but by affixing to him the brand, under the constitution of this State, that he shall not in future be ever allowed to hold an office of trust or profit. If, I say, after this investigation you shall come to that conclusion, of course we have nothing to do except to bow in humble submission to your judgment, being conscious that we have done our duty for his defense. If, on the other hand, as we hope and expect, you will come to the opposite conclusion, we will not only feel that our duty has been done, but we will realize for the first time in this infant government, on a public prosecution like this, that justice has been vindicated, notwithstanding the efforts of influence and of political feeling to produce a conviction. I say "infant government," and I call your attention to the term, for it is not used without reflection.

The government to-day is infant in its nature, because it is composed of an element totally different from that which composed it before the war. It is the new government, under the new regime, with new principles, a new system of civilization, and an organization totally different from that which existed prior to the war, and which we recognize and which is regarded by some as a forward step in the progress of civilization. Therefore, I charge you who are the representatives of the new civilization, called upon the first time to try an officer elected under this new organization—I charge you before you convict him, give him justice and a fair hearing, and not condemn the very system you have built up under the influence of the war, by showing its inefficiency in the selection of proper agents for the administration of your government. Therefore the condemnation of Mr. Wickliffe is the condemnation of yourselves—the manifestation of your incapacity to select the agents for the administration of your government. Bear that in mind in the consideration of this important trial. It is a trial of the old against the new civilization. It is the trial of the old state of things against the new state of things, and, to a certain extent, though I admit not necessarily, a judgment against him bears along with it the confession that, to a certain extent, your first experiment as to your capability for selecting your own agents has proved defective. I do not stand here to defend this Legislature, which has been so much accused by the managers who are representing it, because I am not retained for that purpose. I do not stand here to condemn the legislation which the learned manager has termed an enormity—the printing bill. Nor do I stand here to defend the legislation with regard to the pension law. The only object I have in alluding to that subject is—don't condemn my client for your bad legislation. If you pass bad laws, don't say your agent is bad who executes them; don't make him the scape-goat upon which you will hold him up to the public as a convict and a criminal because he has executed that which you have ordered him to do. This seems to be a sort of Methodist class meeting where the managers are coming before you to make confession of their sins to one another [Laughter], and asking you because of their sins for which they pray God to forgive them, that therefore you must condemn the party who is arraigned before you for trial. It is not necessary for me to defend the legislation, for I had nothing to do with it, and because you have now passed out of your position of a legislator and become a judge, and you are to judge my client not by your own delinquencies in the passage of laws, but by his administration of them, be they bad or good. Now, therefore, it seems to be a great difficulty to ascertain what and who you are. What are you is the question we have been discussing here two weeks. We had supposed that this was a tribunal instituted by the constitution for a specific purpose, judicial in its nature, and to carry into effect a part and parcel of the judicial power reserved by the constitution from the ordinary tribunals of the land to be vested here, as it is in every other State, in the Senate in part and in part in the House of Representatives.

You have noticed the great difficulty that counsel on both sides have had in regard to this subject. A court, is it a court of chivalry, where questions of honor are to be determined? If a court of law, is it a criminal or a civil court? All these questions had to be examined to enable us to arrive at the proper principle applicable to the determination of the case. For if you are not a court of law, if you are not to be governed by legal principles; if you are merely a political machine, operated on by political motives, regardless of all rules of evidence, regardless of the law of the land, then we stand here before a political caucus, whose judgment is to be rendered, not according to any well known and settled principle, but according to your partialities or your prejudices, your interests or your feelings, and discussion becomes unnecessary, because I can not penetrate the breast of each individual, and argue with him that this prejudice or that feeling is right or wrong.

Now, I understand the managers to admit this to be a court, and they could not well deny—because, as I have stated in a previous argument, the difference between the constitution of this State and the constitution of the United States upon this subject is, that the constitution of this State emphatically declares this tribunal to be a court of impeachment, whereas the constitution of the United States merely uses the term that the Senate shall try impeachments without establishing what is the character of the body on the trial, and therefore the discussion which took place during the trial of President Johnson need not and could not take place here, because our constitution had, in express terms, defined that to be a *court*, which in Washington was asserted upon one side, and denied upon the other. I therefore pass over the discussion, and consider it conceded that this is a court.

Now, then, if it be a court, the next question is, is it civil in its nature, or is it criminal. I accept the definition of a criminal court, advanced by the learned manager who opened the case. His definition is correct, and I accept it and make it mine. The characteristic of a criminal court is the investigation of an offense charged with a view to its punishment; and if the judgment of a court is to be followed by punishment, it is necessarily criminal in its nature, no matter what its denomination. The question then is whether or not the judgment which can be rendered in this case is to be followed, or can be followed by punishment. The learned manager says this is a court merely of inquiry for the purpose of ascertaining the worthiness or unworthiness of the officer, and to remove him—that the removal is a mere civil matter, a civil proceeding, and it is followed by no punishment.

Now, then, let us see what the constitution of the State says may be the judgment of this tribunal, in case you shall find the articles of impeachment true:

"Judgment in case of impeachment shall extend only to removal from office and disqualification from holding any office of honor, trust or profit in the State"—so that your judgment will be, in case the party is found guilty, that he shall be removed from the office of Auditor of Public Accounts; and if you choose, that he be disqualified from holding any office of honor, trust or profit in the State. Now, the question is whether that is or is not a punishment. If it is, then we have ascertained that the tribunal which is trying this case is criminal in its nature, to be governed by rules of criminal law, and all its forms and proceedings are to be conducted on the principle that we are administering justice in a criminal court. I do not ask you to believe me, when I say that it is punishment, but I will read to you the decision of the Supreme Court of the United States upon the subject, in which impeachment has been characterized by that court as a proceeding criminal in its nature, and in which disqualification for an office has been declared to be a punishment; with this high authority in my hand I will cease the discussion when I read it to you. I care not, with this high authority in my favor, for individual authorities who may, being guided by their political notions, construe this court to be a political court, or a civil court, or any other sort of court. If I find that a punishment is to be inflicted by this court, and that it has been decreed to be by the Supreme Court of the United States, a punishment to render a judgment to disqualify a person from holding an office. I have ascertained, then, the character of the tribunal, and upon that principle will proceed to discuss the merits of the case. I read from 4 Wallace, page 320. It is the celebrated case of Cummings against the State of Missouri, where that State undertook, by its constitution, to disqualify a number of individuals from holding office or from voting, by the imposition of a certain oath. Now, what does the Supreme Court of the United States say: "The disabilities created by the constitution of Missouri must be regarded as penalties. They constitute punishment. We do not agree with the counsel for Missouri that to punish one is to deprive him of life, liberty, or property," "and that to take from him anything less than these is no punishment at all." The very argument made by the learned manager, that it is no punishment, that the judgment in this case does not deprive the accused of life, liberty or property, and to take from him anything less than that is no punishment.

The learned counsel, says the Supreme Court, does not use the terms life, liberty and property as comprehending any right known to the law. He does not include under liberty freedom from outrage on the feelings, as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, *civil or political*, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. *Disqualification from office may be punishment, as in cases of conviction upon impeachment.*

There is the opinion of the Supreme Court of the United States declaring that disqualification for office is punishment, and instancing a conviction in case of impeachment. Is not this, then, a proceeding to impose upon the defendant punishment, not only by removing him from office, but by an utter disqualification throughout all time from holding office in this State? It is, therefore, clearly a punishment which is sought to be inflicted upon him. Now what does Blackstone call an impeachment? I read from Fourth Blackstone, page 258: He proceeds to discuss "Courts of Criminal Jurisdiction." That is the very title under which he treats of impeachment. "The High Court of Parliament, which is the Supreme Court of the Kingdom, not only for the working, but also for the execution of the laws by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachments. But an impeachment before the lords by the commons of Great Britian in Parliament, is a *prosecution* of the already known and established law, and has been frequently put in practice, *being a presentment to the most high and Supreme Court of criminal jurisdiction* by the *most solemn and grand inquest of the whole Kingdom.*"

In Thirteenth Annual, page 573, the Supreme Court of this State held that, "The terms conviction and offense imply a prosecution by information or indictment." I refer to this for the purpose of establishing that the same terms, used in our State constitution, are to be construed as meaningly implying a prosecution for a criminal offense; and further, that the court in which the party is thus prosecuted, is a criminal court.

Again, Mr. Woodsen, in his lectures on the common law, another high authority, in vol. 2, p. 355, says: "In the last lecture two distinct modes of criminal prosecution were reserved for future inquiry, namely, *proceedings on impeachments* and penal acts of parliament."

The accusation of the Commons is substituted in place of an indictment. Id. p. 358.

As to the trial itself, it must of course vary in external ceremony, but differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments provide for impeachments are not framed to alter the law, but to carry it into more effectual execution. Id. p. 364.

What more authority can the Senate want as to the character of this tribunal? You are called upon to inflict punishment; punishment is the characteristic of a criminal court, for the civil courts never inflict punishment. You are called upon in a case of impeachment to consider the indictment found by the House of Representatives, in lieu of the House of Commons in England, and you are called on as judges to determine on your oaths, according to the known law of the land, and under the rules of evidence prescribed by the laws of the land, to ascertain whether the party be guilty or innocent.

Now, this argument is the more enforced by this further consideration: Under the constitution of the United States, there can be only removal from office by impeachment for treason, bribery, high crimes and misdemeanors. There was no other mode of removal pointed out. In this State there is another mode of removal—there is the mode of removal by address and there is the mode of removal by impeachment. Impeachment implies personal guilt, removal for any cause which the Legislature may see fit, except in case of judges, where the reasons must be assigned. The two powers are not identical, as asserted by the managers; the two powers are distinct and separate, but concurrent; there need be no charge against an officer whom you propose to remove by address; you can remove an officer by address because he is insane, or because you are tired of him, or because he is a drunkard, or because he has done something displeasing to the party in power. When you act by address, you are acting as politicians; you are acting in your capacity as legislators; you are not acting as judges. It is the two branches of the Legislature acting concurrently by a joint vote, with the approval of the Governor; you then exercise your political functions, and in the exercise of those functions you may remove whom you please, and for what cause you please, whether it be personal guilt or any other cause that renders the officer disagreeable to you. A removal by address is not followed by any disqualification for office and there is no punishment. This is a mode instituted by the constitution of this State and of the constitutions of nearly all the States, copied, as I have said, from the British constitution, after the reign of William the Third, for the purpose of getting rid of parties whom it is desired to remove from office.

In the one case, in case of address, it is political action—in the other, in case of impeachment, it is judicial. When you impeach a man you are put on your oaths—you are sworn to do justice—you institute a court—you send for the Chief Justice of your State to preside over your deliberations under the mandates of the constitution; you hear evidence; you determine according to the rules of evidence and according to the laws of the land; whereas by address you care for no law, you are governed by no rule except your own sense of propriety—that is the court of honor which the learned manager would have you institute. The court of address is the court of honor, the court of chivalry, and you could now to-day drop this impeachment, in my humble judgment, and proceed by address to remove this officer for any cause you see fit, whether these articles of impeachment are proven or not. I speak by the card when I say that the two powers are concurrent, because the very question raised has been decided by the Supreme Court of this State, decided under the constitution of 1852, as I will show you, and on clauses of the constitution precisely similar to those in the constitution of 1868. Now, the constitutions of 1845, of 1852 and of 1864 contain, all of them, the same clauses upon this subject. I will read from the constitution of 1852, upon which the case was decided under the title of "impeachment," article eighty-six. "impeachment of the Governor, Lieutenant Governor, Attorney General, Secretary of State, State Treasurer, and the Judges of the inferior courts—Justices of the Peace excepted—shall be tried by the Senate; the Chief Justice of the Supreme Court or the senior Judges thereof shall preside during the trial of such impeachment."

In this the constitutions of 1845, 1852 and 1864 agree with that of 1868. Now, in the constitutions of 1845, 1852 and 1864 are the two following articles, which are omitted in the constitution of 1868:

ART. 88. All officers against whom articles of impeachment may be preferred shall be suspended from the exercise of their functions during the pending of such impeachment; the appointing power may make a provisional appointment to replace any suspended officer until the decision of the impeachment.

ART. 89. The Legislature shall provide by law for the trial, punishment and removal from office of all other officers of the State, by indictment or otherwise.

You have undertaken in this case to exercise the power of suspension, although not granted in the constitution of 1868, article eighty-eight of the constitution of 1852 being omitted in the constitution of 1868.

Observe this is all under the title "impeachment," which provides expressly for the impeachment of the high officers of the government, the Judges, Lieutenant Governor, Governor, Attorney General, Justices of the Supreme Court, but no other officers.

In the same clause of the constitution they say, that the Legislature shall provide by law for the punishment, trial and removal from office of all other officers of the State, whether by indictment or otherwise; so that when an officer was not of such importance that the State should be put to the expense of a trial by impeachment, the mandate was given to the Legislature that it should provide by law a substitute for impeachment. Therefore, under the constitutions of 1845, 1852, 1858 and 1864, there was a criminal mode of removal provided, by impeachment of certain designated officers and by authority delegated to the Legislature to provide by law for removal of all other officers by indictment. Now, since the constitution provided for the removal of every officer either by impeachment or indictment, and for their punishment for crime, then was this clause inserted, article ninety-seven: "All civil officers, except the Governor and Judges of the Supreme and inferior courts, shall be removed by an address of a majority of the members of both Houses, except those the removal of whom has been otherwise provided by this constitution." Now, then, if the right of removal, by address, was not concurrent with the right of impeachment, and the right to try an officer by indictment under article ninety-nine of the constitution of 1852, if it were not concurrent, the previous articles of the constitution provided a mode for the removal of everybody by impeachment or indictment. What, then, was meant by saying that all civil officers, except the Governor and Judges, shall be removed by address. That was the question that came up. The managers have said that, because Mr. Wickliffe can be removed under this constitution by impeachment, he can not be removed by address. In the case I am about to read, the argument was that the Legislature could not remove Mr. Hufty, the sheriff, by address, because article eighty-nine provided that the Legislature should provide by law for his removal from office by indictment—precisely the case, precisely the principle here involved, and how was it decided? The Supreme Court decided that the two powers were concurrent, so that this principle being correct, which I will show you by the decision itself, the constitution of 1868 differs only from that of 1852 or 1864 in this, that in the constitution of 1868 there is no exception. Any officer being removable by address, you can remove by address the Governor, the Lieutenant Governor, and every officer in the State. The constitutions of 1852, 1845 and 1864 excepted from the right of removal by address the Governor. Now, what did the court say in the case of Hufty, and this case is conclusive, because in the face of this case, with full knowledge of it, the constitution of 1868 removed the restriction, even as to the Governor, so that if, under the constitution of this State, you have an unsatisfactory Governor, and do not choose to impeach him, because he may have so much influence as to prevent it, or because he may not be guilty of such acts as may entitle you to impeach him, because, for instance, he may have received bribes, and there is no law of the State punishing bribery; or because he may have been guilty of any other thing which we know, and which all men would judge to be improper, but which there is no law of the State to punish; yet you could remove him, because the right of removal is not restricted under the constitution of 1868, and because you could remove him without the allegation of a single criminal charge. The Supreme Court says [Bell vs. Hufty, 11 Arnold, p. 306.]: "1st. Has the power of removing a sheriff by means of an address of a majority of the members of both Houses been expressly conferred by the constitution in any case? 2d. If it has, are there any restraints or limitations laid down elsewhere in the constitution which rendered the exercise of the power in this particular case null and void?"

1st. Article ninety-seven of the constitution is in these words: "All civil officers, except the Governor and Judges of the Supreme and inferior courts, shall be removed by an address of a majority of both houses, except those the removal of whom has been otherwise provided by this constitution." It is conceded that the sheriff is a civil officer, and that the power of removing him by address is expressly granted under this article, unless he comes within the last exception, to-wit: those officers the removal of whom has been otherwise provided by this constitution. Accurately speaking, the constitution nowhere else provides a mode of removing sheriffs. But it is contended that article eighty-nine, under the title of "Impeachment," brings sheriffs within the exception of article ninety-seven, by declaring that "the Legislature shall provide by law for the trial, punishment and removal from office of all other officers of the State (except those enumerated in the preceding articles) by impeachment or otherwise."

The power of impeachment or prosecution for misdemeanor in office, which in case of conviction involves a removal from office as an incident, and the power of removal without impeachment or prosecution, are concurrent powers, both of which are clearly recognized by the constitution, and neither of which excludes the other.

Then the court goes on and discusses the question at large. I cited the case merely for the purpose of establishing what I asserted, that the power of impeachment, and removal as an incident of impeachment, is a distinct power from the power of removal by address; that the two are concurrent powers not inconsistent in their nature; that the exercise of the one is the exercise of criminal jurisdiction by which you punish a party for his personal delinquency; the exercise of the other is not the exercise of judicial power, but a political power, and exercised irrespective of the guilt or innocence of the party whom you desire to remove from office. Am I mistaken as to that? Take the acts of 1855 upon the subject of impeachment, and you will find that they establish the construction I contend for, and this construction was placed upon the constitution years ago by the Legislature, and it is a contemporaneous construction of it, because the act relative to impeachment was passed years ago, and was only re-enacted in 1855.

"Whenever any person shall wish to prosecute a public officer before the Legislature, he shall address the House of Representatives a memorial containing a brief exposition of the acts of such public officer which are supposed to be contrary to law," not which are supposed to be contrary to the opinion of the public, not what are supposed to be contrary to one's opinion of right or wrong, but accusing him of those acts which are supposed to be contrary to law, going to show that the impeachment was for acts contrary to law and not acts contrary to the opinion of each particular Senator or the community at large, for those opinions had not been enacted into a law, to violate which was an offense. The act goes on to declare that this matter shall be referred to a committee, and the committee shall examine the case and decide whether it shall be expedient to proceed "by means of impeachment or by address," recognizing the two powers as concurrent, one political and the other criminal, one primitive and the other mere right to get rid of an officer without involving him in any moral guilt. It seems to me that I have demonstrated the proposition that the two powers are concurrent, and it is no use for you to go to England or to the constitution of the United States, or to consult authors who write in regard to the laws of other States, because it so happens that your constitutional history is an original history, is peculiar in its nature, and hence, although the constitution of 1812 uses the language of the constitution of the United States, that impeachments would lie only for high crimes and misdemeanors, treason and bribery, that clause was dropped in the constitution of 1845, in regard to all other officers except judges, and dropped in the constitution of 1868, leaving merely impeachments to be tried by the Senate, without saying for what cause. The law in regard to impeachment declares that the accusation must be made to the Legislature of those acts which he who makes the accusation supposes to be contrary to law. He is not authorized to make an accusation before the House of Representatives except for those acts which are contrary to law, implying that any act which is not contrary to law can not be prosecuted by impeachment; but you must resort to the other constitutional remedy by address. Now then I say if reason amounts to anything, if authority amounts to anything, if history, the legal history of our State, fortified by the decisions of the Supreme Court of our State amount to anything, every honest man must come to the conclusion that this is a court, that it is a criminal court, that you are to be governed by law, that you are to administer the law of the land; not that you are to be governed by your caprices or prejudices; that the accused stands here at the bar of a criminal court, limited in its jurisdiction so far as the power to inflict punishment is concerned; but when he is convicted here and a partial punishment is inflicted, you are to hand him over to another tribunal, to exercise the power of further punishment, by deprivation of liberty or by fine or deprivation of property. You are but the commencement of criminal jurisdiction. So far as this accused is concerned, you are to institute the inquiry and if you find him guilty you are to deprive him of the robes of office and send him, without the power or influence of office of which you have stripped him, before the criminal tribunals, there, as any other citizen, to be punished according to the laws of the land; if you desire any further infliction of punishment beyond that already decreed here.

That being the case, the next proposition is for what can you institute this inquiry and punish the accused?

Mr. Ogden: Mr. Chief Justice I would suggest that the Court of impeachment take a recess for an hour.

Mr. Semmes: Mr. Chief Justice, I am perfectly willing, of course, to accommodate myself to the will of the Senate. The only question is whether so short an interval will be time enough to go to dinner. Had we not better adjourn to a later hour, or until to-morrow.

Senator Ogden: I understand, Mr. Chief Justice, that the probabilities are that the arguments will be concluded this evening. At the request of one of the gentlemen of the defense, I make this motion, as well as at the request of Senators, that we adjourn until seven o'clock.

Senator Jenks—I second that motion.

Senator Ogden: I would like to hear the managers on that point.

Mr. Manager McMillen: Mr. Chief Justice, we had yesterday a general understanding, I believe, that this day should be devoted to closing the discussion, and, if possible, we were to try to do so.

Mr. Semmes, of counsel for the accused: I was led to believe that your opening would not take over half an hour, whereas you took up all the morning, and our arrangement is thereby disconcerted.

Senator Ray: If that motion is insisted on, I shall move to amend that we take a recess of five minutes.

Senator Jenks: I will renew the motion that we adjourn until seven o'clock this evening.

The Chief Justice: The motion will be put for the longest time.

Senator Lynch: I will call for the yeas and nays.

The Chief Justice: The Secretary will call the roll.

Senator Foute: I would request that managers and counsel for the defense, would distinctly enunciate as they quote from the law books.

The Chief Justice: Senators, the roll will be called; those of you in favor of taking a recess will answer aye, those opposed will say no.

The roll being called, the Senate refused to take a recess.

The motion to take a recess of five minutes was withdrawn.

The Chief Justice: The counsel will proceed with the argument.

Mr. Semmes: The next question to be discussed is, for what offense can an officer be impeached? I admit the proposition that no one but an officer is liable to be impeached; therefore there will be no discussion upon that subject. The next question is, for what he can be impeached. Now, it is an interesting investigation to trace, in the convention, that framed the constitution of the United States, the history of that clause, as it stands, in that constitution, for the purpose of seeing what phases it assumed as it progressed to its perfection, and as it was finally adopted.

The first terms used, as reported to the convention, were, "that the officer should be impeached for malpractice or neglect of duty." They were not satisfied with that. At a subsequent stage of the proceedings of the convention, it was modified to these words: "Treason, bribery, and corruption." They were not satisfied with that, because the word corruption was too large and general, and because it conveyed no precise idea. Therefore they desired to change the language. In its next phase it assumed this language: "Shall be impeached for treason and bribery" alone, leaving out corruption, leaving out malpractice, leaving out neglect of duty, all of which were general and unsatisfactory terms. In its fourth and last stage, as at present incorporated in the constitution of the United States, it is in these words: "For treason, bribery, and other high crimes and misdemeanors." Now you can almost observe the transition through which this clause passes, and observe the reasoning which induced it. Malpractice and neglect were undefined; treason and bribery were definite enough, because the law defined what they were. Corruption was undefined; they struck it out, they then inserted merely treason and bribery; that was not large enough, and finally they inserted treason, bribery, and other high crimes and misdemeanors. These terms having a definite signification according to law, therefore, they left out everything that might tend to misconstruction, or leave too large a latitude, or might give too much sway to mere political influence and power, and confined it to definite offenses, such as high crimes, treason, bribery and misdemeanor.

Now, under the constitution of this State, in order to understand what I am now about to approach, and it is very important in the elimination and elucidation, what is rendered uncertain in the argument addressed to you by the learned managers. You must remember that Louisiana was never a province of England; you must remember that Louisiana belonged to the French and the Spaniards; that Louisiana was therefore subject to the dominion of civil law, and that what is called the common law of England never existed here, and does not exist here to-day, except in so far as it may have been incorporated into our jurisprudence by a special enactment of the Legislature. Now, if you will bear that in mind you will arrive at a correct determination of what is or is not impeachable. In the common law States a vast mass of offenses exist under the dominion of the common law, the common law being a system of law grown up from time immemorial, out of ancient usages, embodied into system by Judges and amended by statutes, and covers almost every kind of offense which a man can commit. Drunkenness is an offense against common law; indecency is an offense against common law; almost everything which you can imagine, anything which violates morality, religion or public decency; anything which violates propriety, a propriety established by immemorial usage, and not an undefined propriety, according to the judgment of each individual; all that is regulated by the common law, and wherever the common law prevails, in all the States, of course a man could be impeached for any violation of the common law, because it was an offense; because it was wrong, and because the law had established it to be wrong long before he had committed the act—wrong centuries ago, according to the usages of those times. We never had any such system in this State, and what was the result? That when we came to enact our criminal legislation, we did it by statute. There was a clause in the constitutions of 1812, 1845, 1852 and 1864, and there is a similar clause in that of 1868, inserted, though judiciously, between our system and the common law, that you should introduce into the jurisprudence of Louisiana no general system of law by general reference to that system. It was aimed at the common law. In consequence you could not enact the common law by general reference to that system of law, but you would have to go to work as they did in 1855, and enact each statute by itself, declaring what the special law in each one was, and consequently our criminal law is all based upon special enactments of the legislature, and the Supreme Court has decided that nothing is an offense under the laws of Louisiana except that which is defined by some statute; that is decided in Eighth Robinson's Supreme Court, this State, page 273. Judge Bullard says: "I admit that this doctrine is one of the common law which regards every act, *contra bonos mores*, as indictable, and that in this State no such mass of undefined offenses exists, and it is not left to the courts to say what constitutes a public offense or misdemeanor. Nothing is punishable here which is not made an offence, and the punishment is denounced by legislative authority. Therefore, there is nothing in Louisiana like there is in New York, like there is in Washington, like it is in Massachusetts, like it is everywhere in the United States, wherever the State once belonged to the British crown. No such thing as the common law; no such thing as common law offences existed here; but every thing, whether right or wrong, depended upon legislative enactment.

Now, then, that being the case, the first question that arises when a man appears before you, as a court of judication, a criminal court, is the very question which arises before Judge Abel, of the First District Court, when a man is brought there for trial. For instance, the Governor of this State, a few days ago, refused to answer before the Grand Jury of this State certain questions in regard to an alleged effort to corrupt him, made by some banking institution of this State. The matter was brought before the Judge of the First District Court, who decided, and decided properly, that the Governor was not bound to make the answer because even if the effort was directly made to bribe him, as stated, it was no crime to attempt to bribe the Governor on the one hand, or for him to receive it on the other. Strange as it may appear it is a hiatus in the Legislature of this State—probably rendered unnecessary in consequence of the high integrity of the officers who have had charge of it—that no penalty is affixed by the statutes of our State for accepting or offering a bribe, except in the administration of justice, by or to a judge or juror; that every other officer of the State may be tempted by bribes or may receive bribes, and it may be done with perfect impunity, because there is no legislative enactment upon that subject.

Now, what is the state of things in Louisiana? There are a great many things which are offensive to the public which are crimes by the common law, or misdemeanors, because this immense mass of offenses which have grown up from century to century, have been incorporated into the common law. In all those States where the common law prevails a man can scarcely do anything without its being pronounced wrong or right under that system. Here, if there be no statute declaring an act wrong, no man is at liberty to sit in judgment on his neighbor, and say that it is wrong, for as soon as you depart from the law which creates and defines the offense, what do you become? You do not become a court, or judge administering the known law of the land. You do not become the executors of the law, as Blackstone says, but you each one establish within your own mind a tribunal of propriety without any known rule to govern you, and when you come to a conclusion, you first make the law, and then you judge the party and convict him by your own law, made at the time being. As I said the other day, a Mormon who has many wives considers it no harm; you may consider it wrong. A man may do a thing in one State which would be a violation of public sentiment, and he could do the same thing in another State according to a different condition of public sentiment—where it would be perfectly right. Therefore, if there is no known rule laid down in advance, the violation of which is denounced, and you are left to your own individual judgment, and to punish a man for violating what you may conceive to be right; to try him for a thing which you undertake to prove an offense, it seems to me, is setting up your individual judgment over another, when you have no constitutional power to do so. It must necessarily come to that. You may think one religion right, and I may think the other right. You may think it is right, as thought by many at one time, to persecute a man for his religion; you may think it right, as was thought at one time, that persons, on account of their religion, should be excluded from office. Political parties were organized on that principle.

You say Mr. Wickliffe is unworthy to hold office because he has done something which you thought wrong. Those people in those days thought that a man with a certain class of religious opinions ought not to be trusted, because they doubted his allegiance to the government of which he was a citizen. All that has passed away; you do not think so now. The religious furore, created at the time for political purposes, has died out, and your opinions have entirely changed. I only refer to these facts for the purpose of elucidation, and not to rip up old sores, things which are dead and buried, but merely as an argument and elucidation, to show you that when you depart from the plain paths of the law, you have then no landmarks to guide you in arriving at a correct conclusion in regard to these things.

The learned manager cited Mr. Burke on impeachable offenses. I cite him too, but that was under the common law. I read from Mr. Burke, volume 7, pages 13 and 14:

'But the crimes we charge in these articles are not lapses, defects, errors of common frailty which as we know and feel, we can allow for. Let every thing that can be pleaded on the ground of surprise or error be pleaded with success. We give up the whole of these predicaments. We urge no crimes that are not crimes of forethought."

This, going to show that they must be crimes and intentional crimes; they must be crimes of forethought; they must not be merely errors, lapses, or surprises—he gives that all up; but they must be crimes in the sense of the law and crimes aforethought.

In Peck's trial, Mr. Buchanan, who was then manager on the part of the House of Representatives, says:

"What is misbehavior in office? In answer to this question, and without pretending to furnish a definition, I freely admit we are bound to prove that the respondent has violated the constitution or some known law of the land."

Now, then, I think I have established that in this State we are in a peculiar condition; that we have none of this mass of undefined offenses known to the common law; that although under the common law you may indict a man for any of these things—drunkenness, or anything of that kind—you can not do it here, because unless drunkenness is defined to be an offense it can not be punished. And what was the conclusion on the trial of President Johnson? The very same argument, to a certain extent, that I am now making was made then. The opinions delivered by the various Senators, and you will find the most eminent of them, as members of the profession, take the view that I do; and so hardly pressed were the managers on that subject—and how do you think they got rid of it? they got rid of it by saying that in the District of Columbia, where the acts of President Johnson were committed—when Maryland ceded that portion of the District to the United States for the seat of government—the common law which prevailed in Maryland was transferred to the seat of government, and under the common law these things charged against President Johnson were offences, and therefore they could prosecute him.

Mr. Bingham, the ablest of the managers, in his concluding argument, puts his case upon that ground. I read from the second volume of Johnson's trial, page 409:

"Senators, I refer in passing, without stopping to read the statute, for I believe it was read by my associate, (Mr. Manager Boutwell), to the act of February 27, 1801, (2 Statutes at Large, 103, 104), which declares that the common law, as it existed in Maryland at the date of the cession, shall be in force in this District. I refer also to 4 Statutes at large, page 450, section fifteen, which declares that all crimes and offences not therein specifically provided for shall be punished as theretofore provided, referring to the act of 1801. I refer, also, to 12 Statutes at Large, page 763, section three, which confers jurisdiction to try all these offenses upon the courts of the district.

That common law offenses are indictable in the District has been settled by the courts of the District and by the Supreme Court. In the United States vs. Watkins, 3 Cranch, the circuit court of this District ruled: In regard to offences committed within this part of the district, the United States have a criminal common law, and the court has criminal common law jurisdiction.

And in the case of the United States vs. Kendall, before referred to in 12 Peters, 614 the court ruled:

That the common law, as it was in force in Maryland when the cession was made, remained in force in the District.

It is clear that the offenses charged in the articles, if committed in the District of Columbia, would be indictable, for, at the common law, an indictment lies for all misdemeanors of a public evil example, for neglecting duties imposed by law and for offenses against common decency. 4 Bacon's Abridgment, page 312, letter "E."

I think that I have demonstrated my second proposition that your being a criminal court are to administer the laws according to the known law as it is; that you can not make a law of your own; that you must proceed to impeach this party for some offense known to the law; that the common law does not exist in Louisiana; that nothing can be predicated as an offense against the law of Louisiana unless it is prescribed by statute, and that in the trial of this case, therefore, whatever is not announced as a crime, even admitting Mr. Wickliffe guilty of it, you can not on your oaths pronounce him guilty; you can not sit here as a court of honor and chivalry to determine whether this man be a gentleman or not—whether he has the requisite amount of education to fill the office or to determine any principles which are not established by law, and that you can not deviate from the rules of proceedings applicable to the criminal courts, without a violation of the constitution by which you have undertaken to act in pursuance of the rules of justice. Therefore, let no man lay his hand upon his heart and say he is not bound in conscience and in honor by these rules. If you do so, we might as well abandon the case. What shall I say about the acts of the accused? Do I know what you call them; for unless you characterize his acts as being good or bad, and what right (if the law does not say they are bad) have you to say they are bad? What right have you to set up a code of crimes for me here? What right have you to lay down laws, as if you were descendants of the gods—if not the gods themselves—and say that we have violated the laws, and violated them, although they have not yet been announced by the legislative authority of the land? Try any man on rules of that sort, and who will escape conviction? Who will go unwhipped of justice if each one of you were to be the judge of the propriety of a man's conduct? Well may the learned manager have finished his sentence when he said "depart, ye cursed"—into "hell fire," he ought to have said, for if he would have the judgment rendered by his own notions of justice, or yours, he would make this a court of conscience, a court of religion, a sort of inquisition where a man's faith is to be investigated for the purpose of ascertaining his fitness for office, and then followed, not by a desire of justice, but by an *auto de fe*, where a man is to be burnt at the stake for entertaining the opinion which he may, because the law never denounced it. Talk to me about such a system of constitutional law. That my reputation, that my privileges, that my standing before the community and that of my children is to be subjected to the whim and caprice of even the Louisiana Senate, or any other Senate, is preposterous! And it is only by a resort to such a mode of prosecution, it is manifest to my mind that the managers expect conviction, and they call these constitutional guarantees—they call these defenses thrown around you by the law—they call them the meshes and webs of lawyers; and one of these papers, professing to be an organ of public sentiment, but which appears to be the secret organ of the Executive of this State, says if you can not get rid of these meshes, then you must poke your hands through and destroy this Turpin of the treasury, as if we had not had enough violence in this State. I come here for a peaceful remedy—not to be shot at as a robber. I come here, if I am guilty, to be hung by the officers of the law, and not to have this violence threatened, even against the greatest criminal in the land; and ought I not to appeal with perfect certainty to such a tribunal as this—a tribunal, if we may believe its legislation, seeking to establish law and order in the community—seeking to see that justice is administered according to law; and if you, upon the heels of this legislation, turn around and say that you will be governed by no law, and listen to the violent appeals of a newspaper in this town to bring this man into disgrace and to drag him there guilty or not guilty, because, forsooth, they have undertaken to denominate him the Turpin of the State, you will falsify your peaceful professions.

There is another proposition which I must discuss before I direct your attention to the facts of the case; that is that a man may violate the law and not be criminal; in other words, that the essential element of crime is intention. No man who unintentionally violates the law is criminal. No man who does so by accident is criminal. There must be deliberation. Therefore it is that when a man is indicted for murder, they charge the act to have been done with malice, aforethought; therefore it is when a man is indicted for stealing, they charge him with the intent to defraud. So thorough the whole criminal jurisprudence of the country, whether under the civil or common law, it is the intention which constitutes criminality, and on the plainest principles of justice a man is innocent who does not intend the consequences of his acts. Upon this subject I read from the sixth annual report of the Supreme Court, page 228, in the case of the State against Reed. This is a peculiar case, and I ask attention to it because it goes to show to what extent intention is an element of crime. A man was indicted under the following statute:

That whosoever shall make use of language in any public discourse, from the bar or the bench, or in conversation, or shall make use of signs or actions having a tendency to produce discontent among the free colored population of this State—

Mark the language:

"If he shall use any language among the free colored population, having a tendency to produce discontent, or whosoever shall knowingly be instrumental in bringing into this State any paper, pamphlet, or book, having such tendency as aforesaid, shall, on conviction," etc.

The jury found the prisoner guilty; the Supreme Court reversed the judgment, and said, "The counsel appointed by the court to defend the accused, moved to arrest the judgment on the grounds that the crime was not sufficiently and positively stated in the indictment, and that the accused is not charged with any criminal intent in uttering the words alleged to have been spoken, etc.

The indictment contains no charge of any criminal intent, and the word feloniously, which is necessary in indictments for felony, is omitted; nor is there any equivalent word to be found in this indictment. It is urged, on behalf of the State, that the statute does not require any criminal intent to constitute the offense, and that it is not necessary to allege it, inasmuch as malice may be inferred from the language itself, without averment or extrinsic proof. But in this case there are no averments, references or inuendoes concerning the language used which establish the inference."

I cite this for the purpose of showing that although the terms of the statute had been used in the indictment, that as the criminal intent was necessary to constitute the offense, and as the criminal intent was not alleged in the indictment, the court held the indictment bad, and reversed the judgment, and the party was acquitted. I refer you to this also for the purpose of showing you that these rules of law which are called "meshes" are rules which have been adopted by our ancestors from time immemorial, for when an offence is designated under the laws of our State, we refer to the common law for the purpose of ascertaining the definition of the crime; for instance, if you use the term robbery in your statute books, you must look to the common law for the definition of that crime. I say that

[CONTINUED IN SUPPLEMENT.]