IMPEACHMENT.

Trial of President Andrew Johnson for High Crimes and Misdemeanors.

Conclusion of Judge Curtis' Argument.

Opening of the Testimony for the Defence.

Adjutant General Lorenzo Thomas On the Stand.

SPECIAL TELEGRAM TO THE HERALD.

Judge Curtis' Plea for the President—The Testimony of General Thomas—The General's Famous Interview with Mr. Stanton—The Whiskey Rations Fairly Shared by the Rival War Ministers—The President's Case Prejudged by Senators Sprague and Stewart.

WASHINGTON, April 10, 1868.

The High Court wore a gloomy appearance to-day. The weather was very wet, dull and heavy, and the light that streamed into the Senate chamber through the clouded and colored ceiling of panelled glass overhead shed a dismal expression on the assembled mass of faces. Then there were no bright ribbons or dresses to relieve the sombreness of the scene, and the galleries in consequence were tame and uninteresting.

Judge Curtis continued his address, and was listened to throughout with marked attention. It seemed a pity that his voice was unequal to the task of rendering his argument with more impressive effect. It was easy to see that he was a consummate master of his subject; but it cannot be overlooked that volume of voice and lively gesticulation are no slight adventitious aids to a speaker. Judge Curtis resorted to no tricks of oratory; his statement was delivered without a motion of the body, and with hardly a perceptible variation of voice. He went rapidly through the eight articles following the first, deeming them but the same tale long drawn out, and then touched on the charges accusing the President of violating the freedom of speech by indecency of expression. This was, perhaps, the happiest hit Mr. Curtis made. He alluded, in a dignified yet keenly sarcastic tone, to the fact that the House of Representatives had selected men to represent it who were presumed to be models of decency and decorum in expression, and if a blush could make itself visible in Butler's face it should certainly have arisen at this moment at the reflection that little over twelve months since he addressed a New York audience after a fashion which the newspapers felt almost ashamed to publish. Mr. Curtis alluded very pertinently to the kind of freedom of speech which the constitution guaranteed every American citizen, and utterly disclaimed reference to precedents in the history of other countries where freedom of speech meant either the guillotine or the gallows. Mr. Curtis made a very brief peroration; but when he sat down there was a very general feeling that a man of profound thought and learning had delivered himself in a case which he deemed worthy of defence and exculpation.

The counsel for the President then called to the witness stand General Lorenzo Thomas, and of course, every eye was directed towards the illustrious Secretary *ad interim*. The General mounted the stand with a jaunty air, clad in his full uniform, with a brace of stars on each shoulder strap and his coat in a style of careless elegance, half-opened in front. Everybody seemed to expect that the General would relieve the superincumbent weight of dulness in the Senate by some facetious sallies, and in this respect it cannot be said they were disappointed. A little humor of some kind was never at such a premium, and if the General never performed any greater effort in his career he must certainly be allowed a good deal of credit for putting the whole assemblage—Senators, Chief Justice and audience—in the best possible spirits, for a time. The General, in a clear voice, with a peculiar rising inflection, went on first to detail his interview with the President on the memorable 21st of February, and if Butler could only have kept quiet would have told every solitary item bearing ever so remotely on the tremendous appointment conferred upon him as Seretary *ad interim*. But when the objections of the Managers were finally disposed of, and the General was allowed a fair field for his narrative, he brought down the house as it was never brought down before. He told the story of his interview with Stanton with a *naiveté* of manner which was perfectly irresistible. Nothing fierce and sanguinary, as some people might imagine, ever transpired between these two famous Secretaries of War, Stanton and Thomas. No two cooing doves ever met on milder terms. Thomas respected, admired and almost loved Stanton, and Stanton was the same towards Thomas. After the nonsense was disposed of in relation to taking possession of the War Department Stanton asked Thomas to take a seat near the fire and take a drink. General Shriver went for the whiskey, and on his return it was decided to make an equal division between the two Secretaries, Shriver being a temperance man, and according to the illustration given by Thomas on his forefinger, it would appear each had about an inch deep of the ardent exhilarator.

A good deal has been said about the pressure upon Stanton by radical representatives and journalists who wish to see impeachment accomplished at any cost, let the President be guilty or not of the high crimes and misdemeanors charged against him. It has not been said without good cause, for a desperate effort is undoubtedly being made to keep Senators up to the sticking point and prevent them from losing the necessary backbone before the time arrives when they will be called upon to declare, according to the law and their consciences, whether the terrible Andrew Johnson should be removed from his high office and some one elevated to his place. The pro-impeachment lobby is very formidable, enthusiastic radicals of that faith having been summoned here to work upon Senators and terrify them into voting rightly on the question. But these efforts are by no means confined to the lobby. Members of the lower house do not hesitate to take part in the discreditable business, and prominent members at that—men who ought to be above such low scheming and dishonorable devices. As an illustration I will give you an account of a conversation that took place not long ago between a Senator and a member of Congress from Ohio. The latter laid himself out to "pump" the former, and succeeded in accomplishing his object. I will give the names, so that it may not be said that I am merely fabricating a sensation, and so that the parties concerned may deny it if they think proper. The Senator was the juvenile Sprague, of Rhode Island, and the member was General Garfield, of Ohio. The conversation occurred about twelve days ago, in a sleeping car attached to the New York and Washington train. It commenced by some remarks about the prospect in Connecticut. Garfield had been to the Nutmeg State, and declared to Sprague that he had not met a single republican there who did not endorse the action of Congress in impeaching the President. Every republican in that State, according to Garfield, expressed the opinion that the only safe policy was the removal of Andrew Johnson. The salvation of the republican party depended upon carrying out impeachment, and therefore it should be done. Garfield skilfully glided from the subject of Connecticut to that of the views of Senator Sprague himself on impeachment. He alluded to the claim of the President that Stanton's case did not come under the Civil Tenure bill at all, and declaimed quite warmly, in a way requiring assent or dissent on the part of the Senator. Sprague, perhaps thrown a little off his guard, replied to Garfield's interrogative declamation, and said he had no doubt in his mind that Stanton's case was clearly within the Tenure of Office Act, and that the President's position was therefore untenable—in fact, entirely absurd. The further conversation was quite free, and during the whole of it Sprague and Garfield seemed to be perfectly in accord, agreeing that the President was a dangerous man and that he had committed acts for which he ought to be removed. From the President the conversation turned to the Chief Justice, whose course on impeachment was criticized by Garfield, of course in no favorable way. Sprague admitted that the views of his father-in-law on the subject were rather unorthodox, but intimated that he (Sprague) did not agree with the Chief Justice on this matter.

This is about the substance of what occurred. That Sprague should have expressed himself in the manner above described is somewhat remarkable, for he has been counted from the start as among those who would be certain to vote against impeachment. Perhaps it is because he has been so counted that he now appears to be secured in the other direction, in order that people may not have a chance to say that his vote depends upon the views and interests of his father-in-law. But, however this may be, is it not manifest that the honorable Senator has been guilty of a great impropriety in expressing an opinion before the close of the trial, and before a word had been said on the part of the defence. What would be said of a juror in an ordinary lawsuit who would, after hearing only one side of the case and not even the whole of that, declare that his mind was made up, and that he intended to bring in a verdict of guilty? This is precisely Sprague's case. He hesitates not to state that his mind is made up before the testimony of the defence has been adduced, and before the learned arguments of the President's counsel on a point of law, which divides in opinion the best legal minds in the country. It is a bad sign for the President's chances of acquittal when Senators are found thus early announcing their verdict of guilty. Is this trying the case impartially?

The case of Senator Sprague is not the only one that can be cited. Other Senators are quite as injudicious, to use a mild term, and express their views on impeachment without a blush in the public hearing. Only yesterday, I am informed, Senator Stewart, of Nevada, at a fashionable restaurant in this city, indulged in an unseemly display of prejudice, for which he was rebuked by a gentleman who happened to be present, and who deplored the loss of dignity exhibited by Senators of the present day. The gentleman called Mr. Stewart's attention to the fact that Colonel Forney, the Clerk of the Senate, was allowed daily to publish in his paper articles prejudging the President's case, and asked if such conduct was becoming to a high officer of the Court of Impeachment. Mr. Stewart replied that there was more reason to complain of the gentlemen in the Reporters' Gallery than of the Clerk of the Senate. The conduct of the correspondents, who daily ridiculed the High Court and its proceedings, called, in his judgment, more strongly for senatorial interference and condemnation than that of the virtuous Forney. Mr. Stewart further said that for some time he had been considering the propriety of investigating the reportorial corps with a view to put them on their good behavior. There is nothing to prevent Mr. Stewart from "trying it on."

PROCEEDINGS OF THE COURT.

Eleventh Day.

UNITED STATES SENATE CHAMBER, WASHINGTON, April 10, 1868.

The President *pro tem.* called the Senate to order. Prayer was offered by the Chaplain.

The chair was vacated for the Chief Justice, and the court was opened by proclamation in due form at five minutes past twelve, whereupon the Managers and members of the House were successively announced and took their places. The journal of yesterday was read. The gallery in the meantime had become about half filled. General Sherman again occupied a seat on the floor.

Mr. Curtis, of counsel for the President, resumed his opening at fifteen minutes past twelve o'clock. What with the buzzing conversation of uninterested newspaper correspondents and others in the gallery and the reporters' remote position, occasional imperfections may be found in the report.

Conclusion of Mr. Curtis' Argument for the Defence.

Mr. CURTIS—Mr. Chief Justice, among the points which I omitted to notice yesterday is one which seems to me of specific importance, and which induces me to return to it for a few moments. If you will indulge me I will read a short passage of Saturday's proceedings. In the course of those proceedings Mr. Manager Butler said, "It will be seen, therefore, Mr. President and Senators, that the President of the United States says in his answer that he suspended Mr. Stanton under the constitution indefinitely and at his pleasure. I propose now, unless it be objected to, to show that it is false, under his own hand, and I have his letter to that effect, which, if there is no objection, I will read. I will read the signature, which was identified by C. E. Creecy." Then followed the reading of the letter, which is this:—

EXECUTIVE MANSION, August 14, 1867.

SIR—In compliance with the eighth section of the act of Congress of March 2, 1867, entitled "An act regulating the tenure of certain civil offices," you are hereby notified that on the 12th inst. Hon. Edwin M. Stanton was suspended from office as Secretary of War and General Ulysses S. Grant authorized and empowered to act as Secretary of War *ad interim*. I am, sir, very respectfully yours,

ANDREW JOHNSON.

Hon. HUGH MCCULLOCH, Secretary of the Treasury.

This letter was read to show, under the hand of the President, that when he says in his answer that he has removed Mr. Stanton by virtue of the Tenure of Office act that statement was a falsehood. Allow me now to read the eighth section of that act:—

That whenever the President shall, without the advice and consent of the Senate, designate, authorize or employ any person to perform the duties of any office, he shall forthwith notify the Secretary of the Treasury thereof, and it shall be the duty of the Secretary of the Treasury thereupon to communicate such notice to all the accounting and disbursing officers in his department.

The Senate will perceive that this section has nothing to do with the suspension of an officer, but the purport of the section is that in case the President, without the advice and consent of the Senate, shall under any circumstances designate a third person to perform temporarily the duties of the office, he is to make a report of that designation to the Secretary of the Treasury, who is to give the necessary information to the accounting officers. The section applies in terms to and includes all cases. It applies to and includes the designations on account of sickness, or absence, or resignation, or any cause of vacancy, whether temporary or permanent, whether occurring by reason of a suspension or a removal, and, therefore, when the President says to the Secretary of the Treasury, "I give you notice that I have designated General Thomas to perform the duties *ad interim* of Secretary of War," he makes no allusion by force of that letter to the manner in which that vacancy occurred, and therefore, instead of showing under the President's own hand that he has repeated a falsehood, it has no reference whatever to the matter.

Mr. BUTLER—Will you read the second section, if you please—the first clause of the second section?

Mr. CURTIS (reading)—"That when an officer appointed as aforesaid, excepting Judges of the United States courts, shall, during the recess of the Senate, be shown by evidence satisfactory to the President, &c., the President is allowed to suspend such officer." Now, the President states in his answer that he did not act under it.

Mr. BUTLER—That is not reading the section.

Mr. CURTIS—I am aware that it is not reading the section. It is a very long section.

Mr. BUTLER—The first clause of the section is all I want.

Mr. CURTIS—It allows the President, because of crime or other occasion designated in it, to suspend the officer. The section applies to all occasions, whether suspension under this section, whether temporary disqualification, sickness, death, resignation—no matter what that cause may be—if for any reason there is a vacancy, he is authorized to designate a person to supply the office *ad interim*, of which notice is to be given to the Secretary of the Treasury. Therefore I repeat, sir, that the subject matter of this eighth section, and the letter which the President wrote in consequence of it, has no reference to the subject of the authority upon which he removed or suspended Mr. Stanton. I now ask the attention of the Senate to the second article; and I will begin, as I began before, by stating what the substance of this article is. I hope the Senate will be able to see how every one of these allegations is controverted by what is already in the case, and that I shall be enabled to state what we propose to offer by way of proof, in respect to each of them. The first substantive allegation in this article is, that the delivery of the letter of authority to General Thomas was without the authority of the law; that it was an intentional violation of the Tenure of Office act; that it was an intentional violation of the constitution of the United States, and that the delivery of the order to General Thomas was made with intent to violate both that act and the constitution of the United States. That is the substance of the second article. Now the Senate will at once perceive that, if the suspension of Mr. Stanton was not a violation of the act in point of fact—or, to state it in other terms, if the case of Mr. Stanton is not within the act, then his suspension or his removal, if he has been actually removed, is a removal which did actually take place, and would not be a violation of the act, because if his case is not within the act at all, which does not apply to the case of Mr. Stanton, of course his removal is not in violation of that act. If Mr. Stanton continued to hold under the commission which he received from President Lincoln, and has continued to hold under the act of 1789, it was no violation of the Tenure of Office act that Mr. Johnson removed or intended to remove Mr. Stanton, and therefore the Senate will perceive that it is necessary to come back again to recur under this article, because it will be found necessary to recur under the whole of the first eight articles to the inquiry whether Mr. Stanton's case was within the Tenure of Office act; secondly, whether it was so clearly and plainly within that act that it can be attributed to the President as a high misdemeanor that he considered it as not including that case. But suppose the case of Mr. Stanton is within the Tenure of Office act, still the inquiry arises whether the delivery of this letter of authority to General Thomas was a violation of the act. I shall necessarily ask your careful attention to the general subject matter of this act and to the particular provisions contained in it. Senators will remember, undoubtedly, that this act, as it was finally passed, differed in many particulars from the bill as it was originally introduced. The law relates to two distinct subjects—the one the subject of removal, the other the subject of appointments to office. It seems that a practice had grown up under the government that when a person was nominated to the Senate for an office, and when the Senate either did not act upon his nomination or rejected it, it was considered competent for the President after the adjournment of the Senate, by a temporary commission, to appoint that same person to the same office. That was deemed by a large majority of Senators to be an abuse of power—not an intentional abuse. It was a practice that had prevailed under the government to a very very considerable extent. It was not limited to recent years; it had been supported by the opinions of Attorney Generals; but still it was esteemed by Senators to be a departure from the spirit of the constitution and in derogation of the just powers of the Senate in reference to the nominations to office. That being so, it will be found on examination of this law that the first and second sections of the act related exclusively to removals from office and to temporary suspensions during a recess of the Senate; whereas the other sections to which I shall particularly ask your attention relate exclusively to that other subject of temporary appointments made to office after the Senate had refused to concur in the nomination of the person appointed. This law provides that the President shall have power to fill all vacancies which may happen during a recess of the Senate by reason of death or resignation. It will be remarked that this does not include all cases; it does not include the case of the expiration of a commission, but it includes simply death and resignation during the recess of the Senate. Why this was so I don't know. It is manifest that the law does not affect them. In point of fact it does not cover all cases that may arise even belonging to this general class to which the section was designed to refer. It provides that the President shall have power to fill all vacancies which may happen during the recess of the Senate by reason of death or resignation by granting commissions which shall expire at the end of the next session thereafter; and if no appointment by and with the advice and consent of the Senate shall be made to such office during such next session, then such office shall remain in abeyance, without any salary, fees or emoluments attached thereto, until the same shall be filled by appointment by and with the advice and consent of the Senate; and during such time all powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy of such office. Here all the offices brought within this provision of a vacancy occurring during the recess of the Senate, and the filling of that vacancy by the President, are treated as going into abeyance unless the Senate shall have assented to some nomination before its adjournment; and that applies, as I have said, to the two classes of cases—namely, vacancies happening by reason of death or resignation; but it does not apply to any other vacancy. The next section does not relate to that subject, but to the subject of removal. "Nothing in this act shall be construed to extend the term of any office," &c. The fifth section is that:—"If any person shall, contrary to the provisions of this act, accept any appointment to or employment in any office, or shall otherwise attempt to hold or exercise any such office or employment, he shall be deemed and declared to be guilty of a high misdemeanor, and upon trial and conviction therefor shall be punished therefor by a fine not exceeding $10,000, and by imprisonment." What are the provisions of this act in relation to accepting any appointment? They are found in the third section of the act putting some officers into abeyance under similar circumstances, which are described in that section. If any person does accept an office which is thus put in abeyance, or any emolument or authority in reference to such office, he comes within the penal provisions of the fifth section; but outside of that there is no such thing as accepting an office contrary to the provisions of the act, because the provisions of the act extend no further than those cases; and so of the next section, "Every removal, appointment, or employment made, had, or exercised contrary to the provisions of this act, &c., shall be deemed, and is hereby declared, to be a high misdemeanor." The stress of this article does not seem to me to depend at all upon this question of the construction of the law, but upon a totally different matter, which, I agree, should be fairly and carefully considered. The allegation in the article is that this letter of authority was given to General Thomas, enabling him to perform the duties of Secretary of War *ad interim* without the authority of the law. That I conceive to be the main inquiry which arises under this article, provided the case of Mr. Stanton and his removal comes within the Tenure of Office act at all. I wish, first, to bring to the attention of the Senate the act of 1795, which is found in Statutes at Large, page four hundred and fifty. It is a short act, and I will read the whole of it:—

Be it enacted, &c., That in case of a vacancy in the office of Secretary of State, Secretary of the Treasury or Secretary of the Department of War, of any officer in either of said departments who is not appointed by the head of a department, whereby they cannot perform their duties in the said office, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancy be filled; provided, no one vacancy shall be supplied in the manner aforesaid for a longer term than six months.

This act, it has been suggested, may have been repealed by the act of February 20, 1863, which is found in 12, Statutes at Large, page 656. This also is a short act and I will read it:—

Be it enacted, &c., That in case of the death, resignation, absence from the seat of government or sickness of the head of any executive department of the government, or of any officer in either of said departments whose appointment is not in the head of the office, whereby they cannot perform the duties of their respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any other officer of the department whose appointment is vested in the President, at his discretion, to perform the duties of said respective offices until a successor is appointed, or until such absence or inability by sickness shall cease, provided that no vacancy shall be supplied in the manner aforesaid for a longer term than six months.

Now these acts, as the Senate will perceive, although they may be said in some sense to relate to the same general subject matter, are very different in their provisions, and the latter law contains no express repeal of the earlier law. If, therefore, the latter law operates as a repeal of the older law, it is only by implication. It says in terms that all acts and parts of acts inconsistent with it are repealed; but the addition of these words adds nothing to its meaning at all. The same inquiry would arise, if they were not contained in it—namely, how far is that latter law inconsistent with the provisions of the earlier law? There are certain rules on the subject which I shall not fatigue the Senate by citing cases to prove, because every lawyer will recognize them. In the first place there is a rule as to the repeal by implication. As I understand it the courts go upon the assumption of the principle that if the Legislature really intended to repeal the law it would have said so; not that it should necessarily say so, because there are repeals by implication; but the presumption is that if the Legislature entertains a clear and fixed intention to repeal a law, it will be likely at least to say so. Therefore the rule is a settled one that repeals by implication are not favored by the court. Another rule is, that the repugnancy between the two subjects must be clear. It is not enough that under some circumstances one law may possibly be repugnant to the other; the repugnance must be clear, and if the two laws can stand together the latter does not operate as a repeal of the former. If Senators have any desire to refer to the authorities on this subject they will find a sufficient number of them collected in Sedgwick on Statute Laws, page 156. Now, there is no repugnance whatsoever that I can perceive between these two laws. The act of 1905 applies to all vacancies, however created. The act of 1863 applies only to vacancies temporarily or otherwise occasioned by death or resignation. Removals from office and expirations of commission are not included in it. The act of 1795 applies only to vacancies. The act of 1863 applies to temporary absence or sickness. The subject matter, therefore, of the two laws is different. There is no inconsistency between them. They may stand together, each operating on the cases to which it applies; and therefore I submit that in the strictest view that can be taken of this subject, and which may be ultimately taken of it, it is not practicable to maintain that the law of 1863 repeals altogether the act of 1795. But whether it did or not, I state here, what I have so frequently had occasion to state before, that it is a fair question. Is it a crime to be on one side of this question and not on the other? Is it a high misdemeanor to believe that a certain view taken as to a repeal of the earlier by the latter one is a sound view? I submit that that would be altogether too stringent a rule even for the honorable Managers themselves, and they do not, and the House of Representatives do not contend for any such rule. The House puts it on the ground that there was a wilful intention to give this letter with authority of law, not that it was a mistaken one, not that it was one which, after due consideration, lawyers might differ about, but that it was a wilful intention to act without authority. That, I submit, from the nature of the case, cannot be made to appear. The next allegation to which I desire to invite attention as contained in this article is that the giving of this letter to General Thomas during the session of the Senate was a violation of the constitution of the United States, and to that I will require your attentive consideration. The constitution, you are well aware, has provided for two modes of filling offices. The one is by temporary commission during the recess of the Senate when a vacancy happens during the recess, and the other is by appointment with and by the advice and consent of the Senate, followed by a commission by the President. But it very early grew apparent to those who administered the government that cases might and would occur to which neither of the modes provided by the constitution could be promptly and conveniently applied—cases, for instance, of the temporary absence of the head of a department, which department, especially during the session of Congress, might for the public interest continue to be administered—cases of sickness, cases of resignation or of removal, when the President was not in the condition immediately to make a nomination to fill the office or even to issue a commission, and therefore it became necessary by legislation to supply those administrative defects which existed, notwithstanding these two provisions of the constitution. Accordingly, beginning in 1792, there will be found to be a series of acts on that subject—the filling of vacancies by temporary appointment or by *ad interim* appointment. The counsel, in this connection, referred to several acts, from the act of 1792 to the act of February 20, 1863, and continued—The Senate will perceive what difficulty these laws were designed to meet. The difficulty was the occurrence of some sudden vacancies in office or of some sudden inability on the part of the officer to perform his duties; and the intention of each of these laws was to make provision so that, notwithstanding this vacancy or this temporary disability, the duties of the office would still be discharged. That was the purpose of these laws. It is apparent that these temporary vacancies are not as liable to occur during the session of the Senate as they are during the vacations, and that it is just as necessary to have a set of legislative provisions to enable the President to carry on the public service during the session of the Senate as it is to have the same set of provisions during the vacation; and accordingly it will be found by looking into these laws that they make no distinction whatever between the sessions of the Senate and the vacations of the Senate in reference to these temporary appointments. "Whenever the vacancy shall occur" is the language of the statute. Whenever there shall be a death, or a resignation, or an absence, or a sickness, the law applies. When the occurrence takes place which gives rise to the event which the law contemplates, and the particular time when it occurs, is of no particular consequence in itself, and is admitted by the law as of no consequence. In accordance with that has been the uniform, certain and frequent practice of the government from its very earliest days, as I am instructed we shall be able to prove, not in one or two instances, but in a great number of instances. The honorable Managers themselves produced the other day a schedule of temporary appointments, during the sessions of the Senate, of inferior officers of departments, to perform temporarily the duties of heads of departments, and those instances run on all fours with the cases of removals or suspension of officers. Take the case, for instance, of Mr. Floyd, whom I alluded to yesterday. Mr. Floyd went out of office; his chief clerk was a person in sympathy with him and under his control. If the third section of the act of 1789 was allowed to operate the control of the War Department went into the hands of that chief clerk. The Senate was in session. It would not answer to have the War Department in that condition one hour, and Mr. Buchanan sent to the Post Office and took the Postmaster General into the War Department and put it in his charge. There were then in this body a sufficient number of persons to look after a matter of that sort if they felt an interest in it, and accordingly they passed a resolution inquiring of President Buchanan by what authority he had made an appointment of a person to take charge of the War Department without the consent of the Senate. In answer to that a message was sent in containing the facts, and showing to the Senate of that day the propriety and necessity of the step, and the long continued practice under which similar authority was exercised, giving a schedule running through the time of General Jackson and his two immediate successors, and showing a great number of *ad interim* appointments of that kind. There can be no ground, then, whatever for the allegation that this *ad interim* appointment was a violation of the constitution of the United States. I pass, therefore, to the next article, which I wish to consider, and that is not the next in number, but the eighth article. I take it in that order because the eighth, as I have analyzed it, differs from the second only in one particular, and, therefore, taking it in connection with the subject of which I have been just speaking, it will be necessary for me to say but a very few words in relation to it. It charges an intent unlawfully to control the appropriations made by Congress for the military service. That is all there is of it except what is in the second article, and on that, certainly, at this stage of the case, I do not deem it necessary to make any observations. The Senate will remember the offer of proof of the Managers, designed, as it was stated, to connect the President of the United States, through his private secretary, with the Treasurer, and thus to enable him to control the appropriations made for the military service. The evidence, however, was not received, and, therefore, it seems quite unnecessary for me to make any comment upon it. The allegations are, first, that the President appointed General Thomas; second, that he did it without the advice and consent of the Senate; third, that he did it when no vacancy had happened during a recess of the Senate; fourth, that he did it while there was no vacancy at the time; fifth, that he committed a high misdemeanor by thus intentionally violating the constitution of the United States. I desire to say a word or two on this subject. And, first, we deny that he ever appointed General Thomas to the office of Secretary of War. An appointment can be made to an office only by the advice and consent of the Senate, and through a commission signed by the President and bearing the great seal. That is the only mode in which an appointment can be made. The President, as I have said, may temporarily commission officers when vacancies occur during the recess of the Senate. But that is not an appointment, and is not so considered in the constitution. The President may also, under the acts of 1795 and 1863, grant authority to persons to perform temporarily the duties of a certain office when there is a vacancy. All that the President did in this case was to issue a letter of authority to General Thomas authorizing him *ad interim* to perform the duties of Secretary of War. In no sense was this an appointment. But it is said that it was made without the advice and consent of the Senate. Certainly it was. How could the advice and consent of the Senate be obtained to an *ad interim* authority of that kind? This was an appointment to supply temporarily a defect in the administrative machinery of the government. If the President had gone to the Senate for its advice and consent he must have gone under a nomination made by him of General Thomas for that office—a thing which he certainly never intended to do and never made any attempt to carry out. If Mr. Stanton's case is not within the Tenure of Office act; if, as I so frequently repeated, he held his office under the act of 1789 and during the pleasure of the President, the moment he received that order, which General Thomas carried to him, that moment there was a vacancy in point of law, however he may have refused to obey the order in point of fact. The Senate will observe that two letters were delivered to General Thomas at the same time—one of them an order to Mr. Stanton to vacate the office and the other a direction to General Thomas to take possession of the office when Mr. Stanton obeys the order just given. May not the President issue a letter of authority in contemplation that a vacancy is about to occur? Is he bound to take a technical view of the subject and to have the order which creates the vacancy first sent and delivered, and then to sit down to his table, and afterwards sign a letter to another to hold the office? If the President expects a vacancy, if he has done an act which in his judgment is sufficient to create a vacancy, may he not sign the necessary papers appointing another to carry on the duties of the office? If I have been successful in the argument which I have already addressed to you, you must be of the opinion that in point of fact there was no violation of the constitution of the United States in delivering this letter of authority, because the constitution makes no provision for this temporary authority, and the law of Congress has made no provision for it. Here, also, I beg leave to remind the Senate that the case does not fall within the Tenure of Office act. If the order which the President gave to Mr. Stanton to vacate the office was a lawful order, and one which he was bound to obey, everything contained in this article, as well as the preceding articles, fails. It is impossible, I submit, for the honorable Managers to construct a case of an intention on the part of the President to violate the constitution of the United States by anything which he did in reference to the appointment of General Thomas, provided that the order to Mr. Stanton was a lawful order and he was bound to obey it.

I advance now, Senators, to a different class of articles, which may be called the conspiracy articles, because they rest upon a charge of conspiracy between the President and General Thomas. There are four of them—the fourth, fifth, sixth and seventh as they stand. The fourth and sixth are found under the act of July 31, 1861, which is found in the twelfth volume of "Statutes at Large," page 284. The fifth and seventh are found under no act of Congress. They allege an unlawful conspiracy, but they refer to no law by which the acts charged are made unlawful. The acts charged are called unlawful, but there is no law referred to and no case made by the articles within any law of the United States; and I therefore shall treat these articles—the fourth and sixth and the fifth and seventh—together, because I think they belong in that order. The fourth and sixth charge a conspiracy within the Conspiracy act. It is necessary for me to state the substance of the law in order that you may see whether it can have any possible application to the case. It was passed on the 31st of July, 1861, and is entitled "An act to define and punish certain conspiracies." It enacts that if two or more persons within the States or Territories of the United States shall conspire together to overthrow or put down or destroy by force the government of the United States, or to levy war upon the United States, or to oppose by force the authority of the government of the United States, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take or possess any property of the United States against the will and contrary to the authority of the United States, or by force or intimidation or threat to prevent any person from occupying or holding any office of trust or place of confidence under the United States, they shall be guilty of conspiracy. The fourth and sixth articles contain allegations that the President and General Thomas conspired together, by force, intimidation and threats, to prevent Mr. Stanton from continuing to hold the office of Secretary for the Department of War, and also that they conspired together, by force, to obtain possession of property belonging to the United States. These are the two articles which I suppose are designed to be drawn under this act, and these are the allegations which are intended to be sustained by it. Now, it does seem to me that the power to twist this law to any bearing whatsoever upon this case is one of the most extraordinary attempts ever made. In the first place, so far from its having been designed to apply to the President of the United States, or to any act which he might do in the course of the exection of what he believed to be his duty, or to apply to any man or anything in the District of Columbia at all, the words of the act are "that if two or more persons within any State or Territory of the United States," not within the District of Columbia, shall do so and so. Now, this is a highly penal law, and an indictment charging things done under this law within the District of Columbia would, I undertake to say, be quashed on demurrer, because the act is made applicable to certain portions of the country, and is not made applicable to the District of Columbia. We are not, however, standing upon that point, which is a technical point, nor do I refer to it with any such intention; but let us see what is this case. The President is of opinion that Mr. Stanton holds the office of Secretary of War at his pleasure. He thinks so, first, because Mr. Stanton is not provided for in the Tenure of Office act, and that no tenure of office is secured to him; he thinks so, secondly, because he believes that it would be judicially decided if the question could be raised that the law which deprived him of the power of removing an officer at his pleasure is not a constitutional law. He is of opinion that in this case he cannot allow this officer to continue to act as his adviser and his agent to execute the laws if he has the power to remove him. Under these circumstances he gives this order to General Thomas. Now, I do not view this as a purely military order. The service there involved was a civil service, but at the same time Senators will observe that the person who gave the order is Commander-in-Chief of the army; that the person to whom the order was given is the Adjutant General of the army; that the subject matter of the order relates to the performance of service essential to carry on the military service, and, therefore, when such an order was given by the Commander-in-Chief to the Adjutant General respecting a subject of this kind, is it too much to say that there was invoked that spirit of military obedience which constitutes the strength of the service? I do not mean to say that it was a mere military order, or that General Thomas would have been subject to court martial for disobeying it; but I do say that the Adjutant General of the Army of the United States was, in the interest of the service, bound to accept the appointment unless he saw or knew that it was unlawful. I do not know how the fact is—and certainly there is no proof on the subject—but when the distinguished General of the army of the United States on a previous occasion accepted a similar appointment it was under views of propriety and duty such as those which I have now alluded to. And how and why is it to be attributed to General Thomas that he was guilty of design to overthrow the laws of the country when he simply did what the General of the army had done before? Take a case in private, if you please, and put it as strongly as you please, in order to test the question of conspiracy. Suppose one of you has a claim which he considers to be a just and legal claim to property, and he says to A. B., "Go to C. D., who is in possession of this property, and deliver to him this order, to get possession of the property from him." Would anybody ever imagine that that was a conspiracy? Does not every lawyer know that the moment you introduce into any transaction of this kind the element of a claim of right every criminal intention ceases? This was a case of public duty, of public right, claimed upon constitutional grounds, and upon an interpretation of the law which had been given to it by the lawmakers themselves. How, then, I again ask, can the President of the United States under such circumstances be looked upon by any body as guilty of conspiracy under this act? These articles say that the conspiracy between the President and General Thomas was to employ force, threats, intimidations. What they prove against the President is that he issued this order. They prove that, and that alone. Now, on the face of these orders there is no apology for the assertion that it was the design of the President that any body at any time should use force, threats, or intimidation. The order is to Mr. Stanton to "deliver up possession; the order to General Thomas to receive possession from Mr. Stanton when delivered up. No force is assigned to him, no authority is given him to apply force in any direction whatever. There is not only no express authority, but there is no implication of authority, to apply for or obtain or use anything but the order which was given him; and we shall prove that the President from the first had indicated simply a desire to test the question of law. We shall show you what advice the President received on this subject, what views he entertained, what views his counsel and advisers entertained; but, of course, it is not my province now to comment upon the evidence. The evidence must be first adduced, and then it will be time to comment upon it. The other two conspiracy articles will require very little observation from me, because they make no new allegations of fact which are not in the fourth and sixth articles to which I at first adverted, the only distinction between them and the others being that they are not founded upon the conspiracy act of 1861. They simply allege an unlawful conspiracy, and leave the matter there. They do not allege sufficient facts to bring the case within the act of 1861. In other words, they do not allege force, threats, or intimidation. I shall detain the Senate for a few moments on the ninth article, which is the one relating to the conversation with General Emory. The meaning of that article, as I read it, is that the President brought General Emory before himself as Commander-in-Chief of the army, for the purpose of instructing him to disobey the law, with an intent to induce General Emory to disobey, and with an intent to enable himself unlawfully, and by the use of military force, through General Emory, to prevent Mr. Stanton from continuing to hold the office. Now, I submit that not only does this article fail of proof in its substance as thus stated, but that it is disproved by the witness who has been introduced to prove it. In the first place it appears clear from General Emory's statement that the President did not bring him there for any purpose connected with this appropriation bill, affecting the command of the army, or the issuing of orders relating to the army. It is a subject which General Emory introduced himself, and when the conversation was broken he again recurred to it himself, asking the President permission to bring it to his attention. Whatsoever, therefore, was said on that subject was said, not because the President of the United States had brought the commander of the troops in Washington there for that purpose, but because, having brought him there for another purpose, the Commanding General introduced the subject and conversed upon it, and gave the President his views. In the next place, having had his attention called to the act of Congress and the order under it, the President expressed precisely the same opinion to General Emory as he had previously publicly expressed to Congress itself at the time when the act was signed by him. It is found in his answer, on the thirty-second page of the official report of these proceedings, what that opinion was. He considered that that provision of the law interfered with his constitutional right as the Commander-in-Chief of the army, and that is what he said to General Emory. There is not even a probable cause to believe that he said it for any other than the natural and evident reason that General Emory had introduced the subject. He asked leave to call the President's attention to it, evidently expecting and desiring that the President should say something on the subject, and if he said anything was he not to say the truth? That is exactly what he did say. I mean the truth as he apprehended it. It will appear in proof, as I am instructed, that the reason why the President sent for General Emory was not that he might endeavor to seduce that distinguished officer from his allegiance to the laws and constitution of his country, but because he wished to obtain information about military movements which he was informed, on authority which he had a right to rely, and which he was bound to respect, might require his personal attention. I pass, then, from this article as being one on which I ought not to detain Senators, and I come to the last one, concerning which I shall have much to say, and that is the tenth article, which is of and concerning the speeches. In the front of this inquiry the question presents itself, what constitutes an offence against the constitution of the United States? On this question dissertations have been written and printed. One of them is annexed to the argument of the honorable Manager who opened the case for the prosecution; another was written by one of the honorable Managers on the proceedings of the House of Representatives on the occasion of the first attempt to impeach the President; and there have been others written and published by learned jurists touching this subject. I do not propose to detain the Senate with any of these precedents drawn from the Middle Ages. The framers of our constitution were equally as familiar with them as the person who drew up these dissertations, and the framers of our constitution, as I conceive, had drawn from them a lesson which they embodied in their work. I propose, therefore, instead of seeking precedents which were made in the times of the Plantagenets, Tudors and the Stuarts, and which have been repeated since, to come much nearer home and see what the provisions of the constitution of the United States are bearing upon this question. My first proposition is that when the constitution speaks of treason, bribery and other high crimes and misdemeanors it refers to and includes only high criminal offences against the United States, against some law of the United States existing when the acts complained of were committed, and I say that that is plainly to be inferred from each and every provision of the constitution on the subject. Nobody will deny that treason and bribery are high crimes against the United States, made such by the laws of the United States, or which the framers of the constitution knew must be provided for in the laws, because these are high crimes which strike at the existence of the government. Now what is meant by "other high crimes and misdemeanors?" *No scitur a sociis.* They are high crimes and misdemeanors; so high that they belong in the same company with treason and bribery. That is clear on the face of the constitution. There can be no crime, no misdemeanor, without a law of some kind, written or unwritten, expressed or implied. There must be some law, otherwise there is no crime. My impression of it is that "high crimes and misdemeanors" mean offences against the law of the United States. Let me say, if the constitution has not in substance stated so, that the first clause of the second section of the second article of the constitution says that "The President shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." Offences against the United States would include cases of impeachment, and might be pardoned by the President if they were not excepted by the constitution. These cases of impeachment, according to the expressed declaration of the constitution itself, are cases of offences against the United States; still the learned Manager says that this is a court, and that whatever may be the character of the prosection it is bound by no law. What, then, was the understanding of the fathers on this subject?

Mr. BUTLER—Pardon me, sir. I said bound by no common or statute law.

Mr. CURTIS proceeded to read some authorities from law books, and then said:—Another position to which I desire the attention of the Senate is that there is enough written in the constitution to prove that this is a court in which a trial is now being carried on. "The Senate of the United States," says the constitution, "shall have the sole power to try all impeachments. Where the President is tried the Chief Justice shall preside." It is also provided that trial of all crimes except in cases of impeachment shall be by jury. This, then, is the trial of a crime. You are the triers, presided over by the Chief Justice of the United States and on that express word of the constitution. There is also, according to its express word, to be an acquittal or conviction on this trial for a crime. No person shall be convicted on impeachment without the concurrence of two-thirds of the members present. There is also to be a judgment in case there shall be a conviction. A judgment in case of a conviction shall not extend further than removal from office and disqualification to hold any office of honor, trust or profit under the United States. Here, then, there is to be the trial of a crime, a trial by a tribunal designated by the constitution in the place of a court and jury. There is to be a conviction if guilt is proved, a judgment on that conviction and a punishment inflicted by the judgment of the court, and this, too, by the express term of the constitution. I say, then, that it is impossible to come to the conclusion that the constitution of the United States has not designated impeachment offences as offences against the United States. It has provided for the trial of these offences; it has established a tribunal for the purpose of trying them; it has directed the tribunal, in case of conviction, to pronounce a judgment and to inflict a punishment; and yet the honorable Manager tells us that this is not a court, and that it is bound by no law. But the argument does not rest mainly, I think, on the provisions of the constitution or the direct subject of impeachment. It is, at any rate, vastly strengthened by the additional prohibition that Congress shall pass no bill of attainder or *ex post facto* law. According to that prohibition of the constitution, if every member of this body sitting in a legislative capacity, and if every member of the other House also sitting in a legislative capacity, should unite in passing an act to punish an offence after it was committed, that law would be of no account. Yet, what is claimed here by the honorable Managers on behalf of the House of Representatives? It is claimed that as Congress can make a law to punish those acts, if no law existed at the time they were committed the members of the Senate may, sitting here as judges, not only after the fact, but when the case is brought to trial, create, each individual for himself, a law upon the subject. The claim on the part of the honorable Managers would clothe each one of you with imperial powers. It would enable you to say, *Sic volo, sic jubeo; stat pro ratione voluntas* (I make a law unto myself, by which law I propose to govern others). Each one of you has taken an oath that he will administer justice impartially in this case according to the constitution and the laws. But according to the view of the honorable Manager that oath would mean according to such laws as the individual Senator might himself make for his own government. I respectfully submit that this view cannot consistently and properly be taken of the nature of this trial, or of the duties and powers incumbent on this body. Look for a moment, if you please, at the other provision of the constitution, that Congress shall not pass a bill of attainder. What is a bill of attainder? It is a law made by parliament to apply to fact already existing and where every legislator is, to use the phrase of the honorable Manager, "a law unto himself." And if he is to act according to his discretion and his view of what is proper and politic under the circumstances, of what use would be the prohibition in the constitution against the passage of bills of attainder? If it is only necessary for the House of Representatives by a majority to vote articles of impeachment, and for two-thirds of the Senate to sustain those articles, an act of attainder is thus effected by the same process and depends on identically the same principles as a bill of attainder in the English Parliament. It is the individual wills of the legislators instead of the conscientious discharge of the duty of the judge. I submit, then, Senators, that this view of the duties and powers of the body cannot be entertained. But the attempt made by the honorable Managers to obtain conviction on this tenth article is attended with so much peculiarity that I think it is the duty of the counsel for the President to advert to it. The first eight articles are framed upon the allegation that the President broke a law. I suppose the honorable Managers did not intend to carry this so far as to say that unless you find that the President did intentionally break a law those articles are sustained. Therefore there must be a law, and the very gist of the charge is that he broke a law. You must find that a law existed. You must construe it and apply it to the case. You must find a criminal intention on his part to break a law before he can be found guilty on these articles. But when we come to this tenth article we find it stands on no law at all, but is attended with some extraordinary peculiarities. The complaint is that the President made speeches against Congress. The true statements would be much more restricted than that, for although in those speeches the President used the word "Congress" undoubtedly he did not mean the entire constitutional body organized under the constitution of the United States; he meant the dominant majority. Everybody so understood it; but the complaint is that he made speeches against this whole government, against Congress. Well, who are the Grand Jurors in this case? One of the parties, the complainants. And who are the triers? The other complainants. Now, I think there is some incongruity in this. I think there is some reason for pausing before taking any further strides in this direction. The honorable House of Representatives sends its Managers here to take notice of what? That the House of Representatives has erected itself into a school of manners, and, selecting from its ranks those gentlemen whom it deems most competent by precept and example to teach decorum of speech, it desires the judgment of this body as to whether the President of the United States has not been guilty of indecorum—whether he has spoken improperly—for that is the phrase of the honorable Managers. Now, there used to be an old-fashioned notion that though there ought to be a difference of opinion about speeches, that a very important test in reference to them was whether they were true or false—whether what was said was true or false; but it seems that in this case that is no test at all. The honorable Manager (Mr. Butler), in opening the case, finding, I suppose, that it was necessary in some manner to advert to this subject, has done it in these terms:—"The words are not alleged to be either false or defamatory, because it is not within the power of any man, however high his official position, in effect to slander the Congress of the United States, in the ordinary sense of that word, so as to call upon Congress to answer as to the truth of the accusation." Considering the nature of our government, considering the experience which we have gone through on that subject, that is a pretty lofty claim. If we go back to the time of the Plantagenets and seek for precedents there you will not find that so lofty a claim as that was made. I beg leave to read from two statutes, one from 3 Edward I., chapter 34, and the other from 2 Richard II., chapter 1. The statute of Edward the First, after a preamble, enacts "That from henceforth no one be so hardy to sell or publish any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people, or the great men of the realm; and that he that doth so shall be taken and kept in prison until he shall have been brought into court." The statute of Richard the Second refers to "dealers in false news, and in horrible and false lies against dukes, princes, earls, and other nobles and great men of the realm; and also the chancellor, treasurer, clerk of the privy seals, the judges and other great officers of the realm." So that the Senators will see that even in those distant times high officers and bodies were not safe against "horrible and false lies;" and it will be remembered that in the course of our own experience, during the war with France and under the administration of Mr. Adams, an attempt was made to check not freedom of speech, but freedom of writing—an attempt which is stamped in the opinion of of posterity, with the name of "The Sedition law." Senators will find that although it applied only to written libels, it contained an express section that the truth of the libel might be given in evidence. That was a law, as Senators know, making it penal, by written publications, to excite hatred or contempt of the government or of Congress. I will read the second section. It enacts "that if any person shall write, print, utter or publish or shall cause or procure to be written, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of said Congress, or the said President, or to bring them or either of them into contempt or disrespect, or to excite against them or either of them the hatred of the good people of the United States, or to start up sedition within the United States, or to excite unlawful combinations therein," &c. The third section enacts that if any person shall be prosecuted under this act for the printing or publishing of any libel, it shall be lawful for the defendant on the trial of the case to give in evidence in his defence the truth of the matter contained in the published charge, and that the jury who shall try the case shall have the right to determine the law and the facts, under the direction of the court, as in other cases. I desire now to read from the fourth volume of Madison's works, pages 542 and 547, a short passage which in my judgment is as masterly as anything Mr. Madison ever wrote on the subject of the relations of the Congress of the United States in contrast with the relations of the government of Great Britain and the people of that island. The essential difference between the British government and American constitution will place this subject in the clearest light. In the British government the danger of encroachments upon the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the executive. Hence it is a principle that the Parliament is unlimited in its power, or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people, such as their Magna Charta, their Bill of Rights, &c., are not reared against the royal prerogative. They are merely legislative precautions against executive usurpations. Under such a government as this an exemption of the press from previous restraint by licensers appointed by the king is all the freedom that can be secured to it. In the United States the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States the great essential rights of the people are secured against legislative as well as against Executive ambition. They are secured not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licenses, but from the subsequent penalty of the laws. The next passage which I shall read (from page 547 of the same volume) has an extraordinary application to the subject matter now before us. It is as follows:—

The constitution supposes that the President, the Congress and each of its houses may not discharge their trusts, either from defect of judgment or other causes. Hence they are

CONTINUED ON SEVENTH PAGE.